

DON'T TAKE “NO” FOR AN ANSWER



*A Guide to
Pharmacy Refusal
Laws,
Policies
and Practices*

***Includes an update on the
FDA's emergency
contraception decision!***

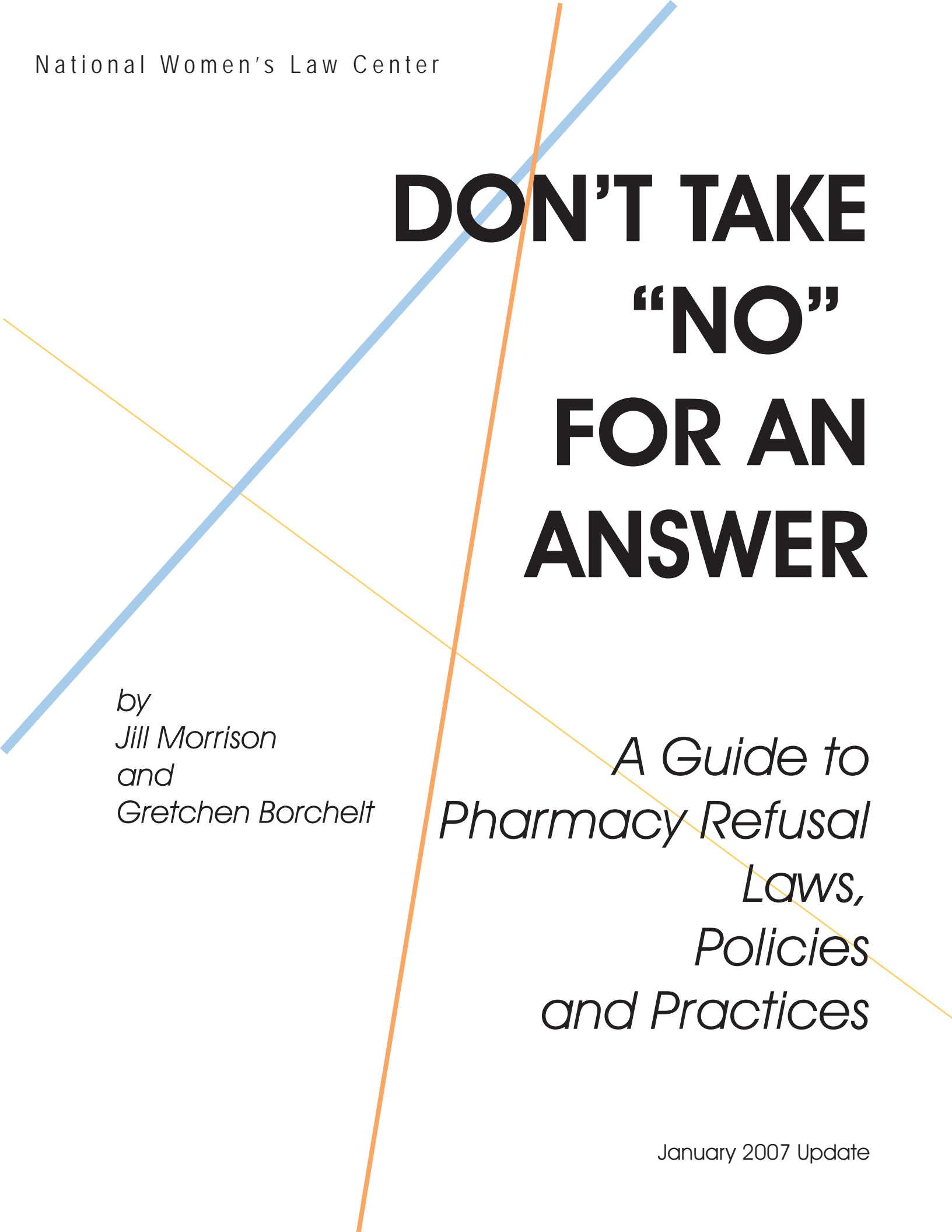
The authors are grateful for the assistance of the following individuals and organizations, who provided helpful input to this report: Marcia D. Greenberger, Judy Waxman, Rachel Vogelstein, Lisa LeMair, Jodi Michael, and Paige Herwig, all from the National Women's Law Center; David R. Work, North Carolina Pharmacy Board, Executive Director; Proskauer Rose (Susan Lewis Bergin and Jaimi Gaffe); Piper Rudnick (Shelly Finlayson); Akin Gump Strauss Hauer & Feld (Emily Schilling and Robyn Rimmer). The authors also want to thank all of the national and state advocates and coalition partners who work on this issue.

This report was made possible by grants specifically for this project from the Brush Foundation, the Compton Foundation, the Nathan Cummings Foundation, and the John Merck Fund. Additional support was provided by the Robert Sterling Clark Foundation, Dyson Foundation, Ford Foundation, Wallace Alexander Gerbode Foundation, Richard and Rhoda Goldman Fund, William and Flora Hewlett Foundation, Huber Foundation, Moriah Fund, Open Society Institute, Overbrook Foundation, David and Lucile Packard Foundation, and Turner Foundation.

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The National Women's Law Center is a nonprofit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major policy areas of importance to women and their families, including health and reproductive rights, employment, education, and family economic security. Jill Morrison is Senior Counsel and Gretchen Borchelt is Counsel at the Center.

National Women's Law Center



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January 2007 Update

INTRODUCTION

Do patients have the right to receive lawfully prescribed medication without delay or humiliation from their pharmacist or pharmacy? Do pharmacists or pharmacies have the right to refuse to dispense lawfully prescribed medication based on their religious, moral or personal beliefs? While in many states, state laws and regulations do not explicitly address the issue, as discussed below, there is much support for the legal duty of pharmacists to dispense medication without regard to their personal beliefs.

Permissible justifications for pharmacist refusals, such as evidence of forgery, abuse, mistaken dosage, or contraindication, are very different from a growing number of occurrences of pharmacists who refuse to fill valid prescriptions simply because the pharmacist disapproves. The legally permissible reasons for a pharmacist or pharmacy to refuse to dispense a medication is based on what is *medically in the interest of the patient, as judged by the professional training of the pharmacist, not on his or her personal beliefs.*

Despite legal and professional obligations, there have been many incidents of pharmacists and pharmacies refusing to fill women's birth control prescriptions. These refusals can have devastating consequences for women's health. Access to contraception is critical to preventing unintended pregnancies, to enabling women to control the timing and spacing of their pregnancies, and to protecting women's health and their ability to bear healthy children. A woman who wants two children must use contraception for roughly three decades of her life.¹ One federal judge, in requiring an employer to provide contraceptive coverage in its health plans, noted that the physical burdens of even a "normal" pregnancy equal or exceed those caused by other covered diseases and conditions.² For some women, pregnancy can entail great health risks and even life-endangerment. Also, women rely on prescription contraceptives for a range of medical reasons in addition to birth control, such as amenorrhea, dysmenorrhea, and endometriosis.

Refusals to fill prescriptions for emergency contraception (the "morning after-pill" or EC, a form of contraception approved by the U.S. Food and Drug Administration) or provide EC over-the-counter are particularly burdensome. EC is an extremely time-sensitive drug, and is most effective if used within the first 12 to 24 hours after contraceptive failure, unprotected sex, or sexual assault. If not taken within 120 hours, this drug is ineffective. Rural and low-income women, as well as survivors of sexual assault, are at particular risk of harm when they are refused. For rape survivors who are turned away, being put at risk of pregnancy presents an additional trauma that no woman should have to endure: the uncertainty of waiting to see if she is pregnant, and the hard decisions that follow.

Most pharmacists want to serve their patients' health needs and are professional and courteous. Refusals grounded in anything other than professional training based on medical and scientific considerations actually undermine the high standards that the public has come to expect from the profession. In fact, refusals to fill prescrip-

tions present a serious breach in the health care system, which depends on pharmacists to help patients comply with doctors' orders. Religious, moral, or personal beliefs do not belong in what should be a patient-focused professional service.

Some have questioned how laws requiring pharmacists to dispense all legally valid and medically appropriate prescriptions comport with the treatment of other medical professionals. In general, medical professionals have a duty to treat patients, with only limited exceptions.³ Most existing laws that allow medical professionals to refuse treatment specifically apply to doctors and nurses, and are limited to abortion services. Allowing pharmacists to refuse to dispense prescriptions for contraception would dramatically expand the universe of permissible refusals. Moreover, unlike doctors and nurses, pharmacists generally do not select or administer treatments or perform procedures. While pharmacists are an important part of the delivery of health care, as the Preamble of the Code of Ethics for Pharmacists by the American Pharmacists Association states, "[p]harmacists are health professionals who assist individuals in making the best use of medications."⁴ Therefore, pharmacists' involvement is not as direct, nor would patients' safety be potentially compromised in the same way, as would be the case if doctors or nurses were forced to perform procedures that they personally oppose.

Some pharmacists that refuse to dispense try to equate contraceptives, especially emergency contraception, with abortion. It is important to note that EC is not the abortion pill (Mifepristone or RU-486), which the FDA requires only be distributed to and dispensed by doctors.⁵ The legal, medical, and scientific consensus is that EC does *not* cause an abortion.⁶ The FDA approved the medication as a *contraceptive to prevent pregnancy*.⁷ In fact, the medication has no effect on an established pregnancy. Similarly, the birth control pill is not an abortifacient, although some pharmacists here too erroneously claim it is.

What does the FDA's recent decision on emergency contraception going over-the-counter mean for pharmacy refusals?

Despite the FDA's recent decision to make EC available without a prescription to women 18 and older,⁸ refusals based on religious, moral, or personal beliefs can still be a problem. Under the FDA's conditions, EC (sold under the brand name Plan B®) is behind the pharmacy counter, so even women who do not need a prescription must ask a pharmacist or other pharmacy personnel for it.⁹ This means that refusals in the pharmacy are likely to continue. And there may actually be an increase in refusals, as more women are made aware of the drug and request it at their pharmacies. Because the FDA decided that women younger than 18 still need a prescription, pharmacists can demand proof of age from women requesting the drug who may not have such proof with them, delaying access.

Moreover, some pharmacists may refuse to fill prescriptions for women under 18 based on a presumption that such women are not married or should not be sexually active, or because of their general opposition to EC.

Additionally, there is already some indication that some states may attempt to restrict access to over-the-counter EC. For example, in Michigan and Missouri, bills were introduced even before the FDA approved over-the-counter use that would prohibit the distribution of emergency contraceptives without a prescription.¹⁰

This means that there is still action needed to counter pharmacy refusals. There is still a need for states to continue their efforts to pass laws and regulations that protect patient access by limiting pharmacists' ability to refuse to provide medications. As discussed below, existing laws, regulations, or policies that protect access or encourage stocking likely still apply even after the FDA's decision.¹¹ It also is important to remember that EC has not been the only drug subject to refusals; women have also been refused ordinary birth control, which is still available only by prescription.

Because the FDA prescription requirement for younger women will continue to delay access to this time-sensitive drug, it is critically important for access that states pass laws that allow pharmacists to prescribe and dispense emergency contraception, including for women under the age of 18, without a prescription from a doctor. Nine states already permit EC to be dispensed to women of all ages directly from pharmacists without a prescription.¹²

Health care providers and women should monitor refusals to stock EC or to honor prescriptions for women under 18. Because of concerns with privacy or a lack of information, younger women may be less likely to report access problems to governmental agencies or advocacy organizations and work with them to file complaints or seek other redress, or request that pharmacies stock the drug.

