

RX FOR DRUGSTORE DISCRIMINATION:
CHALLENGING PHARMACY REFUSALS TO DISPENSE
PRESCRIPTION CONTRACEPTIVES UNDER STATE
PUBLIC ACCOMMODATIONS LAWS

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I. INTRODUCTION

In January 2005, a Wisconsin mother of six children who experienced condom failure after intercourse obtained a prescription for emergency contraception¹ and traveled to a Milwaukee Walgreens to fill the prescription.² Instead of honoring the physician's medical instructions, however, pharmacist Michelle Long refused to fill the prescription and "publicly berated" the customer, telling her, "You're a murderer. I will not help you kill this baby. I will not have the blood on my hands."³ Although the

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¹ Emergency contraception is a prescription contraceptive taken after unprotected intercourse that is medically identical to birth control pills and has no abortifacient effect. See Comm. on Adolescence, Am. Acad. of Pediatrics, Policy Statement, *Emergency Contraception*, 116 PEDIATRICS 1038, 1038 (2005); James Trussell et al., *The Role of Emergency Contraception*, 190 AM. J. OBSTETRICS & GYNECOLOGY S30, S30, S32 (2004). Emergency contraception is popularly known as the "morning-after pill." Alison Karasz et al., *The Visit Before the Morning After: Barriers to Preprescribing Emergency Contraception*, ANNALS FAM. MED., July/Aug. 2004, at 345, 345; *Walgreens Disciplines Four of Its Pharmacists*, CHAIN DRUG REV. (New York, N.Y.), Dec. 19, 2005, at 3. For a complete discussion of emergency contraception, see *infra* notes 20–24 and accompanying text.

² Annysa Johnson, *State Probes Drug Refusal: Pharmacist Wouldn't Fill Order for Contraceptive*, MILWAUKEE J. SENTINEL, May 11, 2005, at B1.

³ *Planned Parenthood Calls on Walgreens to End Prescription Denials*, PLANNED PARENTHOOD NEWS WIRE, May 16, 2005, <http://www.ppwi.org/media/PA/Media/NewsWire/05->

customer tried to reason with the pharmacist, the pharmacist's castigation only escalated:

"I tried to explain to her that it's emergency contraceptives, that it's not an abortion pill. She then snatched the form from me, that the prescription was attached to, telling me the paper was full of lies, and she won't be a part of it. I was crying, shaking, upset, so embarrassed. I wanted to run out of the store and hope[d] nobody else could get a good look at me."⁴

The customer was too traumatized to locate another pharmacist to fill the prescription; subsequently, she discovered that she was pregnant and had, in the face of the unwanted pregnancy, an abortion.⁵

While the actions of the pharmacist in this story were particularly objectionable, the underlying phenomenon of a refusal to dispense prescription contraceptives in a pharmacy has gained increasing visibility in recent years. Pharmacists in states from California to Massachusetts have refused to fill prescriptions for birth control pills.⁶ Pharmacists have denied women emergency contraception following sexual assault as well as after contraceptive failure. For example, a pharmacist in Denton, Texas refused to fill a rape survivor's prescription for emergency contraception on the basis that dispensing the prescription would violate his moral beliefs.⁷ Other pharmacists and pharmacies fail to stock emergency contraception at all.⁸

16-05.htm (internal quotation marks omitted).

⁴ *Id.*

⁵ Johnson, *supra* note 2; see, e.g., Yonat Shimron, *Birth Control Advance Stirs Intense Battle*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 22, 2005, at A1 (describing the refusal of a pharmacist to fill a prescription for the morning-after pill, leaving a customer in tears).

⁶ 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 (noting that cases of pharmacy refusal "have been reported across the country, including in California, Washington, Georgia, Illinois, Louisiana, Massachusetts, Texas, New Hampshire, Ohio and North Carolina").

⁷ Lyndsay Knecht & Margaret Myrick, *Protesters Fight Pharmacy: Groups Target Eckerd's for Violating Rights*, N. TEX. DAILY, Feb. 3, 2004, available at <http://www.ntdaily.com/news/2004/02/03/> (follow "Protesters fight pharmacy" hyperlink); *Pharmacist Refuses Pill for Victim*, CHI. TRIB., Feb. 11, 2004, at 7.

⁸ See, e.g., Judith Davidoff, *Plan B Can Be Out of Reach in Wisconsin: Many Pharmacies Don't Stock Morning-After Pill*, CAP. TIMES (Madison, Wis.), Nov. 1, 2005, at 1A (finding that many Wisconsin pharmacies do not carry emergency contraception); Carla McClain, *Rape Victim: 'Morning After' Pill Denied*, ARIZ. DAILY STAR, Oct. 23, 2005, at A1 (describing rape survivor's difficulty in finding a pharmacy that carried the morning-after pill or a pharmacy with the pill in stock that had a pharmacist willing to dispense the medicine and noting that

Pharmacists who refuse to fill contraceptive prescriptions typically claim a moral, religious, or ethical right to refuse to fill these prescriptions.⁹ Some such pharmacists erroneously believe

the majority of Arizona pharmacies do not stock emergency contraception); Marie McCullough, *Study: Pharmacists Not Informed on Morning-After Pill: Lack of Information Kept Many in Pennsylvania from Being Able to Fill Same-Day Requests*, PHILA. INQUIRER, Oct. 21, 2003, at B3 (reporting results of survey indicating that majority of Pennsylvania pharmacies do not stock emergency contraception); Kathleen O'Dell, *Plan B Isn't Always an Option*, SPRINGFIELD NEWS-LEADER, May 24, 2005, at 1B (discussing pharmacist failure to stock emergency contraception in rural areas). Wal-Mart made national headlines in early 2006 by reversing its policy of refusing to stock emergency contraception; the chain now carries the medicine in stores nationwide. Parija B. Kavilanz, *Drugstores Mull Nonprescription Plan B Sales: Wal-Mart, CVS Reviewing FDA's Approval of the 'Morning-After' Contraception Pill for Over-the-Counter Sale*, CNN MONEY, Aug. 24, 2006, http://money.cnn.com/2006/08/24/news/companies/retailers_planb/index.htm (reporting that Wal-Mart began stocking and selling Plan-B contraceptives on March 20, 2006); Ann Zimmerman, *Wal-Mart to Stock Emergency-Contraception Pill*, WALL ST. J., Mar. 4, 2006, at A6.

⁹ See, e.g., Katie Fairbank, *Some Druggists Say 'No Sale' for the Pill*, STATE (Columbia, S.C.), May 13, 2005, at A1; M. Alexander Otto, *Pharmacist Measure Murky: If Pharmacy Folks Don't Fill Your Prescription, Will They Give It Back? The State Pharmacy Board's Director Admits That a Measure Allowing Druggists to Refuse to Fill Prescriptions They Object to Might Need Some Clarification*, NEWS TRIBUNE (Tacoma, WA), June 3, 2006, at B1; Stein, *supra* note 6. Some organizations support the ability of pharmacists to refuse to fill such prescriptions. For example, in a 2005 news release, the Christian Medical and Dental Associations stated:

There is simply no reason to trample over the consciences of pharmacists to fill these prescriptions. This is often framed as a matter of patient rights and access to healthcare when it in fact is an issue of patient convenience. Patient convenience is a good goal, but it cannot trump fundamental rights of conscience.

Press Release, Christian Med. & Dental Ass'ns, CMA Doctors Counter AMA Position on Abortion and Conscience (June 27, 2005), <http://www.cmdahome.org/index.cgi?cat=100249&art=3025&BISKIT=575187441&CONTEXT=ar>; see, e.g., Pharmacists for Life Int'l, About Us, <http://www.pfli.org/main.php?pfli=aboutus> (last visited Oct. 1, 2006) ("Pharmacists For Life International [(PFLI)] is the only pharmacy association which is exclusively pro-life, something no other pharmacy organization can say (or would have the courage to say!). PFLI represents pharmacist members, and many non-member pharmacists and lay supporters, in the USA, Canada and worldwide."). Other pharmacists believe, however, that moral views should not factor into the decision to fill a contraceptive prescription and continue to dispense these medicines regardless of their personal views. For example:

Deborah Myers, a pharmacist who until recently managed two pharmacies on the Ohio State University campus, testified that she believes in a pharmacist's right to refuse a prescription if it could cause harm, such as an adult medicine being inappropriately prescribed for a child.

But religious or moral beliefs should be kept out of the pharmacy, she said.

Misti Crane, *Bill Backs Health Providers Who Deny Birth Control: Some Doctors, Pharmacists Let Beliefs Rule*, COLUMBUS DISPATCH, Mar. 13, 2006, at 1A; see also O'Dell, *supra* note 8 (quoting views of several pharmacists that a pharmacist's personal beliefs should not dictate whether they fill contraceptive prescriptions). Yet another article highlights the similar views of another pharmacist:

Suzanne Derrick, a pharmacist at the Eckerd drugstore in Lexington, said she has refused to fill prescriptions she thought were harmful - such as narcotics for a known

that emergency contraception is not contraception,¹⁰ but an abortifacient drug and thus refuse to stock or dispense this medicine.¹¹ Other pharmacists believe all hormonal contraceptives are potentially abortifacient drugs.¹² These refusals to dispense

drug addict - but not for birth control.

While pharmacists are entitled to exercise their judgment, "most of us are not going to refuse to fill a prescription, even if we didn't really agree with the treatment," she said. Linda H. Lamb, *Druggists in S.C. Not Refusing to Dispense*, STATE (Columbia, S.C.), May 13, 2005, at A8; cf. Pati Poblete, *Personal Perspective: 'Political Science' and Plan B*, S.F. CHRON., Dec. 12, 2005, at B4 (discussing a pharmacist's assistance in providing emergency contraception); George Schwarz, *Contraceptives Available, Amarillo Pharmacists Say: Birth-Control Requests to Be Honored Over Moral Concerns*, AMARILLO GLOBE-NEWS, Apr. 1, 2004, available at 2004 WLNR 18094174 ("We'll fill whatever a legitimate prescription is," said Remedies [pharmacy] owner Jones Witcher.").

¹⁰ For a broader discussion of why emergency contraception is not abortion, see *infra* notes 20-24 and accompanying text.

¹¹ Judith Graham, *Doctors Tout Emergency Birth Control Prescription*, MONTEREY COUNTY HERALD, May 11, 2006, available at 2006 WLNR 8071448 ("Some pharmacists across the country also have stopped dispensing emergency contraception, citing their opposition to abortion."); Brad Shannon, *Boycott Brews Over Grocer's Plan B Stand*, OLYMPIAN (Olympia, Wash.), June 21, 2006, available at 2006 WLNR 10700025 (describing pharmacy owner's refusal to stock emergency contraception because of ethical concerns, specifically concerns over when exactly life begins). One pharmacist's reasons for refusing to fill prescriptions for emergency contraception are described as follows:

Ron Stephens is both a pharmacist and a Republican state legislator in Illinois Stephens not only supports the pharmacists' right of refusal but he also refuses to fill prescriptions for emergency contraception himself. He does, however, fill prescriptions for the birth control pill. When . . . asked . . . to explain his thinking on the two drugs, he said: "It's the difference between stopping a pregnancy from happening and ending a pregnancy. My understanding of the science is that the morning-after pill can end a pregnancy whereas birth control pills will make a woman's body believe she is already pregnant so that the egg will not be fertilized.

Russell Shorto, *Contra-Contraception*, N.Y. TIMES MAG., May 7, 2006, at 48, 54; see also Rachel E. Stassen-Berger, *Under Bills, Pharmacists Could Refuse Some Orders: But Employers Would Have to Find Another Route to Provide Patients with Prescriptions*, ST. PAUL PIONEER PRESS, Apr. 16, 2006, at A1 (describing the refusal of hospital pharmacist to stock emergency contraception because of his belief that "in some circumstances, the pills can cause the abortion of an early-stage embryo and thus end life").

¹² For example, one pharmacist's beliefs are described as follows:

Last year, Mr. Mosher decided he'd had enough. He joined the growing ranks of pharmacists refusing to dispense birth control because of moral objections.

"I'm a Christian, and I believe that abortion is taking the life of an innocent human being," said Mr. Mosher. Because birth control pills could keep a fertilized egg from implanting, he opposes them, too.

"I look at that, that's the same thing as abortion. I know there are a lot of people that don't agree with me, but that's the way I see it," he said.

Katie Fairbank, *Waging a Moral Battle from Behind the Counter: Pharmacists' Refusal to Fill Contraception Prescriptions Prompts the Question Whose Choice Is It to Make?*, DALLAS MORNING NEWS, Apr. 24, 2005, at 1A. One radio broadcast described the situation as such:

A number of pharmacists across America have refused on moral ground[s] to fill prescriptions for emergency contraception, or what is often called the "morning-after pill." Some of them also won't dispense other contraceptives if there is even a remote chance that the medications could act to kill a fertilized egg.

prescription contraceptives enjoy support from a small, but growing, nationwide anti-contraception movement.¹³ Because millions of American women use prescription contraceptives,¹⁴ such refusals have drawn widespread public attention and media scrutiny nationwide.¹⁵

US Pharmacists Spark Debate By Refusing to Dispense Contraceptives (Dave Arlington, Voice of Am. English Serv. broadcast Nov. 17, 2004), transcript available at 2004 WLNR 10868787, audio available at <http://www.voanews.com/english/archive/2004-11/2004-11-17-voa33.cfm>.

¹³ See, e.g., Shorto, *supra* note 11, at 50–51; Priya Jain, *The Battle to Ban Birth Control*, SALON.COM, Mar. 20, 2006, http://www.salon.com/mwt/feature/2006/03/20/anti_contraception/; Caroline Bollinger, *Access Denied*, 56 PREVENTION 150 (2004); No Room for Contraception, About Us, <http://www.noroomforcontraception.com/About-Us/intro.htm> (last visited Oct. 1, 2006).

¹⁴ According to the Guttmacher Institute's data for the year 2002, 11,661,000 women used birth control pills; 2,024,000 women used a three-month injectable method; 774,000 used an intrauterine device; 461,000 used a one-month injectable or a hormonal patch; and 99,000 used a diaphragm. GUTTMACHER INST., FACTS IN BRIEF: CONTRACEPTIVE USE 1 (2006), available at http://www.guttmacher.org/pubs/fb_contr_use.pdf. Three hundred fifty-four thousand women also used a variety of methods including the sponge, cervical cap, and female condom. *Id.* Oral contraceptives (commonly known as birth control pills) "are the most popular form of reversible contraception" nationwide. Carolyn Westhoff et al., *Bleeding Patterns After Immediate Initiation of an Oral Compared with a Vaginal Hormonal Contraceptive*, 106 OBSTETRICS & GYNECOLOGY 89, 89 (2005).

¹⁵ See, e.g., Chris Blank, *Fired Pharmacist Testifies for Bill Allowing Refusal to Fill Plan B*, ASSOCIATED PRESS, Feb. 14, 2006; Steve Chapman, Editorial, *From the Right to Choose to the Power to Compel*, BALTIMORE SUN, Apr. 11, 2005, at 11A; Sarah L. Cook, *Bills Would Intensify Pain of Sexual Assault Victims*, ATLANTA J.-CONST., Mar. 27, 2006, at A13; Crane, *supra* note 9; Betty Cuniberti, *In Rural Missouri, Pharmacists Emerge as Pastor, Governor and Surgeon General*, ST. LOUIS POST-DISPATCH, May 1, 2005, at E1; Monica Davey & Pam Belluck, *Pharmacies Balk on After-Sex Pill and Widen Fight*, N.Y. TIMES, Apr. 19, 2005, at A1; Editorial, *Dispensing Morality: Patients' Rights Outweigh Pharmacists' Consciences*, SPOKESMAN-REV. (Spokane, Wash.), Mar. 19, 2006, at 8B; Edward Epstein, *Boxer Eyes Prescription Protection Bill: Would Secure Birth Control Rights*, S.F. CHRON., Apr. 19, 2005, at A1; Bonnie Erbe, *Moral Judgments on Birth Control Endangering Women's Lives*, SEATTLE POST-INTELLIGENCER, Apr. 5, 2005, available at http://seattlepi.nwsourc.com/opinion/218755_erbe05.html; Fairbank, *supra* note 9; Stacy Forster, *Lawmakers Push for 'Conscience Clauses': They'd Let Pharmacists Refuse to Offer Service Against Their Beliefs*, MILWAUKEE J. SENTINEL, Mar. 6, 2005, at B1; Stacy Forster, *Pharmacist Rebuked: He Refused to Refill Birth Control Prescription*, MILWAUKEE J. SENTINEL, Apr. 14, 2005, at B1; Stacy Forster, *Reprimand Advised for Pharmacist: Beliefs, Duties Clash: He Refused to Fill Birth Control Order*, MILWAUKEE J. SENTINEL, Mar. 1, 2005, at A1; Todd C. Frankel, *"I'm Sorry I Won't Fill That Prescription"*, ST. LOUIS POST-DISPATCH, Dec. 4, 2005, at B1; Ellen Goodman, Editorial, *Rx for Drugstore Moralists: Quit*, BALTIMORE SUN, Apr. 11, 2005, at 11A; Ryan Holeywell, *Mandatory Contraceptive Prescriptions Eyed*, UPI NEWS, June 11, 2005; Johnson, *supra* note 2; Maura Lerner, *When Can Druggists Refuse to Sell the Pill?: Pharmacists Could Reject Prescriptions on Moral Grounds Under a Minnesota Bill That Reflects a Nationwide Debate*, STAR TRIB. (Minneapolis, MN), Mar. 12, 2006, at 1A; Dahlia Lithwick, *Martyrs and Pestles: Should Pharmacists Be Allowed to Refuse to Dispense Birth Control?*, SLATE, Apr. 13, 2005, <http://www.slate.msn.com/id/2116688/>; Jo Mannies, *Groups Assail Blunt Over Emergency Contraception*, ST. LOUIS POST-DISPATCH, Jan. 12, 2006, at A8; Kevin McDermott, *Bills Get Extra Chance as Legislature Drags on*, ST. LOUIS POST-DISPATCH, Apr. 9, 2006, at D1; O'Dell,

Federal and state lawmakers have waded into the waters of the debate and have advocated a range of legislative solutions, ranging from protections for women seeking to fill contraceptive prescriptions to “refusal clause” statutes granting pharmacists the right to refuse to honor these prescriptions.¹⁶ While some legal nonprofit groups defend the rights of those pharmacists who have refused to fill contraceptive prescriptions,¹⁷ other organizations strive to safeguard a woman’s ability to fill a contraceptive prescription while working with pharmacies to accommodate the diverse beliefs of their pharmacist employees.¹⁸ The controversy

supra note 8; Jim Paul, *Nurse Who Objects to Morning-After Pill Says She Was Denied Job by EIU*, ASSOCIATED PRESS, June 8, 2005; Amanda Paulson, *Culture War Hits Local Pharmacy*, CHRISTIAN SCI. MONITOR, Apr. 8, 2005, at 1 [hereinafter Paulson, *Culture War Hits Local Pharmacy*]; Steven K. Paulson, *Governor Vetoes Emergency Contraception Bill*, ASSOCIATED PRESS, Apr. 14, 2006; *Planned Parenthood Calls on Walgreens to End Prescription Denials*, *supra* note 3; Poblete, *supra* note 9; Sanford J. Schmidt, *Druggists Sue Walgreen Over ‘Morning-After’ Pill Policy*, TELEGRAPH (Alton, Ill.), Jan. 28, 2006; Laura Scott, *Family Planning: Government Intrusions on the Upswing*, KANSAS CITY STAR, Feb. 9, 2006, at B7; Shimron, *supra* note 5; *Should Pharmacists Be Allowed to Turn Away Prescriptions?*, ASSOCIATED PRESS, Mar. 13, 2006; Stein, *supra* note 6; Jim Suhr, *Group Sues to Halt Ill. Contraceptive Rule*, ASSOCIATED PRESS, Dec. 20, 2005; Jim Suhr, *Pharmacists Punished: Contraceptives Unfilled*, FORT WAYNE J. GAZETTE, Dec. 5, 2005, at 7C; E.A. Torriero, *No Middle Ground for Pharmacist: John Menges Refused to Abide by a New State Rule That He Fill Prescriptions for the ‘Morning-After’ Pill. Now He’s Out of a Job*, CHI. TRIB., Mar. 6, 2006, at 1.

¹⁶ See Access to Legal Pharmaceuticals Act, H.R. 1652, 109th Cong. § 249 (2005); Access to Legal Pharmaceuticals Act, S. 809, 109th Cong. § 249 (2005); H.R. 1539, 109th Cong. § 249 (2005); GUTTMACHER INST., STATE POLICIES IN BRIEF: EMERGENCY CONTRACEPTION (2006), available at http://www.guttmacher.org/statecenter/spibs/spib_EC.pdf (describing state legislation concerning emergency contraception and pharmacist refusals to dispense birth control); GUTTMACHER INST., STATE POLICIES IN BRIEF: REFUSING TO PROVIDE HEALTH SERVICES (2006) [hereinafter GUTTMACHER INST., REFUSING TO PROVIDE HEALTH SERVICES], available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf (listing states with laws allowing pharmacists to refuse to dispense contraceptives); Nat’l Conference of State Legislatures, *Pharmacist Conscience Clauses: Laws and Legislation* (Aug. 2006), <http://www.ncsl.org/programs/health/conscienceclauses.htm> (describing various state “conscience clause” legislative efforts); see also CATHERINE WEISS ET AL., ACLU REPRODUCTIVE FREEDOM PROJECT, RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS 3 (2002) (describing debates over religious refusals and proposals for action by the reproductive rights community). For news coverage of such laws, see, for example, Davey & Belluck, *supra* note 15; Ellen Goodman, Editorial, *Dispensing Morality*, WASH. POST, Apr. 9, 2005, at A23; Paulson, *Culture War Hits Local Pharmacy*, *supra* note 15.

