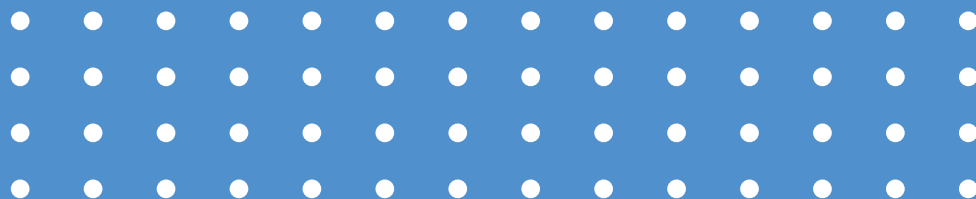
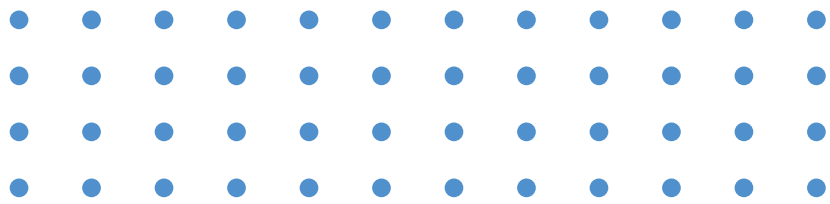


**RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS:
Accessing Birth Control at the Pharmacy**



ACLU Reproductive Freedom Project
ACLU Program on Freedom of Religion and Belief

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ACKNOWLEDGMENTS

On a Saturday in Menomonie, Wisconsin, Jane¹ returned to her neighborhood drugstore to refill her birth control prescription, which she needed to begin taking the following day. The pharmacist on duty asked personal questions of Jane, including whether she used the medication for contraceptive purposes. When Jane acknowledged that this was indeed her objective, the pharmacist refused to refill the prescription because of his religious beliefs. When she asked where her prescription could be refilled, the pharmacist refused to answer. He went further – he refused to transfer the prescription so that it could be filled elsewhere. It wasn't until Monday, when another pharmacist came on duty, that Jane received her birth control pills, two days after requesting the refill and one day after she was scheduled to take her next pill.²



Angela³ faced an unexpected struggle to prevent a pregnancy after a condom broke on a Fourth of July weekend in Cleveland, Ohio. She did not have her own doctor and the local family planning clinic was closed. At 2:00 a.m., at the nearest hospital's emergency room, the attending physician refused to provide emergency contraception – a concentrated dose of birth control pills that can prevent a pregnancy – and he also refused to provide a referral to another source. “What should I do then?” Angela asked in a panic. The physician responded, “I don't know. You should have thought about that before.” A nurse who overheard the conversation tried to help. She told Angela to contact a second hospital. But the staff there informed Angela that the hospital only offers emergency contraception to sexual assault victims. Finally, a physician at a third hospital agreed to call in a prescription to the local pharmacy. But at the pharmacy, the pharmacist told Angela that the store did not stock emergency contraception. Undeterred, Angela called the prescribing physician, who spoke with the pharmacist and convinced her to dispense the contraception.⁴



When Beth⁵ went to the CVS/pharmacy in Coventry, Rhode Island, to fill her prescription for emergency contraception, the pharmacist on duty did not give her the medication she sought. Instead, the pharmacist gave Beth the options of returning the next day or traveling to another CVS/pharmacy.⁶ Following this incident, the corporate office of CVS/pharmacy, the largest pharmacy retailer in the United States, worked with Planned Parenthood Federation of America to create a nationwide policy that guarantees that all women will be able to fill their prescriptions for emergency contraception at their own CVS/pharmacy, while trying wherever possible to honor an individual pharmacist's religious objection.⁷

REFUSALS AT THE PHARMACY: Accessing Birth Control

● A Roadmap

The pharmacy is the latest high-profile setting where religious belief may interfere with reproductive health care. In this briefing paper, we outline the legal and policy considerations that inform the American Civil Liberties Union's (ACLU's) approach to religiously based refusals in the pharmacy. Our approach strives, wherever possible, to protect both the health care needs of women *and* the religious freedom of individual pharmacy department employees.

Based on our analysis, as detailed in this paper, we conclude that a *pharmacy* – a state-regulated business with the responsibility to supply medication to patients – must ensure that women can access birth control, including emergency contraception, at the pharmacy without added delay. The pharmacy should satisfy any lawful and appropriate request to purchase birth control – either with a prescription or from behind the counter – on-site without added delay.⁸ If the drug is not in stock, the pharmacy should ensure that the patient is given the choice of having the pharmacy order the drug, arrange for the drug to be obtained elsewhere, or, if the patient has a prescription, return the prescription to the patient or her representative.

If an *individual pharmacist or other pharmacy department employee* has a religious objection to birth control, the pharmacy should honor the objection provided the pharmacy ensures that patients receive their birth control in a timely manner at the same pharmacy. Pharmacies should put protocols in place to ensure this result. Whatever their religious or moral beliefs, individual pharmacists (or other employees as appropriate) should provide complete and accurate information about the medication, treat the patient with respect, arrange for the patient to be helped by another pharmacist at the pharmacy, and provide the birth control when there is no one else who can provide the drug within the usual time frame. Under no circumstances should pharmacy department employees intimidate, threaten, or harass the patient. An individual pharma-

cist should always have the discretion to refuse to fill prescriptions for contraception due to adverse health consequences, suspicion of abuse, a dosing error, fraud, or payment issues.

IN THE TEXT THAT FOLLOWS WE DISCUSS:

the importance of birth control for women;

the important role the pharmacy plays in the health care system;

the impact on women's lives of a refusal at the pharmacy counter;

our framework for evaluating the appropriateness of religiously motivated refusals to provide reproductive health services;

how existing state and federal laws lend support for requiring a pharmacy to satisfy, without added delay, any lawful and appropriate requests to purchase birth control; and

strategies for addressing the issue of refusals in the pharmacy that aim to preserve meaningful access to reproductive health care, prevent gender discrimination, and protect individual religious liberty wherever possible.



The Importance of Contraception

Access to safe and effective contraception is a critical component of basic health care for women. Since 1965, when the U.S. Supreme Court first protected a woman's access to contraception,⁹ maternal and infant mortality rates have declined.¹⁰ Without contraception, women have more unplanned pregnancies and are less likely to obtain adequate prenatal care in a timely manner.¹¹ Access to contraception also gives women control of their fertility, enabling them to decide whether and when to become a parent. Contraception not only furthers the health of women and their families but equality as well, allowing women to make educational and employment choices that will benefit themselves and their families. Recognizing these benefits, the Centers for Disease Control and Prevention declared family planning one of the ten most significant public health achievements of the 20th century.¹²

Women clearly recognize the benefits of contraception. Almost all sexually active women have used contraception in their childbearing years.¹³ Many women choose birth control pills, which are available only with a prescription, as their form of contraception. According to the Guttmacher Institute, a nonprofit research organization focused on sexual and reproductive health, in 2002, of all women who used contraception, 30.6 percent used birth control pills.¹⁴ Many forms of birth control pills must be taken daily, and a missed or delayed dose can risk its effectiveness in preventing pregnancy.

Increasingly, women who have experienced contraceptive failure, who have been raped, or who have had unprotected intercourse turn to emergency contraception (EC) to prevent unintended pregnancy.¹⁵ Also known as the "morning-after pill" and only available at the pharmacy or clinic, EC is a concentrated dose of the birth control pills that millions of women take every day. EC does not disrupt an established pregnancy, which the medical community defines as beginning with implantation.¹⁶ Timing is critical for EC to be effective: It is most effective the sooner it is taken and must be taken within days of unprotected intercourse or contraceptive failure.¹⁷



The Pharmacy's Role in Women's Health Care

The pharmacist is a key part of the health care team. A pharmacist provides information and counseling about medication and general health care, as well as watches for drug interactions, allergies, and contraindications. A pharmacy's extended hours, convenient location, and appointment-free visits make pharmacists important health care providers.

Women who use birth control are regular pharmacy customers. Birth control pills require a prescription and women typically must return to their pharmacies each month or several times a year to obtain a refill. Because of recent action by the Food and Drug Administration (FDA), EC is available at the pharmacy without a prescription to women 18 and older who present government-issued proof of age.¹⁸ Because EC is kept behind the counter, women still depend on pharmacy department employees for access. For women under the age of 18 and adult women who do not have government-issued proof of age, a prescription is necessary to obtain EC.¹⁹ Low-income women may also continue to need a prescription because in some states, Medicaid patients must have a prescription in order for the drug to be covered.²⁰ Regardless of whether a prescription is required, for all women, EC is only available for purchase when the pharmacy counter is open.

Pharmacists in several states have played a particularly important role in expanding access to EC. In those states, a state law or regulation permits participating pharmacists to prescribe EC. Women of all ages (including those who do not have government-issued proof of age) can thus obtain the medication directly from a pharmacist without a physician's prescription.²¹ In the four years after California passed legislation permitting the practice, more than 3,000 pharmacists were trained to provide EC directly to women.²² A study by the Pharmacy Access Partnership, an organization dedicated to expanding reproductive health services in pharmacies, found that, in 2004, 175,000 California women obtained EC without needing to see a physician for a prescription.²³



Conflict at the Counter

Media reports increasingly include stories of individual pharmacists and pharmacies refusing to provide birth control, including EC, based on a religious objection.²⁴ It is likely that many more incidents go unreported, as women are made to feel ashamed by a lecturing pharmacist or choose not to reveal private medical information to their community.

Religiously based refusals take different forms. Some pharmacists object to EC, while for others all forms of contraception violate their religious beliefs. Some pharmacists will fill prescriptions for contraception only if the drug has been prescribed for non-contraceptive purposes, such as painful or irregular menstruation, iron deficiency anemia, or acne.²⁵ Other pharmacists refuse only if another pharmacist on duty is available to provide the drug. Some pharmacists not only refuse to sell contraception, but refuse to offer referrals to other providers, give incorrect or misleading information about the drug, or harass the woman. Some pharmacies permit their pharmacists to refuse to provide contraception without taking further action. Other pharmacies may not stock EC because their owners have a religious objection.