How to Use this Guide

This guide explores laws, regulations and other authorities that govern the dispensation of prescription medications. State law is the primary source of authority and constitutes the bulk of the discussion here. The resources in this guide can be used to inform a variety of advocacy efforts, primarily to improve state policy or prevent harmful policy from being put into place. This guide is an overview, not an exhaustive study of all existing statutes, cases, and policies. Additional assistance is available from the National Women's Law Center.

This guide provides resources to help advocates find governing and supporting authority to fight against religious, moral, or personal refusals to fill lawful prescriptions. The resources included in this guide can be used to address state authorities, including state legislatures, boards of pharmacy, state attorneys general, and other officials, to ensure women's access to contraceptives, including EC, at the pharmacy. For example, advocates might use these resources to:

- Identify improved state policies. As described below, in 2005, two states—Illinois and California—enacted laws or regulations that require pharmacies to ensure that prescriptions for contraception are filled without delay; additionally in the 2006 session, bills were introduced in Arizona, Maryland, Michigan, Minnesota, Missouri, New Jersey, New York, Ohio, Pennsylvania, West Virginia, and Wisconsin that would require pharmacists or pharmacies to dispense prescription contraceptives;¹³
- Explain the dangers of efforts in state legislatures to pass laws that allow pharmacists or pharmacies to refuse to fill valid prescriptions, identify potential conflicts with existing laws, or to add amendments to such laws. In the 2006 legislative session, refusal bills were introduced or considered in twenty states;
- Establish a standard of care for pharmacists and pharmacies through the state pharmacy board, such as the standards in Delaware, North Carolina, Oregon, New York, Massachusetts, and Texas described below;
- Identify useful amendments to refusal laws to provide more protection for patients, such as advance notice to patients of a pharmacist's refusal to fill or of referral procedures to ensure timely access to medications;¹⁴
- Encourage disciplinary action in refusal cases;
- Encourage pharmacies to improve their own policies on refusals and transfers;
- Challenge pharmacy- or system-wide policies that ban the stocking of EC;
- Gain public support and media attention in a community where a refusal incident occurs;
- Develop press releases, opinion pieces, and letters to the editor;¹⁵

In addition to these policy and advocacy strategies, an individual who is refused her prescription also may have a private cause of action against a pharmacy or pharmacist. While the information here can be useful when initiating a private suit, many areas of law that go beyond the scope of this guide should be considered.¹⁶ For example, a pharmacist may be held responsible for any injuries resulting from a refusal or for medical malpractice. Another act on the part of pharmacists that commonly accompanies refusals, disclosure of private medical information in a public place, also is actionable under various state and federal laws.¹⁷

Depending on the situation, an act of refusal may even be a crime. For example, if a pharmacist refuses to return a prescription, a claim could be brought for theft of the patient's property.¹⁸ In this case, the patient would file a criminal complaint, as opposed to a private suit, which would then be reviewed by a prosecutor.

The National Women's Law Center is available to help you find the laws, regulations, and policies in your state. If you have been refused or know of others who have been refused, or if you know of a pharmacy with bad policies or a pharmacist that refuses to fill prescriptions or provide over-the-counter EC, call 1-866-PILL-4-US or email info@nwlc.org. For more information on the problem of refusals in the pharmacy, please visit www.nwlc.org.

I. STATE LAWS, REGULATIONS, POLICIES, AND ADMINISTRATIVE DECISIONS DIRECTLY ADDRESSING PHARMACY REFUSALS

State law governs the practice of pharmacy and sets forth pharmacists' and pharmacies' rights and responsibilities. These laws usually are found in the sections of the state laws addressing the licensing and regulation of pharmacies and pharmacists. Occasionally, these laws are part of a more general statute. In New York, for example, the pharmacy laws and regulations are in the state Education Law, under the Office of the Professions. States also promulgate regulations that "fill in" the laws and provide specific guidelines for pharmacists and pharmacies to follow. State pharmacy board websites usually provide a link to the relevant laws and regulations in that state, as well as to some of the other sources listed below.¹⁹

State pharmacy boards also issue interpretations of their laws and regulations, described in more detail below, that provide guidance about the standard of practice and can be used in disciplinary actions. There have been some disciplinary actions against pharmacists for refusals to fill and transfer prescriptions, as described below.

The National Women's Law Center can provide assistance in identifying relevant laws, regulations, guidance, and precedent in your state on the issue of pharmacy refusals.

A. Laws and Guidance Directly Addressing the Duty to Dispense and the Right to Refuse

Although there are some similarities, pharmacy laws and regulations vary considerably from state to state. There is no federal law on the issue, but three federal bills were introduced in the 109th Congress that would have required *pharmacies* to protect patients when pharmacists refuse to fill prescriptions based on personal beliefs;²⁰ similar bills may be introduced in the 110th Congress, which begins in January 2007. This area of law is changing rapidly, so carefully review the most recent laws in your state or contact the Center for updates.

Implicit Duty to Fill

The laws most relevant to a pharmacist's refusal to fill valid contraception prescriptions are those that specify the circumstances under which a pharmacist *can* refuse to dispense medication to a patient. These circumstances concern potential harm to the patient. For example, a majority of states require a pharmacist to refuse to fill a prescription if there is a likely interaction between the new prescription and another drug the person is taking; if there is a reason to

believe that the prescription has been forged; if there is an apparent error in the dosage; or if there is reason to think that the medication is being abused. While not directly addressing refusals based on religious, moral or personal beliefs, these particular state laws *permit refusals only for medically or legally valid reasons*. Therefore, by omitting religious, moral or personal beliefs from the enumerated reasons for refusals, most state pharmacy laws implicitly prohibit such refusals.

Explicit Prohibition or Limitation on Refusals to Dispense

Five states explicitly require pharmacists or pharmacies to ensure that valid prescriptions are filled: California, Illinois, Massachusetts, Maine, and Nevada.

- California enacted a law in 2005 that permits a right to refuse based on personal beliefs only if the pharmacist has notified the employer in writing and the employer can accommodate the refusal without undue hardship.²¹ The law requires that the pharmacy ensure that the patient receive the prescription in a timely manner in the event of a refusal.
- On April 1, 2005, prompted by several refusal incidents, the governor of Illinois issued an emergency regulation clarifying that pharmacies in that state must fill valid prescriptions for contraception, including EC, without delay. The rule later became permanent.²² In 2006, a new rule was enacted in Illinois to require pharmacies to post notice of the original pharmacy rule. The new rule will help to ensure that women are notified of their rights at the pharmacy and give women information about filing a complaint if there is a violation of the original rule.²³
- As explained in more detail below, Massachusetts, through its pharmacy board, issued a statement indicating that pharmacists are required to fill all valid prescriptions and that no class of drugs is exempt.²⁴
- Maine pharmacy law and regulations make clear that pharmacists may refuse only for professional reasons and no other reason—such as personal beliefs—is allowed.²⁵
- In Nevada, where the pharmacy board recently passed a new rule permitting a pharmacist to decline to fill a prescription only for professional reasons,²⁶ the general counsel of the pharmacy

board stated that refusals based on other considerations—such as personal or moral beliefs—could result in discipline by the state.²⁷

Additionally, a rule on this issue is pending before the pharmacy board in Washington State, with a final decision expected by Spring 2007. The rule would require pharmacies to deliver lawfully prescribed drugs and devices as well as those approved by the FDA for restricted distribution by pharmacies, which would include over-the-counter EC.²⁸

Prohibition on Obstruction or Refusals to Refer or Transfer

Five states have policy statements that prohibit pharmacists from obstructing patient access to medication or from refusing to transfer or refer a prescription to another pharmacy. As described below, state pharmacy boards in Delaware, New York, North Carolina, Oregon, and Texas have issued policy statements supporting patients' right to receive their medications and clarify that obstruction or harassment of patients by pharmacists may give rise to discipline under existing laws and regulations.²⁹

Explicit Right to Refuse

Four states—Arkansas, Georgia, Mississippi, and South Dakota—have passed laws or regulations explicitly allowing a pharmacist the right to refuse to fill prescriptions based on his or her religious, moral, or personal beliefs or protecting a pharmacist from adverse employment action for doing so.³⁰ These laws fail to provide adequate patient protections or to place any duty on the refusing pharmacist to meet the needs of the patient (for example, by referring the patient to another pharmacist or transferring the prescription elsewhere). While other states have enacted refusal clauses for family planning services, these laws do not include pharmacies or pharmacists, and therefore are not applicable to them.

B. State Pharmacy Board Guidance Directly Addressing the Duty to Dispense and the Right to Refuse

As mentioned above, some state pharmacy boards have issued position statements or interpretive letters on the issue of pharmacy refusals. These statements are more than general principles of patient care; they directly address the refusal issue and indicate that failure to follow the position of the board may constitute a violation of existing pharmacy laws or regulations and result in discipline. For the most part, these statements are protective of patients' rights to receive lawfully prescribed medications. For example, the Massachusetts Board of Pharmacy issued a letter responding to an inquiry about pharmacists' refusals to provide EC.³¹ The Board concluded that pharmacists are required to fill a valid prescription, including those for EC, pursuant to a review for contraindications and similar concerns. The Board emphasized that there is no class of drugs exempt from the general requirement of dispensation.

Statements of other boards of pharmacy permit pharmacists to refuse based on personal beliefs, but also are protective of patients' access to their legally valid medications. For example, the North Carolina Board of Pharmacy clearly places the burden of meeting the patient's needs on the refusing pharmacist:

Pharmacists who object to providing a medication for a patient on this basis alone [moral or ethical belief], therefore, should take proactive measures so as not to obstruct a patient's right to obtain such medication.

The Board notes that although pharmacists have a right to avoid moral or ethical conflict, they do not have a right to obstruct otherwise legitimate prescription dispensing or delivery solely on the basis of conscientious objection.

Board of Pharmacy staff interprets this policy to mean that if a pharmacist refuses to fill a prescription for emergency contraception then that pharmacist has an obligation to get the patient and the prescription to a pharmacist who will dispense that prescription in a timely manner.³²

Pharmacy boards in Delaware, New York, and Oregon have issued similar patient-protective policies. These policies not only prohibit a refusing pharmacist from obstructing patients' access to drugs, but also put a burden on the pharmacy to ensure that when a pharmacist refuses to fill a prescription or provide medication, there are mechanisms in place to ensure delivery of services to the patient.³³

Recently, the Texas State Board of Pharmacy posted a statement on its website stating that pharmacists who refuse to fill prescriptions or sell medications (such as EC over-the-counter) should refer patients to another pharmacist within the pharmacy or refer the patient to a pharmacy where the patient can obtain the medication.³⁴

Some state pharmacy boards have explicitly rejected proposed policies that would permit pharmacists to refuse to dispense prescriptions based on their personal beliefs. Often, rejection of these policies is spurred by grassroots opposition to pharmacy refusals organized by local women's groups and health organizations. For example, in 2005 the Wyoming Board of Pharmacy rejected a proposal that would have allowed pharmacists to refuse to dispense prescriptions based on personal beliefs; in doing so, the Board specifically cited the overwhelmingly negative public comments received from advocates and state groups.³⁵ In addition, in December 2005, due to pressure from the public and state legislators, the Nevada Board of Pharmacy agreed to abandon its proposal to allow pharmacists to refuse to dispense prescriptions based on their personal beliefs.³⁶ Instead, the board adopted a regulation permitting refusals based only on professional judgment, which as explained above, has been interpreted to mean that pharmacists who refuse based on personal beliefs will face discipline.³⁷ Similarly, in July 2006, following extensive public outcry from elected officials and state advocates, the Washington State Board of Pharmacy postponed consideration of a rule that would permit pharmacists to refuse to dispense prescriptions based on their personal beliefs.³⁸ Instead, the board is considering and will likely adopt a rule that requires pharmacies to make sure

patients have timely access to all legally prescribed or requested medications that are kept behind the pharmacy counter.³⁹ These examples demonstrate the powerful effect that advocates can have in ensuring that harmful refusal policies are not adopted by state boards of pharmacy.