¹⁷ See, e.g., Press Release, Am. Ctr. for Law & Justice, ACLJ Files Suit Against Walgreens Claiming Company Violated Illinois’ Conscience Clause Act When It Fired Pharmacists (Jan. 27, 2006), <http://www.aclj.org/news/Read.aspx?ID=2113>; Press Release, Ams. United for Life, Target Fires Pharmacist in Missouri Over Morning-After Pill; Americans United for Life Files EEOC Complaint (Jan. 26, 2006), http://www.unitedforlife.org/press_releases/060126.htm.

¹⁸ See, e.g., WEISS ET AL., *supra* note 16, at 11; Nat’l Women’s Law Ctr., The Pharmacy Refusal Project, <http://www.nwlc.org/details.cfm?id=2185§ion=health> (last visited Oct. 1, 2006).

came to a head in August of 2006 when the federal government granted partial over-the-counter (OTC) status to emergency contraception after years of governmental delays and contentious debates.¹⁹

Complicating the debate has been widespread ignorance and misunderstanding concerning emergency contraception.²⁰ The federal government, as well as leading medical organizations, such as the American College of Obstetricians and Gynecologists (ACOG) and the American Medical Women's Association (AMWA), state that pregnancy begins when a fertilized egg is implanted in the lining of the uterus.²¹ Just like other forms of birth control pills, emergency

¹⁹ The U.S. Food and Drug Administration announced in August 2006 that emergency contraception, known as "Plan B," will be sold in the United States as an OTC medication to women eighteen years and older; a prescription version will continue to be available for women below this age limit. Press Release, U.S. Food & Drug Admin., FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older; Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>. The medication will only be distributed "through licensed drug wholesalers, retail operations with pharmacy services, and clinics with licensed healthcare practitioners, and not through convenience stores or other retail outlets where it could be made available to younger women without a prescription." *Id.*; Ctr. for Drug Evaluation & Res., U.S. Food & Drug Admin., Plan B: Questions and Answers (Aug. 24, 2006), <http://www.fda.gov/cder/drug/infopage/planB/planBQandA20060824.htm>. The OTC application process for emergency contraception was quite long and contentious, involving repeated delays by the federal government in approving the medication for OTC sales and nationwide debates over the politics behind the governmental delays and the science underlying the medication. *See, e.g.*, Gardiner Harris, *F.D.A. Approves Broader Access to Next-Day Pill*, N.Y. TIMES, Aug. 25, 2006, at A1 (quoting a food and drug law expert and former FDA official as saying, "I cannot recall any other issue in my 45 years of watching F.D.A. that has garnered this much attention at all levels of government"); *see also* Marc Kaufman & Rob Stein, *Plan B Approval Said to Be Near: Adults Could Buy 'Morning-After Pill' Over the Counter*, WASH. POST, Aug. 24, 2006, at A1 (describing lengthy and controversial approval process for drug); Shorto, *supra* note 11, at 51–53 (describing agency delays in processing the drug's OTC application in spite of overwhelming evidence of its medical safety and support from agency's medical officials).

²⁰ *See, e.g.*, Diana G. Foster et al., *Knowledge of Emergency Contraception Among Women Aged 18 to 44 in California*, 191 AM. J. OBSTETRICS & GYNECOLOGY 150, 152, 155–56 (2004) (finding that only thirty-eight percent of California women could correctly identify emergency contraception, that "considerable confusion" existed between medical abortion and emergency contraception, and that "[t]hose women who have the fewest resources to manage an unplanned pregnancy" demonstrated little knowledge of emergency contraception); Editorial, *Plan B Victory Only Partial: Battle Not Won*, ARIZ. DAILY STAR, Aug. 29, 2006, at A4 (describing grant of OTC status to Plan B and recognizing that "women often don't know emergency contraception exists, and doctors don't bring it up unless asked about it"); *National Survey Shows Majority of Women Unaware of Plan B Birth Control Pill Contraception*, OBESITY, FITNESS, & WELLNESS WEEK, Sept. 2, 2006, at 824 ("Twenty percent of women are aware of the Plan B birth control pill, and less than 8 percent understand Plan B's mechanism and the situations in which it is medically appropriate or effective . . .").

²¹ *See* 45 C.F.R. § 46.202(f) (2005) ("Pregnancy encompasses the period of time from implantation until delivery."); AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, OBSTETRIC-

contraception acts by preventing ovulation, fertilization, or implantation.²² Thus, emergency contraception does not disrupt an existing pregnancy, but prevents pregnancy altogether, completely distinguishing it from an abortifacient like mifepristone, a medicine that ends established pregnancy.²³ Nonetheless, opponents of contraception and abortion rights regularly advance the misleading view that emergency contraception (and, indeed, all forms of hormonal contraception) is a form of abortion.²⁴

GYNECOLOGIC TERMINOLOGY 299, 327 (Edward C. Hughes ed., 1972); F. GARY CUNNINGHAM ET AL., WILLIAM OBSTETRICS 52 (22d ed. 2005); Am. Med. Women's Ass'n, Emergency Contraception, <http://www.amwa-doc.org/index.cfm?objectid=0EF88909-D567-0B25-531927EE4CC23EFB> (last visited Oct. 1, 2006).

²² See Trussell et al., *supra* note 1, at S32 (emphasizing that emergency contraception, "like all regular hormonal contraceptives such as the birth control pill, the patch Evra, the vaginal ring NuvaRing, the injectable Lunelle, and the injectable Depo-Provera . . . , and even breastfeeding—may prevent pregnancy by delaying or inhibiting ovulation, inhibiting fertilization, or inhibiting implantation of a fertilized egg"); Comm. on Adolescence, *supra* note 1, at 1040 ("Emergency contraception primarily inhibits ovulation, disrupts follicular development, and/or interferes with the maturation of the corpus luteum. These are the same mechanisms by which other hormonal methods of contraception prevent pregnancy."); Press Release, Am. Coll. of Obstetricians & Gynecologists, Medical Groups Set the Record Straight on Emergency Contraception (May 4, 2004), http://www.acog.org/from_home/publications/press_releases/nr05-04-04-3.cfm ("Emergency contraceptive pills, which are specific combinations of birth control pills in higher doses, act to prevent pregnancy. Unlike early medical abortion, if a woman is already pregnant, EC will not terminate her pregnancy."); cf. Caroline Wellbery, *Emergency Contraception*, 9 ARCHIVES FAM. MED. 642, 643 (2000) (stating that "[e]mergency contraception does not interrupt an established pregnancy" and that, although the mechanism of action is unclear, the medicine likely works by "inhibit[ing] ovulation[.]. . . interfer[ing] with luteal phase function, alter[ing] the endometrial lining, creat[ing] an unfavorable cervical mucus, and chang[ing] sperm transport"). The notion that hormonal contraceptives prevent implantation has not been definitively established, however. See *infra* notes 22–24.

²³ David A. Grimes & Elizabeth G. Raymond, *Emergency Contraception*, 137 ANNALS INTERNAL MED. 180, 181 (2002) ("Emergency contraception prevents a pregnancy from starting, which differs fundamentally from interruption of an early established pregnancy."); David G. Weismiller, *Emergency Contraception*, 70 AM. FAM. PHYSICIAN 707, 707 (2004) ("Emergency contraception, sometimes referred to as the 'morning-after' pill, is birth control that women can use to *prevent* pregnancy after known or suspected failure of contraception or unprotected intercourse, including sexual assault." (emphasis added)); Am. Coll. of Obstetricians & Gynecologists, Frequently Asked Questions About Hormonal Approaches to Emergency Contraception, http://www.acog.org/departments/dept_notice.cfm?recno=18&bulletin=1084 (last visited Oct. 1, 2006) ("Emergency contraception will not disrupt an established pregnancy."); Am. Med. Women's Ass'n, *supra* note 21; Duramed Pharmaceuticals, Inc., Plan B Consumer Home Page, <http://www.go2planb.com/ForConsumers/Index.aspx> (last visited Oct. 1, 2006) (stating that the medicine "is not RU-486 (the abortion pill); it will not work if you are already pregnant"); Nat'l Women's Health Info. Ctr., U.S. Dep't of Health & Human Servs., Emergency Contraception: Frequently Asked Questions 3 (May 2006), <http://www.4woman.gov/faq/econtracep.pdf> (stating that emergency contraception is not "the same thing as 'the abortion pill'" and that it "can keep a woman from *becoming* pregnant" (emphasis added)).

²⁴ Some opponents of abortion and birth control dispute the mainstream medical

Refusals to dispense prescription contraceptives in pharmacies are deeply alarming on several fronts. Family planning and public health experts worldwide have definitively established that access to contraception is crucial to women's health and socioeconomic development: it enables women to prevent unwanted and high-risk

community's position that pregnancy begins with the implantation of the fertilized egg and often contend that human life begins with the fertilization of the egg. See, e.g., C. Ward Kischer, Am. Life League, *When Does Human Life Begin? The Final Answer*, <http://all.org/article.php?id=10325> (last visited Oct. 1, 2006); Nat'l Right to Life, *When Does Life Begin?*, <http://www.nrlc.org/abortion/wdlb/wdlb.html> (last visited Oct. 1, 2006). By this logic, if contraception can inhibit the implantation of a fertilized egg, it is an abortifacient. See, e.g., Bollinger, *supra* note 13 (explaining that "[a]nti-Pill doctors and pharmacists" object to the pill because "fertilized eggs—in their view, nascent human lives—are unable to attach to the hormonally altered uterine lining. Instead of implanting and growing, they slough off. . . . Sloughing off a fertilized egg, in their view, is a 'chemical abortion.'"); Greg Munno, *The Morning After: Last Night's Fling Might Seem More Like an Emergency in the Harsh Light of Day*, POST-STANDARD (Syracuse, NY), Mar. 9, 2006, at E8 ("Most anti-abortion groups have come out against emergency contraception. Those opposed to the drug say that, by preventing a potentially fertilized egg from implanting itself in the uterine wall, emergency contraception is potentially killing a viable embryo."); Shorto, *supra* note 11, at 53 ("In some cases, [the emergency contraception pill] may stop an already fertilized egg from attaching to the uterine wall. In such a situation, for those who believe that life—and thus also pregnancy—begins at the moment of fertilization, it would indeed function as an abortifacient.").

The mechanism by which hormonal contraceptives prevent pregnancy, particularly on the individual level, is not always clear, however. See, e.g., Grimes & Raymond, *supra* note 23, at 181–82 ("[E]mergency contraceptive pills probably work through multiple mechanisms that may depend on the timing of their administration in the menstrual cycle. The mechanism of action in any specific case is impossible to determine." (internal citation omitted)). For instance, the notion that hormonal contraceptives prevent implantation is not definitively established. See, e.g., Weismiller, *supra* note 23, at 709 ("Endometrial changes make implantation after fertilization less likely and, depending on when the hormones are taken, may be the more common mechanism. However, how often a post-fertilization effect occurs is unknown."); Carolyn Westhoff, *Emergency Contraception*, 349 NEW ENG. J. MED. 1830, 1833 (2003) ("The mechanism of action of emergency contraception is incompletely understood."); Caroline Bollinger, *The Post-Fertilization Effect: Fact or Fiction?*, PREVENTION.COM (2002), available at <http://www.prevention.com/article/0,5778,s1-1-93-35-4166-1-P,00.html>.

Groups opposed to abortion and most forms of contraception acknowledge the uncertainty surrounding the operation of hormonal contraceptives. See, e.g., PAMELA P. WONG & EMMA ELLIOT, CONCERNED WOMEN FOR AM., HIGH-TECH "BIRTH CONTROL": HEALTH CARE OR HEALTH RISK? (2005), available at <http://www.cwfa.org/brochures/birth-control.pdf> (recognizing that "[m]embers of the medical community sometimes disagree as to whether these chemicals [oral contraceptives] perform early abortions," but opposing the use of the medicine); Ron Hamel, Catholic Health Ass'n of the U.S., *Emergency Contraception and Catholic Health Care: Moral Considerations*, <http://www.chausa.org/Pub/MainNav/whatwedo/Ethics/resources/rapetreatment/considerations.htm> (last visited Aug. 26, 2006) (stating that "[t]he precise mode of action of emergency oral contraceptives is not yet known, but there is evidence of effects at several critical points in the reproductive cycle" and that "there is no current method for ascertaining that an ovum has been fertilized until implantation"). Because of the uncertainty surrounding the operation of emergency contraception in each woman's body, a pharmacist who believes that life begins with fertilization, not at implantation, cannot reliably know when to withhold emergency contraception in a manner consistent with his or her beliefs.

pregnancies, avoid abortion (a particularly important consideration in regions where access to safe abortion is limited), manage reproductive health problems, space, and limit the number of children they choose to have, take advantage of opportunities for educational and economic advancement, and provide better lives for themselves and their families.²⁵ Similarly, millions of American

²⁵ See MARIA JOSÉ ALCALÁ, UNITED NATIONS POPULATION FUND, STATE OF WORLD POPULATION 2005: THE PROMISE OF EQUALITY: GENDER EQUITY, REPRODUCTIVE HEALTH, AND MILLENNIUM DEVELOPMENT GOALS 41 (Janet Jensen ed., 2005), available at http://www.unfpa.org/swp/2005/pdf/en_swp05.pdf (explaining the economic and social benefits of family planning and emphasizing that access to such resources “is one of the wisest and most cost-effective investments any country can make towards a better quality of life”); SAVE THE CHILDREN, STATE OF THE WORLD’S MOTHERS 2005: THE POWER AND PROMISE OF GIRLS’ EDUCATION 11–13, 17, 24–29, 37–39 (Tracy Geoghegan ed., 2005), available at http://www.savethechildren.org/mothers/report_2005/images/SOWM_2005.pdf (discussing the nexus between girls’ education, mothers’ use of contraception, improved maternal and child health outcomes, and women’s socioeconomic development and opportunities for self-determination); UNIV. OF CAL., S.F., CTR. FOR REPROD. HEALTH RESEARCH & POLICY, FACT SHEET ON BENEFITS OF FAMILY PLANNING, available at <http://crhrp.ucsf.edu/publications/files/BenefitsofFPPlanning.pdf> (last visited Oct. 1, 2006) (emphasizing the benefits of family planning and observing that “[i]n addition, women who have control over their fertility have a chance to attain more education and find employment — achievements that enhance their social and economic status and improve the well-being of their families”); WORLD HEALTH ORG. (WHO), FAMILY PLANNING AND POPULATION DIV. OF FAMILY HEALTH, HEALTH BENEFITS OF FAMILY PLANNING 3, 6 (1994), available at http://www.who.int/reproductive-health/publications/health_benefits_family_planning/health_benefits_fp.pdf (stating that access to contraception “reduces maternal mortality[,] . . . prevent[s] unwanted and high-risk pregnancies[,] . . . reduc[es] the need for unsafe abortions. . . . [.] reduc[es] the likelihood of disease transmission,” lowers incidence of certain forms of cancer, and improves pregnancy and childrearing outcomes by enabling families to plan, space, and limit the number of children); Kim Best, *Contraception Influences Quality of Life*, 18 NETWORK, Summer 1998, at 6, available at http://www.fhi.org/en/RH/Pubs/Network/v18_4/NW184ch2.htm (stating that “[f]amily planning offers women clear health benefits,” particularly in developing countries and that “[o]ne benefit clearly attributable to limiting family size is more free time for women, which could be used to devote more attention to family, work or other interests”); Ushma D. Upadhyay & Bryant Robey, *Why Family Planning Matters*, 27 POPULATION REPORTS, JULY 1999, at 1–2, available at <http://www.inforhealth.org/pr/j49/j49.pdf> (stating that “[f]amily planning benefits individuals and countries in many ways” by: reducing maternal mortality from childbirth; reducing the need for unsafe abortion; enabling women to limit childbirth to those years when they are most healthy and to prevent health risks from excessive pregnancies; improving child health outcomes; offering women more educational, economic, and civil participation opportunities; and promoting safe sexual activity); Michael J. Welsh et al., *Access to Modern Contraception*, 20 BEST PRAC. & RES. CLINICAL OBSTETRICS & GYNAECOLOGY 323, 323–24 (2006) (emphasizing the influence and benefits of programs that work to enhance access to contraception, “particularly in resource-poor settings where access to health facilities is constrained and child survival rates are low”); U.S. AGENCY FOR INT’L DEV., FAMILY PLANNING SAVES WOMEN’S LIVES (2001), http://www.usaid.gov/our_work/global_health/pop/publications/docs/fpsaves.html (explaining how family planning works to avert abortions, unintended pregnancies, and pregnancy-related illnesses and fatalities). For a discussion of the medical uses of contraception, unrelated to pregnancy prevention, see, for example, Ronald T. Burkman et al., *Current Perspectives on Oral Contraceptive Use*, 185 AM. J. OBSTETRICS & GYNECOLOGY S4, S4 (2001) (Oral contraceptives “offer women of all ages

women²⁶ depend upon contraception to plan their families by spacing and limiting births, reduce the number of unwanted and high-risk pregnancies, manage gynecological complications unrelated to pregnancy and prevent life-threatening complications, and pursue opportunities for personal and professional advancement.²⁷

a broad array of short- and long-term noncontraceptive health benefits. These benefits include menstrual cycle control, treatment of dysfunctional uterine bleeding, protection against several gynecologic and nongynecologic cancers, preservation of bone density, and improvement in acne.”); Ronald Burkman et al., *Safety Concerns and Health Benefits Associated with Oral Contraception*, 190 AM. J. OBSTETRICS & GYNECOLOGY S5, S5 (2004) (listing benefits associated with hormonal contraceptives, including “slight[] protect[ion] against the risk of several invasive cancers for both white and black patients aged 20 to 59 years,” as well as “established benefits included in product labeling (reductions in anemia and dysmenorrhea, reduced risk of ectopic pregnancy, and fibrocystic breast changes)[, and] emerging benefits on bone density, benign breast changes, and possibly pelvic inflammatory disease”); Patricia J. Sulak, *Ovulation Suppression of Premenstrual Symptoms Using Oral Contraceptives*, 11 AM J. MANAGED CARE S492, S492–93 (2005) (“Combination oral contraceptives (OCs), which contain estrogen and one of several progestins, are commonly prescribed hormonal agents providing a variety of noncontraceptive health benefits, aside from preventing pregnancy.”); L. Lewis Wall & Douglas Brown, *Refusals by Pharmacists to Dispense Emergency Contraception: A Critique*, 107 OBSTETRICS & GYNECOLOGY 1148, 1148 (2006) (describing one pharmacist’s refusal to fill the prescription of a young girl who had been prescribed contraceptive pills in order to control exhibited symptoms of excessive vaginal bleeding).

²⁶ See GUTTMACHER INST., *supra* note 14 (noting that “62% of the 62 million women aged 15–44 are currently using a contraceptive method” and that “[a]mong the 42 million fertile, sexually active women who do not want to become pregnant, 89% are practicing contraception”).

²⁷ See SUSHEELA SINGH ET AL., GUTTMACHER INST., ADDING IT UP: THE BENEFITS OF INVESTING IN SEXUAL AND REPRODUCTIVE HEALTH CARE 24–27 (2003), *available at* <http://www.guttmacher.org/pubs/addingitup.pdf> (providing examples of the medical and non-medical benefits of investing in sexual and reproductive health care); Ctrs. for Disease Control & Prevention, *Ten Great Public Health Achievements — United States, 1900–1999*, 48 MORBIDITY & MORTALITY WKLY. REP. 241, 241–42 (1999), *available at* <http://www.cdc.gov/mmwr/PDF/wk/mm4812.pdf> (describing family planning as one of the ten most significant public health achievements of the twentieth century).

Much legal scholarship has been written on the nexus between access to contraception and abortion and gender equality. *See, e.g.*, Paula Abrams, *Reservations About Women: Population Policy and Reproductive Rights*, 29 CORNELL INT’L L.J. 1, 3 (1996); Ruth Bader Ginsburg, Essay, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375 (1984); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 58 (1977); Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 363–64 (1998); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1311 (1991); Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 415 (1992); Lorraine Schmall, *Birth Control as a Labor Law Issue*, 13 DUKE J. GENDER L. & POL’Y 139, 141 (2006); Elizabeth M. Schneider, *The Synergy of Equality and Privacy in Women’s Rights*, 2002 U. CHI. LEGAL F. 137, 151; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (1992).