These refusals have real consequences for women and their families. A woman who cannot obtain contraception at her local pharmacy may not be able to receive it in a timely manner or at all. In rural areas, a woman may have to drive a great distance to find an alternate pharmacy, if she can even find the time or the means, and may face yet another refusal or a closed counter.²⁶ In urban areas, a woman may be obliged to use the refusing pharmacy under her insurance plan. A woman trying to purchase birth control may face barriers few other patients seeking commonly used drugs encounter.



The Legal Background

In the wake of reports of religiously based refusals to fill prescriptions for contraception, various strategies have emerged to ensure that women can obtain their pills. Legislatures are debating whether to enact laws requiring all pharmacies or pharmacists to fill prescriptions for contraception. Pharmacies are establishing internal guidelines for when an individual pharmacist in their employ refuses to fill a prescription based on a religious objection. State boards of pharmacy are investigating whether an individual pharmacist's refusal to fill or transfer a prescription is unprofessional conduct. This debate continues even though EC can be purchased without a prescription because the medication must be kept behind the pharmacy counter.

In our 2002 report, *Religious Refusals and Reproductive Rights*, we set forth a framework for analyzing the appropriateness of religiously motivated refusals to provide reproductive health care.²⁷ Our framework balances protecting the public health in general, reproductive health in particular, patient autonomy, and gender equality with protecting individual religious belief and institutional religious worship.

When evaluating the appropriateness of a religiously based refusal to provide reproductive health care, our primary concern is whether the refusal burdens people who do not share and should not bear the brunt of the objector's religious beliefs. The more the burdens fall on such people, the less acceptable any claimed right to refuse.

- Consistent with this analysis, an *institution's* religiously based refusal has a greater potential to harm people who do not share those religious beliefs. The refusal of institutions operating for the benefit of the general public, such as hospitals, pharmacies, or other corporate entities, directly affects patients, customers, and enrollees of diverse backgrounds and faiths. These institutions, when operating in the public world, ought to play by public rules.

In contrast, institutions engaged primarily in religious practices, such as churches, temples, mosques, and seminaries, are less likely to impose their religious values on those who do not share them and ought generally to be free from obligations to provide services repugnant to their beliefs.

- An *individual health care provider's* religiously based refusal does not impose inappropriate burdens on others if the provider takes steps to ensure that the patient can receive the care elsewhere. Whatever their religious or moral beliefs, health care providers should always disclose their refusal in a clear, timely, and respectful manner, give complete and accurate information, make appropriate referrals, and provide care in an emergency or if no alternative is reasonably feasible.

Based on our framework, we conclude that the *pharmacy* should satisfy any lawful and appropriate request to purchase birth control – either with a prescription or from behind the counter – on-site without added delay. The pharmacy is a state-regulated business that supplies medication to the general public and serves people of diverse backgrounds and faiths; it operates in the public world and should play by public rules. If the drug is not in stock, the pharmacy should ensure that the patient is given the choice of having the pharmacy order the drug, arrange for the drug to be obtained elsewhere, or, if the patient has a prescription, return the prescription to the patient or her representative. An *individual pharmacist's* or *pharmacy department employee's* religious objection to selling birth control should be honored so long as the pharmacy ensures that the customer is able to purchase the birth control on-site in a timely manner.

Existing state and federal laws lend further support for solutions that focus on the *pharmacy's* duty to ensure that women have access to birth control while protecting the religious beliefs of *individual pharmacists* and *pharmacy department employees* wherever possible. Legally requiring a pharmacy to ensure that women have access to birth control is constitutional, as well as

consistent with prohibitions against sex discrimination in commerce. Moreover, a focus on the *pharmacy* provides a framework that respects women's access to health care while attempting, where possible, to accommodate individual religious belief as well.

THE CONSTITUTIONAL LANDSCAPE

The First Amendment to the Federal Constitution contains two provisions aimed at protecting religious freedom from state interference: the Free Exercise Clause and the Establishment Clause.²⁸ As discussed below and in our 2002 report, these provisions offer little guidance about how a state may address religiously based refusals in the pharmacy. The Federal Constitution does not prevent the government, via legislation, regulation, or pharmacy board action, from requiring all pharmacies or pharmacists to ensure that women have access to birth control at the pharmacy nor does it prevent the government from protecting a pharmacy's or pharmacist's religiously based refusal to sell those medications.²⁹ Advocacy is thus crucial. Our framework and federal and state law provide guidance.

The U.S. Constitution does not require religious exemptions

The Free Exercise Clause protects “the right to believe and profess whatever religious doctrine one desires,”³⁰ free from government influence or compulsion. As interpreted by the U.S. Supreme Court, the Free Exercise Clause does not prevent states from requiring those with religious objections to comply with “valid and neutral law[s] of general applicability.”³¹ A law is not neutral if its object is to suppress religious conduct,³² and a law is not generally applicable if it only burdens conduct motivated by religious belief.³³

Measured against these standards, courts have already held that the Federal Constitution does not require a religious exemption to reproductive health mandates.³⁴ In *Catholic Charities of Sacramento, Inc. v. Superior Court*, the California Supreme Court upheld as constitutional the California Women's Contraception

Equity Act, a state law requiring health insurance policies that include prescription drug benefits to include coverage for prescription contraceptives.³⁵ The law exempts a narrow category of religious employers – those whose main purpose is to inculcate religious values and who primarily employ and serve people who share their religious beliefs.³⁶ In other words, the law exempts churches, mosques, and temples, but not religiously affiliated charities and other organizations.³⁷

Catholic Charities, a Catholic social service agency that did not meet the statutory definition of a religious employer, sued the state, claiming a constitutional right to be exempted from complying with the contraceptive equity law. The California Supreme Court held that the California Women’s Contraception Equity Act was a “valid and neutral law of general applicability” and thus satisfies federal constitutional standards.³⁸ The court also held that the law could satisfy even the strictest interpretation of the state constitution’s protections for religious freedom because it serves a compelling interest in redressing gender discrimination in the workplace.³⁹

Just as employers with religious objections may be legally required to offer insurance coverage for contraception, pharmacies or pharmacists with a religious objection can be legally required – consistent with the Federal Constitution – to ensure that women have access to contraception at the pharmacy. A pharmacy or individual pharmacist with a religious objection does not have a federal constitutional right to be exempted from a legal obligation to satisfy, without added delay, any lawful and appropriate request to purchase birth control.⁴⁰

The U.S. Constitution tolerates broad religious exemptions

The Establishment Clause of the Federal Constitution prevents the government from favoring one religion over another and, in general, from privileging religion over nonreligion. As interpreted by the U.S. Supreme Court, the clause does not prohibit broad religious exemptions, or “refusal clauses,” from otherwise gen-

erally applicable laws. For example, the Court upheld a federal law that exempts a wide array of religious organizations from the general rule that otherwise prohibits religious discrimination in employment.⁴¹ Moreover, the Court has held that an exemption may run exclusively to religious institutions and need not “come[] packaged with benefits to secular entities.”⁴² Therefore, consistent with the Federal Constitution, a state law, regulation, or pharmacy board decision requiring pharmacies or pharmacists to satisfy, without added delay, any lawful and appropriate request to purchase birth control may include a refusal clause for those with a religious objection. Because constitutional challenges are of limited utility to invalidate refusal clauses, legislative advocacy is paramount in this area.

LEGAL PROTECTIONS AGAINST DISCRIMINATION IN THE PHARMACY

Protecting against discrimination in employment

Although the Federal Constitution provides no recourse, state and federal law may offer protection to pharmacy department employees who have a religious objection to selling birth control to customers. Moreover, it is often practically possible for a pharmacy to accommodate the religious objections of an individual employee while still ensuring that the customer can obtain birth control at the pharmacy without added delay. Legislation, regulation, or pharmacy board action should place the obligation on pharmacies – rather than individual pharmacists – to ensure that all valid and appropriate requests for birth control are satisfied on their premises in a timely manner. This approach is consistent with long-standing protection for individual religious belief in the workplace.

Title VII of the Civil Rights Act (“Title VII”), a federal law that applies to employers nationwide that have 15 or more employees,⁴³ protects current and prospective employees from discrimination in various forms, including discrimination on the basis of the employee’s religion. Under the federal law, it is generally unlawful for employers to make employment decisions based on

an employee's religion.⁴⁴ Title VII also directs employers to try to accommodate an employee who has stated that he or she won't perform a certain task because of a religious belief.⁴⁵ The employer must consider accommodating the employee's religious objection even though a nonreligious objection would be a legitimate ground for discharge.⁴⁶ There is a limit, however, to how much the employer must do to accommodate the employee.

Title VII requires covered employers to "reasonably accommodate" an employee's religious conflict unless it causes "undue hardship" on the employer's business.⁴⁷ According to the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the statute, a reasonable accommodation is "any adjustment to the work environment that will allow the employee to practice his religion," such as job reassignment, flexible scheduling, lateral transfers, and voluntary substitutions or swaps with other employees.⁴⁸ The accommodation should eliminate the employee's religiously based conflict with the job requirement,⁴⁹ but does not have to be the employee's preferred way of doing so.⁵⁰

The employer does not, however, have to accommodate an employee's religious belief if the accommodation causes the employer undue hardship.⁵¹ Title VII does not require the employer to incur significant costs. For example, an accommodation could cause the employer undue hardship if it forces the employer to hire another employee to do the job,⁵² requires coworkers to change their working conditions,⁵³ decreases the services the employer provides to the public,⁵⁴ forces the employer to break the law or be subject to penalties,⁵⁵ or creates unsafe conditions.⁵⁶ Accommodating an employee who objects to a "substantial proportion of the duties of a particular position," rather than a "minute percentage," could cause the employer undue hardship.⁵⁷

How an employee will fare in a challenge to the employer's accommodation strategy depends on the specific employment relationship at issue. Although it is impossible to predict the outcome of a case, sev-

eral general principles emerge that are relevant when an individual pharmacist or pharmacy department employee voices a religious objection to providing birth control.