C. Administrative Decisions Addressing Refusals

If a consumer believes that state pharmacy laws or regulations have been violated by a pharmacy or pharmacist, she could file a complaint with the state board of pharmacy.⁴⁰ The board assures compliance with its rules, and is empowered to issue fines, suspensions, licensing conditions, or other discipline. As with most matters of state law, disciplinary procedures vary by state. The board may resolve the complaint itself after conducting an investigation. Alternatively, the board may file a complaint before a state Administrative Law Judge (ALJ). The ALJ then makes a finding as to whether there has been a violation and recommends an appropriate remedy. In some states, the board may accept, reject, or amend the ALJ's decision. The decision of the ALJ and/or board may be appealed to the state court. In some states, reports of these administrative proceedings may only be available from the pharmacy board and may not be available online or through any database.

One administrative proceeding addressing a refusal to transfer a prescription for contraception was brought in Wisconsin. After a hearing, the ALJ recommended that the pharmacist receive a reprimand, finding that he violated state regulations prohibiting unprofessional conduct by a pharmacist, including acts that could "be a danger to the health, welfare or safety of the patient or public."⁴¹ The ALJ found that he departed from the normal standard of care exercised by a pharmacist, and recommended that he be required, as a condition of retaining his pharmacy license, to file a plan specifying "the steps he will take to ensure that a patient's access to medication is not impeded by his declination(s)." The pharmacist was charged the costs of the disciplinary proceeding. The Wisconsin Pharmacy Board unanimously accepted these recommendations and approved the sanctions against the pharmacist on April 13, 2005.

While this case focused solely on the issue of transfer, it is an excellent example of a judge properly relying on laws requiring professional conduct and generally accepted standards of care within the profession. The ALJ's finding applies only to the particular pharmacist at issue, but the strong language of the opinion and its grounding in existing pharmacy laws and regulations should be influential to other judges or pharmacy boards considering these types of cases.

More recently, the California Board of Pharmacy investigated and resolved a pharmacist refusal complaint. A young mother sought emergency contraception after a birth control failure. Her doctor called in the prescription to a pharmacy, but the pharmacist on duty not only refused to fill the prescription, he also refused to enter the prescription information into the system so that it could be transferred elsewhere.⁴² The woman, with the assistance of the National Women's Law Center, filed a complaint with the California Board of

Pharmacy.⁴³ In June 2006, the board resolved the complaint. The board found that the pharmacist violated California law in obstructing the patient by refusing to fill or transfer the prescription, and that the violation constituted unprofessional conduct. The pharmacist was fined \$750 for the violation.⁴⁴ This represents the first discipline by a pharmacy board for a pharmacist's refusal to *fill* a prescription, as distinct from the Wisconsin Pharmacy Board's discipline for refusal to *transfer*.

D. The Application of Refusal Laws, Regulations, and Guidance to Over-the-Counter EC

Most of the laws, regulations, and policies about pharmacy refusals were developed before the FDA's decision to allow women 18 and over to access EC without a prescription. Whether they will apply to EC in the over-the-counter context will vary depending on the specific language of each law, regulation, or policy. But generally, if a pharmacist is prohibited from refusing to provide prescription medication based on personal beliefs, he or she should not be able to refuse to provide EC to a woman who does not need a prescription. Permitting a refusal would violate the spirit of these laws, regulations, and policies, which, like the FDA's decision, seek to improve women's access to contraceptives. Additionally, it would create an untenable situation by prohibiting refusals of EC to younger women with prescriptions, but allowing them for older women who do not need a prescription. Since pharmacists will be acting merely as a gatekeeper for women 18 and over—checking purchasers' identification to ensure that they meet the FDA's age restriction—it would be illogical to allow refusals in that context. Nevertheless, the American Pharmacists Association has extended its policy, described below, which permits pharmacists' refusals, to over-the-counter EC.⁴⁵ On the other hand, at least one state—Illinois—has already made clear that its refusal rule will continue to apply to over-the-counter EC.⁴⁶ Certainly, the broader patient protective language described above, which prohibits harassment of customers, disclosure of private information, and obstruction of access to medication will apply in the over-the-counter EC context.

The role of state pharmacy boards in over-the-counter EC regulation and implementation is unclear. The National Association of Boards of Pharmacy notes that the age restriction "has raised a number of logistical and administrative uncertainties" but anticipates that states will pass rules and regulations to provide guidance on implementing the age restriction.⁴⁷ The manufacturer has indicated that it will develop professional education materials for pharmacy boards to distribute to their membership regarding the prescription requirement for those 17 and under. While some pharmacy boards have begun to educate consumers about over-the-counter EC and how to access it,⁴⁸ others have remained silent on the issue. The FDA's approval decision does contemplate a role for pharmacy boards, but it is uncertain how involved pharmacy boards can and will become in regulating over-the-counter EC.

II. OTHER SUPPORT AGAINST REFUSALS IN STATE LAW AND REGULATIONS

A. Sex Discrimination Prohibitions

In eight states (AK, IA, ME, MD, ND, OK, PA, WI), discrimination on the basis of sex or gender is prohibited in the pharmacy and is a ground for discipline.⁴⁹ Pharmacists that impose barriers to medications used solely by women, such as contraceptives, violate these sex discrimination provisions because:

- Only prescriptions taken by women (and usually sought at the pharmacy by women) are subject to such refusals;
- Only women are at risk of pregnancy, and thus subject to the possible health consequences of an unplanned pregnancy from an inability to promptly fill their prescription;
- Only women have certain conditions that are managed or treated with hormonal contraceptives, such as amenorrhea and endometriosis;
- Only women face the potential additional cost of a doctor's visit, travel, and time necessary to replace a prescription if the pharmacy refuses to return it;
- In the vast majority of cases, only women have to suffer the humiliation of being turned away by a pharmacy.

Similar arguments were made successfully to secure insurance coverage for contraceptives. Employers who provide insurance coverage for prescription drugs but exclude contraceptives have been found to discriminate against women. The administrative agency charged with interpreting our nation's employment antidiscrimination laws, the Equal Employment Opportunity Commission, reasoned:

[P]rescription contraceptives are available *only* for women. As a result, Respondents' explicit refusal to offer insurance coverage for them is, by definition, a sex-based exclusion. Because 100 percent of the people affected by Respondent's policy are members of the same protected group—here, women—Respondent's policy need not specifically refer to that group in order to be facially discriminatory.⁵⁰

There also have been court decisions in support of this reasoning.⁵¹

States with these laws or regulations recognize the potential harm to an individual's health that may result when a pharmacist or other pharmacy personnel treat customers differently based on their sex. In these eight states, the existing sex discrimination prohibitions in pharmacy law can be used to challenge refusals to dispense prescription contraception or over-the-counter emergency contraception to women. While there are no reported cases or administrative decisions involving sex discrimination in the practice of pharmacy, such provisions should protect patients from pharmacists' refusals.

States that do not have a specific prohibition on sex discrimination may nonetheless have a pharmacy law or regulation that prohibits

discrimination generally. These general discrimination prohibitions could be used to argue against refusals to dispense contraception or provide EC over-the-counter. For example, Tennessee pharmacy law prohibits a pharmacist from discriminating "in any manner between patients or groups of patients."⁵² While such general provisions do not specifically prohibit discrimination on the basis of sex, they could be interpreted to do so.

State pharmacy patient's bills of rights also may include protection against sex discrimination. New Hampshire's board of pharmacy, for example, has endorsed a pharmacy patient's bill of rights that says that pharmacists must treat patients "with dignity . . . regardless of manner of payment, race, sex, age, nationality, religion, disability, or other discriminatory factors."⁵³ Such provisions could be used to redress refusals to provide contraception, especially when they are accompanied by harassment or moralistic lectures. Although state pharmacy bills of rights do not always have the force of law, they provide guidance about the standard of practice and could be used in disciplinary actions.⁵⁴

In addition, state "public accommodation" laws may offer protections for consumers seeking access to contraceptives in pharmacies. These laws prohibit discrimination in places that serve the public. **Almost all states have public accommodation laws; some specifically mention pharmacies while others incorporate pharmacies and pharmacists by reference to a different law.**⁵⁵

Finally, if a state legislature or state pharmacy board were to permit refusals without ensuring that women are able to receive their legally valid contraceptives without delay, it may be possible to challenge such action under sex discrimination protections in state constitutions and other states' requirement of equal protection of the law. Twenty states give explicit protection against sex discrimination in their constitutions.⁵⁶

B. Rules of Professional Conduct, Codes of Ethics, and Pharmacy Patient's Rights Laws

Laws or regulations prohibiting patient abandonment or defining behavior that constitutes unprofessional conduct also may be used to prohibit refusals or, at a minimum, require procedures to ensure that patients get their medication without delay. The Wisconsin ALJ decision against a pharmacist, mentioned above, was based on state rules of professional conduct. In Illinois, before the rule governing pharmacy refusals was in place, the Illinois Department of Financial and Professional Regulation brought complaints against pharmacies for failure to provide pharmaceutical care and unprofessional conduct when they refused to fill prescriptions for contraception.⁵⁷ Other states have similar rules that could be used to discipline a pharmacist in refusal situations or develop patient protective policies. For example, West Virginia's Rules of Professional Conduct⁵⁸ include several provisions that could be read to limit refusals based on non-

professional considerations. Rule 15-1-19.2.1, Freedom of Practice, states:

No pharmacist shall engage in conduct, in the practice of pharmacy, or the operation of a pharmacy, which tends to reduce the public confidence in the ability and integrity of the profession of pharmacy, or endangers the public health, safety and welfare; nor shall he or she interfere in the provision of pharmaceutical care or offer pharmaceutical services under any terms or conditions which tend to impair the free and complete exercise of professional skill and judgement of another pharmacist.

Rule 15-1-19.4, Professional Services, states:

It is the duty of a practicing pharmacist to make his or her professional services available to the public. Every licensed pharmacy...shall provide pharmaceutical care, including the compounding and dispensing of *all prescription orders which may reasonably be expected to be compounded or dispensed by pharmacists* (emphasis added).

In New York, the Rules of the Board of Regents,⁵⁹ which apply to the profession of pharmacy, define as “unprofessional conduct”:

Abandoning or neglecting a patient or client under and in need of immediate professional care, without making reasonable arrangements for the continuation of such care....

North Dakota has adopted the National Association of Boards of Pharmacy's Model “Pharmacy Patient's Bill of Rights” as law.⁶⁰ It states in relevant part, that pharmacists shall provide care in accordance with the patient's right:

1. To professional care provided in a competent and timely manner in accordance with accepted standards of pharmacy practice.
2. To be treated with dignity, consistent with professional standards, regardless of manner of payment, race, sex, age, nationality, religion, disability, or other discriminatory factors.
3. To pharmaceutical care decisions made in the patient's best interest in cooperation with the patient's physician.
4. To have the pharmacist serve as one of the patient's advocates for appropriate drug therapy and to make reasonable efforts to recommend alternative choices in cooperation with the patient's physician.
- ...
6. To receive health care information and to review the patient's records upon request.
7. To receive patient counseling, using the methods appropriate to the patient's physical, psychosocial, and intellectual status.
8. To have the patient's prescriptions dispensed and pharmacy services provided at a pharmacy of the patient's choice in an atmosphere that allows for confidential communication.