Moreover, ACOG, AMWA, the American Academy of Pediatrics, the Guttmacher Institute, and medical scholars state that improved access to emergency contraception would annually reduce several thousand unintended pregnancies and abortions in the United States.²⁸ The National Women's Law Center also states that "[e]ach year 25,000 pregnancies occur as a result of sexual assault, and experts predict that timely access to [emergency contraception] could prevent up to 22,000 of these pregnancies."²⁹ To that end, ACOG has stated that improving women's access to emergency contraception is an important public health goal and has launched a nationwide campaign to educate women of reproductive age about the importance of emergency contraception and to encourage them

²⁸ Press Release, Am. Coll. of Obstetricians & Gynecologists, *supra* note 22 (estimating "that making [emergency contraception] widely available over-the-counter has the potential to prevent at least half of unintended pregnancies in the US (or about 2 million pregnancies annually) and half of US abortions (or nearly 500,000 abortions per year)"); Am. Med. Women's Ass'n, *supra* note 21 ("AMWA believes that emergency contraception can play a much stronger role in reducing unintended pregnancy and unnecessary abortion in our nation."); Comm. on Adolescence, *supra* note 1, at 1038 (presenting the view of the American Academy of Pediatrics that that rate of unintended pregnancy will decline upon implementation of policies focusing on "improving the knowledge, accessibility, and availability of contraceptive services, including emergency contraception"); HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., ABORTION IN WOMEN'S LIVES 33 (2006), available at <http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf> (discussing the importance of increased contraceptive access, including access to emergency contraception, to reducing high rates of unintended pregnancy in United States); Horacio B. Croxatto & Soledad Díaz Fernández, *Emergency Contraception — A Human Rights Issue*, 20 BEST PRAC. & RES. CLINICAL OBSTETRICS & GYNAECOLOGY 311, 313 (2006) ("[I]f [emergency contraception] was available and accessible without barriers to all women who need it, the number of unwanted pregnancies, and therefore the number of induced abortions, could be reduced greatly."); Suzanne F. Delbanco et al., *Missed Opportunities: Teenagers and Emergency Contraception*, 152 ARCHIVES PEDIATRICS & ADOLESCENT MED. 727, 727, 732 (1998) (noting that approximately one million teenage girls become pregnant annually in the United States and that "[e]mergency contraceptive pills can be a valuable tool for reducing unplanned pregnancies among teenagers"); David A. Grimes & Mitchell D. Creinin, *Induced Abortion: An Overview for Internists*, 140 ANNALS INTERNAL MED. 620, 625 (2004) ("Provision of contraception and encouragement of emergency contraception, as needed, can further reduce the burden of suffering from unintended pregnancies nationwide."); S. Marie Harvey et al., *Women's Experience and Satisfaction with Emergency Contraception*, 31 FAM. PLAN. PERSPS. 237, 237 (1999) ("Experts agree that widening the menu of contraceptive choice is desirable, and that a method to prevent pregnancy after unprotected intercourse or after a contraceptive failure is critically needed."); Trussell et al., *supra* note 1, at S30 ("Half of all pregnancies in the United States are unintended . . . Emergency contraception, which prevents pregnancy after unprotected sexual intercourse, has the potential to reduce significantly the incidence of unintended pregnancy and the consequent need for abortion.")

²⁹ Nat'l Women's Law Ctr., Fact Sheet: Emergency Contraception (Apr. 2006), http://www.nwlc.org/pdf/FSEmergencyContraception_04.07.06.pdf (last visited Oct. 1, 2006); cf. Clara Bell Duvall Reprod. Freedom Project, Am. Civil Liberties Union of Pa., About RaisingHerVoice.org, <http://www.raisinghervoice.org/about/index.html> (last visited Oct. 1, 2006) (supporting sexual assault survivors' timely access to emergency contraception).

to obtain an “advance prescription” for the medication that can be used in the event of contraceptive failure or sexual assault.³⁰

As such, refusals to dispense prescription contraceptives in pharmacies threaten to deny millions of American women an essential health care service.³¹ The potential adverse impact of such refusals is vast: over sixty million American women are currently within their childbearing years,³² and ninety-eight percent of those women who have ever been sexually active have used at least one contraceptive method.³³ Approximately thirty-eight million women are currently using a contraceptive method.³⁴ Refusals to dispense prescription contraceptives in pharmacies disproportionately impact certain demographic groups: a woman in a rural area or without ready access to transportation, child care, or leave from work who suffers a refusal may not be able to travel to another pharmacy or find a pharmacy that stocks the medicine she needs.³⁵ Refusals to fill prescriptions for emergency contraception in pharmacies are especially problematic because emergency contraception must typically be administered within 120 hours of unprotected intercourse in order to prevent pregnancy,³⁶ but is more effective the

³⁰ Press Release, Am. Coll. of Obstetricians & Gynecologists, ACOG Steps Up Efforts to Get Emergency Contraception to Women (May 8, 2006), *available at* http://www.acog.org/from_home/publications/press_releases/nr05-08-06-1.cfm.

³¹ Moreover, some medical commentators have noted that a refusal to dispense prescription contraceptives in a pharmacy is unethical from a health care perspective because, *inter alia*, pharmacists do not provide diagnostic care to the patient. *See, e.g.*, Wall & Brown, *supra* note 25, at 1149–50.

³² GUTTMACHER INST., *supra* note 14. The report also notes that

31% of the 62 million women do not need a method because they are infertile; are pregnant, postpartum or trying to become pregnant; have never had intercourse; or are not sexually active.

Thus, only 7% of women aged 15–44 are at risk of unwanted pregnancy but are not using contraceptives.

Id.

³³ *Id.*

³⁴ *See id.*

³⁵ *E.g.*, AM. PUB. HEALTH ASS'N, ENSURING THAT PATIENTS ARE ABLE TO HAVE CONTRACEPTIVE PRESCRIPTIONS FILLED AT PHARMACIES 3 (2005), *available at* <http://apha.org/legislative/policy/2005/LB-6.pdf>; Julie Cantor & Ken Baum, *The Limits of Conscientious Objection — May Pharmacists Refuse to Fill Prescriptions for Emergency Contraception?*, 351 NEW ENG. J. MED. 2008, 2010 (2004); Stein, *supra* note 6; Religious Coal. for Reprod. Choice, Perspectives: Pharmacy Refusals - A New Threat to Women's Health, http://www.rerc.org/calltojustice/perspectives_pharmacy.php (last visited Oct. 1, 2006).

³⁶ Charlotte Ellertson et al., *Extending the Time Limit for Starting the Yuzpe Regimen of Emergency Contraception to 120 Hours*, 101 OBSTETRICS & GYNECOLOGY 1168, 1168 (2003); Press Release, Am. Coll. of Obstetricians & Gynecologists, Emergency Contraception: Works Up to 120 Hours and in Different Combinations (May 31, 2003), http://www.acog.org/from_home/publications/press_releases/nr05-31-03-5.cfm.

sooner it is used after intercourse.³⁷

Because access to contraception is central to women's health and right to self-determination, this Article contends that refusals to dispense prescription contraceptives in pharmacies constitute sex-based discrimination. This Article examines the possibility for legal redress against this sex discrimination through litigation or administrative action and contends that state public accommodation statutes are a promising vehicle for challenging such discrimination.³⁸ Many of these statutes explicitly prohibit sex-based discrimination and offer multiple forms of legal redress against such discriminatory acts and many define or can be interpreted to include pharmacies as places of public accommodation.³⁹

Moreover, federal law does not explicitly prohibit sex-based discrimination in places of public accommodation⁴⁰ or in contractual transactions.⁴¹ Because the pharmacies where refusals to dispense prescription contraceptives have occurred are typically private actors unaffiliated with any governmental entity, federal constitutional safeguards such as equal protection are also inapplicable to them.⁴² Thus, in order to seek redress in the courts

³⁷ Press Release, Am. Coll. of Obstetricians & Gynecologists, *supra* note 22 ("Access and speed are important if [emergency contraceptive pills] are to be effective. If taken within 72 hours of unprotected sexual intercourse, ECPs prevent 89% of pregnancies. Efficacy is greatest, however, if used within 24 hours.").

³⁸ For an overview of the importance and benefits of public accommodations laws, see, for example, Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1474-77 (1996) and Pamela Griffin, Comment, *Exclusion and Access in Public Accommodations: First Amendment Limitations Upon State Law*, 16 PAC. L.J. 1047, 1050-56 (1985).

³⁹ See *infra* notes 49-54 and accompanying text.

⁴⁰ See 42 U.S.C. § 2000a(a) (2000) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.").

⁴¹ See *id.* § 1981(a). The statute provides that

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

⁴² See, e.g., *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 384 (1979) (Stevens, J., concurring) ("Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action."); see also Jessica E. Rank, Comment, *Is Ladies' Night Really Sex Discrimination?: Public Accommodation Laws, De Minimis Exceptions, and*

for such pharmacy refusals, it is necessary to look beyond federal law. The road to bringing a refusal challenge under a state public accommodation statute is not perfectly smooth, however. Pharmacies as well as pharmacists who refuse to dispense prescription contraceptives on the basis of a moral or religious objection may have certain protections under federal and state law.⁴³ This Article discusses bringing a sex discrimination claim against a pharmacy and any defenses to such a claim that will need to be addressed.

For purposes of this Article, “prescription contraceptives” include all forms of contraception that require a pharmacist to dispense the medicine to the patient. The term applies to all forms of birth control that can only be obtained with a prescription. It applies equally to emergency contraception sold OTC because such medicine is legally required to be housed behind the pharmacy counter,⁴⁴ a barrier that would enable a pharmacist to refuse to dispense the medicine to the patient.⁴⁵

Stigmatic Injury, 36 SETON HALL L. REV. 223, 225 (2005) (stating that not only does Title II of the Civil Rights Act of 1964 fail to contemplate sex as a protected class, but also that “allegations of gender-based pricing often arise from the actions of private businesses, and as such are not subject to the ‘state action’ doctrine under the Fourteenth Amendment. Gender discrimination in places of public accommodation is, therefore, largely an issue left to the states.” (footnote omitted)).

⁴³ See *infra* Part II.C.

⁴⁴ See *supra* note 19 and accompanying text.

⁴⁵ See, e.g., Judith Davidoff, *Plan B Access Not as Easy as It Sounds: Women Must Still Ask Pharmacist for It*, CAP. TIMES (Madison, Wis.), Aug. 26, 2006, at B1 (quoting official of Planned Parenthood Advocates of Wisconsin as saying, “[w]omen still have to go to a pharmacist, ask them for it, and they will still encounter any of the prejudices women have already experienced around their ability to access birth control.”); David Nova, Editorial, *Birth Control v. Delay, Delay, Delay*, ROANOKE TIMES & WORLD NEWS, Aug. 29, 2006, at B7 (“Last week’s FDA ruling is a victory in the race against time. However, the attempts to institute delays will continue . . . Pharmacies are being pressured not to stock Plan B. Pharmacists are being pressed to refuse giving Plan B, which must be kept behind the counter.”); Editorial, *Plan B Goes Forward, But Not Far Enough*, ALBUQUERQUE J., Aug. 28, 2006, at A8 (“Even women 18 and over must jump through FDA hoops. The pills will be sold only from behind the counter at drug stores, with pharmacists asking for photo identification to ascertain age.”); Kris Wise, *Pharmacists Struggle Over Plan B: Some Question Ethics of Pill, Others Say Implementation of Plan Poses Problem*, CHARLESTON DAILY MAIL (W. Va.), Aug. 30, 2006, at 1A (describing possible obstacles, including pharmacist refusals, to dispensing Plan B even as an OTC medicine).

II. CONSTRUCTING A CLAIM OF SEX DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON A REFUSAL TO DISPENSE PRESCRIPTION CONTRACEPTIVES IN A PHARMACY

Bringing a claim alleging sex discrimination in public accommodations based on a refusal to dispense prescription contraceptives in a pharmacy requires several steps of legal analysis. First, a plaintiff must determine that her state's public accommodation statute (1) protects against sex discrimination; (2) includes or could be interpreted to include pharmacies as places of public accommodation; (3) contains a mechanism to enable an individual plaintiff to seek relief; and (4) offers the remedies sought by the plaintiff.⁴⁶ Second, a plaintiff must firmly link the usage of prescription contraceptives to sex in order to show that a refusal to dispense prescription contraceptives in a pharmacy is sex discrimination. Third, a plaintiff must be prepared to address certain defenses to these claims. This Article examines each of these components of a public accommodations claim in turn, using certain states' laws to illustrate various facets of a claim.

A. *State Public Accommodations Statutes*

State public accommodations statutes prohibit discrimination on the basis of certain demographic characteristics in places of public accommodations.⁴⁷ These statutes ensure nondiscriminatory access to places of public life in order to provide individual remedies

⁴⁶ Although a person may choose to file a claim under a state's public accommodations statute, there are additional avenues a plaintiff may pursue, including filing a complaint with the state pharmacy board alleging that the pharmacist violated professional standards. For instance, the State of Wisconsin's Pharmacy Examining Board disciplined Neil T. Noesen, a Wisconsin pharmacist who refused to fill or transfer a K-Mart customer's prescription for birth control. *See In re Noesen*, No. LS0310091PHM (Pharmacy Examining Bd. Apr. 13, 2005) (final decision and order), available at <http://drl.wi.gov/dept/decisions/docs/0405070.htm>. The Board found that Noesen violated section 10.03(2) of the Wisconsin's Administrative Code for the Pharmacy Examining Board. *Id.* The Administrative Code states that

Engaging in any pharmacy practice which constitutes a danger to the health, welfare, or safety of patient or public, including but not limited to, practicing in a manner which substantially departs from the standard of care ordinarily exercised by a pharmacist which harmed or could have harmed a patient [constitutes unprofessional conduct]. WIS. ADMIN. CODE PHAR. § 10.03(2) (2006). Noesen filed an appeal in state court, which affirmed the Board's decision, and has now appealed this decision. *Noesen v. Wis. Dep't of Regulation & Licensing Pharmacy Examining Bd.*, No. 05 CV 212, at 16-17 (Wis. Cir. Ct. Feb. 3, 2006), appeal docketed, No. 2006AP001110 (Wis. Ct. App. May 8, 2006).

⁴⁷ *See infra* note 49 and accompanying text.

against discrimination as well as to promote social welfare and democratic ideals such as equality, fairness, and human dignity.⁴⁸ A plaintiff who has been refused prescription contraceptives in a pharmacy will ideally find that her state has a public accommodations statute that prohibits sex discrimination, defines “pharmacy” as a place of public accommodation, provides a private right of action, and offers a range of relief, including punitive damages and equitable remedies.

A plaintiff who has been refused prescription contraceptives in a pharmacy has many opportunities for relief under individual state laws. First, nearly forty states have public accommodations statutes prohibiting sex or gender-based discrimination.⁴⁹ A few of

⁴⁸ For example, the Idaho statute states that the purpose of the chapter is:

To secure for all individuals within the state freedom from discrimination because of race, color, religion, sex or national origin or disability in connection with employment, public accommodations, and real property transactions, discrimination because of race, color, religion, sex or national origin in connection with education, discrimination because of age in connection with employment, and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights and privileges of individuals within the state.

IDAHO CODE ANN. § 67-5901(2) (2006). Similarly, the Pennsylvania statute states that The practice or policy of discrimination against individuals or groups by reason of their race, color, familial status, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals . . . is a matter of concern of the Commonwealth. Such discrimination foments domestic strife and unrest, threatens the rights and privileges of the inhabitants of the Commonwealth, and undermines the foundations of a free democratic state. The denial of equal employment, housing and public accommodation opportunities because of such discrimination, and the consequent failure to utilize the productive capacities of individuals to their fullest extent, deprives large segments of the population of the Commonwealth of earnings necessary to maintain decent standards of living, necessitates their resort to public relief and intensifies group conflicts, thereby resulting in grave injury to the public health and welfare, compels many individuals to live in dwellings which are substandard, unhealthful and overcrowded, resulting in racial segregation in public schools and other community facilities, juvenile delinquency and other evils, thereby threatening the peace, health, safety and general welfare of the Commonwealth and its inhabitants.

43 PA. CONS. STAT. ANN. § 952(a) (West Supp. 2006).

⁴⁹ Most of these laws exist in state civil codes. ALASKA STAT. §§ 18.80.210, .230 (2004); ARIZ. REV. STAT. ANN. § 41-1442 (2004); ARK. CODE ANN. § 16-123-107(a) (2006); CAL. CIV. CODE § 51(b) (West Supp. 2006); COLO. REV. STAT. § 24-34-601 (2005); CONN. GEN. STAT. ANN. § 46a-64(a)(1)–(2) (West 2004); DEL. CODE ANN. tit. 6, §§ 4503–4504(a) (2005) (amended 2006); D.C. CODE ANN. §§ 2-1402.01, .31(a) (LexisNexis 2005); FLA. STAT. ANN. § 760.08 (West 2005); HAW. REV. STAT. § 489-3 (1993) (amended 2006); IDAHO CODE ANN. § 67-5909 (2006); 775 ILL. COMP. STAT. ANN. § 5/5-102 (West 2001); IND. CODE ANN. § 22-9-1-3(d) (LexisNexis 1997 & Supp. 2006); IOWA CODE ANN. § 216.7 (West 2000); KAN. STAT. ANN. § 44-1009(c)(1) (2000); LA. REV. STAT. ANN. §§ 49:146, 51:2247 (2003); ME. REV. STAT. ANN. tit. 5, §§ 4591, 4592(1) (Supp. 2005); MD. CODE ANN., § 49B-5 (LexisNexis 2003 & Supp. 2005); MICH. COMP. LAWS SERV. § 37.2302 (LexisNexis 2001); MINN. STAT. ANN. § 363A.11(subdiv. 1)(a)(1) (West

these states explicitly define “pharmacy” or “dispensary” as a place of public accommodation.⁵⁰ Others have broad definitions of public accommodation that may encompass pharmacies.⁵¹

2004); MO. ANN. STAT. § 213.065 (West 2004); MONT. CODE ANN. § 49-2-304 (2005); NEB. REV. STAT. §§ 20-132, -134 (1997); N.H. REV. STAT. ANN. §§ 354-A:16 to :17 (Supp. 2005); N.J. STAT. ANN. §§ 10:5-4, :5-12(f) (West Supp. 2006); N.M. Stat. Ann. § 28-1-7(F) (LexisNexis Supp. 2005); N.Y. CIV. RIGHTS LAW § 40-c (McKinney Supp. 2006); N.Y. EXEC. LAW §§ 291(2), 296(2) (McKinney 2005 & Supp. 2006); N.D. CENT. CODE § 14-02.4-14(1) (Supp. 2005); OHIO REV. CODE ANN. § 4112.02(G) (LexisNexis 2001); OKLA. STAT. ANN. tit. 25, § 1402 (West 1987); OR. REV. STAT. § 659A.403 (2005); 43 PA. CONS. STAT. ANN. § 955(i) (West Supp. 2006); S.D. CODIFIED LAWS. § 20-13-23 (2004); TENN. CODE ANN. § 4-21-501 (2005); UTAH CODE ANN. §§ 13-7-3 to -4 (2005); VT. STAT. ANN. tit. 9, § 4502(a) (1993 & Supp. 2005); WASH. REV. CODE ANN. §§ 49.60.030, .215 (West 2002) (amended 2006); W. VA. CODE ANN. § 5-11-9(6) (LexisNexis 2006); WIS. STAT. ANN. § 106.52(3) (West Supp. 2005) (amended 2006).

Some states have criminal prohibitions on public accommodations discrimination, either instead of or in addition to civil prohibitions. *E.g.*, ALASKA STAT. § 18.80.270 (2004) (amended 2006); COLO. REV. STAT. § 24-34-602 (2005); CONN. GEN. STAT. ANN. § 46a-64(c); IDAHO CODE ANN. § 18-7303 (2004); IND. CODE ANN. § 35-46-2-1 (LexisNexis 2004); NEB. REV. STAT. § 20-124 (1997); N.Y. CIV. RIGHTS LAW § 40-d (McKinney 1992); WYO. STAT. ANN. §§ 6-9-101 to -102 (2005). Some variations on criminal prohibitions also exist. For instance, in Massachusetts and Rhode Island, the prohibitions against public accommodations discrimination are classified as criminal offenses, but individual complainants can bring civil complaints under the laws. MASS. ANN. LAWS ch. 272, § 98 (LexisNexis 1992); R.I. GEN. LAWS §§ 11-24-1 to -4 (2002).

Finally, some states’ public accommodations statutes do not prohibit gender or sex-based discrimination, either explicitly or at all. *See, e.g.*, ALA. CODE § 21-7-3 (LexisNexis 1997) (stating that the disabled are entitled to equal accommodations); GA. CODE ANN. § 30-4-2 (2003) (same); KY. REV. STAT. ANN. §§ 344.120, .145 (LexisNexis 2005) (prohibiting sex-based discrimination only if the establishment is supported by government funds); MISS. CODE ANN. § 43-6-5 (West 1999) (stating that the disabled are entitled to equal accommodations); N.C. GEN. STAT. § 168A-6 (2005) (same); S.C. CODE ANN. § 45-9-10(A) (Supp. 2005) (prohibiting discrimination “on the ground of race, color, religion, or national origin”); TEX. HUM. RES. CODE ANN. § 121.003 (Vernon Supp. 2006) (prohibiting discrimination against the disabled). While Virginia law reflects a state public policy against sex-based discrimination, VA. CODE ANN. § 2.2-3900 (2005), it does not actually appear to prohibit this sort of public accommodation discrimination because other areas of Virginia law contain explicit prohibitions on other forms of public accommodation discrimination. VA. CODE ANN. § 51.5-44 (2005) (prohibiting discrimination against the disabled). Similarly, compare section 233.010(2) of the Nevada Revised Statutes Annotated, NEV. REV. STAT. ANN. § 233.010(2) (LexisNexis Supp. 2005), declaring a public policy against sex discrimination in public accommodations, with section 651.070 of the Nevada Revised Statutes Annotated, NEV. REV. STAT. ANN. § 651.070 (LexisNexis 2004), prohibiting public accommodations discrimination on the basis of “race, color, religion, national origin or disability.”

⁵⁰ *See, e.g.*, COLO. REV. STAT. § 24-34-601(1); D.C. CODE ANN. § 2-1401.02(24) (LexisNexis 2005 & Supp. 2006); HAW. REV. STAT. § 489-2(9) (1993); ME. REV. STAT. ANN. tit. 5, § 4553(8)(F) (2002); N.J. STAT. ANN. § 10:5-5(d) (West Supp. 2006); N.Y. CIV. RIGHTS LAW § 40 (McKinney 1992); N.Y. EXEC. LAW § 292(9) (McKinney Supp. 2006); 43 PA. CONS. STAT. ANN. § 954(d) (West 1991 & Supp. 2006); R.I. GEN. LAWS § 11-24-3(5). A pharmacy falls within the definition of a dispensary. *See* BLACK’S LAW DICTIONARY 504 (8th ed. 2004) (defining dispensary to include “[a] place where drugs are prepared or distributed”); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 521 (4th ed. 2000) (defining dispensary to include “a public institution that dispenses medicines or medical aid”).