- *Offering to transfer an employee to a position that will not conflict with the employee's religious beliefs is often deemed a reasonable accommodation.* When a counselor refused to counsel patients about same-sex or extramarital relationships, the court held that an offer to transfer the counselor to another position where the likelihood of a religious conflict was reduced was a reasonable accommodation.⁵⁸ The employer did not have to accommodate the counselor by scheduling her to work and travel with another counselor who would be available in case the subject arose, or by scheduling a follow-up counseling session.⁵⁹
- *If the job requirement that conflicts with the employee's religious beliefs is not a large part of the employee's workload, an employer may be able to accommodate the conflict by assigning another employee to cover the task.* When a tax law specialist refused to handle applications or exemptions from groups or persons that advocate abortion or other issues to which he objects, the court found that the employee could be reasonably accommodated by giving those cases to a coworker.⁶⁰ The cases to which the specialist objected constituted only a "minute percentage" of his workload,⁶¹ and any delay caused by the absence of coworkers would be comparable to the normal delay in the decision-making process.⁶² If, however, the employee's religious beliefs rendered him "unable to perform a substantial proportion of the duties of a particular position," the employer did not have to permit the employee to remain in the position.⁶³
- *Employers need not accommodate a health professional's proselytizing.* When an ultrasound technician informed his employer that he would have to counsel any pregnant patient considering

an abortion against the procedure, his employer accommodated him by not scheduling him to work with women who were considering abortion, and by permitting him to leave if he became aware that they were considering abortion.⁶⁴ But the court held that the hospital did not have to permit the technician to “provide unauthorized pastoral care to patients.”⁶⁵

- *Employers are not required to accommodate employees in ways that endanger patients.* A labor and delivery nurse’s refusal to participate in emergency procedures to end pregnancies caused a half-hour delay of a lifesaving operation for her patient.⁶⁶ The court held that the hospital did not have to allow the nurse to remain in the labor and delivery section and instead could accommodate her with a lateral transfer to another position.⁶⁷ The court recognized that public health care providers have a heightened obligation to provide services to all, particularly during emergencies.⁶⁸
- *An employer who makes no attempt to reasonably accommodate an employee will have difficulty proving undue hardship.* When a part-time workroom instrument aide at a medical surgical center refused to clean and prepare instruments and to handle fetal tissue after abortions, her employer fired her without attempting any accommodation.⁶⁹ The employer did not consider permitting a transfer or allowing a willing coworker to clean instruments for the aide. Instead, the employer simply asserted that “there are so many religious views that it would be impossible to respect them all and maintain service.”⁷⁰ The court rejected the employer’s argument.

Whether Title VII would protect a pharmacist who has a religious objection to selling birth control depends on the specific employment situation at issue. For example, if the refusing pharmacist is always on duty with several other pharmacists, the pharmacy might arrange for the nonrefusing pharmacists to handle

requests for birth control. Alternatively, transferring the pharmacist to a pharmacy where such an arrangement is possible could also be a reasonable accommodation. Patients would be none the wiser, and this rearrangement of the workload would not require the pharmacy to hire another employee or lose business. If, however, the refusing pharmacist is the only pharmacist on duty, and no transfer is possible, the pharmacy could require the pharmacist to satisfy all lawful and appropriate requests for birth control, as doing otherwise would force the pharmacy either to lose revenue or hire another pharmacist. In no circumstances does the pharmacy have to accommodate proselytizing to customers.

Two Title VII cases specifically address an individual pharmacist’s religious objection. In *Noesen v. Medical Staffing Network, Inc.*,⁷¹ the court held that Title VII does not require accommodations that allow pharmacists to abandon a customer. When a pharmacist notified his employer that he had a religious objection to participating in any pharmacy function related to contraception, the pharmacy agreed to let other pharmacists on duty handle all aspects of processing and dispensing those prescriptions.⁷² But when the pharmacist refused even to notify the other pharmacists when a request for contraception came in – leaving patients indefinitely waiting for assistance in the store and on the phone – he was fired.⁷³ The pharmacist sued the pharmacy, claiming religious discrimination in violation of Title VII. The court held that the pharmacy’s original accommodation was sufficient and that the pharmacy was justified in firing the pharmacist for his “abandonment of customers” and related disruptive behavior.⁷⁴

In *Hellinger v. Eckerd Corporation*,⁷⁵ a pharmacy did not even consider an applicant for a pharmacist position once the pharmacy learned of his religious objection to selling condoms.⁷⁶ The pharmacist sued the pharmacy for religious discrimination in violation of Title VII.⁷⁷ The case went to trial to assess whether the employer could have accommodated the pharmacist, either by allowing him to direct customers to another register, scheduling him at a time or in a store where

he would always be working with a drug clerk or pharmacy technician, authorizing him to exchange shifts with fellow pharmacists to avoid working alone, or permitting him to refuse without further action.⁷⁸ The pharmacy argued that, with any accommodation, the situation could arise where the pharmacist would be alone at the register and his refusal could risk revenue, customers, and community goodwill.⁷⁹ The jury agreed that any accommodation would result in undue hardship for the employer.⁸⁰

Title VII's goal of protecting religious liberty in the workplace should shape the policies considered by state legislatures, regulatory bodies, and pharmacy boards to address religiously based refusals in the pharmacy. Advocates should suggest policies that are consistent with Title VII's long-standing protection for individual religious belief in the workplace. Policies that place the duty on the pharmacy allow the pharmacy to accommodate individual religious belief wherever possible while ensuring that patients receive care on-site without delay.

Preventing sex discrimination in the marketplace

Almost all states have laws that protect consumers from sex discrimination when they seek goods and services in the marketplace.⁸¹ These laws prohibit discrimination in places of "public accommodation," which are establishments that serve the public. Under many state laws, a pharmacy is a place of public accommodation,⁸² and its refusal to satisfy lawful and appropriate requests for birth control, medication used exclusively by women, may constitute unlawful sex discrimination.⁸³

There is precedent for this claim. In *Erickson v. Bartell Drug Co.*, for example, a federal district court in Washington held that an employer's failure to cover prescription contraceptives, "drugs made for women," in its otherwise comprehensive insurance plan violated Title VII's prohibition against sex discrimination.⁸⁴ The court held that the employer discriminated against female employees by offering them less complete cov-

erage than the male employees received. "Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses."⁸⁵ The *Erickson* case is but one example – several state attorneys general⁸⁶ and the EEOC⁸⁷ have all formally concluded that the failure to provide insurance coverage for contraception is sex discrimination.

Although there is no case law to this effect yet, like a woman whose employer refuses to cover contraception, a woman whose local pharmacy refuses to satisfy her request for birth control may have a claim of sex discrimination.⁸⁸ Moreover, action by legislatures, regulatory bodies, and pharmacy boards requiring pharmacies to ensure that women can fill their prescription for contraception furthers the goal of ending sex discrimination in the marketplace.



The Prescription for Religiously Based Refusals at the Pharmacy

A pharmacist's religiously based refusal to sell birth control invokes two important values in our society – the right to make personal decisions about whether or not to have a child and the right to religious freedom. Whether addressing the problem of religiously based refusals in the local pharmacy, pharmacy board, or legislature, with care, it is possible to develop solutions that both facilitate a woman's access to birth control without delay at the pharmacy and accommodate individual religious belief wherever possible. Placing a duty on the pharmacy to ensure that women are able to obtain birth control at their pharmacy does not run afoul of the religious freedom protections of the Federal Constitution, prevents pharmacies from discriminating against their customers on the basis of sex, and allows the pharmacy to accommodate an individual pharmacist's religious beliefs to the extent required by federal law. By keeping these values in mind, advocates can achieve results that safeguard religious liberty and ensure that women have access to safe and effective contraception, a critical component of basic preventative health care and women's equality.

NOTES

¹ Jane is a pseudonym.

² See *Neil T. Noesen*, LS0310091PHM (Wis. Pharmacy Examining Bd. April 13, 2005) (final decision and order), available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm>, *aff'd*, *Noesen v. Wis. Dep't of Regulation & Licensing Pharmacy Examining Bd.*, No. 05 CV 212 (Wis. Cir. Ct. Feb. 3, 2006), *appeal docketed*, No. 2006AP001110 (Wis. Ct. App. May 8, 2006).

³ Angela is a pseudonym.

⁴ Rebecca Meiser, *Bitter Pill*, CLEVELAND SCENE, July 13, 2005.

⁵ Beth is a pseudonym.

⁶ Barbara Polichetti, *Pharmacist Refuses to Fill Contraceptive Prescription*, PROVIDENCE J., Aug. 11, 2005.

⁷ Planned Parenthood Federation of America, *CVS Gets PPFA Thumbs Up*, <http://www.saveroe.com/fillmypillsnow/cvsgetsthumbsup> (last visited Feb. 28, 2007).

⁸ For birth control prescriptions, the pharmacy must ensure that the prescription is filled at the pharmacy within the customary and usual time frame for filling prescriptions. Likewise, if the medication is available without a prescription, the pharmacy must ensure that it can be purchased without added delay.

⁹ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁰ See *Ten Great Public Health Achievements – United States, 1900-1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 242 (1999), available at <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf> (access to family planning has led to “fewer infant, child, and maternal deaths”); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2006, at 222 (2006); U.S. DEP'T OF HEALTH & HUMAN SERVS., VITAL AND HEALTH STATISTICS: TRENDS IN INFANT MORTALITY BY CAUSE OF DEATH AND OTHER CHARACTERISTICS, 1960-88, at 3 (1993).