At least one state board, South Carolina, has codified the American Pharmacists Association's Code of Ethics, described in Section III.A below, giving it the force of law.⁶¹ Both Wyoming and New Hampshire have binding codes of ethics in their state pharmacy regulations requiring that a pharmacist “[h]old the health and safety of patients to be of first consideration.”⁶² New Hampshire further requires that the pharmacist “fulfill all professional obligations conscientiously and with due respect for the physical and well-being of the community....”⁶³

Each of the above rules or codes, depending on the circumstances, could be violated when a pharmacist refuses to fill a prescription for contraceptives for religious, moral, or personal reasons. Laws and regulations like these are clearly in conflict with those allowing for pharmacists refusals, and should be used to show how such laws would undermine the states' earlier efforts to secure high quality health care for citizens of the state. Such laws and regulations also can be interpreted to support additional provisions that would explicitly require pharmacy access to contraceptives.

C. Transfer Provisions

Most states have regulations that address the transfer of prescriptions between pharmacies. Many states' regulations make transfer *mandatory* at the request of the patient, and explicitly state that refusal to transfer a prescription by a pharmacy or pharmacist constitutes unprofessional conduct or another violation of the state's pharmacy rules and regulations.⁶⁴ Oklahoma explicitly states that a patient has a “property right” in his or her prescription and makes failure to transfer a crime.⁶⁵ These provisions have practical uses when patients are confronted with refusals. They also support the principle that the duty is on the pharmacist or pharmacy to facilitate a patient's access to lawfully prescribed medication.

Many commentators and organizations, including the American Pharmacists Association, suggest that the interests of pharmacists and patients can be balanced by requiring a transfer and referral process. However, these attempts to balance competing interests do nothing to correct the discriminatory nature of refusals.

Moreover, commentators' examples presume that there are always two pharmacists working side by side, and one who refuses to fill a prescription can simply ask his or her colleague to step in. This option often is not available. If there is only one pharmacist working at the time, and that pharmacist refuses to fill a prescription, he or she would have to send the customer to another pharmacy. This is likely to be the case during late-night shifts at 24-hour pharmacies. Even in large cities, there may be few pharmacies open during late-night hours in a given area.⁶⁶

Transfers to other pharmacies are even more burdensome. Women in rural areas may not have a selection of pharmacies. Nor does transfer to another pharmacy provide an adequate remedy if that pharmacy is closed, or a woman cannot find transportation. More importantly, each of these scenarios presumes that a pharmacist that refuses to fill a prescription is willing to transfer the prescription. There have been cases reported where a pharmacist refuses

not only to fill a prescription based on religious, moral, or personal beliefs, but further asserts a right not to transfer the prescription to another pharmacy to be filled.⁶⁷ In fact, the organization

“Pharmacists for Life” asserts a right not *only* to refuse, but to *transfer* as well.⁶⁸

III. OTHER NATIONAL AND STATE POLICY STATEMENTS AND GUIDANCE

While not legally binding, at a minimum, national and state policy statements and guidance provide some notice to pharmacists of what is expected of them when serving the public. Such statements also establish what patients can reasonably expect from a pharmacist. This type of guidance can be persuasive in disciplinary proceedings against pharmacists who refuse, or in encouraging state attorneys general or legislators to make explicit findings that current laws and regulations prohibit pharmacists from impeding patients’ access to medications.

A. Guidance from national organizations

National associations for pharmacists, pharmacies, boards, and other medical and health professionals issue guidance to their membership. Medical journals also comment on standards of care, including standards for the practice of pharmacy.⁶⁹ Often this guidance directly addresses pharmacists’ refusals, and generally is very protective of the patient’s right to receive medication.

The American Pharmacists Association

The American Pharmacists Association (APhA) states:

APhA recognizes the individual pharmacist’s right to exercise conscientious refusal and supports the establishment of systems to ensure patient’s access to legally prescribed therapy without compromising the pharmacist’s right of conscientious refusal.⁷⁰

This policy has been interpreted by the APhA to require a pharmacist to refer to another pharmacist a prescription that he or she refuses to fill on grounds of conscience if referral is the alternative system adopted by the pharmacist and their employer (if applicable). APhA also suggests that there are many alternative systems available to navigate pharmacist objections, including the pharmacist’s choice of practice setting, collaboration with local prescribers (including pharmacists practicing under collaborative practice agreements), and the use of “opt-in” networks where prescribers and pharmacists actively direct patients to participating providers.⁷¹ The organization notes that the patient should not have any awareness that the pharmacist was refusing to fill the prescription.

When the profession’s policy is implemented correctly—and proactively—it is seamless to the patient, and the patient is not aware that the pharmacist is stepping away from the situation. Whether another pharmacist on duty completes the prescription or patients are proactively directed to pharmacies where certain therapy is available, or even different systems are set up, the patient gets the medication, and the pharmacist steps away from that activity—with no intersection between the two.⁷²

As noted above, the APhA has extended this refusal policy to the EC over-the-counter context.⁷³

The APhA also has a Code of Ethics, which is “intended to state publicly the principles that form the fundamental basis of the roles and responsibilities of pharmacists.” The Code includes several provisions that support a duty to dispense or, at a minimum, refer, stating that a pharmacist “respects personal and cultural differences among patients,” “avoids discriminatory practices, behavior or work conditions that impair professional judgment, and actions that compromise dedication to the best interests of patients,” and provides referrals, recognizing that “colleagues and other health professionals may differ in the beliefs and values they apply to the care of the patient.”⁷⁴ According to the APhA, “In adopting the official policy (above) the House of Delegates considered the Code of Ethics and sees no conflict between the policy allowing the pharmacist to opt out (as this opting out is based on use of the medication not the characteristics of the patient) and the Code of Ethics.”⁷⁵ Nonetheless, in situations where a pharmacist places personal beliefs before the best interest of the patient, which includes getting time sensitive medications as soon as possible, the policy appears to be inconsistent with the Code of Ethics.

National Association of Boards of Pharmacy

Other sources and commentary likewise support patients’ right to obtain legal medications and discourage some of the behavior that may accompany a refusal based on religious, moral or personal beliefs. The National Association of Boards of Pharmacy’s Model Pharmacy Patient’s Bill of Rights holds that patients have the right to not be discriminated against on the basis of sex.⁷⁶ The Model also requires that the pharmacist put the patient’s well being at the forefront of professional decision making. Moreover, its requirement that patients be treated with dignity is contrary to a pharmacist making comments about a patient’s sexual activity, marital status, or presumed promiscuity, as has been reported in refusal incidents. Despite these provisions, the National Association of Boards of Pharmacy has declined to take a specific position on the issue of pharmacy refusals. It did, however, recently say in its newsletter that “Pharmacists should also consider their career trajectory in light of their moral views; for example, a pharmacist with strong beliefs against contraceptive drugs might prefer to work in a setting that would not normally dispense EC.”⁷⁷

American Medical Association

The American Medical Association, the nation’s largest physician group, weighed in on the issue of pharmacist refusals at its 2005 annual meeting. The AMA’s actions were prompted by increased attention to pharmacist refusals and state legislative efforts to allow

for such refusals. Noting the potential impact on patient care, and the role of the pharmacist in working with the physician to meet the needs of the patient, the AMA stated that it will support laws that require dispensation or meaningful and timely referral processes.⁷⁸

American Medical Women's Association

In support of the Illinois emergency rule mentioned above, the American Medical Women's Association issued the following policy statement:

AMWA takes the position that contraception should be available to anyone with a valid prescription. Unless the physician is notified of contraindications, AMWA believes that pharmacies should guarantee seamless delivery, without delay (within the standard practice for ordering), judgment, or other interference, of all contraceptive drugs and devices lawfully prescribed by a physician.⁷⁹

American Public Health Association

Pharmacists also belong to other professional associations, such as the American Public Health Association, which issue their own standards and provide professional guidance. In 2006, the American Public Health Association adopted a comprehensive policy on the subject of refusals to provide contraception at pharmacies. The policy clearly states, "When a health professional... has prescribed contraception, the patient must be able to obtain the contraceptive in a timely manner at a pharmacy, without interference from those pharmacists who have personal objections to contraception. Similarly, patients need timely access to non-prescription emergency contraception."⁸⁰

Other Organizations

Other national organizations, such as the American Academy of Family Physicians and the National Rural Health Association, have issued statements or policies in support of patients' rights to obtain legally valid prescriptions.⁸¹

IV. PHARMACY POLICIES ON REFUSALS, TRANSFERS, AND STOCKING

A. Pharmacy Policies on Refusals and Transfers

Some major pharmacy chains have their own policies on refusals and transfers.⁸⁵ Pharmacists at these chains are expected to comply with these policies and are subject to disciplinary action for failure to do so. Some of these chains' policies are protective of the patient's right to receive medication. For example, Costco does "not encourage or permit our Pharmacists to allow personal beliefs to impede the legitimate dispensing of legally prescribed medication."⁸⁶ CVS requires a pharmacist to inform his or her employer of any objection to filling a prescription *before* a refusal arises, so that the pharmacy can ensure that customers' needs are met "without delay."⁸⁷ Note,

B. Guidance from State Sources

Some state pharmacy boards, while not codifying a Bill of Rights, nonetheless use it to guide pharmacists' treatment of patients, and to inform patients of what they should expect from a licensed pharmacist. For example, Tennessee has adopted the National Association of Boards of Pharmacy's Model Pharmacy Patient's Bill of Rights described in Section III.A above.⁸² The adoption of a code of ethics by a pharmacists' association provides additional notice of the professional standard expected of pharmacists in that state.⁸³

State pharmacy boards also may offer other guidance that can be useful in addressing religious, moral, or personal refusals. These administrative bodies might issue statements related to the right to refuse while commenting on a different, but related matter. For example, while commenting on a case in which a pharmacist refused to fill a patient's prescription based on nonpayment, the Alabama State Board of Pharmacy remarked:

Several important points should be kept in mind when a refusal to dispense scenario unfolds in your practice:

...

Refusals should never be based on bias or prejudice toward the patient or the prescriber.

...

It is always a drastic step to refuse medication to a patient, and pharmacists usually take this step only under the most extreme of circumstances. There is no "play it safe" position in drug therapy. Dispensing and refusing to dispense are both legally hazardous. But pharmacists can take care with their refusals and, by being mindful of the principles above, reduce exposure to liability.⁸⁴

While this guidance addressed nonpayment, the underlying principles and commentary on what harm can result when a patient is denied medication hold equally true in instances of refusals based on religious, moral, or personal beliefs.

however, that actual enforcement of chains' policies varies from location to location.