⁵¹ *See* ALASKA STAT. § 18.80.300(14) (2004); ARIZ. REV. STAT. ANN. § 41-1441(2) (2004);

In states with public accommodations statutes that likely apply to pharmacies and prohibit sex-based discrimination, there are several different routes for a plaintiff who has been refused prescription contraceptives in a pharmacy to pursue a public accommodations claim. Some states enable individual plaintiffs to seek administrative remedies with judicial review or offer a private right of action predicated on administrative exhaustion.⁵² Moreover, several states provide a private right of action not predicated on

ARK. CODE ANN. § 16-123-102(7) (2006); CAL. CIV. CODE § 51(b); CONN. GEN. STAT. ANN. § 46a-63(1) (West 2004 & Supp. 2006); DEL. CODE ANN. tit. 6, § 4502(11) (2005); IDAHO CODE ANN. § 67-5902(9) (2006); 775 ILL. COMP. STAT. ANN. § 5/5-101(A) (West 2001); IND. CODE ANN. § 22-9-1-3(m); IOWA CODE ANN. § 216.2(12) (West 2000); KAN. STAT. ANN. § 44-1002(h) (2000); LA. REV. STAT. ANN. § 51:2232(10) (2003); MD. CODE ANN., § 49B-5(e); MICH. COMP. LAWS SERV. § 37.2301(a) (LexisNexis 2001); MINN. STAT. ANN. § 363A.03(subdiv. 34) (West 2004 & Supp. 2006); MO. ANN. STAT. § 213.010(15) (West 2004); MONT. CODE ANN. § 49-2-101(20) (2005); NEB. REV. STAT. § 20-133 (1997); N.H. REV. STAT. ANN. § 354-A:2(XIV) (Supp. 2005); N.M. Stat. Ann. § 28-1-2(H) (LexisNexis Supp. 2005); N.D. CENT. CODE § 14-02.4-02(14) (Supp. 2005); OHIO REV. CODE ANN. § 4112.01(A)(9) (LexisNexis 2001); OKLA. STAT. ANN. tit. 25, § 1401(1) (West 1987); OR. REV. STAT. § 659A.400(1) (2005); S.D. CODIFIED LAWS § 20-13-1(12) (2004); TENN. CODE ANN. § 4-21-102(15) (2005); UTAH CODE ANN. § 13-7-2(1) (2005); VT. STAT. ANN. tit. 9, § 4501(1) (1993); WASH. REV. CODE ANN. § 49.60.040(10) (West 2002); W. VA. CODE ANN. § 5-11-3(j) (LexisNexis 2006); WIS. STAT. ANN. § 106.52(1)(e)(1) (West Supp. 2005). A strong argument exists under these statutes that a pharmacy is a place of public accommodation. For instance, Arkansas public accommodations antidiscrimination law states in relevant part that a

‘[p]lace of public resort, accommodation, assemblage, or amusement’ means any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds

ARK. CODE ANN. § 16-123-102(7). In turn, a pharmacy is certainly a store that supplies goods and services to the public, suggesting that it can easily be classified as a public accommodation under such a definition. The exact analysis to demonstrate that a pharmacy is a place of public accommodation will vary according to the language of each statute.

Finally, some states have public accommodations statutes that may prohibit gender-based discrimination but do not apply to pharmacies. *See, e.g.*, FLA. STAT. ANN. §§ 760.02(11), .08 (West 2005); KY. REV. STAT. ANN. § 344.145(1) (LexisNexis 2005).

⁵² *See* ARIZ. REV. STAT. ANN. § 41-1471 (2004); CONN. GEN. STAT. §§ 46a-82, -83 to -86, -94a to -95, -100 to -101 (West 2004 & Supp. 2006); DEL. CODE ANN. tit. 6, §§ 4508, 4511 (2005) (amended 2006); FLA. STAT. ANN. § 760.11 (West 2005); IDAHO CODE ANN. §§ 67-5907, -5908 (2006); IOWA CODE ANN. §§ 216.15, .16 (West 2000 & Supp. 2006); KAN. STAT. ANN. §§ 44-1005, -1010, -1011 (2000); MD. CODE ANN. art. 49B, §§ 9A-11 (LexisNexis 2003); MO. ANN. STAT. §§ 213.075-.076, .085, .111 (West 2004); MONT. CODE ANN. §§ 49-2-501, -504, -509 (2005); NEB. REV. STAT. §§ 20-140 to -142 (1997); N.H. REV. STAT. ANN. §§ 354-A:21, :22 (Supp. 2005); N.M. Stat. Ann. §§ 28-1-10, -13 (LexisNexis Supp. 2005); OKLA. STAT. ANN. tit. 25, §§ 1502, 1506 (West 1987 & Supp. 2006); 43 PA. CONS. STAT. ANN. §§ 959, 962 (West 1991 & Supp. 2006); R.I. GEN. LAWS § 11-24-4 (2002); R.I. GEN. LAWS §§ 28-5-17, -24.1, -28 (2003); S.D. CODIFIED LAWS §§ 20-13-29, -35.1 (2004) (section 20-13-29 was found to be unconstitutional as applied in a different context). Maine requires partial administrative exhaustion for certain types of relief. *See* ME. REV. STAT. ANN. tit. 5, §§ 4611-4612, 4621 (2002 & Supp. 2005).

administrative exhaustion.⁵³ These state public accommodations statutes offer several different types of relief, such as punitive and compensatory damages, injunctive relief, attorney's fees, and costs.⁵⁴

⁵³ Some states offer a judicial right of action as the mechanism for resolving public accommodations complaints, and other states offer both judicial and administrative routes for resolving such complaints. As with the states that have only administrative complaint mechanisms, the administrative mechanisms in these states often have their own judicial review process and/or may contain a right-to-sue provision that is activated based on certain decisions of the administrative body. *E.g.*, ALASKA STAT. § 18.80.100 (2004) (amended 2006) (administrative mechanism); ALASKA STAT. § 22.10.020(i) (2004) (judicial mechanism); ARK. CODE ANN. § 16-123-107(b) (judicial mechanism); CAL. CIV. CODE § 52(c) (West 1982 & Supp. 2006) (judicial mechanism); CAL. CIV. CODE § 52(f) (West Supp. 2006) (administrative mechanism); COLO. REV. STAT. § 24-34-306 (2005) (administrative mechanism); *id.* § 24-34-307 (judicial review and enforcement of administrative action); *id.* § 24-34-603 (judicial mechanism); D.C. CODE ANN. § 2-1403.04 (LexisNexis 2005) (administrative mechanism); *id.* § 2-1403.16 (judicial mechanism); HAW. REV. STAT. § 489-6 (Supp 2005) (administrative mechanism); *id.* § 489-7.5 (judicial mechanism); 775 ILL. COMP. STAT. ANN. § 5/7A-102 (West Supp. 2006) (administrative mechanism); 775 ILL. COMP. STAT. ANN. § 5/10-102(A) (West 2001) (judicial mechanism); IND. CODE ANN. § 22-9-1-6(e) (LexisNexis 1997) (administrative mechanism); *id.* § 22-9-1-16 (LexisNexis 1997) (limited judicial mechanism activated only upon consent of both parties and prior finding of probable cause); LA. REV. STAT. ANN. § 51:2257 (2003) (administrative mechanism); *id.* § 51:2264 (judicial mechanism); MICH. COMP. LAWS SERV. § 37.2602(c) (LexisNexis 2001) (administrative mechanism); *id.* § 37.2801 (judicial mechanism); MINN. STAT. ANN. § 363A.28(subdiv. 1) (West 2004) (administrative mechanism); *id.* § 363A.33(subdiv. 1) (judicial mechanism); N.J. STAT. ANN. § 10:5-13 (West 2002) (providing administrative and judicial mechanisms); N.Y. CIV. RIGHTS LAW § 40-d (judicial mechanism predicated on notice to the Attorney General); N.Y. EXEC. LAW §§ 297(1), (9) (McKinney 2005) (administrative and judicial mechanisms); N.D. CENT. CODE § 14-02.4-19(1) (Supp. 2005) (administrative and judicial mechanisms); OHIO REV. CODE ANN. § 4112.05 (LexisNexis 2001) (administrative mechanism); *id.* § 4112.99 (judicial mechanism); OR. REV. STAT. § 659A.820 (2005) (administrative mechanism); *id.* § 659A.885(5) (judicial mechanism); TENN. CODE ANN. § 4-21-302 (2005) (administrative mechanism); *id.* § 4-21-311 (judicial mechanism); UTAH CODE ANN. § 13-7-4(3) (judicial mechanism); VT. STAT. ANN. tit. 9, § 4506(a) (1993) (judicial and administrative mechanisms); WASH. REV. CODE ANN. § 49.60.030(2) (West 2002) (judicial mechanism); *id.* § 49.60.230(1)(a) (administrative remedy); W. VA. CODE ANN. § 5-11-10 (LexisNexis 2006) (administrative mechanism); *id.* § 5-11-13(b) (judicial mechanism); WIS. STAT. ANN. § 106.52(4) (West Supp. 2005) (administrative and judicial mechanisms).

⁵⁴ *E.g.*, ALASKA STAT. § 22.10.020(i) (damages and equitable relief); ARIZ. REV. STAT. ANN. § 41-1472 (2004) (actual and compensatory damages, including damages for emotional distress, court costs, attorneys' fees, and equitable relief); ARK. CODE ANN. § 16-123-107(b) (compensatory and punitive damages, litigation costs, and attorney's fees); CAL. CIV. CODE § 52(a) (actual damages and attorneys' fees); COLO. REV. STAT. § 24-34-306(9) (injunctive and other necessary "action"); *id.* § 24-34-603 (damages); CONN. GEN. STAT. ANN. §§ 46a-86(a), (c) (2004 & Supp. 2006) (injunctive relief, orders for affirmative actions to be taken by respondents, damages, costs, and attorney's fees); DEL. CODE ANN. tit. 6, § 4508(h) ("actual damages suffered by the aggrieved person 'including damages caused by humiliation and embarrassment,' costs, expenses, reasonable attorneys' fees and injunctive or other equitable relief," and a civil penalty payable to the state); D.C. CODE ANN. § 2-1403.13 (LexisNexis 2005) (injunctive relief, access to place of public accommodation, compensatory damages, attorneys' fees, civil penalties, hearing costs, and compliance reporting); *id.* § 2-1403.16 ("damages and such other remedies as may be appropriate"); FLA. STAT. ANN. §§ 760.11(5), (6) (providing a range of remedies in administrative and civil proceedings); HAW. REV. STAT. §

489-7.5(a) (damages, costs, attorneys' fees, and injunctive relief); IDAHO CODE ANN. § 67-5908(3) (injunctive relief, actual, and punitive damages); 775 ILL. COMP. STAT. ANN. § 5/8A-104 (West 2001) (injunctive relief, actual damages, admission to place of public accommodation, access to services, attorneys' fees, costs, compliance reporting, and posting of notices indicating requirements to achieve compliance with the Act); IND. CODE ANN. § 22-9-1-6(k) (injunctive relief, compensation of complainant's losses, required posting of notice of state civil rights public policy, required compliance monitoring, and potential license disciplinary procedures); *id.* § 22-9-1-17(b) (extending administrative remedies to judicial context); IOWA CODE ANN. § 216.15(8) (injunctive relief, admission to place of public accommodation, compliance reporting, notice posting, damages, court costs, and attorneys' fees); KAN. STAT. ANN. § 44-1005(k) (injunctive relief, access to place of public accommodation, compliance reporting, and "damages for pain, suffering and humiliation"); LA. REV. STAT. ANN. § 49:146(A)(4) (referencing provision of Louisiana Civil Code that provides for damages); LA. REV. STAT. ANN. § 51:2261 (2003) (injunctive relief, admission to place of public accommodation, compliance reporting, notice posting, damages for injury incurred, including humiliation and embarrassment, other costs, and publication of names of guilty); *id.* § 51:2264 (injunctive relief, actual damages, court costs, and reasonable attorneys' fees, in addition to other remedies); ME. REV. STAT. ANN. tit. 5, §§ 4613(1), (2)(B) (2002) (injunctive relief and damages); *id.* § 4614 (attorneys' fees and costs); MD. CODE ANN., § 49B-11(e) (equitable and monetary relief); MICH. COMP. LAWS SERV. § 37.2605(1)-(3) (LexisNexis 2001) (injunctive relief, admission to place of public accommodation and provision of services of place of public accommodation, compliance reporting, notice posting requirements, damages, costs and attorneys' fees, civil fine, and adverse licensing actions); *id.* § 37.2801(1) (injunctive relief and damages); MINN. STAT. ANN. §§ 363A.29(3), (4), (11) (West 2004) (civil penalties, injunctive relief, punitive and compensatory damages, and litigation costs); *id.* § 363A.33(6), (7) (attorneys' fees and costs); MO. ANN. STAT. § 213.075(11)(1) (providing injunctive relief, "the extension of full, equal and unsegregated public accommodations," actual damages, and compliance reporting); MONT. CODE ANN. § 49-2-506(1) (2005) (injunctive relief, damages, and compliance reporting); NEB. REV. STAT. § 20-141(4) (injunctive relief and access to places of public accommodation); *id.* § 20-142(2) (attorneys' fees and costs); N.H. REV. STAT. ANN. § 354-A:21(II)(d) (injunctive relief, access to place of public accommodation, compliance reporting, compensatory damages, and administrative fine); N.J. STAT. ANN. § 10:5-13 (West 2002) ("All remedies available in common law tort actions shall be available to prevailing plaintiffs."); N.M. Stat. Ann. § 28-1-11(E) (LexisNexis 2000) (providing for actual damages, attorneys' fees, and "affirmative action," including compliance reporting); N.Y. CIV. RIGHTS LAW § 40-d (penalty); N.Y. EXEC. LAW § 297(4)(c) (injunctive relief, access to place of public accommodations, compensatory damages, and compliance reporting); N.D. CENT. CODE § 14-02.4-20 (Supp. 2005) (injunctive and other equitable relief, attorneys' fees, and costs); OHIO REV. CODE ANN. § 4112.05(G)(1) (injunctive relief, affirmative action, damages, and attorneys' fees); *id.* § 4112.99 (damages, injunctive relief, and "any other appropriate relief"); OKLA. STAT. ANN. tit. 25, § 1505(B)-(C) (West Supp. 2006) (providing injunctive relief, "admission of individuals to a public accommodation," compliance reporting, notice posting, costs, and attorneys' fees); OR. REV. STAT. § 659A.850(4) (2005) (injunctive relief, affirmative steps to vindicate purposes of statute and to eliminate discriminatory practices, and compliance reporting); *id.* §§ 659A.885(1), (5) (injunctive relief, costs, attorneys' fees, compensatory, and punitive damages); 43 PA. CONS. STAT. ANN. § 959(f)(1) (injunctive relief, affirmative action, and expenses associated with filing of complaint); R.I. GEN. LAWS § 28-5-24 (2003) (injunctive relief, affirmative action, including compliance reporting, litigation expenses, and compensatory damages); S.D. CODIFIED LAWS § 20-13-35.1 (2004) (injunctive relief, compensatory damages, and affirmative action); *id.* § 20-13-42 (injunctive relief, affirmative action, notice posting, compliance reporting, and other compensation); TENN. CODE ANN. § 4-21-306 (2005) (admission to place of public accommodation, compliance reporting, notice posting, damages for injuries, including humiliation and embarrassment, costs, and attorneys' fees); *id.* § 4-21-311(b) (injunctive relief, actual damages, costs, and attorneys' fees); UTAH

The choice of the defendant in a state public accommodations lawsuit challenging a refusal to dispense prescription contraceptives in a pharmacy is also a strategic one for the plaintiff. Such a plaintiff should ideally bring a state public accommodations challenge against the pharmacy itself (the place of public accommodation). Public accommodations statutes rest on the social policy objective of providing all people with equal and nondiscriminatory access to *places* of public accommodation and the goods and services they offer.⁵⁵ As such, the actual public accommodation itself is the most obvious defendant in a public accommodations lawsuit. Furthermore, a pharmacy might be liable for failing to institute a clear policy ensuring that customers will be able to fill contraceptive prescriptions at the store or for failing to reprimand pharmacists who refuse to dispense contraceptive prescriptions.

A plaintiff may consider suing *both* the pharmacy and the individual pharmacist who has refused to dispense prescription contraceptives. State public accommodations laws typically prohibit discrimination by employees or agents of places of public

CODE ANN. § 13-7-4(3) (“damages and any other remedy available in law or equity”); VT. STAT. ANN. tit. 9, § 4506(a)–(b) (injunctive relief, compensatory and punitive damages, costs, attorneys’ fees, and “any other appropriate relief”); WASH. REV. CODE ANN. § 49.60.250(5) (West 2002) (injunctive relief, affirmative action, damages, and compliance reporting); W. VA. CODE ANN. § 5-11-10 (injunctive relief, affirmative action, including access to place of public accommodation, and compliance reporting); *id.* § 5-11-13(c) (injunctive relief, affirmative action, costs, and attorneys’ fees); WIS. STAT. ANN. § 106.52(4)(e)(1) (injunctive relief, damages, including punitive damages, court costs, and attorneys’ fees).

⁵⁵ The preamble of a public accommodations statute typically illustrates a purpose to eradicate discrimination in places of public accommodation. *See, e.g.*, N.Y. EXEC. LAW § 290(3) (McKinney 2005). The New York statute states:

The legislature hereby finds and declares that the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants. A division in the executive department is hereby created to encourage programs designed to insure that every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the state; to encourage and promote the development and execution by all persons within the state of such state programs; *to eliminate and prevent discrimination* in employment, *in places of public accommodation*, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided; and the division established hereunder is hereby given general jurisdiction and power for such purposes.

Id. (emphasis added).

accommodation.⁵⁶ That said, bringing a claim solely against the actual pharmacy is far preferable to challenging the actions of an individual pharmacist. First, as will be discussed in Part II.C., an individual pharmacist may have additional legal defenses to a state public accommodation claim that a pharmacy would not have.⁵⁷ Moreover, a pharmacy is ideally positioned to establish personnel management practices that guarantee patients' timely access to prescription contraceptives while accommodating the rights and beliefs of pharmacists who may object to dispensing the medicine.⁵⁸ A pharmacy will also be better placed than an individual pharmacist to pay meaningful damages to a plaintiff and to undertake substantial steps to ensure broad-based access to prescription contraceptives in the store. Finally, a lawsuit against a pharmacy provides a useful opportunity for raising public awareness about the broader issue of pharmacy refusals and undertaking educational advocacy on the importance of access to contraception.

B. Refusal to Dispense Prescription Contraceptives in a Pharmacy as Sex Discrimination

To establish that a refusal to dispense prescription contraceptives

⁵⁶ For instance, Alaska statute section 18.80.230(a) prohibits discrimination by "the owner, lessee, manager, agent, or employee of a public accommodation." ALASKA STAT. § 18.80.230(a) (2004). Similarly, the Delaware statute states:

[n]o person being the owner, lessee, proprietor, manager, director, supervisor, superintendent, agent or employee of any place of public accommodation, shall directly or indirectly refuse, withhold from or deny to any person, on account of race, age, marital status, creed, color, sex, disability or national origin, any of the accommodations, facilities, advantages or privileges thereof.

DEL. CODE ANN. tit. 6, § 4504(a) (2005) (amended 2006). Other states employ similar language in their public accommodations statutes. *E.g.*, IOWA CODE ANN. § 216.7(1) (West 2000); ME. REV. STAT. ANN. tit. 5, § 4592(1) (Supp. 2005); MD. CODE ANN. § 49B-5(b); MONT. CODE ANN. § 49-2-304(1) (2005); N.H. REV. STAT. ANN. § 354-A:17 (Supp. 2005); N.J. STAT. ANN. § 10:5-12(f)(1) (West 2002 & Supp. 2006); OHIO REV. CODE ANN. § 4112.02(G) (LexisNexis 2001). Other statutes have broad language prohibiting public accommodations discrimination by "a" or "any" person. *E.g.*, COLO. REV. STAT. § 24-34-601(2) (2005); NEB. REV. STAT. § 20-134 (1997).

⁵⁷ See *infra* Part II.C.3-4.

⁵⁸ See Marcia D. Greenberger & Rachel Vogelstein, *Pharmacist Refusals: A Threat to Women's Health*, 308 SCIENCE 1557, 1558 (2005) (Pharmacies, rather than pharmacists, should bear the burden of "ensuring that prescriptions for all drugs are filled without delay or interference. Such a requirement would allow pharmacies to make arrangements to accommodate the personal beliefs of individual pharmacists."); see also *infra* Part II.C.2 (examining the scope of a pharmacy's duty to "reasonably accommodate" a pharmacist's religious beliefs under Title VII of the Civil Rights Act).

in a pharmacy violates a state public accommodations statute, the plaintiff must show that such a refusal constitutes sex discrimination under the statute. Existing federal and state court jurisprudence on contraceptive coverage supports this claim.