¹¹ NAT'L FAMILY PLANNING & REPROD. HEALTH ASS'N, CONTRACEPTION 101 1 (2006), <http://www.nfprha.org/atf/cf/{C342E09A-9DD8-4743-8E8C-EBDC304DF4B8}/Contraception101March2006FINAL.pdf>.

¹² See *Ten Great Public Health Achievements – United States, 1900-1999*, *supra* note 10, at 242.

¹³ GUTTMACHER INST., FACTS IN BRIEF: CONTRACEPTIVE USE (2006), http://www.agi-usa.org/pubs/fb_contr_use.pdf.

¹⁴ *Id.*

¹⁵ EC should not be confused with mifepristone (RU-486 or the “early-abortion pill”), a drug approved by the Food and Drug Administration (FDA) in September 2000, which causes an abortion in the early weeks of pregnancy. Mifepristone is available only through a qualified physician and cannot be obtained at a patient's pharmacy.

¹⁶ James Trussell & Beth Jordan, Editorial, *Mechanism of Action of Emergency Contraceptive Pills*, 74 CONTRACEPTION 87, 87 (2006) (reviewing medical research to conclude that emergency contraception does not interrupt an established pregnancy); F.G. CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 20 (21st ed. 2001) (explaining that pregnancy begins when a fertilized egg attaches to the wall of the uterus).

¹⁷ Charlotte Ellertson et al., *Extending the Time Limit for Starting the Yuzpe Regimen of Emergency Contraception to 120 Hours*, 101 OBSTET. GYNECOL. 1168, 1168 (2003); Helena von Hertzen et al., *Low dose mifepristone and two regimens of levonorgestrel for emergency contraception: A WHO multicentre randomised trial*, 360 LANCET 1803, 1809-10 (2002).

¹⁸ See Letter from Steven Galson, Director, Ctr. for Drug Evaluation & Research, Food & Drug Admin., to Joseph A. Carrodo, Vice President, Duramed Research, Inc., <http://www.fda.gov/cder/foi/applletter/2006/021045s011ltr.pdf> (last visited Feb. 28, 2007) [hereinafter FDA Letter]; Memorandum from Steven Galson, Director, Ctr. for Drug Evaluation & Research, Food & Drug Admin., to NDA 21-045, S-011 4 (Aug. 24, 2006), <http://www.fda.gov/cder/drug/infopage/planB/memo.pdf> [hereinafter FDA Memo].

¹⁹ See FDA Letter, *supra* note 18; FDA Memo, *supra* note 18.

²⁰ For example, in Massachusetts, state Medicaid regulations require recipients to provide a legal and valid prescription in order for the cost of a drug to be covered. See MASS. CODE REGS. 406.402, .411. In New York, however, the Department of Health formally decided to cover EC for adult Medicaid recipients without requiring a prescription. See Letter from Deborah Bachrach, Medicaid Director, N.Y. Dep't of Health, to Pharmacy

Provider (Jan. 23, 2007) (on file with author).

²¹ Currently, pharmacists in Alaska, California, Hawaii, Maine, Massachusetts, New Hampshire, New Mexico, Vermont, and Washington can provide EC directly to women without a prescription from their physicians. Guttmacher Inst., *State Policies in Brief: Emergency Contraception* (Feb. 1, 2007), http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf.

²² Nicole Monastersky & Sharon Cohen Landau, *Future of Emergency Contraception Lies in Pharmacists' Hands*, 46 J. AM. PHARMACISTS ASS'N 84, 87 (2006).

²³ *Id.*

²⁴ Chrisanne Beckner, *Birth Control Battle*, SACRAMENTO NEWS & REV., Aug. 10, 2006; Editorial, *Moralists at the Pharmacy*, N.Y. TIMES, Apr. 3, 2005; Rob Stein, *Pharmacists' Rights at Front of New Debate*, WASH. POST, Mar. 28, 2005, at A1.

²⁵ Andrew M. Kaunitz, *Oral Contraceptive Health Benefits: Perception Versus Reality*, 59 CONTRACEPTION 29S, 29S (1999) [oral contraceptives prescribed because of moderate acne vulgaris, several gynecologic disorders, as well as dysmenorrhea and menorrhagia, menstrual cycle irregularities, iron deficiency anemia, ectopic pregnancy, pelvic inflammatory disease, ovarian cysts, benign breast disease, endometrial cancer, and ovarian cancer].

²⁶ See generally AM. PUB. HEALTH ASS'N, POLICY STATEMENT No. 20061, ENSURING THAT INDIVIDUALS ARE ABLE TO OBTAIN CONTRACEPTIVES AT PHARMACIES (2006), available at <http://www.apha.org/advocacy/policy/policysearch/default.htm?id=1335>. For example, in Fabens, Texas, a small town on the U.S.-Mexican border, the only pharmacist in the only pharmacy will not stock birth control pills, including EC, or condoms. Although condoms are available at several convenience stores in town, women must drive 27 miles to El Paso, or travel across the border to Mexico, to get their prescriptions for birth control filled. Katie Fairbank, *Pharmacists' Refusal to Fill Contraception Prescriptions a Question of Choice*, DALLAS MORNING NEWS, Apr. 29, 2005. A study of pharmacies in northeastern Pennsylvania revealed that pharmacies located in rural communities were less likely to have longer store hours, making it more difficult for those who must travel after being refused at their own pharmacy. See Cynthia H. Chuang & Laura D. Shank, *Availability of Emergency Contraception at Rural and Urban Pharmacies in Pennsylvania*, 73 CONTRACEPTION 382, 384 (2006).

²⁷ ACLU REPROD. FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS (2002), available at <http://www.aclu.org/reproductiverights/religion/12679pub20020122.html>.

²⁸ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

²⁹ It is important to note that the Federal Constitution imposes no limitations on nongovernmental institutions. If a privately owned pharmacy requires an individual pharmacist to fill all prescriptions regardless of the pharmacist's religious objection, the religious protections of the Federal Constitution do not apply. Other areas of law, as explained in the text, may provide legal protections for a refusing pharmacist. See *infra* text accompanying notes 43-81.

³⁰ See *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

³¹ See *id.* at 879 (internal quotation omitted). In contrast to the Federal Constitution, some state constitutions require a religious exemption where compliance with a law would substantially burden religion and an exemption would not undermine compelling state interests. See, e.g., *Minnesota v. Hershberger*, 462 N.W.2d 393, 397-99 (Minn. 1990).

³² *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

³³ *Id.* at 543-46.

³⁴ See *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67 (Cal.), cert. denied, 543 U.S. 816 (2004) (No. 03-1618); *Catholic Charities of the Diocese v. Serio*, 859 N.E.2d 459 (N.Y. 2006).

³⁵ See *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 79-89; see also CAL. HEALTH & SAFETY CODE § 1367.25; CAL. INS. CODE § 10123.196.

³⁶ CAL. HEALTH & SAFETY CODE § 1367.25(b)(1); CAL. INS. CODE § 10123.196(d)(1).

³⁷ As we explained in greater detail in our 2002 report, *Religious Refusals and Reproductive Rights*, this refusal clause is both constitutionally sound and appropriately narrow. See ACLU REPROD. FREEDOM PROJECT, *supra* note 27, at 8; ACLU REPROD. FREEDOM PROJECT, *APPLYING THE FRAMEWORK: DISTINGUISHING BETWEEN ACCEPTABLE AND UNACCEPTABLE REFUSAL CLAUSES* (2002).

³⁸ *Catholic Charities of Sacramento, Inc.*, 85 P.3d at 81-83.

³⁹ *Id.* at 91-94. For a fuller discussion of this case, see ACLU REPROD. FREEDOM PROJECT, *VICTORIES ON THE COASTS: COURTS UPHOLD BALANCE BETWEEN REPRODUCTIVE RIGHTS AND RELIGIOUS FREEDOM* (2007).

⁴⁰ Similarly, it does not violate the Federal Constitution for a state agency to discipline an individual pharmacist who refuses to fill a prescription based on a religious belief.

⁴¹ See *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 338-40 (1987) (upholding an exemption from Title VII of the Civil Rights Act that permits a wide array of religious organizations to discriminate on the basis of religion in employment decisions).

⁴² *Id.* at 338.

⁴³ 42 U.S.C. § 2000e(b). Like Title VII, state anti-employment discrimination laws also prohibit discrimination on the basis of religion. The protections of these statutes may apply to employers with fewer than 15 employees. See, e.g., CAL. GOV'T CODE § 12926(d) (covers employers with five or more employees); IND. CODE § 22-9-1-3(h) (covers employers with six or more employees). Some state courts adopt Title VII's analysis and case law when analyzing state claims. See, e.g., *Craig v. Suburban Cablevision, Inc.*, 660 A.2d 505, 508-09 (N.J. 1995). A handful of states also have specific protections for pharmacists that refuse to fill certain prescriptions. See ARK. CODE ANN. § 20-16-304(4); GA. CODE ANN. § 16-12-142(b); MISS. CODE ANN. §§ 41-107-3, -5; S.D. CODIFIED LAWS § 36-11-70.

⁴⁴ 42 U.S.C. § 2000e-2(a). Title VII has exceptions to its prohibition on discrimination based on an employee's religion. It allows "a religious corporation, association, educational institution, or society" to discriminate in hiring, firing, and other employment decisions in favor of members of a particular faith. See *id.* § 2000e-1(a). It also allows employers to take employment action based on an individual's religion if religion constitutes a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business." *Id.* § 2000e-2(e)(1). For example, adherence to the Muslim faith is a bona fide occupational qualification (BFOQ) for a helicopter pilot whose job requirements include flying into Mecca because any non-Muslim caught in Mecca will be beheaded. *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196, 1200, 1202 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984). A pharmacist's responsibility to fill prescriptions is not a BFOQ under Title VII.