Other pharmacy chains have policies that permit refusals and lack patient protections. One example is Wal-Mart, which allows its pharmacists to refuse to fill prescriptions for moral, religious or personal reasons and refer customers to another store,⁸⁸ except where in its view such refusals are explicitly prohibited by state law. Target has a similar policy, which does not guarantee that all prescriptions for birth control, including emergency contraception, will be filled in the store, without discrimination or delay.⁸⁹

There are campaigns around the nation to use positive publicity to recognize and reward stores with policies that protect their custom-

ers, and urge those with harmful or confusing policies to ensure customers get the service they deserve.⁹⁰

There are many advantages for pharmacies that choose to adopt positive policies to deal with refusals based on personal beliefs. For example, policies that accommodate refusing pharmacists can ensure the type of “seamless” patient interaction supported by the American Pharmacists Association. Such an accommodation clearly puts the emphasis on patient care while delineating allowable actions by the pharmacy and the pharmacist. To adequately protect patients, any policy allowing for a refusal must require the pharmacist to inform the employer in advance of the refusal, so that the employer can implement a protocol to ensure that the patient’s needs are met. Such protocols should assure that no patient will be faced with a refusal, and no pharmacy will be surprised by a pharmacist that abandons patients. In addition to protecting patients, this type of protocol also protects a pharmacy that disciplines a pharmacist for refusing to dispense, since the pharmacy, while willing to accommodate the pharmacist, also has made clear the penalty for failing to inform the employer about his or her intent to refuse.

Alternatively, a pharmacy may decide to implement a policy that prohibits refusals for moral, religious, or personal grounds altogether. Such a policy can be justified based on a pharmacy’s analysis of its small staff size, its customers’ needs, the demographics of the community, or its desire to protect its business reputation. Under Title VII employment discrimination law,⁹¹ if sued by a pharmacist claiming the right to refuse, the pharmacy would have to show that any accommodation of a refusal for non-medical reasons would have presented an undue hardship. Depending on the surrounding circumstances, any of the aforementioned reasons could result in such a hardship and present a valid defense for the pharmacy.

B. Pharmacy Policies on Stocking

In addition to a policy on filling and transferring prescriptions, it is possible for a chain or an individual pharmacy to have a policy prohibiting stocking emergency contraception. It is important to make a distinction, however, between pharmacies that could be out of stock of a particular drug at one time, which is routine in the practice of pharmacy, and a pharmacy- or corporate-wide ban on stocking a particular drug.

Depending on the circumstances, a ban on stocking EC could be a violation of pharmacy law or regulations in the states where the ban is in effect. Such bans could be challenged in a few different ways. In the case of a system-wide ban, the policy could be challenged as

the unlicensed practice of pharmacy. Every state has a provision in its laws or regulations defining the practice of pharmacy for that state. Because many of those provisions require the pharmacist-in-charge or the individual pharmacy to make decisions on drug procurement and selection for its pharmacy,⁹² a corporate-wide policy that forbids stocking a certain drug essentially usurps the decisionmaking power given to the individual pharmacist or pharmacy. Additionally, stocking bans could violate provisions in state pharmacy laws that require pharmacies to meet “community needs” or maintain an adequate stock of drugs.⁹³ Stocking bans also could violate sex discrimination prohibitions in those states that have them, based on arguments laid out above.⁹⁴ Finally, in those states that permit pharmacists to dispense emergency contraception directly to individuals without requiring them to first visit a doctor for a prescription,⁹⁵ a stocking ban would prohibit those pharmacists who want to participate in the program from doing so.

The “community needs” argument was successful in challenging Wal-Mart’s well publicized corporation-wide ban on stocking emergency contraception.⁹⁶ Wal-Mart repeatedly asserted that its refusal to stock emergency contraception was a “business decision” and not motivated by any political pressure or bias.⁹⁷ In 2006, advocates challenged the corporate ban. In Massachusetts, local advocates filed a lawsuit and complaints with the pharmacy board on behalf of three women who were denied emergency contraception at Wal-Mart, alleging a violation of Massachusetts’s community needs provision.⁹⁸ The Massachusetts Board of Pharmacy responded quickly, finding that the Wal-Mart policy violated this provision and that “Wal-Mart Pharmacies are required to stock and dispense EC.”⁹⁹ Other states and advocates quickly began to apply pressure to Wal-Mart¹⁰⁰ and in March 2006 Wal-Mart reversed its corporate ban.¹⁰¹ This case demonstrates that the combination of creative legal theories and strategic advocacy can change policies harmful to women.

New York City took a different approach to the problem of pharmacy refusals to stock EC. In 2003, it passed a local law requiring pharmacies to post a sign notifying customers if they do not carry EC.¹⁰² While a positive step that could help women to identify EC-friendly pharmacies and preserve their privacy by avoiding the need to ask aloud and in public for the drug, the law has not been sufficiently enforced,¹⁰³ and its effectiveness as an approach is undetermined. Nevertheless, an ordinance similar to the New York City law was adopted by the Madison, Wisconsin Common Council in November 2006. It requires pharmacies that either do not stock EC or are temporarily out of stock of EC to post signs informing customers of that fact and of the nearest pharmacy that has EC.¹⁰⁴

V. CASES BROUGHT BY PHARMACISTS CLAIMING A RIGHT TO REFUSE

As more customers become aware of the pharmacist refusal issue, and more pharmacists feel empowered to refuse, there likely will be an increase in court activity on the matter. State and local governments may, like Illinois, enact laws and policies to ensure that customers have access to their lawfully prescribed medications. Individual pharmacists or chains also may adopt policies limiting the

right to refuse, as a way to comply with these laws, or in an effort to respond to the needs of consumers.

Pharmacists can be expected to respond to these acts by challenging the validity of these laws, regulations, and policies. Additionally, pharmacists also may sue when they are fired for violating these

laws, regulations, and policies. The following section examines claims brought by pharmacists in an effort to establish their right to refuse. Additionally, this section also outlines other types of claims that pharmacists might make, and provides an analysis of those possible claims.

A. Free Exercise Clause of the First Amendment

Several pharmacists have challenged the Illinois pharmacy regulation (see Section I.A. above) as a violation of “religious liberty” under the Free Exercise Clause of the First Amendment.¹⁰⁵ The pharmacists allege that the regulation “was enacted with the express purpose of suppressing the religious practice of persons such as plaintiffs . . . [and] contains numerous exemptions for conduct based on secular and non-religious motivations.”¹⁰⁶

Despite the pharmacists’ assertions, it is important to note that the Illinois regulation applies to *pharmacies*, not to individual *pharmacists*. The rule requires pharmacies that sell contraceptives to fill prescriptions for birth control without delay, if in stock. When a contraceptive is not in stock, the pharmacy must—as the customer directs—provide an alternative, order the drug, transfer it to another pharmacy, or return the prescription to the customer.¹⁰⁷

A decision in this case is pending, but based on other court decisions involving similar challenges, the regulation should be upheld as constitutional. Courts have found that while individuals (including certain corporations) do have a right to religious expression, individuals are not exempt from following a law that is “neutral” and “generally applicable.”¹⁰⁸ If a law has an incidental burden on a religious practice, the court will examine both the intent and effect of the law in determining its constitutionality.¹⁰⁹ A law is neutral if the law does not target religious conduct.¹¹⁰ A law is generally applicable if compliance burdens every person or entity subject to the law—regardless of religious affiliation.¹¹¹

Two cases in which a religious entity challenged state laws requiring insurance coverage for contraceptives provide some guidance about how a court might evaluate the Illinois pharmacy regulation. The California Supreme Court found that even though the contraceptive coverage law violated the religious principles of a particular religious employer, the law applied “neutrally and generally” to every employer regardless of religious affiliation and was passed not to limit the employers’ practice of religion, but to remedy discrimination in employment benefits.¹¹² A New York appellate court held that its state contraceptive coverage law was constitutional on similar grounds.¹¹³

Here too, the Illinois pharmacy rule is both neutral and generally applicable. It is neutral because no particular religious belief is singled out. Additionally, as Illinois points out in response to the challenge to the rule, the purposes of the rule reflect neutrality; it is concerned with the public welfare, not suppression of religion.¹¹⁴ The rule is generally applicable because it applies to pharmacies that do not stock a particular contraceptive regardless of their stated reason for failing to stock that contraceptive.¹¹⁵ A pharmacy that does not

stock a particular contraceptive because of a lack of profit is subject to the regulation in the exact same manner as a pharmacy that does not stock contraception based on a religious objection. The law is therefore both neutral and generally applicable to all pharmacies.¹¹⁶

If a court finds that a law is not neutral and generally applicable, then the law is constitutional only if it meets a “compelling governmental interest” and is “narrowly tailored to advance that interest.”¹¹⁷ As held in the California contraceptive coverage case, reducing unintended pregnancies and eliminating sex discrimination are clearly compelling governmental interests furthered by ensuring access to contraception.¹¹⁸ The New York court concluded that the state’s interest in gender equity and health care outweighed the religious entity’s free exercise of religion claim.¹¹⁹

Likewise, the Illinois regulation was enacted in response to reports of pharmacists’ refusals to dispense legally prescribed medication, and to address the “threat to the public interest, safety or welfare” caused by refusals.¹²⁰ Furthermore, because the law permits pharmacies to comply in a variety of ways, and allows for employee accommodations that satisfy Title VII, described below, the law is narrowly drawn to meet this governmental interest. Therefore, there is every indication that laws like the one in Illinois are legal, and that other states are able to pass similar laws to protect access to contraceptives.

B. Title VII of the Civil Rights Act of 1964

The federal law that governs employment discrimination, Title VII, prohibits discrimination on the basis of religious beliefs.¹²¹ An employee cannot be fired, not hired, or otherwise disadvantaged based on workplace practices related to his or her religion. As indicated below, while refusing to dispense certain contraceptives can be a “religious practice,” this does not mean, however, that pharmacists have the right to refuse to dispense lawful prescriptions based on their own religious beliefs.

The law holds that an employer must accommodate an employee’s religious practice, so long as the practice does not impose an “undue hardship” on the employer’s ability to run the business. Courts have found that an employee’s religious practice that burdens patients, customers or coworkers presents an “undue hardship” under Title VII that the employer does not have to accommodate.¹²² One reported case illustrates the limitations of the employer’s duty to accommodate a refusal to dispense lawfully prescribed medications.

In *Noesen v. Medical Staffing Network*, a pharmacist sued a placement agency and Wal-Mart under Title VII, claiming that the defendants failed to accommodate his religious refusal to dispense any form of contraception.¹²³ Noesen and the supervising pharmacist agreed to an arrangement specifying that Noesen would notify other staff when a customer presented a contraceptive prescription. When Noesen refused to comply and instead ignored the customers presenting birth control prescriptions, he was fired. The court found that Noesen was offered a reasonable accommodation and failed to comply with that accommodation. The court rejected the claim that Noesen was fired based on his religion, concluding instead that his

termination was due to his disruptive behavior and abandonment of customers.

While the court found that this arrangement was reasonable in this particular case, an arrangement such as this might present an undue hardship to a smaller pharmacy with fewer pharmacists on duty. Under Title VII, if an employer can show that an employee cannot be accommodated without an undue hardship, then the employer has no duty to accommodate the employee, and may fire or refuse to hire the employee.