In particular, the reasoning of existing case law on Title VII of the Civil Rights Act of 1964⁵⁹ as amended by the Pregnancy Discrimination Act (PDA)⁶⁰ is compelling and applicable to the situation of pharmacy refusal. Title VII provides:

It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin⁶¹

With the passage of the PDA, Congress amended Title VII to state in relevant part:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes. . . .⁶²

The PDA was enacted in response to a series of cases standing for the proposition that discrimination based on pregnancy was not sex discrimination. First, in *Geduldig v. Aiello*, the Supreme Court rejected a claim that a disability insurance program's exclusion of coverage for pregnancy-related disabilities constituted sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.⁶³ Subsequently, the Supreme Court's decision in *General Electric Co. v. Gilbert* held that an employer's disability benefits plan which denied disability benefits for any work absence on account of pregnancy did not violate Title VII's prohibition on sex discrimination.⁶⁴ The *Gilbert* Court's reasoning

⁵⁹ 42 U.S.C. §§ 2000a–2000h-6 (2000).

⁶⁰ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)).

⁶¹ 42 U.S.C. § 2000e-2(a)(1).

⁶² *Id.* § 2000e(k).

⁶³ 417 U.S. 484, 494 (1974).

⁶⁴ 429 U.S. 125, 128, 145–46 (1976). As a component of its compensation package, the company provided "nonoccupational sickness and accident benefits to all employees under its

hinged upon a distinction the Court created between pregnancy and the status of being female.⁶⁵ While the Court recognized that “it is true that only women can become pregnant,” it nonetheless found that “it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”⁶⁶ The *Gilbert* majority expressed its support for the *Geduldig* Court’s view that no gender-based discrimination occurred in such disability programs because the programs “[did] not exclude anyone from benefit eligibility because of gender but merely remove[d] one physical condition—pregnancy—from the list of compensable disabilities.”⁶⁷ *Gilbert* also distinguished the status of pregnancy from other disabilities by finding that it was “not a ‘disease’ at all” and was “significantly different from the typical covered disease or disability,” as it was “often a voluntarily undertaken and desired condition.”⁶⁸

The *Gilbert* dissent vehemently disagreed with the majority’s assumptions about pregnancy and its conclusion that “an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.”⁶⁹ The dissent found that “the social policies and aims to be furthered by Title VII . . . fairly forbid an ultimate pattern of coverage that insures all risks except a commonplace one that is applicable to women but not to men.”⁷⁰ The dissent observed that the employer’s disability plan covered all disabilities that impacted both sexes, those disabilities that were “male-specific or ha[d] a predominant impact on males” such as vasectomies and circumcisions, and those disabilities that uniquely impacted women “except for the most prevalent, pregnancy.”⁷¹ Additionally, the dissent observed that the labeling of pregnancy as a “voluntary” condition was not a compelling factor as a basis for exclusion because the disability plan covered other “voluntary” disabling conditions such as injuries resulting from recreational activities and elective operations such as cosmetic

Weekly Sickness and Accident Insurance Plan . . . in an amount equal to 60% of an employee’s normal straight-time weekly earnings. These payments [were] paid to employees who [became] totally disabled as a result of a nonoccupational sickness or accident.” *Id.* at 128.

⁶⁵ *Id.* at 134–35.

⁶⁶ *Id.* at 134 (internal quotation marks omitted) (quoting *Geduldig*, 417 U.S. at 496 n.20).

⁶⁷ *Id.* (internal quotation marks omitted) (quoting *Geduldig*, 417 U.S. at 496 n.20).

⁶⁸ *Id.* at 136.

⁶⁹ *Id.*; see *id.* at 150–51 (Brennan, J., dissenting).

⁷⁰ *Id.* at 155 (Brennan, J., dissenting).

⁷¹ *Id.* at 152, 155.

surgery.⁷² Finally, the dissent noted that many pregnancies did result in “disease” in the form of miscarriages or other medical complications.⁷³

Congress responded to *Gilbert* by enacting the PDA⁷⁴ which amended Title VII “to reflect the commonsense view . . . that distinctions based on pregnancy are *per se* violations of Title VII[s]” prohibitions against sex discrimination in employment.⁷⁵

The change in Title VII had immediate and significant legal consequences. In *Newport News Shipbuilding & Dry Dock Co. v. Equal Employment Opportunity Commission*, the Supreme Court held that an employer’s health plan that provided female employees pregnancy-related hospitalization benefits equal to those for other medical conditions but provided male employees with less comprehensive pregnancy benefits for their spouses violated Title VII as amended by the PDA “because the protection it afford[ed] to married male employees [was] less comprehensive than the protection it afford[ed] to married female employees.”⁷⁶ The Court again stressed that “[t]he Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”⁷⁷

In *UAW v. Johnson Controls, Inc.*, the Court examined the question of whether Title VII as amended by the PDA permitted an employer to “exclude a fertile female employee from certain jobs because of its concern for the health of the fetus the woman might

⁷² *Id.* at 151.

⁷³ *Id.* The dissent also noted that “even the proposition that pregnancy is a voluntary condition is overbroad” because “negligent [and] accidental conception also occurs.” *Id.* at 151 n.3 (quoting *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 377 (E.D. Va. 1974)).

⁷⁴ Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)); see H.R. REP. No. 95-948, at 2 (1978) (“[T]he [*Gilbert*] majority erred in finding that the exclusion of pregnancy disability coverage was a nondiscriminatory policy. . . . It is the committee’s view that the dissenting Justices correctly interpreted the Act.”).

⁷⁵ H.R. REP. No. 95-948, at 3.

⁷⁶ 462 U.S. 669, 670–71, 676 (1983). While recognizing that the congressional debates on the PDA focused principally on the challenges faced by working women, the Court stated that the content of the debate did not suggest that the legislation concerned only the problem of discrimination against female employees. *Id.* at 679–80. Rather, “[p]roponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment—including but not limited to pregnant women workers.” *Id.* at 681 (alteration in original).

⁷⁷ *Id.* at 684.

conceive.”⁷⁸ The Court held that the employer could not maintain such a policy.⁷⁹ The Court stated that the PDA “made clear that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.”⁸⁰ The employer’s “policy classifie[d] on the basis of gender and childbearing capacity, rather than [on] fertility alone. . . . [and did] not seek to protect the unconceived children of all its employees.”⁸¹ The Court held that under the PDA, such a classification “on the basis of potential for pregnancy” was equivalent to “explicit sex discrimination.”⁸² The Court also rejected the contention that the policy could be sustained on the basis that sex was a bona fide occupational qualification (“BFOQ”)—in particular, that discrimination on the basis of sex was permissible if it related to an employee’s ability to perform the job safely.⁸³ The Court found that the PDA modified the BFOQ defense with respect to pregnancy and established that women who were either pregnant or capable of being pregnant had to be treated the same as male employees absent any difference “in their ability or inability to work” and such women had the right to make their own decisions about the impact of work on their reproductive abilities.⁸⁴

In turn, the denial of prescription contraceptive coverage in an otherwise comprehensive employee health benefits plan has also been viewed as sex discrimination.⁸⁵ The seminal federal court decision in this field is *Erickson v. Bartell Drug Co.*⁸⁶ The *Erickson* court held that “the selective exclusion of prescription contraceptives from [an employer’s] generally comprehensive prescription plan constitutes discrimination on the basis of sex” under Title VII as amended by the PDA.⁸⁷

The court in *Erickson* recognized that

Male and female employees have different, sex-based disability and healthcare needs, and the law is no longer

⁷⁸ 499 U.S. 187, 190 (1991).

⁷⁹ *Id.* at 211.

⁸⁰ *Id.* at 199 (internal quotation marks omitted) (quoting *Newport News*, 462 U.S. at 684).

⁸¹ *Id.* at 198 (noting evidence of “the debilitating effect of lead exposure on the male reproductive system”).

⁸² *Id.* at 199.

⁸³ *Id.* at 200–03.

⁸⁴ *Id.* at 204, 206 (internal quotation marks omitted) (quoting 42 U.S.C. § 2000e(k) (2000)).

⁸⁵ *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1276–77 (W.D. Wash. 2001).

⁸⁶ *Id.*

⁸⁷ *Id.* at 1268, 1276–77.

blind to the fact that only women can get pregnant, bear children, or use prescription contraception. The special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs.⁸⁸

The legislative history of the PDA was central to the *Erickson* court's reasoning. The court noted that Congress enacted the PDA in order to overturn the Supreme Court's decision in *Gilbert*.⁸⁹ Although the PDA made no mention of contraceptives, the *Erickson* court noted that

Of critical importance to this case . . . is the fact that, in enacting the PDA, Congress . . . not only recognized that there are sex-based differences between men and women employees, but also required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same.⁹⁰

Although Title VII did not require employers to offer "any particular type or category of benefit," the court stated that an employer that offered a prescription plan covering most, but not all, services was legally obligated under the statute "to make sure that the resulting plan [did] not discriminate based on sex-based characteristics and that it provide[d] equally comprehensive coverage for both sexes."⁹¹ Because only women use prescription contraceptives, the employer's failure to provide coverage for these medicines was discriminatory.⁹² The court rejected the employer's defense that the PDA was not applicable because its express terms did not include contraceptive coverage, stating that Congress enacted the PDA in order to eliminate gender-based discrimination "in all aspects of employment, from hiring to the provision of fringe benefits."⁹³ The court in *Erickson* also noted that its reasoning accorded with that of a prior Equal Employment Opportunity Commission (EEOC) decision, which ruled that an employer's failure to provide coverage for prescription contraceptives and devices in a health care plan violated Title VII as amended by the PDA.⁹⁴

⁸⁸ *Id.* at 1271.

⁸⁹ *Id.* at 1270.

⁹⁰ *Id.*

⁹¹ *Id.* at 1272.

⁹² *Id.*

⁹³ *Id.* at 1274.

⁹⁴ *Id.* at 1275-76. In that prior decision, the EEOC stated that "[c]ontraception is a means

The *Erickson* court's language on the importance of contraception to women is particularly compelling. The court stated that "the availability of affordable and effective contraceptives is of great importance to the health of women and children because it can help to prevent a litany of physical, emotional, economic, and social consequences."⁹⁵ The court observed that the United States had a very high rate of unintended pregnancy which "carr[ie]d enormous costs and health consequences for the mother, the child, and society as a whole."⁹⁶ Moreover, the court noted that the burdens of unintended pregnancies fell "most harshly on women and interfere[d] with their choice to participate fully and equally in the 'marketplace and the world of ideas.'"⁹⁷ Indeed, the court recognized that obtaining contraceptive care was a "primary healthcare issue throughout much of a woman's life and is, in many instances, of more immediate importance to her daily healthcare situation than most other medical needs."⁹⁸ The fact that pregnancy was not understood as a "disease" or "illness" was not a material difference because "[b]eing pregnant, though natural, is not a state that is desired by all women or at all points in a woman's life. Prescription contraceptives, like all other preventative drugs, help the recipient avoid unwanted physical changes."⁹⁹ Moreover, the defendant employer in *Erikson* covered other preventative drugs.¹⁰⁰

Erickson marks a watershed moment for jurisprudence on Title VII and contraceptive coverage because it is the first federal court decision to hold that Title VII's protections against pregnancy discrimination mandate contraceptive coverage in employer health

by which a woman controls her ability to become pregnant. The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives." Comm'n Decision on Coverage of Contraception, 2000 WL 33407187, at *2 (E.E.O.C. Dec. 14, 2000).

⁹⁵ *Erickson*, 141 F. Supp. 2d at 1273. The court listed these consequences in detail:

A woman with an unintended pregnancy is less likely to seek prenatal care, more likely to engage in unhealthy activities, more likely to have an abortion, and more likely to deliver a low birthweight, ill, or unwanted baby. Unintended pregnancies impose significant financial burdens on the parents in the best of circumstances. If the pregnancy results in a distressed newborn, the costs increase by tens of thousands of dollars.

Id. (internal citation omitted).

⁹⁶ *Id.*

⁹⁷ *Id.* (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)).

⁹⁸ *Id.* at 1273–74.

⁹⁹ *Id.* at 1273.

¹⁰⁰ *Id.*

plans.¹⁰¹ The *Erickson* court's robust language on the importance of contraception to women's lives and health provides a particularly compelling and articulate explanation of the necessity for employers to provide prescription contraceptive coverage in health plans on the same terms that they cover other prescription medicines. Several other state and federal legal decisions have relied upon some combination of Title VII and the PDA to require various employers to provide coverage for prescription contraceptives in health plans on the same terms that they provide prescription coverage to other medicines.¹⁰²

¹⁰¹ *Erickson* is not the first favorable federal court decision to discuss insurance coverage for prescription contraceptives, but it is the first one to reach a judgment on the issue. In *Equal Employment Opportunity Commission v. United Parcel Service, Inc.*, the EEOC brought a Title VII claim on behalf of certain employees of United Parcel Service (UPS) alleging that UPS's failure to include coverage of oral contraceptives in its health benefit plan violated Title VII. 141 F. Supp. 2d 1216, 1217 (D. Minn. 2001). The court rejected UPS's motion to dismiss, which argued that no disparate treatment claim existed because the exclusion of oral contraceptives was "gender neutral" and that the plan's dependent coverage eliminated any disparate impact (namely, both female employees and spouses of male employees were not covered). *Id.* at 1218–20. The court found that the plaintiffs sufficiently alleged a disparate treatment claim because "[t]he plan exclude[d] oral contraceptives for any reason, including treatment for female hormonal disorders, while medically necessary treatments for male hormonal disorders are not excluded." *Id.* at 1219. The court also rejected UPS's disparate impact argument because female employees and spouses of male employees were more disadvantaged than male employees and spouses of female employees. *Id.* at 1220. Because *United Parcel Service* came before the court as a motion to dismiss, its discussion of the health plan at issue in the case is not a conclusive ruling on the legality of the plan under Title VII, but only a finding that the allegations formed a prima facie Title VII case and thus survived dismissal under rule 12(b)(6) of the Federal Rules of Civil Procedure. *Id.* Moreover, the court did not consider the claim as a violation of the PDA because this claim was not properly alleged in the complaint. *Id.* at 1218 n.1. On December 13, 2001, the case was settled by consent decree. *Equal Employment Opportunity Comm'n v. United Parcel Serv., Inc.*, No. 00-2229 PAM/JGL (D. Minn. Dec. 13, 2001) (consent decree). The decree required UPS to "modify [its] Flexible Benefits Plan to provide coverage for oral contraceptives, prescribed for birth control and/or for legitimate medical reasons" and provided monetary relief to a limited class of women who had been prescribed oral contraceptives for purposes other than pregnancy prevention. *Id.* at ¶¶ 5, 7, 9.

¹⁰² *See, e.g.*, *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1015, 1022 (W.D. Mo. 2006) (granting plaintiff's motion for summary judgment on the claim that defendant's failure to provide contraceptive coverage in health plan violated the PDA and Title VII); *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1149 (D. Neb. 2005) (granting plaintiffs' motion for partial summary judgment on the claim that the employer violated Title VII as amended by the PDA by providing health insurance benefits that exclude all prescription contraception); *Wright v. DaimlerChrysler Corp.*, No. 4:03-CV-1843-CDP, 2005 U.S. Dist. LEXIS 42366, at *2–*3 (E.D. Mo. Jan. 10, 2005) (denying motion to dismiss claim that employer's failure to provide contraceptive coverage in health plan violated Title VII, but granting motion to dismiss claim that this policy violated PDA); 51 Mont. Op. Att'y Gen. No. 16 (Mar. 28, 2006), 2006 WL 842284, at *5 (holding that Montana's unisex insurance law and the Montana Human Rights Act require employee benefit and insurance plans to include coverage for prescription contraceptives and related medical services when the plan otherwise

The reasoning of *Erickson*, the EEOC decision, and numerous other rulings (hereinafter called the “contraceptive equity cases”¹⁰³) can form the heart of a state public accommodations challenge to a refusal to dispense prescription contraceptives in a pharmacy. The

provides prescription drug coverage and other medical services); Wis. Op. Att’y Gen. No. 1-04 (Aug. 16, 2004), 2004 WL 3078999, at *1 (holding that “the exclusion of contraceptives from an employer or college or university sponsored benefits program that otherwise provides prescription drug coverage violates Wisconsin law prohibiting sex discrimination in employment and in higher education”); Wash. Att’y Gen. Op. No. 5 (Aug. 8, 2002), 2002 WL 31936085, at *7 (holding that “offering a generally comprehensive prescription drug plan that excludes prescription contraceptives would constitute an unfair practice and is not an option for either insurance carriers or employers”); *cf.* *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 981, 986 (E.D. Mo. 2003) (denying defendant’s motion to dismiss plaintiff’s claim that “the selective exclusion of prescription contraceptives from an otherwise comprehensive health care benefits plan constitutes discrimination on the basis of sex”); *Mauldin v. Wal-Mart Stores, Inc.*, No. A.1:01-CV-2755-JEC, 2002 WL 2022334, at *16–*17 (N.D. Ga. Aug. 23, 2002) (granting class certification to plaintiffs alleging that defendant’s failure to cover prescription contraceptives in health plan violated Title VII as amended by the PDA).

Only one case rejects this prevailing argument. In *Cummins v. Illinois*, a federal district court granted a defendant-employer’s motion to summarily dismiss a claim that its failure to cover prescription contraceptives in its health plan violated Title VII and the PDA. No. 2002-CV-4201-JPG, 2005 U.S. Dist. LEXIS 42634, at *1–*2, *28 (S.D. Ill. Aug. 30, 2005). The reasoning of this court’s decision is extremely conclusory; much of the court’s determination about the absence of evidence of sex discrimination in the health plan rests upon the fact that women are not the sole users of contraception but that men also use one form of contraception (the condom). *See id.* at *6. This case does not successfully distinguish *Erickson* and subsequent jurisprudence because it never squarely addresses the nub of the contraceptive equity argument—namely, that women are uniquely disadvantaged by a health plan’s failure to cover *prescription* contraceptives. This case is now on appeal. *Cummins*, 2005 U.S. Dist. LEXIS 42634, *appeal docketed*, No. 05-3877 (7th Cir. Sept. 30, 2005). The other two cases with negative treatment of contraceptive coverage in prescription plans also do not significantly undermine the argument for coverage. *Cf.* *Alexander v. Am. Airlines, Inc.*, No. 4:02-CV-0252-A, 2002 WL 731815, at *4 (N.D. Tex. Apr. 22, 2002) (granting motion to dismiss because, *inter alia*, plaintiff lacked standing to raise contraceptive equity claim and stating in dicta that plaintiff’s claim would fail on the merits even if she had standing); *Glaubach v. Regence BlueShield*, 74 P.3d 115, 116, 118–19 (Wash. 2003) (holding that a health plan’s failure to provide all forms of FDA prescription contraceptives did not violate two provisions of Washington state insurance law). The adverse *Glaubach* ruling has virtually no practical impact in Washington state, which has a regulation that requires contraceptive coverage in otherwise comprehensive health plans. WASH. ADMIN. CODE 284-43-822 (effective Oct. 6, 2001). In addition, the *Glaubach* court recognized that, under *Erickson*, employers are required to provide coverage in their health plans for prescription contraceptives on the same terms that they provide coverage for other prescriptions. *Glaubach*, 74 P.3d at 116.

¹⁰³ Several women’s rights and reproductive rights organizations use the term “contraceptive equity” to describe the legal requirement that employers provide prescription contraception in employee health plans on the same terms that they cover other prescription drugs. *See, e.g.*, Ctr. for Reprod. Rights, Contraceptive Equity (Sept. 13, 2005), http://www.crlp.org/st_law_equity.html (describing state laws that mandate contraceptive equity in employee health programs); Coal. of Labor Union Women, Contraceptive Equity Project, <http://www.cluw.org/contraceptive.html> (last visited Oct. 1, 2006) (“Contraceptive equity means simple fairness. If a health plan covers prescription drugs and devices, it has to cover contraception too.”).

arguments made in these cases illustrate that a refusal to dispense prescription contraceptives in a pharmacy is tantamount to sex discrimination.

First, “only women can get pregnant, bear children, or use prescription contraception.”¹⁰⁴ The use of prescription contraceptives by women is a sex-related condition because such medicines are used solely by women¹⁰⁵ for the management of health conditions exclusive to women, such as gynecological problems and pregnancy prevention.¹⁰⁶ As such, the need for women to access prescription contraceptives is tantamount to a sex-based characteristic.¹⁰⁷

Second, a refusal to fill a contraceptive prescription in a pharmacy is a violation of a state public accommodations law’s prohibition on sex discrimination. A pharmacy is a place of public accommodation that opens its doors to the community and offers goods and services to the public at large.¹⁰⁸ In doing so, the pharmacy is compelled by state public accommodations law to offer its goods and services in a nondiscriminatory manner.¹⁰⁹ A refusal to fill a contraceptive prescription in a pharmacy is discrimination

¹⁰⁴ *Erickson*, 141 F. Supp. 2d at 1271; *see Stocking*, 436 F.Supp. 2d at 1017 (stating that “only women can become pregnant” (internal quotation marks omitted) (quoting Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680 (8th Cir. 1996)).

¹⁰⁵ Women are the sole consumers of prescription birth control methods such as hormonal contraceptives, intrauterine devices, and barrier methods such as the cervical cap. *See, e.g.*, ORTHO-MCNEIL PHARMACEUTICAL INC., ORTHO TRI-CYCLEN TABLETS (Mar. 2001), *available at* <http://www.ortho-mcneilpharmaceutical.com/products/pi/pdfs/cycltri.pdf> (hormonal contraceptive literature); FEI WOMENS HEALTH LLC., PARAGARD: INTRAUTERINE COPPER CONTRACEPTIVE (Sept. 2005), *available at* http://www.paragard.com/paragard/custom_images/Prescribing-Info.pdf (intrauterine device literature); Femcap: A New Non-Hormonal Latex-Free Birth Control Method for Health Conscious Women, <http://www.femcap.com/description.htm> (last visited Oct. 1, 2006) (cervical cap literature); *see also In re Union Pac. R.R.*, 378 F. Supp. 2d at 1141–42 (“All six available methods of prescription contraception are used exclusively by women: oral contraceptives (‘the pill’); intrauterine devices (‘IUD’); Depo Provera injections; barrier methods (diaphragm and cervical cap); the contraceptive patch; and the contraceptive ring.”).