⁴⁵ 42 U.S.C. § 2000e(j). Title VII's protections generally apply only if the employee has informed the employer of the conflict and requested an accommodation. See *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1019-21 (4th Cir. 1996). In certain cases, an employer's previous knowledge of an employee's religious beliefs may satisfy the notification requirements. See *id.* at 1020 & n.3.

⁴⁶ See *id.* at 1018.

⁴⁷ 42 U.S.C. § 2000e(j).

⁴⁸ See EEOC, Religious Discrimination, <http://www.eeoc.gov/types/religion.html> (last visited Feb. 28, 2007).

⁴⁹ *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776 (9th Cir. 1986).

⁵⁰ *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68 (1986).

⁵¹ According to the U.S. Supreme Court, an undue hardship is one that imposes "more than a *de minimis* cost" on the employer. *TWA v. Hardison*, 432 U.S. 63, 84 (1977).

⁵² See *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 146-47 (5th Cir. 1982) (hiring substitute for pharmacist who requires days off for religious observance is more than a *de minimis* cost).

⁵³ See *Baz v. Walters*, 782 F.2d 701, 707 (7th Cir. 1986) (disrupting job preferences of other employees is considered when evaluating undue hardship).

⁵⁴ See *Aron v. Quest Diagnostics, Inc.*, No. Civ.A. 03-2581 JSH, 2005 WL 1541060, at *7 (D.N.J. June 30, 2005) (accommodating phlebotomist who would not work on Saturdays was an undue hardship in part because of

impact on patient service), *aff'd*, 174 Fed. Appx. 82 (3d Cir. 2006).

⁵⁵ See *Weber v. Leaseway Dedicated Logistics, Inc.*, 166 F.3d 1223, 1999 WL 5111 (10th Cir. Jan. 7, 1999)

(accommodating employee's religious objection to supplying his social security number constitutes undue hardship because it would subject the employer to penalties from the Internal Revenue Service).

⁵⁶ See *Draper v. U.S. Pipe & Foundry Co.*, 527 F.2d 515, 521 (6th Cir. 1975) ("Title VII does not require that safety be subordinated to the religious beliefs of an employee.").

⁵⁷ See *Haring v. Blumenthal*, 471 F. Supp. 1172, 1180, 1184 (D.D.C. 1979).

⁵⁸ *Bruff v. N. Miss. Health Servs., Inc.*, 244 F.3d 495, 501 (5th Cir. 2001).

⁵⁹ *Id.*

⁶⁰ *Haring*, 471 F. Supp at 1180.

⁶¹ *Id.*

⁶² *Id.* at 1180 n.23.

⁶³ See *id.* at 1180, 1184. When a social service worker refused to license potential foster parents who are gay, unmarried, or involved in extramarital affairs because it conflicted with his religious beliefs, the court held that it was a reasonable accommodation to permit him to refuse to license gay couples. *Phillips v. Collings*, 256 F.3d 843, 850-51 (8th Cir. 2001) (section 1983 claim incorporating Title VII analysis). As same-sex couples rarely sought to become foster parents, the court found this accommodation "would have had virtually no effect on his employment duties nor the administration of the division." *Id.* at 850.

⁶⁴ *Grant v. Fairview Hosp. & Healthcare Servs.*, No. Civ. 02-4232JNEJGL, 2004 WL 326694, at *5 (D. Minn. Feb. 18, 2004).

⁶⁵ *Id.* ("Title VII does not require employers to allow employees to impose their religious views on others."). In another case, the court held that an employee who proselytized could not be accommodated without undue hardship. See *Baz*, 782 F.2d 701 (chaplain who was fired from the Veterans Hospital for reasons that included changing the format of a music event to a Christian evangelical service and praying during surgical procedures could not be reasonably accommodated). Cf. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (employee who posted scriptural passages designed to hurt gay coworkers cannot be reasonably accommodated without undue hardship); *Chalmers*, 101 F.3d 1012 (sales supervisor who wrote letters to coworkers accusing them of immoral conduct could not be accommodated without undue hardship).

⁶⁶ *Shelton v. Univ. of Med. & Dentistry of N.J.*, 223 F.3d 220, 223 (3d Cir. 2000).

⁶⁷ *Id.* at 226.

⁶⁸ *Id.* at 228. Courts often take into account the effect on public health and safety of an employee's refusal to provide services. See, e.g., *Rodriguez v. City of Chicago*, 157 F.3d 771, 779 (7th Cir. 1998) (Posner, J., concurring) (police officer's religious objection to guard abortion clinics can cause a "loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect"). For example, when a police officer refused to work at a casino because of a religious objection, the court found that any accommodation would pose an undue hardship. *Endres v. Indiana State Police*, 349 F.3d 922, 927 (7th Cir. 2003) ("Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police.").

⁶⁹ *Tramm v. Porter Mem'l Hosp.*, No. H 87-355, 1989 U.S. Dist. LEXIS 16391 (N.D. Ind. Dec. 22, 1989).

⁷⁰ *Id.* at *12-14.

⁷¹ No. 06-C-071-S, 2006 WL 1529664 (W.D. Wis. June 1, 2006), *appeal docketed*, No. 06-2831 (7th Cir. June 30, 2006).

⁷² *Id.* at *2.

⁷³ *Id.*

⁷⁴ *Id.* at *3-4.

⁷⁵ 67 F. Supp. 2d 1359 (S.D. Fla. 1999).

⁷⁶ *Id.* at 1361.

⁷⁷ *Id.* at 1360.

⁷⁸ *Id.* at 1366.

⁷⁹ *Id.*

⁸⁰ Jay Weaver, *Jewish Pharmacist Loses Suit Over Refusal to Sell Condoms*, MIAMI HERALD, Feb. 12, 2000, at 3B.

⁸¹ See, e.g., DEL. CODE ANN. tit. 6, § 4504(a); MICH. COMP. LAWS ANN. § 37.2302(a); UTAH CODE ANN. § 13-7-3. Certain states prohibit discrimination on the basis of marital status. See, e.g., MD. ANN. CODE art. 49B, § 5(b). A pharmacy may violate this proscription if it refuses to dispense contraception to a woman if she is unmarried.

⁸² In a few states, a pharmacy is expressly included in the definition of a place of public accommodation. See ME. REV. STAT. ANN. tit. 5, § 4553(8)(F) (“pharmacy”); 43 PA. CONS. STAT. ANN. § 954(l) (“drug stores”). In many other states, the definition is so broad that it would include pharmacies. See, e.g., MICH. COMP. LAWS ANN. § 37.2301(a) (“institution of any kind, whether licensed or not, whose goods, services . . . are extended, offered, sold, or otherwise made available to the public”); N.J. STAT. ANN. § 10:5-5(L) (“retail shop, store, establishment, or concession dealing with goods or services of any kind”).

⁸³ Related federal law, however, would not apply in this situation. The federal public accommodation law does not prohibit discrimination on the basis of sex but rather is limited to race, color, religion, and national origin, and only addresses discrimination in hotels, restaurants, or entertainment centers. See 42 U.S.C. § 2000a.

⁸⁴ 141 F. Supp. 2d 1266, 1271-72, 1274 (W.D. Wash. 2001).

⁸⁵ *Id.* at 1277. But see *In re Union Pac. R.R. Employment Practices Litig.*, No. 06-1706, 2007 WL 763842, at *6 (8th Cir. Mar. 15, 2007) (holding that employer’s failure to cover prescription contraception in its employee benefit plan is not unlawful sex discrimination because condoms and vasectomies are also not covered).

⁸⁶ See Office of the Attorney General, State of Montana, Opinion No. 16 (2006), 2006 WL 842284, at *5 (excluding coverage for contraception and related medical services violates Montana’s unisex insurance law and the Montana Human Rights Act); Office of the Attorney General, State of Washington, Opinion No. 5 (2002), 2002 WL 31936085, at *7 (excluding coverage for prescription contraceptives is an unfair trade practice under Washington law); Office of the Attorney General, State of Wisconsin, Opinion 1-04 (2004), 2004 WL 3078999, at *1 (excluding coverage for contraception from an employer, college, or university sponsored benefits program violates Wisconsin law prohibiting sex discrimination in employment and in higher education).

⁸⁷ The EEOC opined that health plans that exclude prescription drugs that are used overwhelmingly by women, such as contraception, unlawfully discriminate on the basis of sex. EEOC, Commission Decision on Coverage of Contraception, 2000 WL 33407187 (Dec. 14, 2000), available at <http://www.eeoc.gov/policy/docs/decision-contraception.html>.

⁸⁸ Charu A. Chandrasekhar, *Rx for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55 (2006). Pharmacies that refuse to fill prescriptions for contraception not only risk liability under applicable public accommodation laws, but may also violate laws specifically prohibiting sex discrimination in the practice of pharmacy. In eight states, the state’s pharmacy code prohibits pharmacists from discriminating against a customer based on his or her gender. See, e.g., 2-392-5 ME. CODE R. § 1 (a pharmacist engages in unprofessional conduct by “discriminating in the practice of pharmacy on the basis of . . . gender”); see also JILL MORRISON & GRETCHEN BORCHELT, NAT’L WOMEN’S LAW CTR., DON’T TAKE “NO” FOR AN ANSWER: A GUIDE TO PHARMACY REFUSAL LAWS, POLICIES, AND PRACTICES 5 (2007), available at <http://www.nwlc.org/pdf/donttakeno2007.pdf>.

REFUSALS AT THE PHARMACY: Strategies for Change

● Surveying Pharmacies

Facing a refusal to provide birth control in the pharmacy has real consequences for women. Advocates around the country have developed diverse strategies for addressing the needs of women in their communities, region, or state. No matter what the approach, as a starting point, the ACLU encourages advocates to reach out to allies in the pharmacy community to create workable solutions. We urge advocates to pursue policies that ensure that women are able to obtain birth control at the same pharmacy without added delay while, wherever possible, accommodating individual religious belief.