There is additional case law indicating that pharmacists who interfere with their employers' ability to meet patients' needs will not fare well with juries. In one case, Eckerd Pharmacy refused to hire a pharmacist, Hillel Hellinger, who claimed that his religion prohibited him from selling condoms. Eckerd made no attempt to accommodate Hellinger. A jury had to decide whether or not such an accommodation was necessary or could have been made without an undue hardship on Eckerd.¹²⁴ Ultimately, a jury found that Eckerd did not have a duty to accommodate Hellinger's refusal to sell condoms.¹²⁵

The same pharmacists who are challenging the Illinois regulation under the federal constitution are also challenging it under Title VII. They have filed a federal lawsuit¹²⁶ and also filed an EEOC complaint alleging a Title VII violation by their employer, Walgreens.¹²⁷ The pharmacists claim that they were fired for refusing to sign a statement agreeing to comply with the Illinois regulation, and that Walgreens made no attempt to accommodate their refusal to dispense EC, as required by Title VII.¹²⁸ There are many unknown facts at this time, such as the wording of the statement as well as the circumstances that caused Walgreens to believe that accommodating the pharmacists would present an undue hardship. Lawyers for the pharmacists have indicated that the EEOC complaint is the precursor to filing a federal lawsuit against Walgreens.¹²⁹

C. Protection for Employees under State Abortion Refusal Laws

Some pharmacists attempt to equate contraception with abortion, and assert protection under refusal laws that permit medical professionals to refuse to provide abortions. As discussed above, there are valid reasons why these laws should not apply to pharmacists.¹³⁰ Courts have not addressed whether state refusal laws for abor-

tion can offer protection for pharmacists unwilling to fill birth control prescriptions. This claim was made in a case filed by Karen Brauer, a pharmacist working at an Ohio Kmart, who was fired for refusing to dispense a certain type of contraceptive pill, called Micronor.¹³¹ Brauer filed a lawsuit against Kmart for wrongful termination. She claimed that state law allowing health care professionals to refuse to participate in abortions also protected her refusal to dispense medication that she believed caused abortions. The court refused to dismiss the case, finding that what mattered for the purposes of Brauer's claim of protection under the refusal law was her *subjective* belief that the particular medication caused what she *believed* to be an abortion.

Also, because Brauer was fired for refusing to sign a pledge to dispense *all* legally prescribed drugs, the court stated, "[t]he proposed agreement conceivably encompasses drugs which may currently be available or which may become available in the future, that could be prescribed and ingested with the intent to produce an abortion."¹³² The court did not determine that there was any validity to Brauer's belief or merit to her claims; rather, the court only found that it could not conclude that the refusal law did not apply in this case. The suit has since been dismissed on administrative grounds.¹³³ Because the medical and scientific facts clearly indicate that contraceptives do not cause abortion, even if the lawsuit is revived, the cause of action brought under the state's refusal clause should ultimately be decided in favor of Kmart.

At least one other court, however, has refused to accept the claim that contraceptives are abortifacients under state refusal laws.¹³⁴ This is to be expected, since it is well established in the medical literature that all forms of contraception, including the morning-after pill¹³⁵ and the contraceptive at issue in the Brauer case,¹³⁶ are not abortifacients because they have no impact on an established pregnancy. While Brauer's claim hinged on her belief that certain contraceptive medications are tantamount to abortion due to their interference with a fertilized egg, even if certain contraceptives work after an egg has been fertilized, these medicines and devices are still commonly understood to be contraceptives and not abortifacients.¹³⁷ Recent research has called into serious doubt the scientific evidence that Plan B works post-fertilization.¹³⁸ Only the abortion pill, also known as RU-486 or mifepristone, which terminates an established pregnancy, can be included under state laws allowing individuals to refuse to participate in abortion.¹³⁹

pharmacist. Furthermore, the pharmacy profession overwhelmingly supports measures that protect patients' access to medication generally, including contraceptives. It should do no less—because women's health and sometimes even their lives are on the line.

CONCLUSION

There has been a recent increase of both media reports of refusals and federal and state responses to the issue. As a result, this area of law and policy is in constant flux. Nonetheless, there are many laws, regulations, policies, and principles that support a woman's right to receive contraception in the pharmacy or from the

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- 2 *In re Union Pac. R.R. Employment Practices Litig.*, No. 8:03CV437, slip op. at 13-14 (D. Neb. July 22, 2005).
- 3 Federal law states that the receipt of federal funds does not require an entity to provide abortions, and prohibits discrimination against employees who refuse to perform abortions. Public Health and Welfare, 42 U.S.C. § a-7. Forty-seven states and the District of Columbia have laws allowing certain individuals or entities to refuse to provide women specific reproductive health services, information or referrals. NARAL PRO-CHOICE AM., WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES 23 (2006). This does not exempt individuals from performing life-saving procedures, including abortion, or complying with the Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd.
- 4 Am. Pharmacists Ass'n., Code of Ethics for Pharmacists (Oct. 1994) (emphasis added), available at http://www.aphanet.org/AM/Template.cfm?Section=About_APhA&CONTENTID=2654&TEMPLATE=/CM/HTMLDisplay.cfm.
- 5 See Ctr. for Drug Evaluation and Research, Food and Drug Admin., Mifeprex (mifepristone) Questions and Answers (updated July 19, 2005), <http://www.fda.gov/cder/drug/infopage/mifepristone/mifepristone-qa.htm>.
- 6 While the science is not 100% definitive, the best evidence indicates that Plan B works before fertilization. Frank Davidoff & James Trussell, *Plan B and The Politics of Doubt*, 296 JAMA 1775 (2006). However, even if EC did prevent implantation of a fertilized ovum, EC still would not and could not medically or scientifically cause an abortion since pregnancy is defined as beginning at implantation.
- 7 As stated on the label, approved by the FDA, "Plan B® works like a birth control pill to prevent pregnancy. . . ." Food and Drug Admin., Carton Text Plan B (levonorgestrel) tablets, 0.75 mg, available at <http://www.fda.gov/cder/foi/label/2006/021045s011bl.pdf> (last visited Nov. 20, 2006).
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- 9 See Ctr. for Drug Evaluation and Research, U.S. Food and Drug Admin., Plan B: Questions and Answers (Aug. 24, 2006), available at <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm>; see also *Accessing Non-Prescription Emergency Contraception: The Basics* (National Women's Law Center, Washington, D.C.), available at http://www.nwlc.org/pdf/FSECOTC_11.21.06.pdf.
- 10 See H.B. 5311, 93d Leg., 2005-2006 Reg. Sess. (Mich. 2005); S.B. 608, 93d Gen. Assem., 2d Reg. Sess., (Mo. 2006).
- 11 See *infra* section I.D.
- 12 States where women of all ages can obtain EC directly from a pharmacist and without a prescription from a doctor include: Alaska, California, Hawaii, Maine, Massachusetts, New Hampshire, New Mexico, Vermont, and Washington. For more information, visit <http://www.EC-Help.org>.
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- 14 Model dispensation laws that incorporate the highest standards for the practice of pharmacy and ensure seamless delivery of all legally prescribed medications are available from the National Women's Law Center.
- 15 The National Women's Law Center can assist in drafting pieces for the media.
- 16 See generally David Work, *Refusing to Dispense Carries Legal Risks*, DRUG TOPICS, July 25, 2005, <http://www.drugtopics.com/drugtopics/article/articleDetail.jsp?id=171440>.
- 17 The Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires providers, including pharmacies, to protect patient information. Pub. L. No. 104-191. The privacy provision is enforced by the department of Health and Human Services's Office of Civil Rights. For more information, visit <http://www.hhs.gov/ocr/hipaa/>.
- 18 See *infra* note 65. The Oklahoma pharmacy statute makes failure to return a prescription a misdemeanor.
- 19 To find your state board of pharmacy, visit <http://www.nabp.net/index.html?target=/whoware/boards3.asp>.
- 20 Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. (2005) (introduced Apr. 14, 2005 by Sen. Frank Lautenberg); Pharmacy Consumer Protection Act of 2005, S. 778, 109th Cong. (2005) (introduced Apr. 13, 2005 by Sen. Barbara Boxer); An Act to Amend the Public Health Service Act with Respect to the Responsibilities of a Pharmacy When a Pharmacist Employed by the Pharmacy Refuses to Fill a Valid Prescription for a Drug on the Basis of Religious Beliefs or Moral Convictions, and for Other Purposes, H.R. 1539, 109th Cong. (2005) (introduced Apr. 8, 2005 by Rep. Carolyn McCarthy).
- 21 CAL. BUS. & PROF. CODE §§ 4314, 4315, 733 (2005).
- 22 The Illinois Pharmacy Practice Act, Section 1330.91(j), Duty of Division I Pharmacy to Dispense Contraceptives final rule states:
 - 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.
 - 3) Nothing in this subsection (j) shall interfere with a pharmacist's screening for potential drug therapy problems due to therapeutic duplication, drug-disease contraindications, drug-drug interactions (including serious interactions with nonprescription or over-the-counter drugs), drug-food interactions, incorrect drug dosage or duration of drug treatment, drug-allergy interactions or clinical abuse or misuse, pursuant to 225 ILCS 85/3 (q).
- ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2005).
- 23 Notice of Rights Regarding the Dispensing of Contraceptives, to be codified at 68 Ill. Admin. Code 1330.91(k). The Governor directed this rulemaking because of reports that pharmacists were attempting to evade the existing rule. See Press Release, Illinois Dep't of Fin. & Prof'l Regulation, Governor Blagojevich Introduces New Rule to Ensure Women's Access to Prescription Contraceptives After New Tactic to Deny Women Access to Birth Control Surfaces (Mar. 27, 2006) (on file with the National Women's Law Center).