¹⁰⁶ *See supra* note 25 and accompanying text.

¹⁰⁷ *Cf. Cooley*, 281 F. Supp. 2d at 984 (“[A]s prescription contraceptives are only available to women, the exclusion is not gender neutral because it only burdens female employees. . . . Further, as only women have the potential to become pregnant, denying a prescription medication that allows women to control their reproductive capacity is necessarily a sex-based exclusion.”); *Erickson*, 141 F. Supp. 2d at 1271–72 (recognizing that prescription birth control is one of “[t]he special or increased healthcare needs associated with a woman’s unique sex-based characteristics” and that “[i]n light of the fact that prescription contraceptives are used only by women, [the employer’s] choice to exclude that particular benefit from its generally applicable benefit plan is discriminatory”).

¹⁰⁸ *See supra* notes 50–51 and accompanying text.

¹⁰⁹ *See supra* note 49 and accompanying text.

on the basis of a sex-based characteristic: the ability to use prescription contraceptives. Indeed, a refusal to fill a contraceptive prescription in a pharmacy that continues to fill other prescriptions is analogous to an employer's refusal to provide prescription contraceptive coverage in its health plan while providing prescription coverage for other medications.¹¹⁰

Furthermore, a refusal to fill a contraceptive prescription in a pharmacy contravenes the public policy purposes of the public accommodations statute.¹¹¹ A refusal to dispense prescription contraceptives in a pharmacy raises many of the same societal-level gender equality concerns as does an employer's failure to provide prescription coverage for contraception when it provides prescription coverage for other medications. As previously discussed, access to prescription contraceptives is necessary for women "to participate fully and equally in the 'marketplace and the world of ideas.'"¹¹² The denial of access to prescription contraceptives at the pharmacy level could be devastating to women's health given that there are millions of American women who utilize contraception each year.¹¹³

In turn, the goal of a public accommodations statute that prohibits sex-based discrimination is to promote the full participation of women in public life and to ensure their unfettered access to the goods and services of places of public accommodation,¹¹⁴ such as pharmacies. The public policy principles

¹¹⁰ *Cf. Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1016 (W.D. Mo. 2006) (stating that an employer's failure to cover prescription contraceptives for women "disregards the sex-related circumstance that the limitation of prescribed contraceptives applies to women only, under current availability conditions, and also disregards the importance of pregnancy or freedom from that condition for women, for health conditions, narrowly defined, and otherwise"); *Erickson*, 141 F. Supp. 2d at 1277 ("Although the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered.")

¹¹¹ *See supra* note 48 and accompanying text.

¹¹² *Erickson*, 141 F. Supp. 2d at 1273 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975)).

¹¹³ GUTTMACHER INST., *supra* note 14.

¹¹⁴ The preamble or statement of purpose of these public accommodations statutes typically reflects such a purpose. For instance, the "Findings and declarations" section of the New Jersey Law Against Discrimination reflects the notion that discrimination is harmful to individuals and society and illustrates an intent to achieve full integration in public life:

The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, affectional or sexual orientation, marital status, familial status, liability for service in the Armed Forces of the United States, disability or nationality, are matters of concern to the

underlying state public accommodations statutes are quite analogous to the principles enshrined in the PDA and the contraceptive equity cases, which have aimed to remedy the pernicious discrimination suffered by women in the labor market on account of a unique, sex-based characteristic: the ability to become pregnant (and its various associated conditions, such as the need for contraception).¹¹⁵ State public accommodations statutes work in

government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State

The Legislature further declares its opposition to such practices of discrimination . . . , in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and ensured.

The Legislature further finds that because of discrimination, people suffer personal hardships, and the State suffers a grievous harm. The personal hardships include: economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm resulting from the strain of employment controversies; relocation, search and moving difficulties; anxiety caused by lack of information, uncertainty, and resultant planning difficulty; career, education, family and social disruption; and adjustment problems, which particularly impact on those protected by this act. Such harms have, under the common law, given rise to legal remedies, including compensatory and punitive damages. The Legislature intends that such damages be available to all persons protected by this act and that this act shall be liberally construed in combination with other protections available under the laws of this State.

N.J. STAT. ANN. § 10:5-3 (West Supp. 2006). Undertaking a similar policy analysis, the court in *King v. Greyhound Lines, Inc.* held that racial slurs made by a public accommodation employee to a customer during a transaction violated the state's public accommodations statute and that

the chief harm resulting from the practice of discrimination by establishments serving the general public is not the monetary loss of a commercial transaction or the inconvenience of limited access but, rather, the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.

656 P.2d 349, 352 (Or. Ct. App. 1982).

¹¹⁵ See H.R. REP. No. 95-948, at 3 (1978), as reprinted in 1978 U.S.C.C.A.N. 4749, 4751 ("As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."). The *Erickson* court emphasized that

The PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant. Read in the context of Title VII as a whole, it is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees.

141 F. Supp. 2d at 1271. Similarly, the EEOC has commented on the enactment of the PDA, stating that

Congress wanted to equalize employment opportunities for men and women, and to address discrimination against female employees that was based on assumptions that they would become pregnant. . . . It was only by extending such protection that Congress could ensure that women would not be disadvantaged in the workplace either because of their pregnancies or because of their ability to bear children.

parallel to the PDA and contraceptive equity cases because they all rest on the shared notion that sex-based discrimination is not an isolated individual concern but harms society as a whole.

Some state public accommodations statutes explicitly prohibit pregnancy discrimination or link sex and pregnancy as does the PDA.¹¹⁶ In these states, the failure to dispense prescription contraceptives can be viewed both as sex discrimination for the aforementioned reasons and as discrimination based on the pregnancy-related status protected by the statute because prescription contraceptives are used to prevent pregnancy and its associated health risks.¹¹⁷

The argument is also strong in those states that do not explicitly link sex discrimination and pregnancy discrimination but that only prohibit sex discrimination. The fact that the contraceptive equity cases rely on the PDA, the text of which involves pregnancy and not

Comm'n Decision on Coverage of Contraception, 2000 WL 33407187, at *3 (E.E.O.C. Dec. 14, 2000).

¹¹⁶ *E.g.*, ALASKA STAT. § 18.80.230(a)(1) (2004) (prohibiting public accommodations discrimination on the basis of “sex, physical or mental disability, marital status, changes in marital status, pregnancy, parenthood, race, religion, color, or national origin”); ARK. CODE ANN. § 16-123-102(1) (2006) (stating that “[b]ecause of gender’ means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions”); CAL. CIV. CODE § 51(e)(4) (West Supp. 2006) (referring to California’s Government Code for the definition of “Sex” under California’s equal rights requirement); CAL. GOV’T CODE § 12926(p) (West 2005) (“‘Sex’ includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth.”); D.C. CODE ANN. § 2-1401.05 (LexisNexis 2005) (same); MINN. STAT. ANN. § 363A.03(subdiv. 42) (West 2004 & Supp. 2006) (“‘Sex’ includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth.”); N.H. REV. STAT. ANN. § 354-A:7(VI)(a) (1995) (same); N.D. CENT. CODE § 14-02.4-02(18) (Supp. 2005) (same); OHIO REV. CODE ANN. § 4112.01(B) (LexisNexis 2001). The Ohio Code states that

[T]he terms “because of sex” and “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

....

Id.

¹¹⁷ *Cf. In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1143 (D. Neb. 2005) (“Because the PDA . . . applies to ‘women affected by pregnancy’ and not merely to *pregnant* women, the clear language of the statute requires that the Plans treat the *risk* of pregnancy no less favorably than the Plans treat other similar health risks.”). The risks of pregnancy to women’s health and lives are well recognized. *See generally* CTRS. FOR DISEASE CONTROL, U.S. DEPT OF HEALTH & HUMAN SERVS., SAFE MOTHERHOOD: PROMOTING HEALTH FOR WOMEN BEFORE, DURING, AND AFTER PREGNANCY 2 (2006), *available at* http://www.cdc.gov/nccdphp/publications/aag/pdf/aag_drh2006.pdf (stating that “2–3 women die of pregnancy complications each day” in the United States).

prescription contraceptives,¹¹⁸ does not make this body of law distinguishable from the public accommodations context. As *Erickson* stated, the fact that the PDA failed to mention contraceptives specifically was not a bar to the application of the statute to require employers to provide coverage for prescription contraceptives.¹¹⁹ Rather, the dispositive consideration involved the recognition that women were uniquely impacted by the need for prescription contraceptives, read in combination with the statute's aim of promoting gender equality.¹²⁰ Both of these concerns have equal force in the state public accommodations context.

For these reasons, a refusal to dispense prescription contraceptives in a pharmacy raises many of the same concerns and problems for women's equality as does an employer's failure to provide health care coverage for contraception on equal terms with other medicines. A refusal to dispense prescription contraceptives by a pharmacy that continues to dispense all prescriptions to male customers is treating the two classes of customers differently based upon a discriminatory notion. The reasoning of the contraceptive equity cases can form the crux of a public accommodations claim that a refusal to dispense prescription contraceptives in a pharmacy is tantamount to sex discrimination. The application of this case law will be strengthened if a state already has favorable rulings requiring employers to include prescription contraceptive coverage in health care plans.¹²¹

C. Potential Defenses to a State Public Accommodations Claim

A pharmacy and a pharmacist who are sued for a public accommodations claim might pursue different responses. First, a pharmacy may try to disclaim liability for the acts of a pharmacist who refuses to dispense prescription contraception.¹²² Second, a pharmacy may try to claim that the applicability of a state public accommodations statute is preempted by federal employment law.¹²³ Third, pharmacists in certain states may also claim the protections

¹¹⁸ 42 U.S.C. § 2000e(k) (2000).

¹¹⁹ 141 F. Supp. 2d at 1270.

¹²⁰ *Id.* at 1271.

¹²¹ *See supra* notes 101–102 and accompanying text.

¹²² *See infra* Part II.C.1.

¹²³ *See infra* Part II.C.2.

of certain state law “refusal clause” statutes.¹²⁴ Fourth, pharmacists may try to bring constitutional challenges to state public accommodations laws or laws prohibiting refusals.¹²⁵ This Article provides an overview of each of these possibilities.

1. Pharmacy Disclaiming Liability for a Pharmacist’s Actions

A pharmacy may try to defend a claim of public accommodations discrimination by arguing that it is not responsible for the actions of a pharmacist who fails to dispense prescription contraceptives. Although there is not extensive jurisprudence examining the ability of a place of public accommodation to disclaim liability for the discriminatory acts of its employees, the existing state and federal public accommodations case law illustrates the legal analysis involved in such a claim and the factors that might prevent a pharmacy from denying responsibility for its pharmacist’s actions.

For instance, in *State v. Hoshijo*, the Hawai’i Supreme Court rejected a state university’s argument that it could not be liable under the public accommodations law for the racially discriminatory statements of its employee to a spectator at a sports match.¹²⁶ The court held that the university was liable for the biased acts pursuant to the doctrine of respondeat superior,¹²⁷ under which an employer may be liable for the acts of its employees or agents that occur within the scope of the employee’s relationship with the employer.¹²⁸ According to state law on respondeat superior, the

¹²⁴ See *infra* Part II.C.3.

¹²⁵ See *infra* Part II.C.4.

¹²⁶ 76 P.3d 550, 552 (Haw. 2003).

¹²⁷ *Id.* at 562–64.

¹²⁸ Respondeat superior (also known as vicarious liability), the law of agency, and the role of these legal doctrines in discrimination cases are very well-examined topics in the law. See, e.g., 3 AM. JUR. 2D *Agency* §§ 1–354 (2002) (discussing the law of agency); 27 AM. JUR. 2D *Employment Relationship* §§ 373–88 (2004) (discussing vicarious liability); Susan D. Carle, *Acknowledging Informal Power Dynamics in the Workplace: A Proposal for Further Development of the Vicarious Liability Doctrine in Hostile Environment Sexual Harassment Cases*, 13 DUKE J. GENDER L. & POL’Y 85 (2006) (discussing respondeat superior in the context of sexual harassment cases); Charles Davant IV, *Employer Liability for Employee Fraud: Apparent Authority or Respondeat Superior?*, 47 S.D. L. REV. 554 (2002) (discussing respondeat superior in instances of employee fraud); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999) (discussing respondeat superior in the context of the claimant’s civil rights); Mark E. Roszkowski & Christie L. Roszkowski, *Making Sense of Respondeat Superior: An Integrated Approach for Both Negligent and Intentional Conduct*, 14 S. CAL. REV. L. & WOMEN’S STUD. 235 (2005) (discussing the different treatments of respondeat superior based on whether the agent’s conduct was intentional or unintentional);

university was liable for the employee's actions if the employee was an agent of the university and the employee was acting within the scope of his authority.¹²⁹ Although the university conceded that the employee was its agent, it contended that the employee was acting outside the scope of his authority when he made the racially discriminatory statements.¹³⁰ The court rejected this argument, finding that the employee acted within the scope of his authority because the act "was of the kind that he was authorized to perform" (namely, interactions with spectators), "occurred within authorized time and space limits" of his job, and was undertaken, "at least in part, by a purpose to serve the [university]."¹³¹

Although *Hoshijo* does not provide much discussion of what it means for conduct to be undertaken with a purpose to serve the employer,¹³² *Arguello v. Conoco, Inc.*, a case analyzing a claim of public accommodations discrimination under the federal civil rights statute 42 U.S.C. § 1981,¹³³ is illustrative on this score.¹³⁴ The court reversed a grant of summary judgment for a Conoco gas station

Aric G. Elsenheimer, Comment, *Agency and Liability in Sexual Harassment Law: Toward a Broader Definition of Tangible Employment Actions*, 54 AM. U. L. REV. 1635 (2005) (discussing the standard for employer liability in sexual harassment cases); Amanda G. Main, Note, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 299–301 (2000) (discussing respondeat superior in the context of racial profiling claims).

¹²⁹ *Hoshijo*, 76 P.3d at 561.

¹³⁰ *Id.* at 561–62.

¹³¹ *Id.* at 562–63.

¹³² The Court did discuss, however, how the employee's conduct, which consisted of using a racial slur to chastise a spectator who was criticizing the university's sports coach and team, could be construed as assisting the university because the spectator's conduct might have "interfer[ed] with the concentration or morale of the coaches or players." *Id.* at 563.

¹³³ The federal civil rights statute reads as follows:

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (2000).

¹³⁴ 207 F.3d 803, 808–12 (5th Cir. 2000).

franchise on the question of whether it was vicariously liable for the discriminatory acts of its gas station employee that occurred as the employee was serving customers.¹³⁵ The court stated that “[u]nder general agency principles a master is subject to liability for the torts of his servants while acting in the scope of their employment.”¹³⁶ The court noted that the factors to be considered in determining whether an employee was acting within the scope of his employment included the following:

- 1) the time, place and purpose of the act; 2) its similarity to acts which the servant is authorized to perform; 3) whether the act is commonly performed by servants; 4) the extent of departure from normal methods; and 5) whether the master would reasonably expect such act would be performed.¹³⁷

Analyzing the fourth prong of the test, the court found that although shouting racial epithets at a customer marked a departure from regular business practice, the actions took place while the employee “was performing her normal duties as a clerk.”¹³⁸ Thus, it could not be said that as a matter of law the employee was acting outside the scope of her employment.¹³⁹ The court noted that “the fact that an employee engages in intentional tortious conduct does not require a finding that the employee was outside the scope of his employment,” citing to a prior case which held that a ship captain who stole and resold oil had been acting within the scope of his employment because the illegal transaction was similar to the transactions he was authorized to perform.¹⁴⁰

Analyzing the fifth prong of the test, the *Arguello* court recognized that there was no evidence in the record that Conoco could have reasonably believed that its employee would act as she did.¹⁴¹ Nonetheless, “even if Conoco [was] able to show that they could not have expected this conduct by [the employee], the jury [was] entitled to find that the other factors outweigh[ed] this consideration.”¹⁴² The court “reject[ed] the presumption that because [the employee] behaved in an unacceptable manner that

¹³⁵ *Id.* at 812.

¹³⁶ *Id.* at 810.

¹³⁷ *Id.*

¹³⁸ *Id.* at 811.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *Domar Ocean Transp., Ltd. v. Indep. Ref. Co.*, 783 F.2d 1185, 1190 (5th Cir. 1986)).

¹⁴¹ *Id.*

¹⁴² *Id.*

she was obviously outside the scope of her employment.”¹⁴³ The court stated that the plaintiffs provided evidence sufficient to survive summary judgment: (1) the employee “was on duty as a clerk”; (2) the employee “was performing authorized duties such as conducting sales”; and (3) the employee’s “position as clerk, and her authorization from Concoco to conduct sales allowed her to interact with [the plaintiffs], and put [her] in the position to commit the racially discriminatory acts.”¹⁴⁴ The plaintiffs also provided evidence that the employee used her authority to commit the allegedly discriminatory acts.¹⁴⁵ Furthermore, distinguishing public accommodations cases from employment cases, the court also rejected the notion that an employer could not be vicariously liable for the discriminatory acts of non-supervisory employees, stating that

[A] rule that only actions by supervisors are imputed to the employer would result, in most cases, in a no liability rule. Unlike the employment context it is rare that in a public accommodation setting[] a consumer will be mistreated by a manager or a supervisor. Most consumer encounters are between consumers and clerks who are non-supervisory employees.¹⁴⁶

Finally, cases involving federal civil rights claims against the restaurant chain Waffle House are also helpful in analyzing this possible defense.¹⁴⁷ In the case of *Solomon v. Waffle House*, the court denied defendant Waffle House’s motion for summary judgment, which claimed that the restaurant could not be liable under 42 U.S.C. §§ 1981¹⁴⁸ and 2000a¹⁴⁹ for an employee’s racially discriminatory actions toward two of the plaintiff-customers.¹⁵⁰

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 810.

¹⁴⁷ *Slocumb v. Waffle House, Inc.*, 365 F. Supp. 2d 1332, 1341 (N.D. Ga. 2005); *Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1328–31 (N.D. Ga. 2004).

¹⁴⁸ *See supra* note 133 (quoting the full text of 42 U.S.C. § 1981 (2000)).

¹⁴⁹ 42 U.S.C. § 2000a(a) (“All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.”).

¹⁵⁰ *Solomon*, 365 F. Supp. 2d at 1331. Because the legal framework for analyzing the claim under 42 U.S.C. § 2000a was the same for analyzing the section 1981 claim, the court also denied Waffle House’s motion for summary judgment on this claim with little additional discussion. *Id.*

Waffle House claimed that it was not liable for its employee's actions "because his actions were either (1) limited to him personally and not committed in furtherance of the employment; or (2) outside the scope of his employment."¹⁵¹ The court did not embrace the *Arguello* court's formation of the test for respondeat superior.¹⁵² Nevertheless, it found that Waffle House failed to show that the employee acted outside the scope of his employment, noting that there was no evidence that the employees had received statements of the restaurant's non-discrimination policy, that the employee was working as a server at the time of the challenged acts, and that the employee "was charged by his employer with direct customer dealings."¹⁵³ Thus, the employee's "acts were neither purely personal nor without any benefit to Waffle House."¹⁵⁴ Even assuming that the employee was acting outside the scope of his employment, sufficient evidence existed for a jury to conclude that Waffle House "ratified" the employee's conduct because the manager on duty did nothing to prevent or correct the employee's behavior, suggesting that the restaurant acquiesced in his behavior.¹⁵⁵ Furthermore, even though the restaurant disciplined the manager and the employee, the discriminatory conduct was not the focus of the discipline.¹⁵⁶

Similarly, in the case of *Slocumb v. Waffle House, Inc.*, the court denied defendant Waffle House's motion for summary judgment, which claimed that it could not be liable under 42 U.S.C. §§ 1981 and 2000a for its employees' racially discriminatory actions toward restaurant customers.¹⁵⁷ The *Slocumb* court stated that under the laws of agency, "an employer is liable for the torts of its employees

¹⁵¹ *Id.* at 1328.

¹⁵² *Id.* at 1328–29. The *Solomon* court instead used the common law of agency to determine Waffle House's liability for its employee's conduct:

Pursuant to Section 219(1) of the Restatement (Second) of Agency, an employer will always be held liable for the torts of its employees committed while acting in the scope of their employment. If the employee acts outside the scope of their employment, however, the employer may still be held liable if one of the following four conditions is met: (a) the employer intended the conduct or the consequence; (b) the employer was negligent or reckless; (c) the conduct violated a non-delegable duty of the employer; or (d) the employee purported to act or speak on behalf of the employer and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency.