There have been increasing reports across the country of incidents in which an individual pharmacist denies a woman birth control, including EC. Many more cases go unreported, as women and their health care providers are unsure whether or with whom to share their experiences. Advocates need a way to assess whether women in their community can get contraception at their local pharmacies. A survey of pharmacies can answer this crucial question and thus serve as an essential building block for future advocacy. For information and advice about pharmacy access surveys, please contact the ACLU Reproductive Freedom Project at rfp@aclu.org or (212) 549-2633.

Advocates can survey pharmacies in their town, city, region, or state. The survey can focus on access to EC or all forms of contraception. The survey instrument can address the various obstacles faced by women trying to purchase birth control, including the pharmacist's religiously based refusal to fill the prescription; the pharmacist's or other pharmacy department employee's refusal to sell EC without a prescription; the pharmacy's failure to stock the medication due to lack of demand; the pharmacist's refusal to refill a prescription; the pharmacist's misunderstanding about how EC works; the added delay when the pharmacy reorders a medication not in stock; or the pharmacist's failure to provide a referral to another pharmacy that can provide the medication. Advocates can then address issues the survey uncovers. For example, if it appears that pharmacists do not understand EC's time frame for effectiveness, an advocacy plan should focus on educating pharmacists in the workplace and at pharmacy schools.

Surveys may be conducted in different ways. Working with physicians, women can attempt to fill prescriptions for contraception or purchase EC without a prescription at pharmacy counters and record their experiences. As an alternative, women can telephone pharmacies to ask whether their prescriptions may be filled or whether they may purchase EC without a prescription. As another option, advocates can ask pharmacies via telephone or a written questionnaire for

their policies when an individual pharmacist refuses to satisfy a request for contraception. Although this latter approach reveals how the pharmacy should operate, it may not be consistent with the pharmacy's actual practice and will not uncover pharmacists who have kept their refusals hidden from their employer. Planned Parenthood Federation of America has surveyed the refusal policies of the top 50 national pharmacy chains and has categorized many of those responses at: <http://www.saveroe.com/campaigns/fillmypillsnow/scored>. If a woman faces a refusal in a pharmacy that violates the store's official policy, this survey, as well as those of other advocates, may be helpful in encouraging the pharmacy to remedy the situation.

Surveys from around the country have indicated that women face multiple obstacles to getting EC in the pharmacy.¹ From its telephone survey of pharmacies across the state, the Reproductive Freedom Project of the ACLU of Kentucky, along with partnering organizations, discovered that women rarely find EC in their pharmacies, and some will not find it anywhere nearby. Only 13 percent of the pharmacies surveyed had EC in stock and, in six counties, no pharmacy sold EC. At 60 percent of pharmacies surveyed, the pharmacist mistakenly believed that EC caused an abortion. To address these problems and increase access to the drug, advocates have been educating women, doctors, and pharmacists through informational brochures, advertisements in newspapers and bus shelters, and various public forums.²



Educating Pharmacists About Emergency Contraception

When an individual pharmacist refuses to provide EC based on a misunderstanding of the drug, there is an opportunity for education. A study of Pennsylvania pharmacists by the Clara Bell Duvall Reproductive Freedom Project of the ACLU of Pennsylvania showed that an alarming number of pharmacists had inaccurate information about EC. When asked to provide an explanation of EC to a female patient, only 49 percent were able to identify EC as birth control pills or hormones taken in high doses.³ Thirteen percent confused the drug with RU-486, the early-abortion pill, or stated that it causes an abortion, and 5 percent stated that the drug was not available in this country.⁴ Pharmacists also provided consumers with different time frames for effectiveness.⁵ Surveys around the country, in states as different as South Dakota and Connecticut, have revealed similar gaps in knowledge.⁶

Educating pharmacists about EC is an important step to expanding availability. Advocates can arrange for physicians and pharmacists to talk about EC at state pharmacy association meetings, pharmacy schools, and continuing pharmacy education seminars. For example, following its survey work, the Duvall Project sponsored a workshop at the annual meeting of the Pennsylvania Pharmacists Association, where an obstetrician/gynecologist presented a medical overview, an anti-sexual assault advocate discussed the importance of providing EC promptly, and a reproductive rights advocate highlighted the need for pharmacy and patient education. This advocacy is an important first step to increasing access to and accurate information about EC.



Filing Complaints Against Pharmacists and Pharmacies for Unprofessional Conduct

A consumer who feels her pharmacist or pharmacy treated her unfairly can lodge a complaint with the state board of pharmacy. A pharmacist is a licensed professional whose conduct is regulated by his or her state board of pharmacy. A pharmacy is a business also regulated by the board of pharmacy. It is the board of pharmacy's role to protect the health and welfare of consumers. A board's finding that the pharmacist or pharmacy acted unprofessionally or otherwise violated the state pharmacy code may result in discipline. Filing a complaint will also put the board of pharmacy on notice that there is a problem in the state, and may prompt the board to issue guidance on how to ensure that women can access birth control in the pharmacy. The pharmacy boards of all 50 states and the District of Columbia have complaint procedures for consumers.⁷

One woman in Wisconsin successfully used this strategy. Faced with an individual pharmacist who refused to refill or transfer her prescription for birth control based on a religious objection, she filed a complaint with the state Pharmacy Examining Board.⁸ After a lengthy hearing before an administrative law judge, the board reprimanded the pharmacist for departing from the standard of care expected of a pharmacist.⁹ The board denounced his failure to properly inform his managing pharmacist that he would not transfer the prescription based on a religious objection and his failure to provide the woman with information about her options for obtaining a refill.¹⁰ The board stated:

A pharmacist is a professional health care provider who has ethical duties to [his or her] patients. A pharmacist in exercising [his or her] conscientious objection must seek to avoid results that cause harm or potential harm to [his or her] patients, such as the denial of access to their prescribed medications and disruptions in the patient's continuity of care.¹¹

The board also rejected the pharmacist's claim that disciplining him for the exercise of his religious beliefs interferes with his religious liberty. The board stated

that the pharmacist "is not being sanctioned for exercising his conscience. Rather, he is being held accountable, as would any other registered pharmacist, for engaging in a practice that departed from the standards of care that govern his profession."¹² To date, the decision has been affirmed on appeal.¹³



Working with the Pharmacy Board

As state pharmacy boards consider issuing policies to address religiously based refusals in the pharmacy, advocates can work with the boards to achieve policies that appropriately protect patients, such as recommending that pharmacies adopt protocols to ensure that all lawful and appropriate requests to purchase birth control, including EC, are satisfied on-site without added delay. Although generally not legally binding, pharmacy board policies help establish that pharmacies have a duty to ensure that patients can access their pills and do not face discrimination in the pharmacy.

After a coalition of women's health advocates approached the Oregon Board of Pharmacy, the board adopted a policy that instructs pharmacies to establish policies and procedures that require a refusing pharmacist to take steps to ensure that the patient receives the medication, such as referring the patient to a nearby pharmacy that has the medication in stock and will dispense it.¹⁴ Although this policy fails to ensure that patients will receive their drugs at the same pharmacy without added delay, it requires the refusing pharmacists to act professionally and find the patient an alternative source of the medication.¹⁵



Engaging in Consumer Advocacy

As businesses, pharmacies are likely to respond to their customers' needs. After a woman's request to purchase contraception is denied in her pharmacy, members of the community can respond by organizing grassroots campaigns, including submitting letters or petitions urging local pharmacies to stock and satisfy requests for contraception; withdrawing business from pharmacies that refuse to stock contraception based on a conflict with religious beliefs; identifying insurance and pharmaceutical companies to pressure pharmacies to carry contraception; and creating consumer demand by encouraging women to ask for EC at the pharmacy en masse and in advance.

Consumer advocacy is likely to garner widespread public support. When polled by the ACLU, 85 percent of the public agreed that pharmacies have a professional obligation to provide patients with any medication that has been legally prescribed, including contraception.¹⁶

Such approaches have already proven successful. National pressure from women's health advocates and consumer groups, for example, led Wal-Mart to recant its national policy to ban EC from its pharmacy shelves. After the Massachusetts Board of Registration in Pharmacy advised Wal-Mart that the state's pharmacy regulations required it to stock EC in its Massachusetts stores,¹⁷ advocates sent letters and e-mails urging Wal-Mart to revise its policy for stores all across the country. On March 3, 2006, Wal-Mart publicly announced that it would stock EC nationwide.¹⁸ This decision should greatly expand access in many rural communities where Wal-Mart is the only pharmacy in the area.¹⁹



Advocating for a Legislative or Regulatory Solution

If a survey reveals that there is a statewide problem with access to contraception in the pharmacy, a legislative or regulatory mandate may be appropriate. As an initial step, advocates should consult with allies in the professional pharmacy community. The regulation of pharmacies and pharmacists varies by state, and those familiar with pharmacy practice and law will be indispensable in crafting workable solutions, as well as assessing the wisdom of different approaches.

A law or regulation should require pharmacies to ensure that any lawful and appropriate request to purchase birth control – either with a prescription or from behind the counter – is satisfied on-site without added delay. If the drug is not in stock, the pharmacy should give the customer the choice of having the pharmacy order the drug, arrange for the drug to be obtained elsewhere, or, if the customer has a prescription, return the prescription to the customer or her representative. A pharmacy mandate should not interfere with a pharmacist’s discretion to refuse to fill prescriptions because of adverse health consequences, fraud, suspicions of abuse, a dosing error, or payment issues.

Placing the legal duty on the pharmacy does not run afoul of the religious freedom protections of the Federal Constitution. This approach will make sure that female customers do not face sex discrimination in their pharmacies when seeking to purchase medication that only women use. Imposing a mandate on pharmacies, and not individual pharmacists, permits the pharmacy, in many cases, to accommodate the religious beliefs of its pharmacy department employees while preserving the rights of patients to access their medication. A mandate should not be imposed on an individual pharmacist.²⁰ Moreover, pharmacies should not be able to refuse to comply with legislative or regulatory mandates.²¹ The pharmacy is not engaged in religious practice and we reject the imposition of religious beliefs on those who do not share them.