- 24 See *infra* Section I.B.
- 25 CODE ME. R. 02-392 ch. 19, § 11 (citing ME. REV. STAT. ANN. tit. 32 § 13795(2)).
- 26 Adopted Regulation of the Nevada State Board of Pharmacy, LCB File No. R036-06 (effective May 4, 2006).
- 27 Cy Ryan, *Pharmacy Asked to Withhold Judgment*, LAS VEGAS SUN, May 6, 2006, available at <http://www.lasvegassun.com/sunbin/stories/sun/2006/may/06/566613322.html>.
- 28 Draft Text WAC 246-869-010 Pharmacies' Responsibilities, available at <http://www3.doh.wa.gov/policyreview/> (last visited Dec. 12, 2006).
- 29 See *infra* Section I.B.
- 30 ARK. CODE ANN. § 20-16-304 (1973); GA. COMP. R. & REGS. r. 480-5-.03 (2001); MISS. CODE ANN. § 41-107-1 (2004); S.D. CODIFIED LAWS § 36-11-70 (1998).
- 31 Letter from President James T. DeVita, The Commonwealth of Massachusetts Board of Registration in Pharmacy, to Dianne Luby, President/CEO, Planned Parenthood League of Massachusetts, Inc. (May 6, 2004) (on file with the National Women's Law Center).
- 32 North Carolina Board of Pharmacy, Pharmacist FAQs: Frequently Asked Questions for Pharmacists on Conscience Clause, http://www.ncbp.org/faqs/Pharmacist/faq_ConscienceClause.htm (last visited Nov. 20, 2006).
- 33 *Considering Moral and Ethical Objections*, DELAWARE STATE BOARD OF PHARMACY NEWS (Delaware State Board of Pharmacy, Dover, Del.), Mar. 2006, at 4; Letter from Lawrence H. Mokhiber, Executive Secretary, New York State Board of Pharmacy, to Supervising Pharmacists, Re: Policy Guideline Concerning Matters of Conscience (Nov. 18, 2005), available at <http://www.op.nysed.gov/pharmconscienceguideline.htm>; Oregon Board of Pharmacy, Position Statement: Considering Moral and Ethical Objections (June 7, 2006), available at http://www.oregon.gov/Pharmacy/M_and_E_Objections_6-06.pdf.
- 34 Texas State Board of Pharmacy, Plan B, <http://www.tsbp.state.tx.us/planb.htm> (last visited Dec. 13, 2006).
- 35 Associated Press, *Pharmacy Board Rejects Rule Change*, BILLINGS GAZETTE, Oct. 5, 2005, available at <http://www.billingsgazette.com/newdex.php?display=rednews/2005/10/05/build/wyoming/39-pharm-ethics.inc>.
- 36 Anjeanette Damon, *State Pharmacy Board Won't Decide Conscience Rule*, RENO GAZETTE-JOURNAL, Dec. 9, 2005, at 1A; Molly Ball, *No Remedy in Sight: State Unlikely to Revisit Pharmacy Issue*, LAS VEGAS SUN, Jan. 30, 2006.
- 37 See *supra* text accompanying notes 26-27.
- 38 Kyung M. Song, *Pharmacy Board May Be Rethinking Rule Change*, SEATTLE TIMES, July 22, 2006.
- 39 See *supra* note 28 and accompanying text.
- 40 State Board of Pharmacy websites provide information on how to file a complaint. See *supra* note 19.
- 41 In the Matter of Disciplinary Proceedings Against Neil T. Noesen, RHP, No. LS0310091PHM (Wisc. Feb. 28, 2005), available at <http://www.naralwi.org/assets/files/noesendecision&finalorder.pdf>.
- 42 Chrisanne Beckner, *Birth Control Battle*, SACRAMENTO NEWS AND REVIEW, Aug. 10, 2006, available at <http://www.newsreview.com/sacramento/PrintFriendly?oid=oid%3A113250>.
- 43 Two separate complaints were filed: one against the pharmacy and one against the pharmacist, since both have duties under California law. As of December 2006, the complaint against the pharmacy had not been resolved.
- 44 *In re Becker-Ellison*, Citation No. CI 2005 31291 (Cal. Bd. of Pharmacy, Dep't of Consumer Affairs, June 30, 2006) (citation and fine) (on file with the National Women's Law Center).
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- 47 *Plan B Availability OTC Raises Logistical and Administrative Challenges*, NABP NEWSLETTER (Nat'l Ass'n of Boards of Pharmacy, Mount Prospect, Ill.), Nov.-Dec. 2006, at 199, available at <http://www.nabp.net/ftpfiles/newsletters/NABP/nabp122006.pdf>.
- 48 Steven Malson, PharmD Candidate, Wyoming State Board of Pharmacy, Answers to Frequently Asked Questions Concerning OTC Plan B®, <http://pharmacyboard.state.wy.us/interest/PlanBFAQ.pdf> (last visited Nov. 27, 2006); Oregon Board of Pharmacy, Answers to Frequently Asked Questions: OTC Plan B®, http://www.pharmacy.state.or.us/Pharmacy/Imports/Plan-B_FAQ.pdf (updated Nov. 7, 2006).
- 49 ALASKA ADMIN. CODE tit. 12 § 52.920 (19); IOWA ADMIN. CODE r. 657-811(6); CODE ME. R. § 02-392, ch. 30, sec. 27; MD. CODE REGS. 10.34.10.06(A); N.D. ADMIN. CODE 61-04-04-01(16); OKLA. ADMIN. CODE § 535:10-3-1.2(13); 27 PA. CODE § 27.18; WIS. ADMIN. CODE PHAR. § 10.02(9).
- 50 U.S. Equal Employment Opportunity Comm'n, Commission Decision on Coverage of Contraception (Dec. 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.
- 51 See, e.g., *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266 (W.D. Wash., 2001); *In re Union Pac. R.R. Employment Practices Litig.*, 378 F.Supp.2d 1139 (D. Neb. 2005).
- 52 TENN. COMP. R. & REGS. 1140-2-.01.
- 53 New Hampshire Board of Pharmacy, Pharmacy Patient's Bill of Rights (emphasis added), available at <http://www.nh.gov/pharmacy/rights.html> (last visited Oct. 30, 2006).
- 54 At least one state, North Dakota, has codified its pharmacy patient's bill of rights. N.D. ADMIN. CODE 61-04-07-01(2).
- 55 See, e.g., DC CODE § 3-1205.14. For a more in-depth examination of the applicability of public accommodation laws to refusal situations, see ACLU REPROD. FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACCESSING BIRTH CONTROL AT THE PHARMACY (forthcoming 2007).
- 56 Some states have their own Equal Rights Amendment giving heightened protection against sex discrimination. States with their own Equal Rights Amendment include: Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Maine, Montana, New Hampshire, New Jersey, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. Most state equal rights amendments repeat the language of the proposed federal amendment, while in others the wording resembles the Equal Protection Clause of the Fourteenth Amendment. LESLIE W. GLADSTONE, CONGRESSIONAL RESEARCH SERVICE, THE LIBRARY OF CONGRESS, EQUAL RIGHTS AMENDMENTS: STATE PROVISIONS (updated Aug. 23, 2004).
- 57 *Ill. Dep't of Fin. & Prof'l Regulation v. Walgreen*, No. 2005-04253-1 (Sept. 15, 2005); *Ill. Dep't of Fin. and Prof'l Regulation v. American Drug Stores, Inc.*, No. 2005-01122-1 (Apr. 1, 2005).
- 58 W. VA. CODE ST. R. § 15-1-19.
- 59 N.Y. COMP. CODES R. & REGS. tit. VIII, § 29.2(a)(1) (general provisions for health professions).
- 60 N.D. ADMIN. CODE 61-04-07-01.
- 61 S.C. CODE ANN. § 40-43-86(W) (codifying the APhA's Code of Ethics for Pharmacists).
- 62 WYO. ADMIN. CODE COM. PHAR. Ch. 4 sec. 2; N.H. CODE ADMIN. R. ANN. Bd. of Pharm. 501.01(b)(1).
- 63 N.H. CODE ADMIN. R. ANN. Bd. of Pharm. 501.01(b)(13).
- 64 See, e.g., 22 TEX. ADMIN. CODE § 291.34(d)(5) ("A pharmacist or pharmacist intern may not refuse to transfer original prescription information to another pharmacist or pharmacist intern who is acting on behalf of a patient and who is making a request for this information as specified in paragraph (4) of this subsection."); OHIO ADMIN. CODE § 4729-5-24(D)(2) ("No pharmacy shall refuse to transfer information about a previously dispensed prescription to another pharmacy when requested by the patient. Prescription information shall be transferred in accordance with this rule as soon as possible in order to assure that the patient's drug therapy is not interrupted."); W. VA. CODE R. § 15-1-11.1 (same); MINN. R. 6800.3120 Subp. 9 ("The board shall consider it evidence of unprofessional conduct for a pharmacist to refuse to provide a transfer of original prescription information to another pharmacist who is acting on behalf of a patient and who is making a legal

- request for this information under this part.”).
- 65 OKLA. STAT. tit. 59, § 354A (“A prescription is the property of the patient for whom it is prescribed.”); OKLA. STAT. tit. 59, § 354C (“No legally-competent practitioner of the healing arts shall refuse to honor the requests of his patient to have his prescription transferred to the registered pharmacist or pharmacy of the patient’s choice.”); OKLA. STAT. tit. 59 § 353.24 (making violations of provisions of the Oklahoma Pharmacy Act that do not specify penalties punishable as misdemeanors).
- 66 In Spring 2004, the Chicago-based organization African American Women Evolving conducted a survey of 24-hour pharmacies in the Chicago area. They found that even in this populous city, there was only one 24-hour pharmacy available in certain areas, and that there were few transportation options to get women to pharmacies outside of their neighborhoods during these hours (survey information on file with the National Women’s Law Center).
- 67 See, e.g., *supra* Section I.C.
- 68 The president of Pharmacists for Life, Karen Brauer, is just as opposed to referrals as she is to dispensing contraception. According to Brauer, “That’s like saying, ‘I don’t kill people myself but let me tell you about the guy down the street who does.’ What’s that saying? ‘I will not off your husband, but I know a buddy who will?’ It’s the same thing.” Rob Stein, *Pharmacists’ Rights at Front Of New Debate: Because of Beliefs, Some Refuse To Fill Birth Control Prescriptions*, WASH. POST, Mar. 28, 2005, at A1.
- 69 See, e.g., R. Alta Charo, *The Celestial Fire of Conscience—Refusing to Deliver Medical Care*, 352 N. ENG. J. MED. 2471 (2005). Charo observes that the professional licensing system creates a monopoly and results in a “collective obligation” on the part of pharmacists to meet the needs of the public. Charo concludes that the “best effort” to reconcile the competing conscience rights of patients and pharmacists requires systems of counseling and referral of patients. See also Julie Cantor & Ken Baum, *The Limits of Conscientious Objection—May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008 (2004) (concluding that the beliefs of a pharmacist should be accommodated, but that patient access must be protected).
- 70 Am. Pharmacists Ass’n, 2004 House of Delegates, Report of the Policy Review Committee 10 (2004) (retaining 1998 Policy).
- 71 E-mail from Susan Winckler, Vice President for Policy and Communications and Staff Counsel, American Pharmacists Association, to Jill C. Morrison, Senior Counsel, National Women’s Law Center (Aug. 21, 2006) (on file with the National Women’s Law Center).
- 72 Letter from American Pharmacists Association, to the Editor of *Prevention Magazine* (July 1, 2004) (submitted), available at <http://www.aphanet.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=2689>.
- 73 See *supra* note 45 and accompanying text.
- 74 Am. Pharmacists Ass’n, Code of Ethics for Pharmacists (Oct. 1994), available at http://www.aphanet.org/AM/Template.cfm?Section=About_APhA&CONTENTID=2654&TEMPLATE=/CM/HTMLDisplay.cfm.
- 75 E-mail from Susan Winckler, *supra* note 71.
- 76 Nat’l Ass’n of Boards of Pharmacy, Pharmacy Patient’s Bill of Rights (1992).
- 77 *Plan B Availability OTC Raises Logistical and Administrative Challenges*, NABP NEWSLETTER (Nat’l Ass’n of Boards of Pharmacy, Mount Prospect, Ill.), Nov.-Dec. 2006, at 199, available at <http://www.nabp.net/ftpfiles/newsletters/NABP/nabp122006.pdf>.
- 78 Am. Med. Ass’n, H-120.947 and D-120.975, Preserving Patients’ Ability to Have Legally Valid Prescriptions Filled (2005).
- 79 Am. Medical Women’s Ass’n, AMWA Supports NWLC Pharmacy Refusal Project (Apr. 2005), <http://www.amwa-doc.org/index.cfm?objectId=40180BF5-D567-0B25-59A34CD02FB1A145>.
- 80 Am. Public Health Ass’n, Ensuring that Individuals are Able to Obtain Contraceptives at Pharmacies, Policy No. 200611 (Nov. 8, 2006) (citation omitted), available at <http://apha.org/legislative/policy/policysearch/index.cfm?fuseaction=view&id=1333>.
- 81 Am. Academy of Family Physicians, AAFP Policies, Pharmacists’ Right of Conscientious Objection (2005), available at <http://www.aafp.org/online/en/home/policy/policies/p/pharmacistsright.html> (last visited Nov. 20, 2006); Nat’l Rural Health Ass’n, Policy Statement, Pharmacists’ Right to Refuse Service (Aug. 2005), available at <http://www.nrharural.org/advocacy/sub/PolicyBrf.html> (last visited Nov. 20, 2006).
- 82 Tennessee Board of Pharmacy, Department of Commerce and Insurance, You & Your Pharmacist: Patient Bill of Rights, <http://www.state.tn.us/commerce/boards/pharmacy/yourPharmacist.html> (last visited Nov. 20, 2006).
- 83 Michigan Pharmacists Ass’n, Michigan Pharmacists Association Code of Ethics (Nov. 1996), available at http://www.michiganpharmacists.org/about/code_of_ethics.html (last visited Nov. 20, 2006).
- 84 *No Damages from Refusal to Dispense*, NEWS (Alabama State Board of Pharmacy, Birmingham, Ala.), May 2001, available at <http://www.nabp.net/ftpfiles/newsletters/AL/AL052001.pdf>.
- 85 See Planned Parenthood Federation of America, Behind the Counter: PPFA Brings You the Real Story, <http://www.saveroe.com/campaigns/fillmypillsnow/scored> (last visited Nov. 20, 2006).
- 86 Letter from [unsigned], Costco Wholesale, to [unnamed] (undated), available at http://www.saveroe.com/media/113_costcoletter.pdf (last visited Nov. 21, 2006).
- 87 See Letter from Jon Roberts, R.Ph., Senior Vice President, Store Operations, CVS /pharmacy, to Karen Pearl, Interim President, Planned Parenthood Federation of America (May 20, 2005), available at http://www.saveroe.com/media/104_cvsmay2005fax.pdf.
- 88 David J. Morrow, *Policy on Prescription Orders at Wal-Mart Draws Praise*, N.Y. TIMES, Sept. 16, 1999, at C10; Press Release, Wal-Mart, Wal-Mart to Carry Plan B Emergency Contraception (Mar. 3, 2006) (on file with the National Women’s Law Center).
- 89 Planned Parenthood Federation of America, The Truth About Target, <http://www.saveroe.com/target> (last visited Nov. 20, 2006).
- 90 Planned Parenthood Federation of America has organized such campaigns and has posted a detailed list of pharmacy policies on its website. See Planned Parenthood Federation of America, Behind the Counter: PPFA Brings You the Real Story, <http://www.saveroe.com/campaigns/fillmypillsnow/scored> (last visited Nov. 20, 2006).
- 91 See *infra* section V.B.
- 92 See, e.g., ME. REV. STAT. ANN. title 32, § 13702(22) (defining “practice of pharmacy” as, *inter alia*, “the participation in drug selection”); CODE ME. R. 02-392 ch. 13, § 3 (“The pharmacist in charge is responsible legally and professionally for all activities related to the practice of pharmacy within the retail drug outlet . . . [including] The drug outlet’s procedures for the procurement . . . of drugs.”).
- 93 See, e.g., IND. CODE § 25-26-13-18(a)(2) (“The pharmacy will maintain a sufficient stock of emergency and frequently prescribed drugs and devices as to adequately serve and protect the public health.”); S.D. CODIFIED LAWS § 36-11-41 (“The pharmacy . . . shall possess a stock of pharmaceuticals adequate to serve the needs of the community in which the pharmacy is located.”).
- 94 See *supra* section II.A.
- 95 See *supra* note 12.
- 96 Dana Canedy, *Wal-Mart Decides Against Selling a Contraceptive*, N.Y. TIMES, May 14, 1999, at C1.
- 97 *Id.*
- 98 See *McCarty v. Wal-Mart Stores, Inc.*, No. 06-0422 (Mass. filed Feb. 1, 2006).
- 99 Letter from George A. Cayer, R.Ph., President, Board of Registration in Pharmacy, Commonwealth of Massachusetts, to John F. Batter, III, Esq., Wilmer Hale (Feb. 14, 2006) (on file with the National Women’s Law Center).
- 100 See, e.g., Letter from Jack Schwartz, Assistant Attorney General, Director, Health Policy Development, Office of the Attorney General, State of Maryland, to Kevin Burr, Esquire, Associate General Counsel, Wal-Mart Stores, Inc. (Mar. 3, 2006) (on file with the National Women’s Law Center); Cara Rubinsky, *AG Proposes Action to Make Wal-Mart Carry Emergency Contraception*, ASSOCIATED PRESS, Mar. 2, 2006 (explaining that the Connecticut Attorney General ruled that the state insurance plan should no longer cover prescriptions at Wal-Mart unless it agrees to stock