Id. at 1329 (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ 365 F. Supp. 2d 1332, 1334, 1341 (N.D. Ga. 2005).

committed while acting in the scope of their employment” and might be liable for such torts “[e]ven if the employees are acting outside the scope of employment.”¹⁵⁸ The court held that the plaintiffs produced sufficient evidence for a jury to conclude that the Waffle House employees were acting within the scope of their employment when they undertook the discriminatory acts against the customers because “the Waffle House employees were working as servers at the time of the incident, the alleged misconduct involved their function as servers, and they were authorized by Waffle House to interact with patrons.”¹⁵⁹ Furthermore, “[a] jury could find that Waffle House’s failure to respond immediately, its ultimate finding that discrimination had not occurred, and its failure to make reasonable attempts to contact Plaintiffs, implicitly condoned the employees’ alleged wrongdoing.”¹⁶⁰

Although the foregoing case law is not a definitive examination of the issues that might arise when a pharmacy alleges that it is not liable for the discriminatory acts of its pharmacists,¹⁶¹ these cases do suggest that it may be difficult for a pharmacy to distance itself legally from the discriminatory acts of its pharmacist employees. A pharmacist is likely an agent or employee of the pharmacy and is acting in the course of business as a pharmacist when filling prescriptions and interacting with customers. Under the logic of the *Arguello* and the *Waffle House* cases, a pharmacist who refuses to dispense prescription contraceptives is operating in a position of authority when refusing to fill the prescription.¹⁶² The *Arguello* case also suggests that the fact that the pharmacist’s refusal to fill a contraceptive prescription may be an unacceptable form of customer interaction does not alone instantly preclude pharmacy

¹⁵⁸ *Id.* at 1341 (citing RESTATEMENT (SECOND) OF AGENCY § 219 (1958)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ One federal case has held that the doctrine of respondeat superior does not apply to claims brought under 42 U.S.C. § 2000a and the Massachusetts Civil Rights Act (MCRA). *Jones v. City of Boston*, 738 F. Supp. 604, 606 (D. Mass. 1990). Because the federal statute would provide no relief for a pharmacy-refusal plaintiff due to its failure to prohibit sex discrimination, this portion of the holding is not applicable to the pharmacy refusal context. *See* 42 U.S.C. § 2000a(a) (2000). Moreover, the state law ruling in *Jones* has likely been overruled. *Chaabouni v. City of Boston*, 133 F. Supp. 2d 93, 103 (D. Mass. 2001) (finding that the doctrine of respondeat superior applied in the context of claims brought under the MCRA to create liability on the part of private actors while holding that the municipal defendant could not be held liable under such a theory).

¹⁶² *See Arguello v. Conoco, Inc.*, 207 F.3d 803, 811 (5th Cir. 2000); *Slocumb*, 365 F. Supp. 2d at 1341; *Solomon v. Waffle House, Inc.*, 365 F. Supp. 2d 1312, 1329 (N.D. Ga. 2004).

responsibility for a pharmacist's discriminatory conduct.¹⁶³ Finally, the *Waffle House* cases also suggest that a pharmacy's failure to discipline a refusing pharmacist or to immediately ameliorate the discriminatory impact of the pharmacist's actions will also limit the pharmacy's ability to disavow responsibility for the rogue pharmacist.¹⁶⁴

2. Title VII Preemption of State Public Accommodations Statutes

A pharmacy may also claim that compliance with a state public accommodations law prohibiting sex discrimination prevents it from complying with federal law prohibiting employment discrimination on the basis of religion, thus requiring preemption of the state public accommodations law. Title VII of the Civil Rights Act of 1964 provides that an employer¹⁶⁵ may not discriminate against an employee on the basis of that employee's religion.¹⁶⁶ Section 2000e(j) of the statute says that "[t]he term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."¹⁶⁷ The Supreme Court has stated that "[t]he intent and effect of this [law] was to make it an unlawful employment practice . . . for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees."¹⁶⁸

In particular, the pharmacy may argue that, under Title VII, it cannot compel pharmacists who have religious objections to dispensing prescription contraceptives to dispense these medicines, even if such a refusal in a pharmacy is a violation of state public accommodations law. The pharmacy may further argue that to do so would preclude its legal duty to "reasonably accommodate" its

¹⁶³ See *Arguello*, 207 F.3d at 811.

¹⁶⁴ See *Slocumb*, 365 F. Supp. 2d at 1341; *Solomon*, 365 F. Supp. 2d at 1329.

¹⁶⁵ Title VII applies to private sector employers like pharmacies. See *West v. Gibson*, 527 U.S. 212, 214 (1999). The defendant-pharmacy in such a case must meet the statute's definition of "employer." 42 U.S.C. § 2000e(b) (2000) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.").

¹⁶⁶ *Id.* § 2000e-2(a).

¹⁶⁷ *Id.* § 2000e(j).

¹⁶⁸ *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).

employee's religious beliefs within the meaning of § 2000e(j).¹⁶⁹ The pharmacy will then argue that the resulting conflict requires preemption of the state law under 42 U.S.C. § 2000e-7¹⁷⁰ or § 2000h-4.¹⁷¹

The argument that Title VII should preempt a state public accommodations law is unlikely to prevail.¹⁷² Preemption of a state law by a federal statute, which "is not to be lightly presumed," can occur in one of three circumstances.¹⁷³ Congress can explicitly state that a federal law is meant to preempt state law.¹⁷⁴ Additionally,

[e]ven without an express provision for preemption, . . . state law must yield to a [federal law] in at least two circumstances. When Congress intends federal law to 'occupy the field,' state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute.¹⁷⁵

The first two grounds of preemption are inapplicable in this case: Title VII does not expressly state that it intends to preempt state public accommodations law nor is there evidence that Title VII—a

¹⁶⁹ 42 U.S.C. § 2000e(j).

¹⁷⁰ Section 2000e-7 states:

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

¹⁷¹ Section 2000h-4 states:

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Although § 2000e-7 only applies to Title VII, § 2000h-4 is applicable to all titles of the Civil Rights Act of 1964. *Id.* §§ 2000e-7, 2000h-4.

¹⁷² A search of reported cases suggests that such a preemption argument involving a state public accommodations statute has not apparently been made. Typically, the preemption arguments involving the preemption provisions of Title VII concern the ability of Title VII to preempt state employment laws. *See, e.g.*, *Cal. Fed. Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 279–80 (1987) (discussing whether Title VII preempted California state employment law); *Aldred v. Duling*, 538 F.2d 637, 638 (4th Cir. 1976) (discussing whether Title VII preempted City of Richmond employment ordinance); *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081, 1082–84 (8th Cir. 1972) (discussing whether Title VII preempted Arkansas state employment statute).

¹⁷³ *Guerra*, 479 U.S. at 280–81.

¹⁷⁴ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

¹⁷⁵ *Id.* (internal citations omitted).

federal employment discrimination law—intended to “occupy the field” of state public accommodations law. Title VII did not even aim to “occupy the field” of all employment discrimination law; rather, Title VII recognizes the continuing validity of state employment laws.¹⁷⁶ Thus, to suggest that Title VII should preempt state law on an entirely different subject when it does not even preempt state law on the same subject is not a tenable argument for preemption.

The only argument left for preemption, then, is the contention that the application of state public accommodations law to prevent refusals to dispense prescription contraceptives in pharmacies conflicts with Title VII’s requirement that the religious beliefs of employees be accommodated.¹⁷⁷ The Supreme Court has recognized that a conflict between state and federal laws requiring preemption of the state law occurs “either because ‘compliance with both federal and state regulations is a physical impossibility,’ or because the state law stands ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁷⁸ No such conflicts exist in the instant case between the application of a state public accommodations law and the preservation of an employee’s Title VII rights.

a. Compliance with State Public Accommodations Law Does Not Preclude Compliance with Title VII

First, the operation of a state public accommodations law to prohibit refusals to dispense prescription contraceptives in pharmacies does not hinder an employer’s ability to comply with Title VII’s mandates of nondiscrimination in employment on the basis of religion. Such an argument is meritless because a pharmacy-employer enjoys considerable latitude under Title VII in determining the scope of an accommodation for a pharmacist’s religious beliefs.

The crux of this analysis turns on the meaning of “reasonably accommodate” and “undue hardship.”¹⁷⁹ In *Ansonia Board of Education v. Philbrook*, the Supreme Court reiterated the Court’s

¹⁷⁶ *Guerra*, 479 U.S. at 281 (citing 42 U.S.C. §§ 2000e-7, 2000h-4).

¹⁷⁷ 42 U.S.C. § 2000e-2(a).

¹⁷⁸ *Guerra*, 479 U.S. at 281 (internal citations omitted).

¹⁷⁹ See *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 67 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977).

previous holding in *Trans World Airlines, Inc. v. Hardison* and stated that “an accommodation [within the meaning of 42 U.S.C. § 2000e(j)] causes ‘undue hardship’ whenever that accommodation results in ‘more than a *de minimis* cost’ to the employer.”¹⁸⁰ The Supreme Court also established that the employer enjoys some latitude with providing “reasonable accommodation” within the meaning of 42 U.S.C. § 2000e(j).¹⁸¹ The Court held:

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. . . . Thus, where the employer has already reasonably accommodated the employee’s religious needs, the statutory inquiry is at an end.¹⁸²

The Court rejected the lower court’s conclusion that when the employer and the employee each propose an accommodation, the employer must accept the employee’s preferred accommodation unless it causes undue hardship to the employer.¹⁸³ Under the *Ansonia* Court’s reformulation of the test, the issue of “undue hardship” arose only when an employer claimed an inability to “reasonably accommodate” the plaintiff’s religious beliefs at all.¹⁸⁴ The Court did not establish a bright-line test for “reasonably accommodate,” but remanded for consideration of the question in light of the facts of the case.¹⁸⁵ In doing so, the Court suggested that a particular accommodation for religion was not reasonable if accommodations for all other secular purposes were more generous.¹⁸⁶

In turn, in order to apply *Ansonia* to the pharmacy refusal context, it is necessary to understand what a “reasonable

¹⁸⁰ 479 U.S. at 67 (quoting *Trans World Airlines, Inc.*, 432 U.S. at 84).

¹⁸¹ *Id.* at 68–69.

¹⁸² *Id.* at 68.

¹⁸³ *Id.* at 68–69.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 70–71.

¹⁸⁶ *Id.* at 71. The Court stated that

The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work. . . . But unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes *except* religious ones.

Id. at 70–71.

accommodation” is and how this concept might be interpreted in the context of a pharmacy with a pharmacist who refuses to dispense prescription contraceptives.

(1) Title VII Cases Involving Religiously Motivated Pharmacist Refusals

Two cases involving pharmacist refusals to dispense contraception are useful. First, *Noesen v. Medical Staffing Network, Inc.* addressed the claims of a pharmacist that he suffered, inter alia, employment discrimination on the basis of religion in violation of Title VII when he was terminated from a Wal-Mart pharmacist position on the basis of his refusal to assist with the dispensing of prescription contraceptives.¹⁸⁷ Prior to commencing his employment at Wal-Mart, the plaintiff and the employer signed a statement “acknowledging that plaintiff would not ‘participate in the provision of contraceptive articles while contracting with [the] pharmacy.’”¹⁸⁸ During his brief employment with the pharmacy, the plaintiff was never asked “to transfer, refer, renew, dispense, verify or touch prescriptions for birth control.”¹⁸⁹ Nevertheless, when customers arrived at or called the store to discuss a prescription contraceptive, the plaintiff would “simply walk away from customers or leave them on hold indefinitely.”¹⁹⁰ The employer informed the plaintiff that he had to “signal” to other pharmacists that such a customer required assistance with filling a birth control prescription.¹⁹¹ The employee refused to cooperate and was terminated after creating an altercation in the store and refusing to depart voluntarily.¹⁹² Applying *Ansonia*, the court found that Wal-Mart reasonably accommodated the pharmacist’s religious beliefs and granted the store’s motion for summary judgment on the claim.¹⁹³ The court noted that “Title VII requires an employer to provide one reasonable option that will eliminate the conflict between the employee’s job and religious beliefs” and that “[d]efendant Wal-Mart gave plaintiff the exact accommodation that

¹⁸⁷ No. 06-C-071-S, 2006 WL 1529664, at *1 (W.D. Wis. June 1, 2006).

¹⁸⁸ *Id.* at *2.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at *2-*3.

¹⁹³ *Id.* at *4.

he sought.”¹⁹⁴

Second, in *Hellinger v. Eckerd Corp.*, a court denied an employer’s motion for summary judgment on a job applicant’s Title VII claim challenging the employer’s failure to hire him on the basis of his religious refusals to sell condoms.¹⁹⁵ The court rejected the employer’s claim that it could not have accommodated the employee without undue hardship.¹⁹⁶ The defendant claimed that the only way it could accommodate the plaintiff would be to: 1) hire another “pharmacist to work side-by-side with the [pharmacist] during his shift; 2) allow the [pharmacist] to refuse to sell the condoms;” or 3) ask that the customers pay for their condom purchases at a different register.¹⁹⁷ Although the court agreed that hiring another employee would impose more than a de minimis cost, it found that the store failed to offer more than speculative or hypothetical evidence of how the other two options would have posed more than a de minimis hardship.¹⁹⁸ The plaintiff also offered other possible accommodations that would have not unduly burdened the employer.¹⁹⁹

(2) Title VII Cases Involving Other Religiously Motivated Refusals

Moreover, lower court interpretations of *Ansonia* involving employees who have raised religious objections to undertaking specific employment-related tasks are also illustrative.

For instance, in *Shelton v. University of Medicine & Dentistry of New Jersey*, the Third Circuit examined the question of whether, in a Title VII employment discrimination case, “a state hospital reasonably accommodated the religious beliefs and practices of a

¹⁹⁴ *Id.*

¹⁹⁵ 67 F. Supp. 2d 1359, 1360 (S.D. Fla. 1999).

¹⁹⁶ *Id.* at 1366.

¹⁹⁷ *Id.* at 1364.

¹⁹⁸ *Id.* at 1364–65.

¹⁹⁹ *Id.* at 1366. The court explained that

According to the Plaintiff, there are several other ways in which Eckerd could have reasonably accommodated him without suffering undue hardship. The Plaintiff suggests that the Defendant could have scheduled the Plaintiff to work during hours in which a drug clerk or pharmacy technician was also on duty. Another option the Plaintiff offers is that Eckerd could have placed the Plaintiff in a medium to high sales volume store where a drug clerk or pharmacy technician is always on duty. Plaintiff also suggests that the Defendant could have allowed the Defendant to work out his schedule with other pharmacists in order to avoid a scenario in which the Plaintiff would be the only employee working in the pharmacy department.

Id.

staff nurse who refused to participate in what she believed to be abortions.”²⁰⁰ The hospital terminated the nurse for twice refusing to treat patients after the nurse failed to respond to a thirty day ultimatum to accept an alternative job at the hospital.²⁰¹ First, the nurse refused to assist in inducing labor for a pregnant patient suffering from a “life-threatening” membrane rupture.²⁰² Second, she refused to assist with the emergency cesarean section delivery of a heavily bleeding woman suffering from placenta previa, objecting because the procedure would terminate the pregnancy.²⁰³ Consequently, the hospital told the nurse that she could no longer work in the Labor and Delivery section of the hospital “because of her refusal to assist in ‘medical procedures necessary to save the life of the mother and/or child.’”²⁰⁴ The hospital’s staffing schedule “prevented it from allowing [the nurse] to trade assignments” potentially involving abortion; the hospital also believed that the nurse’s refusals jeopardized patient safety.²⁰⁵ The hospital did not terminate the nurse but offered her a “lateral transfer” to another department and suggested that she contact the hospital’s personnel office for assistance with “identify[ing] other [suitable] nursing positions.”²⁰⁶ After the nurse failed to pursue this option, the hospital fired her.²⁰⁷

Relying on *Ansonia*, the Third Circuit affirmed the district court’s grant of summary judgment for the defendant-employer, which had rested on the finding that the hospital had reasonably accommodated the plaintiff’s beliefs.²⁰⁸ The court observed that the plaintiff would suffer no adverse career or economic consequences if she transferred to a different nursing position and concluded her “refusal to cooperate in attempting to find an acceptable religious accommodation was unjustified” and that it “undermine[d] the cooperative approach to religious accommodation issues that Congress intended to foster.”²⁰⁹ Furthermore, the court commented that

²⁰⁰ 223 F.3d 220, 222 (3d Cir. 2000).

²⁰¹ *Id.* at 222–24.

²⁰² *Id.* at 222–23.

²⁰³ *Id.* at 223.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 223–24.

²⁰⁸ *Id.* at 227–28.

²⁰⁹ *Id.* at 228.

It would seem unremarkable that public protectors such as [public health care providers] must be neutral in providing their services. . . . Although we do not interpret Title VII to require a presumption of undue burden, we believe public trust and confidence requires that a public hospital's health care practitioners—with professional ethical obligations to care for the sick and injured—will provide treatment in time of emergency.²¹⁰

Similarly, in *Bruff v. North Mississippi Health Services, Inc.*, the plaintiff brought a Title VII claim of religious discrimination alleging that her employer's requirement that she undertake certain forms of client work impermissibly conflicted with her religious beliefs.²¹¹ The plaintiff was a counselor who claimed that her religious beliefs precluded her from working with clients engaged in same-sex relationships or in relationships outside of marriage on topics related to improving those relationships, but that she could continue to counsel them on unrelated topics.²¹² The employer found that it could not accommodate her request not to counsel individuals on these specific topics by reallocating responsibilities among the other counselors.²¹³ Such accommodation was not possible because of

the small size of the [counseling] staff; the travel and extended hours the counselors must work; the inability to determine beforehand when a trait or topic might arise that would require referring the employee to another counselor, thus requiring either multiple counselors to travel, or scheduling additional counseling sessions at another time; and the additional sessions that introducing a new counselor might require to build the trust relationship necessary to be effective.²¹⁴

The employer offered the plaintiff the option to “reconsider her request for accommodation,” take thirty days to request a transfer to another unit where such conflicts would be less likely to arise and to receive the assistance of the in-house employment counselor in

²¹⁰ *Id.* In affirming the district court, the Third Circuit also rejected the plaintiff-nurse's contention that the hospital engaged in impermissible “viewpoint discrimination” in violation of the First Amendment by firing her on the basis of her views on abortion. *Id.* at 229.

²¹¹ 244 F.3d 495, 496 (5th Cir. 2001).

²¹² *Id.* at 497.

²¹³ *Id.*

²¹⁴ *Id.* at 498.

relocating, or resign.²¹⁵

The Fifth Circuit reversed the district court's judgment for the plaintiff on the Title VII claim, finding that the employer reasonably accommodated the plaintiff's beliefs by offering to assist her with finding a different position that likely posed fewer religious conflicts.²¹⁶ Moreover, the court found that permitting the employee to counsel patients only on selected subjects would be an undue hardship on the employer.²¹⁷ The court noted that although the employer had previously accommodated another employee's preferences for counseling certain types of patients, that employee would nevertheless undertake the disfavored work if no other employee could do so.²¹⁸ In contrast, the plaintiff's "request for accommodation was [not] similarly flexible; instead, she contends that under Title VII the [employer] must excuse her from counseling on all subjects of concern at all times."²¹⁹ The court stated that "Title VII does not require an employer to accommodate such an inflexible position."²²⁰

Finally, three decisions from the Seventh Circuit are instructive.²²¹ First, *Endres v. Indiana State Police* held that a police officer who claimed that his termination was unlawful because his religious beliefs prevented him from undertaking certain casino guard work failed to state a claim of religious discrimination under Title VII.²²² The court soundly rejected the police officer's contention that Title VII "gives law-enforcement

²¹⁵ *Id.*

²¹⁶ *Id.* at 501. The court also affirmed the dismissal of plaintiff's state law claim. *Id.* at 496.

²¹⁷ *Id.* at 501. The court stated:

Appellants contend, and the record supports, that given the size of the [counseling] staff, the area covered by the program and the travel involved, and the nature of psychological counseling incorporating trust relationships developed over time, any accommodation of [the plaintiff] in the . . . counselor position would involve more than *de minimis* cost to the [employer]. Requiring one or both counselors to assume a disproportionate workload, or to travel involuntarily with [the plaintiff] to sessions to be available in case a problematic subject area came up, is an undue hardship as a matter of law. Requiring the [employer] to schedule multiple counselors for sessions, or additional counseling sessions to cover areas [the plaintiff] declined to address, would also clearly involve more than *de minimis* cost.

Id. (internal footnotes omitted).

²¹⁸ *Id.* at 500.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Endres v. Ind. State Police*, 349 F.3d 922 (7th Cir. 2003); *Rodriguez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998); *Ryan v. U.S. Dep't of Justice*, 950 F.2d 458 (7th Cir. 1991).

²²² 349 F.3d at 923, 927.

personnel a right to choose which laws they will enforce, and whom they will protect from crime.”²²³ Second, *Rodriguez v. City of Chicago* affirmed a judgment for a police department against a police officer where the officer alleged that his employer discriminated against him on the basis of religion under Title VII by refusing to exempt him from assignments to guard abortion clinics, which he found incompatible with his religious beliefs.²²⁴ The court held that the city had reasonably accommodated the employee within the meaning of Title VII by providing him the opportunity to transfer to a different district without reduction in his pay or benefits.²²⁵ Third, *Ryan v. United States Department of Justice* upheld judgment for the government against a Federal Bureau of Investigation (FBI) agent’s claim that he faced religious discrimination under Title VII when the government refused to accommodate his refusal to investigate certain religious groups.²²⁶ The court noted that the agent “proposed no course other than discontinuing investigations of the sort to which he is opposed, which would be capitulation rather than accommodation. *Ansonia* tells us, however, that the employee’s proposals are not the measure of the employer’s obligation”²²⁷ The FBI’s only other two options for accommodation—taking no action or moving him to another office and assigning him different work—imposed more than de minimis costs on the agency.²²⁸

(3) Discussion

The aforementioned cases illustrate that a pharmacy can likely comply simultaneously with the requirements of a state public accommodations statute as well as with Title VII’s mandates of nondiscrimination in employment on the basis of religion. Title VII does not always require an employer to accommodate an employee’s religiously motivated conduct. Although a pharmacy needs to

²²³ *Id.* at 925–27.

²²⁴ 156 F.3d at 772.