Advocates achieved success with this approach in Illinois. Based on local reports, surveys, and community demonstrations revealing that Illinois women were

being denied their birth control pills at local pharmacies, the Governor of Illinois issued a rule requiring pharmacies to fill all valid prescriptions for contraceptives “without delay, consistent with the normal time frame for filling any other prescription.”²² Under the rule, if the drug is not in stock, the pharmacy must order it “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,”²³ unless the patient prefers a transfer to a local pharmacy or to have the prescription returned.²⁴ The pharmacy must post a clearly visible sign informing its patients of their rights under the regulation and explaining how to file a complaint if those rights are violated.²⁵

NOTES

- ¹ See ARIZ. FAMILY PLANNING COUNCIL, IS EMERGENCY CONTRACEPTION AVAILABLE IN ARIZONA PHARMACIES? (2004); Press Release, Planned Parenthood Affiliates of Cal., Emergency Contraception Access Project Reveals California Cases of Refusals (April 11, 2005); PLANNED PARENTHOOD OF CONN. & NARAL PRO-CHOICE CONN., CONNECTICUT PHARMACISTS' KNOWLEDGE OF EC: A TELEPHONE SURVEY (2005); ACLU OF KY. REPROD. FREEDOM PROJECT, EMERGENCY CONTRACEPTION ACCESS: A SURVEY OF KENTUCKY PHARMACIES (2006); PLANNED PARENTHOOD AFFILIATES OF MICH., REDUCING ABORTIONS AND UNINTENDED PREGNANCY (n.d.); Press Release, NARAL Pro-Choice Mo., NARAL Pro-Choice Missouri Foundation Releases Report on Missouri Women's Lack of Access to EC (May 11, 2005), available at <http://www.prochoicemissouri.org/news/press/200505111.shtml>; Eve Espey et al., *Emergency Contraception: Pharmacy Access in Albuquerque, New Mexico*, 102 OBSTETRICS & GYNECOLOGY 918 (2003); COUNCIL OF THE CITY OF NEW YORK, EMERGENCY CONTRACEPTION: AVAILABLE AT YOUR PHARMACY YET? (2004); NARAL PRO-CHOICE OR., EMERGENCY CONTRACEPTION PHARMACIST SURVEY, available at http://www.prochoiceoregon.org/assets/files/oregon_ec_report_final.pdf (last visited Feb. 28, 2007); Wendy Bennett et al., *Pharmacists' Knowledge and the Difficulty of Obtaining Emergency Contraception*, 68 CONTRACEPTION 261 (2003); Cynthia H. Chuang & Laura D. Shank, *Availability of Emergency Contraception at Rural and Urban Pharmacies in Pennsylvania*, 73 CONTRACEPTION 382 (2006); Kristi K. Van Riper & Wendy L. Hellerstedt, *Emergency Contraceptive Pills: Dispensing Practices, Knowledge and Attitudes of South Dakota Pharmacists*, 37 PERSPECTIVES ON SEXUAL & REPRODUCTIVE HEALTH 19 (2005); W. Va. Free et al., *Pharmacy Access to Emergency Contraception in West Virginia*, http://www.wvfree.org/pdf/Pharm_Access_Fact_Sheet.pdf (last visited Feb. 28, 2007); Judith Davidoff, *Plan B Can Be Out of Reach in Wisconsin*, CAPITAL TIMES, Nov. 1, 2005, at 1A.
- ² ACLU OF KY. REPROD. FREEDOM PROJECT, *supra* note 1.
- ³ See Bennett et al., *supra* note 1, at 263.
- ⁴ *Id.*
- ⁵ *Id.*
- ⁶ Compare PLANNED PARENTHOOD OF CONN. & NARAL PRO-CHOICE CONN., *supra* note 1, at 5 (43 percent of pharmacists surveyed confused EC with an abortifacient), with Van Riper & Hellerstedt, *supra* note 1, at 22 (37 percent of pharmacists surveyed did not understand EC's mechanism of action).
- ⁷ The National Association of Boards of Pharmacy has helpfully compiled links to all state pharmacy boards. See <http://www.nabp.net>.
- ⁸ See *Neil T. Noesen*, LS0310091PHM (Wis. Pharmacy Examining Bd. April 13, 2005) (final decision and order), available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm>, *aff'd*, *Noesen v. Wis. Dep't of Regulation & Licensing Pharmacy Examining Bd.*, No. 05 CV 212 (Wis. Cir. Ct. Feb. 3, 2006), *appeal docketed*, No. 2006AP001110 (Wis. Ct. App. May 8, 2006). Under Wisconsin law, the board can reprimand an individual pharmacist who has engaged in unprofessional conduct, Wis. STAT. § 450.10(1)(b), which is defined to include endangering "the health, welfare, or safety of patient or public" and "practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist," Wis. ADMIN. CODE § 10.03(2).
- ⁹ See *Neil T. Noesen*, LS0310091PHM. The court ordered the pharmacist to notify any future pharmacy about his refusal as well as "the steps he will take to ensure that a patient's access to medication is not impeded by his declination(s)." *Id.* He is "allowed to work as a pharmacist and to exercise his beliefs about contraception; he is merely prevented from doing so in a manner where he deprives patients of their legal health care rights by failing to inform his practice setting of the acts he will not perform." *Id.*
- ¹⁰ See *id.* The board opined that the pharmacist should have transferred the prescription to another pharmacy as requested or routed the patient to an emergency room to get a new prescription. *Id.*
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ The pharmacist filed an appeal in state court, which upheld the board's decision that refusing to transfer or inform the customer of her options to obtain a refill was unprofessional conduct and grounds for discipline. In rejecting the pharmacist's argument that the board's decision violated the state constitution's protection of religious freedom, the court noted that "the state has a compelling interest in ensuring that patients are able

to access the medications that have been prescribed to them.” *Noesen v. Wis. Dep’t of Regulation & Licensing Pharmacy Examining Bd.*, No. 05 CV 212, slip op. at 16 (Wis. Cir. Ct. Feb. 3, 2006), *appeal docketed*, No. 2006AP001110 (Wis. Ct. App. May 8, 2006). The pharmacist has again appealed the decision.

¹⁴ OR. BD. OF PHARMACY, POSITION STATEMENT: CONSIDERING MORAL AND ETHICAL OBJECTIONS (2007), *available at* http://www.pharmacy.state.or.us/Pharmacy/Position_Statements.shtml.

¹⁵ Policy statements from Delaware, North Carolina, and New York similarly fail to ensure that patients can fill their prescriptions at the same pharmacy. *Considering Moral and Ethical Objections*, 27 DEL. STATE BOARD OF PHARMACY 4 (2006), *available at* <http://www.nabp.net/ftpfiles/newsletters/DE/DE032006.pdf>; N.C. BD. OF PHARMACY, CONSCIENCE CONCERNS IN PHARMACIST DECISIONS (2005), *available at* <http://ncbop.org/LawsRules/ConscienceClause.pdf>; Memorandum from Lawrence H. Mokhiber, Office of the Professions, N.Y. State Educ. Dep’t, to Supervising Pharmacists (Nov. 18, 2005), *available at* <http://www.op.nysed.gov/pharmconscienceguideline.htm>.

¹⁶ Questionnaire and Topline Results from a National Survey of Conscience Clauses for the American Civil Liberties Union 4 (2001) (on file with author).

¹⁷ Letter from George A. Cayer, President, Bd. of Registration in Pharmacy, to John F. Batter, III, Wilmer Hale (Feb. 14, 2006) (on file with author) (advising Wal-Mart’s counsel that “the Board has determined that Wal-Mart Pharmacies are required to stock and dispense EC to comply with” Massachusetts regulations).

¹⁸ Press Statement, Wal-Mart Stores, Inc., Wal-Mart to Carry Plan B Emergency Contraception (Mar. 3, 2006), <http://www.walmartfacts.com/articles/1704.aspx>. In response to pressure from activists across the country, on April 4, 2007, Wal-Mart adopted a refusal policy that ensures that women can access contraception in the same store without added delay if an individual pharmacist refuses to fill a prescription. Press Release, Am. Civil Liberties Union of Fla., ACLU of Florida Applauds New Wal-Mart Policy Requiring its Pharmacies to Fill Valid Requests for Birth Control (Apr. 4, 2007), <http://www.aclu.org/reproductiverights/contraception/29275prs20070404.html>.

¹⁹ In several areas in Texas, Wal-Mart is the only pharmacy in town. See Katie Fairbank, *Pharmacists’ Refusal to Fill Contraception Prescriptions a Question of Choice*, DALLAS MORNING NEWS, Apr. 29, 2005 (“there are 10 towns in Texas in which Wal-Mart is the only pharmacy”); see also Editorial, *Moralists at the Pharmacy*, N.Y. TIMES, Apr. 3, 2005.

²⁰ The laws and regulations of California, Maine, and Nevada focus on the individual pharmacist. In California, the state legislature passed a law requiring pharmacists to dispense all drugs except when the prescription is unlawful or would compromise the patient’s health, the drug is out of stock, or the pharmacist has an ethical, moral, or religious objection to the drug. CAL. BUS. & PROF. CODE § 733(b). In the case of an ethical, moral, or religious objection, a pharmacist may only refuse to fill the prescription if his or her employer has been notified and can accommodate the objection. *Id.* § 733(b)(3). Although this scheme commendably attempts to balance the religious beliefs of the individual pharmacist with the patient’s access to the prescription, it ultimately falls short. The pharmacy must ensure that the patient has “timely access” to the prescription, but does not specify that the pharmacy must ensure that the prescription will be filled on-site. See *id.*

In Maine and Nevada, state regulations detail when a pharmacist can refuse to fill a prescription. 02-392-19 ME. CODE R. § 11 (pharmacist may only refuse to fill a prescription if the pharmacist doubts the prescription’s legitimacy or appropriateness or the identification presented by the customer); NEV. ADMIN. CODE § 639.753(1) (pharmacist may refuse to fill a prescription if it would be unlawful, harmful to the patient’s health, fraudulent, or is not for a legitimate medical purpose). These regulations do not explicitly obligate the individual pharmacist to fill all prescriptions. The general counsel for the Nevada State Board of Pharmacy stated that based on the state’s regulation, an individual pharmacist with a religious objection had no grounds to refuse. See Cy Ryan, *Pharmacy Asked to Withhold Judgment*, LAS VEGAS SUN, May 6, 2006, at A3. This regulation, so interpreted, fails to permit a pharmacy to accommodate an individual pharmacist’s religious belief.