emergency contraception).

- 101 Press Release, Wal-Mart, Wal-Mart to Carry Plan B Emergency Contraception (Mar. 3, 2006) (on file with the National Women's Law Center).
- 102 Local Law of the City of New York, No. 25 (2003).
- 103 See COUNCIL INVESTIGATION DIV., COUNCIL OF THE CITY OF NEW YORK, EMERGENCY CONTRACEPTION: AVAILABLE AT YOUR PHARMACY YET? (Feb. 2004).
- 104 A pharmacy in Madison that does not stock EC must post the following notice:
NOTICE: This pharmacy does not stock Emergency Contraception (EC). EC, sometimes called the "morning after pill," is a FDA approved high dose of oral contraception that should be taken as soon as possible after unprotected intercourse to prevent pregnancy. The FDA approves this up to 72 hours (3 days) after unprotected intercourse. Some studies indicate that this product can be effective up to 120 hours (5 days) after unprotected intercourse. You do not need a prescription to obtain EC if you are 18 or older; if you are under 18, you must get a doctor's prescription. A location where EC is known to be available is [name of pharmacy], [address of pharmacy], or the pharmacist here will refer you to another pharmacy that is known to have the medication in stock.
City of Madison, Legislative File No. 04663 (Dec. 8, 2006).
- 105 The Free Exercise Clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;..." U.S. CONST. amend. I.
- 106 *Menges v. Blagojevich*, Complaint for Declaratory and Injunctive Relief, Civil Action No. 05-cv-3307, ¶ 40 (C.D. Ill. Dec. 22, 2005) (on file with the National Women's Law Center).
- 107 See *supra* note 22.
- 108 See, e.g., *Employment Div. v. Smith*, 494 U.S. 872, 880-81 (1990).
- 109 See, e.g., *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).
- 110 *Id.* at 533-34.
- 111 *Id.* at 542-43.
- 112 *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*, 85 P.3d 67, 82-83 (Cal. 2004) (rejecting Free Exercise claim of religiously affiliated social services agency and finding that contraceptive coverage law was passed to remedy discrimination).
- 113 *Catholic Charities of the Diocese of Albany v. Serio*, 808 N.Y.S.2d 447 (N.Y. App. Div. 2006). This decision was recently upheld by the New York Court of Appeals. *Catholic Charities of the Diocese of Albany v. Serio*, 2006 WL 2970515, 2006 N.Y. Slip Op. 07517 (N.Y. Oct. 19, 2006).
- 114 *Menges v. Blagojevich*, Motion to Dismiss, Civil Action No. 05-cv-3307, at 3 (C.D. Ill. Mar. 31, 2006) (on file with the National Women's Law Center).
- 115 *Id.*
- 116 A district court in Illinois has allowed the pharmacists' case to go to trial, saying that there is an issue of fact as to whether the rule is religiously neutral and generally applicable. *Menges v. Blagojevich*, No. 05-3307, 2006 WL 2579719 (C.D. Ill. Sept. 6, 2006).
- 117 *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).
- 118 See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 92-94.
- 119 *Catholic Charities of the Diocese of Albany*, 808 N.Y.S.2d at 457-58. The Free Exercise clause in New York's constitution provides even greater protection to religious entities than the Free Exercise Clause of the federal Constitution, yet the court held that the state's interest in fostering equality between the sexes and providing women with better health care was compelling enough to overcome the state free exercise of religion rights. *Catholic Charities of the Diocese of Albany v. Serio*, 2006 WL 2970515, 2006 N.Y. Slip Op. 07517 (N.Y. Oct. 19, 2006).
- 120 *Menges v. Blagojevich*, Motion to Dismiss, at 3.
- 121 Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.
- 122 See, e.g., *Anderson v. U.S.F. Logistics*, 274 F.3d 470 (7th Cir. 2001) (holding that employer's ban against employee using the phrase "Have a Blessed Day" with a certain customer but not all was a reasonable accommodation); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996) (employee claimed that religious belief compelled her to write letters to co-workers questioning their behaviors; in dicta, court noted need of company to protect itself from other employees' claims of religious harassment); *Grant v. Fairview Hosp.*, 2004 WL 326694 (D. Minn. Feb. 18, 2004) (holding that employer not required to risk breaching duty of care to patients to accommodate ultrasound technician whose religious beliefs compelled him to counsel patients against having abortions).
- 123 *Noesen v. Medical Staffing Network, Inc.*, Memorandum and Order, No. 06-C-071-S, 2006 WL 1529664 (W.D. Wis. June 1, 2006).
- 124 *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999).
- 125 Catherine Wilson, *Eckerd Wins Bias Verdict: Chain Wouldn't Hire Practicing Hassidic Jew*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 12, 2000, at 2B.
- 126 The pharmacists assert in federal court that the Illinois rule is preempted by Title VII. The district court in Illinois has allowed the pharmacists' case to go to trial, saying that the pharmacists state a claim to go forward. *Menges v. Blagojevich*, No. 05-3307, 2006 WL 2579719 (C.D. Ill. Sept. 6, 2006).
- 127 Todd C. Frankel, *Pharmacists Allege Religious Bias in Pill Dispute*, ST. LOUIS POST DISPATCH, Dec. 8, 2005, at C9.
- 128 The pharmacists also assert protection under the Illinois Right of Conscience Act (ILL. COMP. STAT. 70/1), despite the fact that legislative history indicates a purposeful exclusion of pharmacists.
- 129 Frankel, *supra* note 127.
- 130 See *supra* Introduction section.
- 131 *Karen Brauer v. Kmart Corp.*, No. C-1-99-618, slip op. (S.D. Ohio Jan. 23, 2001) (Brauer also alleged violations of Title VII, public policy, and breach of her employment agreement; these claims were dismissed on procedural grounds.).
- 132 *Id.* at 14. RU-486, the medication that causes an abortion, is available only from a doctor; pharmacists are not permitted to dispense this drug. See *supra* note 5 and accompanying text.
- 133 *Karen Brauer v. Kmart Corp.*, No. C-1-99-618, Order (S.D. Ohio Sept. 30, 2004) (Administratively Closing Case, subject to potential re-opening).
- 134 See *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal.Rptr. 240 (Cal. Ct. App. 1989).
- 135 See generally Food and Drug Admin., Carton Text Plan B (levonorgestrel) tablets, 0.75 mg, available at <http://www.fda.gov/cder/foi/label/2006/021045s011bl.pdf> (last visited Nov. 20, 2006).
- 136 See generally Food and Drug Admin., Watson Pharma Physician Labeling Nor OD-Tablets, available at http://www.fda.gov/medwatch/SAFETY/2005/Oct_PI/Nor-QD_PI.pdf (last visited Nov. 17, 2006).
- 137 *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240 (Cal. Ct. App. 1989) (concluding that "[a]bortion, as it is commonly understood, does not include the IUD, the 'morning-after' pill, or, for example, birth control pills," despite the possible post-fertilization effects of these drugs and devices) quoting *Margaret S. v. Edwards*, 488 F. Supp. 181 at 191 (E.D. La. 1980).
- 138 Frank Davidoff & James Trussell, *Plan B and The Politics of Doubt*, 296 JAMA 1775 (2006) (concluding that "the ability of Plan B to interfere with implantation remains speculative, since virtually no evidence supports that mechanism and some evidence contradicts it.").
- 139 See Letter from Kathryn M. Rowe, Assistant Attorney General, Office of Counsel to the General Assembly, The Attorney General of Maryland, to The Honorable Andrew P. Harris (Jan. 23, 2003) (finding that only Mifepristone clearly falls under the state's abortion-related conscience protection) (on file with the National Women's Law Center).



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