²¹ A small number of states protect certain pharmacies against discrimination or liability for their failure to fill a prescription for contraception and a mandate would need to take such a refusal clause into account.

See MISS. CODE ANN. §§ 41-107-3, -7 (pharmacy may not be held liable for declining to dispense a drug, device, or medication based on religious, moral, or ethical principles provided it meets certain documentation requirements); 745 ILL. COMP. STAT. ANN. 70/3, /9, /10 (no health care facility may be held liable for refusing to participate in any phase of patient care based on the facility's conscience as defined in its governing documents); ARK. CODE ANN. § 20-16-304(9) (no private institution shall be held liable for refusing to provide contraceptive procedures, supplies, and information based on religious or conscientious objection); COLO. REV. STAT. § 25-6-102(5) (same); ME. REV. STAT. ANN. tit. 22, § 1903(4) (same); TENN. CODE ANN. § 68-34-104(5) (same). However, the later passage of a mandate on all pharmacies would likely negate the application of a state's preexisting refusal clause.

If a pharmacy employs a pharmacist with a religious objection to filling prescriptions for contraception, Title VII likely does not provide a legal basis for a pharmacy's refusal to comply with a mandate to fill those prescriptions. Although the federal law specifically states that employers need not comply with state laws that force them to treat their employees in a manner that would violate Title VII, 42 U.S.C. § 2000e-7, the pharmacy should be able to either reasonably accommodate the refusing pharmacist or demonstrate that any accommodation would cause undue hardship. The pharmacy can thus comply with both federal and state laws. See generally *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 291-92 (1987).

²² ILL. ADMIN. CODE tit. 68, § 1330.91(j)(1).

²³ *Id.* Under this directive it is conceivable that a pharmacy that decides not to stock contraceptive drugs at all, and therefore has no procedure for ordering contraceptive drugs, would not have to comply with the mandate.

²⁴ *Id.*

²⁵ *Id.* § 1330.91(k).

REFUSALS AT THE PHARMACY: Frequently Asked Questions

Each year, millions of women purchase birth control, including emergency contraception (EC), at their local pharmacies. Media reports increasingly include stories of pharmacies and individual pharmacists refusing to sell contraception based on a religious objection. These stories raise questions about a woman's right to access contraception at the pharmacy, as well as the legal obligations and protections that cover pharmacies and pharmacists.

● Protecting a Woman's Right to Contraception

Does a pharmacy or pharmacist violate a woman's federal constitutional rights by refusing to satisfy her request to purchase birth control?

No. A pharmacy's or pharmacist's refusal to sell birth control does not violate a woman's federal constitutional rights. The U.S. Constitution imposes no limitations on nongovernmental institutions like privately owned pharmacies. Even if the refusal takes place in a state-owned pharmacy, a woman has no federal constitutional right to receive contraception. Although the Constitution protects a woman's right to contraception, it does not ensure that women can access reproductive health services.

Is it sex discrimination when a pharmacy refuses to sell medications that only women need?

Some states have laws that prevent businesses from discriminating against customers based on their sex. Under these "public accommodation laws," a pharmacy that refuses to satisfy a woman's request for a medication that only women use – such as birth control pills – may be discriminating on the basis of her sex.

Do women have any recourse if a pharmacy refuses to satisfy her request for birth control?

If a woman is treated unfairly by her pharmacist or her pharmacy, she can file a complaint with the state board of pharmacy. The board of pharmacy will investigate her complaint, evaluating whether the individual pharmacist or pharmacy acted unprofessionally or otherwise violated the state pharmacy code. All 50 states and the District of Columbia have complaint procedures for consumers. For assistance filing a complaint in any state or exploring other legal options, please contact rfp@aclu.org or (212) 549-2633.



Understanding Legal Obligations and Protections in the Pharmacy

Do pharmacists have a legal duty to fill all lawful and appropriate prescriptions?

The practice of pharmacy is governed by a state's laws, regulations, and board of pharmacy. Each state has a different regulatory scheme.

Only a few state pharmacy codes explicitly require the pharmacist or the pharmacy to fill every lawful and appropriate prescription that is presented. Even if there is no explicit requirement, such a duty may be implied from other professional obligations. For example, one state's pharmacy code requires pharmacists to "engage only in behavior that is in the patient's best interest," while another state's code directs pharmacists to "make their professional services available to the public." Refusing to fill a prescription for contraception may conflict with these professional responsibilities.

May a pharmacist refuse to transfer a prescription or harass a woman who is requesting birth control?

Pharmacists, like all professionals, must abide by a professional code. These codes, which are generally enforced by the state's pharmacy board, require a pharmacist to act professionally and serve patients' needs and may thus provide relief in some cases for women denied birth control. In Wisconsin, for example, the board of pharmacy reprimanded a pharmacist who, on the basis of his religious beliefs, had refused to refill or transfer a patient's prescription for birth control. The board found that he had departed from the standard of care expected of a pharmacist. To date, the courts have upheld this action.

As an employer, can a pharmacy require a refusing pharmacist to satisfy all appropriate and legal requests for birth control?

This answer depends on the specific circumstances. Pharmacists with religious objections may have various legal protections.

Title VII of the Civil Rights Act – the federal anti-employment discrimination statute – or similar state law may require the pharmacy to try to accommodate the pharmacist. Title VII applies to employers nationwide that have 15 or more employees. Some states have similar laws that apply to smaller employers. Consistent with these laws, if an employee objects to a job function based on a religious belief, an employer must try to accommodate the employee, for example by shifting work responsibilities or transferring the employee to another job. The employer doesn't have to accommodate the employee if doing so will be burdensome; for example, an accommodation would likely be burdensome if it causes the employer to hire another employee or lose business. So if a pharmacist objects to satisfying requests for certain medications because of his or her religious belief, the pharmacy may have a limited obligation under Title VII or similar state law to see if the employee can be accommodated.

In addition, several states have laws that specifically protect a pharmacist from any liability, such as being fired or disciplined, for refusing to fill prescriptions based on a religious objection. How courts interpret these refusal clauses remains to be seen.



Addressing Refusals at the Pharmacy in Law and Policy

If a statewide solution is needed, how can the state effectively address the problem of refusals at the pharmacy?

In response to reports of women facing refusals at their pharmacies, state legislatures, administrative bodies, and pharmacy boards have considered how best to address the problem. For example, Illinois enacted a regulation that created a duty for pharmacies to fill all valid prescriptions for contraception.

Consistent with the ACLU's commitment to reproductive freedom and religious liberty, a law or regulation should require pharmacies to ensure that any lawful and appropriate request to purchase birth control – either with a prescription or from behind the counter – is satisfied on-site without added delay. If the drug is not in stock, the pharmacy should give the customer the choice of having the pharmacy order the drug, arrange for the drug to be obtained elsewhere, or, if the customer has a prescription, return the prescription to the customer or her representative. The law or regulation should not interfere with a pharmacist's discretion to refuse to fill prescriptions because of adverse health consequences, fraud, suspicions of abuse, a dosing error, or payment issues.

Imposing a mandate on pharmacies, and not individual pharmacists, permits the pharmacy, in many cases, to accommodate the religious beliefs of its employees while preserving the rights of customers to access their medication.

If a mandate requires pharmacies to satisfy all lawful and appropriate requests to purchase birth control, does it need a refusal clause exempting those pharmacies with a religious objection?

No. Although the Federal Constitution prevents the government from burdening religious belief or unduly restricting religious practice, it does not relieve an institution or individual with a religious objection from complying with a valid and neutral law of general applicability. Therefore, a pharmacy does not have a federal constitutional right to be exempted from a law

or regulation requiring it to satisfy all lawful requests to purchase birth control regardless of religious objections. For this reason, a pharmacy mandate need not include a refusal clause.

The inclusion of a refusal clause in a pharmacy mandate, however, is not unconstitutional. Although the Federal Constitution prevents the government from favoring one religion over another and, in general, from privileging religion over nonreligion, it does not prevent a state from including a refusal clause in any law or regulation requiring the provision of contraceptives.

Though not constitutionally forbidden, protecting a pharmacy's refusal to provide birth control to its customers fails to protect women's health and is bad public policy. The pharmacy is a state-regulated business that supplies medication to the general public and serves people of diverse backgrounds and faiths; it operates in the public world and should play by public rules. For these reasons, the ACLU believes that pharmacy mandates should not include refusal clauses.

Given its commitment to protecting individual religious belief and access to contraception, how does the ACLU evaluate "pharmacist refusal clause" legislation?

State legislatures are debating bills that protect a pharmacist from any liability for his or her refusal to provide birth control. Unless they contain specific patient safeguards, the ACLU believes these "pharmacist refusal clauses" fail to strike an appropriate balance between religious liberty and reproductive freedom. The legislation should require the refusing pharmacist to provide complete and accurate information about the medication, treat the patient with respect, arrange for the patient to be helped by another pharmacist at the pharmacy, and provide the birth control when there is no one else who can provide the drug at the pharmacy within the usual time frame. While a pharmacist's religious objections should be accommodated wherever possible, it is only with these necessary safeguards that we can be sure that women are always able to purchase birth control at the same pharmacy without added delay.

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