²²⁵ *Id.* at 775. The *Rodriguez* court rejected the employee’s argument that the city should have accepted the employee’s proposed accommodations (namely, to permit the employee to remain in the district with exemptions from abortion clinic assignments), noting that “Title VII . . . requires only ‘reasonable accommodation,’ not satisfaction of an employee’s every desire.” *Id.* at 777 (quoting *Wright v. Runyon*, 2 F.3d 214, 217 (7th Cir. 1993)).

²²⁶ 950 F.2d at 459–60, 462.

²²⁷ *Id.* at 461 (citing *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 68–69 (1986)).

²²⁸ *Id.* at 462.

provide a reasonable accommodation for a pharmacist who does not personally want to fill certain prescriptions on the basis of religious belief, under *Ansonia*, it is enough that a pharmacy provides a form of reasonable accommodation; it does not have to be the pharmacist's preferred one.²²⁹ Moreover, the pharmacy need not accommodate a pharmacist if doing so would cause an "undue hardship."²³⁰ Application of a state public accommodations law in this context does not strip a pharmacy of its discretion to determine the scope of "reasonable accommodation" and "undue hardship" in the circumstances of its particular business.

As the aforementioned cases (particularly *Noesen* and *Hellinger*) suggest, some forms of "reasonable accommodation" for a pharmacist with religious objections to dispensing prescription contraceptives could include asking another pharmacist to fill the prescription, assigning the pharmacist to work only on shifts or in stores in which another non-objecting pharmacist is on duty, or assigning the pharmacist to a line or place of work not involving the dispensing of prescription contraceptives.²³¹ As the totality of the case law indicates, the ability of the pharmacy to offer such alternatives without experiencing "undue hardship" to its business will necessarily impact the "reasonableness" of the accommodation. This analysis will vary according to such factors as the size of the pharmacy, the number of employees, the business structure of the pharmacy (namely, whether it is a standalone store or part of a larger chain), the pharmacy's ability to undertake reassignment of employees to different locations or lines of work, and its ability to assist objecting pharmacists with finding work compatible with their religious beliefs.²³² It is important to note that the fact that prescription contraceptives are only available from behind a pharmacy counter likely limits the scope of the permissible accommodations. Unlike an OTC medicine or device (such as the condoms at issue in *Hellinger*) that can be accessed by a customer

²²⁹ *Ansonia Bd. of Educ.*, 479 U.S. at 68.

²³⁰ *See id.* at 68–69.

²³¹ *Noesen v. Med. Staffing Network, Inc.*, No. 06-C-071-S, 2006 WL 1529664, at *4 (W.D. Wis. June 1, 2006); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359, 1364–65 (S.D. Fla. 1999); AM. PUB. HEALTH ASS'N, *supra* note 35, at 8; Cantor & Baum, *supra* note 35, at 2011; Religious Coal. for Reproductive Choice, *supra* note 35. For a good examination of this specific issue, see generally, Amy Bergquist, Note, *Pharmacist Refusals: Dispensing (with) Religious Accommodation Under Title VII*, 90 MINN. L. REV. 1073, 1085–93 (2006).

²³² *See* Bergquist, *supra* note 231, at 1093–1101 (discussing some of the factors that may influence a finding of undue hardship).

without pharmacist assistance and paid for at non-pharmacy cash registers, a pharmacist is typically involved in the dispensing of most prescription contraceptives and also likely has to complete the sale of them.

b. State Public Accommodations Law Does Not Undermine the Purpose and Objectives of Title VII

The application of state public accommodations law does not stand as “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”²³³ Although “Congress was understandably motivated by a desire to assure the individual [employee] additional opportunity to observe religious practices” in enacting Title VII’s prohibitions against employment discrimination on the basis of religion, “it did not impose a duty on the employer to accommodate [an employee’s religious beliefs] at all costs.”²³⁴ Thus, a pharmacy will likely be unable to prevent the application of a state public accommodations statute by claiming that Title VII preempts the law.

3. “Refusal Clauses”

A pharmacist who faces a claim of public accommodations discrimination may try to defend under a state “refusal clause” statute. “A refusal clause (sometimes also called a religious exemption or ‘conscience clause’) is a law that allows entities and/or individuals to refuse to provide or cover certain health services based on religious or moral objections.”²³⁵ Although several variants of refusal clause statutes exist across the states, few would likely provide ironclad defenses to a refusing pharmacist.

First, the vast majority of states have refusal clauses that protect health care personnel from liability based on their refusal to perform abortion services.²³⁶ Because the provision of prescription

²³³ Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 281 (1987) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

²³⁴ *Ansonia Bd. of Educ.*, 479 U.S. at 70.

²³⁵ WEISS ET AL., *supra* note 16, at 6 (discussing the broader legal and social issues implicated in refusal clauses).

²³⁶ See GUTTMACHER INST., REFUSING TO PROVIDE HEALTH SERVICES, *supra* note 16 (noting that forty-six states have laws that protect health care providers from liability based on refusal to perform abortion services).

contraceptives is not abortion,²³⁷ these statutes would not protect a pharmacist's refusal to dispense such medicine.²³⁸ Other states have general refusal clauses that shield certain health care providers from liability for refusing to dispense prescription contraceptives, but do not specifically mention pharmacists. For instance, Florida's refusal clause statute permits "a physician or other person" to refuse "to furnish any contraceptive or family planning service, supplies, or information for medical or religious reasons."²³⁹ Other states grant such a right of refusal only to people working in specific health care settings. For instance, Oregon's refusal clause statute only protects employees of the State's Department of Human Services.²⁴⁰ Finally, only a few states have specific laws protecting the right of a pharmacist to refuse to dispense prescription contraceptives.²⁴¹ Examples of such states include Arkansas²⁴² and Mississippi.²⁴³

²³⁷ See *supra* notes 22–23 and accompanying text.

²³⁸ Cf. *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240, 244–45 (Cal. Ct. App. 1989) (holding in relevant part that state statute permitting certain health care providers to refuse to perform abortions did not immunize provider from liability for failing to provide "estrogen pregnancy prophylaxis," which is "'post-coital contraception,' not abortion").

²³⁹ FLA. STAT. ANN. § 381.0051(6) (West 2002). See, e.g., WYO. STAT. ANN. § 42-5-101(d) (2005) ("Any person may refuse to accept the duty of offering family planning and birth control services to the extent the duty is contrary to his personal or religious beliefs.").

²⁴⁰ OR. REV. STAT. § 435.225 (2005). The statute states:

Any employee of the Department of Human Services may refuse to accept the duty of offering family planning and birth control services to the extent that such duty is contrary to the personal or religious beliefs of the employee. However, such employee shall notify the immediate supervisor in writing of such refusal in order that arrangements may be made for eligible persons to obtain such information and services from another employee. Such refusal shall not be grounds for any disciplinary action, for dismissal, for any interdepartmental transfer, for any other discrimination in employment, or for suspension from employment, or for any loss in pay or other benefits.

Id.

²⁴¹ GUTTMACHER INST., REFUSING TO PROVIDE HEALTH SERVICES, *supra* note 16 (listing states with laws allowing pharmacists to refuse to dispense contraceptives and also offering a list of sources wherein several legal commentators have discussed the scope of such laws in the context of refusals to dispense birth control prescriptions in pharmacies).

²⁴² ARK. CODE ANN. § 20-16-304(4) (2005) ("Nothing in this subchapter shall prohibit a physician, pharmacist, or any other authorized paramedical personnel from refusing to furnish any contraceptive procedures, supplies, or information.").

²⁴³ MISS. CODE ANN. § 41-107-3(b) (West Supp. 2005) (defining health care provider to include pharmacists). The Mississippi Code goes on to provide that

A health care provider has the right not to participate, and no health care provider shall be required to participate in a health care service that violates his or her conscience. However, this subsection does not allow a health care provider to refuse to participate in a health care service regarding a patient because of the patient's race, color, national origin, ethnicity, sex, religion, creed or sexual orientation.

MISS. CODE ANN. § 41-107-5(1) (West Supp. 2005).

Because the protection offered by such statutes varies according to the language of the statute, statutory interpretation techniques can be used to argue that a refusal clause statute should not provide liability protection to a pharmacist who refuses to dispense prescription contraceptives. For instance, Maine's statute protects the pharmacist's refusal to "provide" family planning services,²⁴⁴ suggesting that a pharmacist who refuses to dispense prescription contraceptives in a state with such statutory language does not have protection under the statute for his or her refusal to ask another pharmacist to fill the prescription or to tell the customer where else she might be able to obtain the medicine.²⁴⁵ Florida's statute only protects refusals for "medical or religious reasons,"²⁴⁶ suggesting that a pharmacist in a state with such statutory language who refuses to dispense prescription contraceptives because of an erroneous medical belief that they have abortifacient properties or because of sexist views that women who use emergency contraception are immoral would not enjoy the protections of the statute. Tennessee's statute only protects private institutions, physicians, and the agents or employees of institutions or physicians.²⁴⁷ If a pharmacist is an independent contractor working at a pharmacy in a state with such statutory language, an argument might exist that the pharmacist is not an agent or employee of the pharmacy. Courts have displayed a willingness to construe refusal clause statutes narrowly²⁴⁸ as well as to read

²⁴⁴ ME. REV. STAT. ANN. tit. 22, § 1903(4) (2004) ("No private institution or physician or no agent or employee of such institution or physician shall be prohibited from refusing to provide family planning services when such refusal is based upon religious or conscientious objection."). "[C]ontraceptive supplies" are included in the definition of "[f]amily planning services." *Id.* § 1902(4).

²⁴⁵ Donald W. Herbe, Note, *The Right to Refuse: A Call for Adequate Protection of a Pharmacist's Right to Refuse Facilitation of Abortion and Emergency Contraception*, 17 J.L. & HEALTH 77, 99 (2002-03).

²⁴⁶ FLA. STAT. ANN. § 381.0051(6) (West 2002).

²⁴⁷ TENN. CODE ANN. § 68-34-104(5) (2001). The Tennessee statutes states:

No private institution or physician, nor any agent or employee of such institution or physician, shall be prohibited from refusing to provide contraceptive procedures, supplies, and information when such refusal is based upon religious or conscientious objection, and no such institution, employee, agent, or physician shall be held liable for such refusal.

Id. The definition of physician in Tennessee includes only doctors of medicine or osteopathy. *Id.* § 68-34-102(5).

²⁴⁸ *See, e.g.,* *Spellacy v. Tri-County Hosp.*, No. 77-1788, 1978 WL 3437, at *3-*4 (Pa. C.P. Mar. 23, 1978). The court in *Spellacy* considered the applicability of a state's refusal clause which protected employees who refused to "perform, participate in, or cooperate in" abortions to a hospital admissions clerk who claimed that it contravened her religious beliefs to admit

additional legal requirements into refusal clause statutes that lessen their impact,²⁴⁹ suggesting that there is room for creative statutory interpretation arguments. Furthermore, such refusal

patients for abortions. *Id.* at *1, *3 (quoting 43 PA. CONS. STAT. ANN. § 955.2(a) (West 1991)). Because the regulation promulgated to define protected employees under the statute only protected employees “directly involved” in abortions and employees “in attendance” at abortions whose services were essential to the procedures, the court held that the plaintiff could not avail of the protections of the statute. *Id.* at *3 (quoting 16 PA. CODE § 51.41(b) (1977)). The court concluded that “[p]laintiff’s own testimony as to her duties makes it clear that her duties were ‘ancillary’ and ‘clerical’ in nature.” *Id.* at *4. Other cases have asserted similar narrow interpretations of refusal clauses. *See, e.g.,* *Erzinger v. Regents of the Univ. of Cal.*, 187 Cal. Rptr. 164, 167–68 (Cal. Ct. App. 1982) (holding that a federal antidiscrimination statute protecting students refusing to “assist or in any way participate in the performance of abortions” did not apply to students refusing to pay university registration fees, which included health care fees that covered abortion counseling, referral, and provision (quoting 42 U.S.C. § 300a-7(d) (Supp. 1976) (current version at 42 U.S.C. § 300a-7(d) (2000))); *Brownfield v. Daniel Freeman Marina Hosp.*, 256 Cal. Rptr. 240, 244–45 (Cal. Ct. App. 1989) (interpreting the definition of the word “abortion” in the state’s refusal clause narrowly to omit inclusion of the morning-after pill from the statute’s scope). Even when courts have applied refusal clauses to protect refusals, they have indicated that exigent circumstances might not permit such application. *See, e.g.,* *Swanson v. St. John’s Lutheran Hosp.*, 597 P.2d 702, 711 (Mont. 1979) (holding that Montana statute protecting refusals to assist with sterilizations protected nurse who refused to assist with such procedures but noting that it left open the question of “whether in a proper case an untimely notice [of refusal] might outweigh the statutory right of a person to refuse to participate in a sterilization procedure”). *See generally* RELIGIOUS REFUSALS AND REPRODUCTIVE RIGHTS: ACLU REPRODUCTIVE FREEDOM PROJECT, CONFLICTS BETWEEN RELIGIOUS REFUSALS AND WOMEN’S HEALTH: HOW THE COURTS RESPOND (2002) (outlining this argument by analyzing several cases and concluding that “the courts provide a possible check on the harm caused by a refusal to treat. The cases are nuanced and fact-dependent, but they suggest that courts generally will not allow providers, relying on refusal clauses, to sacrifice patients’ health for religious principle.”).

²⁴⁹ At least one court has suggested that adverse employment action might be permissible against an employee who refuses to perform certain health care services even though the state’s refusal clause provides absolute protection for such refusals. *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262, 1266 (Fla. Dist. Ct. App. 1981). In *Kenny*, a nurse brought an action against her hospital employers for demoting her for refusing to assist with abortions. *Id.* at 1263. The nurse said that she enjoyed protection under a state law permitting refusals to participate in abortion-related services. *Id.* at 1264. This case is interesting because, although the statute provided absolute protection against adverse employment action for refusals, the court nonetheless applied Title VII employment discrimination jurisprudence to determine if the employer’s action was protected under Title VII or if the employer could have accommodated the employee’s beliefs. *Id.* at 1264–66. In doing so, the court imported an additional requirement into the state refusal clause, which did not require consideration of the employer’s interests. *Id.* at 1266. Although the court reversed a judgment for the defendants, its reasoning suggests that the defendants might have prevailed had they been able to show that accommodating the refusing nurse posed an “undue hardship” under Title VII such that accommodation of her beliefs was not necessary. *Id.* at 1267. For further discussion of *Kenny*, see Cristina Arana Lumpkin, Comment, *Does a Pharmacist Have the Right to Refuse to Fill a Prescription for Birth Control?*, 60 U. MIAMI L. REV. 105, 124–25 (2005); Dennis Rambaud, Note, *Prescription Contraceptives and the Pharmacist’s Right to Refuse: Examining the Efficacy of Conscience Laws*, 4 CARDOZO PUB. L. POL’Y & ETHICS J. 195, 216–17 (2006).

clauses may be poorly drafted, thus providing additional grounds for challenges. For example, the Mississippi statute permits pharmacist refusals for reasons of “conscience” but also prohibits refusals on the basis of sex,²⁵⁰ setting up a conflict between the protections for refusing pharmacists and the argument that refusal to fill a contraceptive prescription is a form of sex discrimination. Finally, some commentators have suggested that refusal clauses that protect a pharmacist from all employment discrimination for refusing to dispense a prescription contraceptive may be subject to constitutional challenges under the Establishment Clause to the First Amendment of the Federal Constitution.²⁵¹

The law in this area is rapidly developing:²⁵² NARAL Pro-Choice America notes that “[i]n 2005, seven states considered 15 measures” to protect women’s right to fill contraceptive prescriptions, while “15 states considered 19 . . . measures” that would protect a pharmacist’s right to refuse to fill such a prescription.²⁵³ A plaintiff challenging a refusal to dispense prescription contraceptives in a pharmacy should actively monitor the developments of law in her state and be prepared to offer arguments for the inapplicability of a state’s refusal clause to a refusing pharmacist should she decide to

²⁵⁰ MISS. CODE ANN. §§ 41-107-3(b), -5(1) (West Supp. 2005); *supra* note 243 (setting forth the text of the Mississippi provisions).

²⁵¹ Rambaud, *supra* note 249, at 217–20. *But see* WEISS ET AL., *supra* note 16, at 7 (suggesting that refusal clauses are constitutionally permissible under the Establishment Clause).

²⁵² Because of the fluid nature of the law in this area, this Article does not provide an exhaustive survey of pending “refusal clause” legislation. The National Conference of State Legislatures offers a good overview of pending legislation. Nat’l Conference of State Legislatures, *supra* note 16; *see* Nat’l Women’s Law Ctr., Pharmacy Refusals 101 (Apr. 2006), http://www.nwlc.org/pdf/PharmacyRefusals101_04.04.06.pdf. Much legal scholarship is currently being devoted to this topic. *See, e.g.*, Mary K. Collins, *Conscience Clauses and Oral Contraceptives: Conscientious Objection or Calculated Obstruction?*, 15 ANNALS HEALTH L. 37, 37–38 (2006); Maryam T. Afif, Comment, *Prescription Ethics: Can States Protect Pharmacists Who Refuse to Dispense Contraceptive Prescriptions?*, 26 PACE L. REV. 243, 253, 256–57 (2005); Karissa Eide, Comment, *Can a Pharmacist Refuse to Fill Birth Control Prescriptions on Moral or Religious Grounds?*, 42 CAL. W. L. REV. 121, 126–44 (2005); Lumpkin, *supra* note 249, at 122–30; Jed Miller, Note, *The Unconscionability of Conscience Clauses: Pharmacists’ Consciences and Women’s Access to Contraception*, 16 HEALTH MATRIX 237, 241–45 (2006); Minh N. Nguyen, Comment, *Refusal Clauses & Pro-Life Pharmacists: How Can We Protect Ourselves from Them?*, 8 SCHOLAR 251, 255, 261–62, 272–74 (2005); Holly Teliska, *Obstacles to Access: How Pharmacist Refusal Clauses Undermine the Basic Health Care Needs of Rural and Low-Income Women*, 20 BERKELEY J. GENDER L. & JUST. 229, 240–46 (2005); Matthew White, Comment, *Conscience Clauses for Pharmacists: The Struggle to Balance Conscience Rights with the Rights of Patients and Institutions*, 2005 WIS. L. REV. 1611, 1614–20 (2005).

²⁵³ *See* NARAL PRO-CHOICE AM. FOUND., GUARANTEE WOMEN’S ACCESS TO PRESCRIPTIONS 5 (2006), <http://www.prochoiceamerica.org/assets/files/Birth-Control-Pharmacy-Access.pdf>.

bring a claim against an individual pharmacist in addition to a claim against a pharmacy.

4. Constitutional Challenges to State Laws

A pharmacist who raises a religious objection to filling a contraceptive prescription likely cannot defend a state public accommodations claim of sex discrimination by challenging the constitutionality of the state public accommodations statute under the Free Exercise Clause of the First Amendment to the Federal Constitution,²⁵⁴ which “protects against governmental hostility [towards religion] which is masked as well as overt.”²⁵⁵ In particular, such a defense is likely untenable under the Supreme Court’s decision in *Employment Division v. Smith*.²⁵⁶ In *Smith*, the Supreme Court reiterated that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or prescribes).’”²⁵⁷ In reaching this conclusion, the Court recognized that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.’”²⁵⁸ The Supreme Court has stated that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral.”²⁵⁹ A law is also not “general[ly] applic[able]” if it is “pursued only against conduct with a religious motivation.”²⁶⁰

By these standards, a state public accommodations law is a “valid

²⁵⁴ U.S. CONST. amend. I (“*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*” (emphasis added)). The Free Exercise Clause applies to the states by incorporation of the Fourteenth Amendment. *Employment Div. v. Smith*, 494 U.S. 872, 876–77 (1990).

²⁵⁵ *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

²⁵⁶ 494 U.S. 872.

²⁵⁷ *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

²⁵⁸ *Id.* at 885 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 451 (1988)).

²⁵⁹ *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533.

²⁶⁰ *Id.* at 542–43.

and neutral law of general applicability” under *Smith*.²⁶¹ Such a law is “neutral” and “generally applicable” because its purpose is to guarantee equal access to places of public accommodation, not to impinge upon religiously motivated practices, and applies to all pharmacist refusals regardless of motivation, be it religious, moral, or ethical. It is important to note, however, that individual state constitutions may provide greater protection to a refusing pharmacist than the Federal Constitution.²⁶² Although this Article does not undertake a specific examination of the religious protections afforded by each state’s constitution relative to the Federal Constitution, a plaintiff in such a case must be prepared to confront the possibility of a state constitutional challenge to a state public accommodations law.²⁶³

²⁶¹ 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring)).

²⁶² For instance, in *Attorney General v. Desilets*, the Massachusetts Supreme Judicial Court refused to apply *Smith* to interpret the state constitutional provision protecting free exercise of religion and instead interpreted this provision under the pre-*Smith* test, which offered heightened scrutiny of laws burdening religion. 636 N.E.2d 233, 235–36 (Mass. 1994). Under the standard adopted by the Massachusetts Supreme Judicial Court, the state can “substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Id.* at 236 n.5 (quoting Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1(b) (2000), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997)). Applying this test, the court held that a state statute prohibiting housing discrimination on the basis of marital status substantially burdened the religious exercise of landlords who, on the basis of their Roman Catholic views, refused to rent to unmarried cohabiting couples. *Id.* at 234–35, 238. The court reversed a grant of summary judgment for the defendants, holding that factual questions existed about whether the state had a compelling governmental interest in eradicating housing discrimination against unmarried cohabiting couples. *Id.* at 241; *see also* *First Covenant Church v. City of Seattle*, 840 P.2d 174, 186–88 (Wash. 1992) (holding that the state constitution’s free exercise provision offered broader protection for religious exercise than the Federal Constitution and that, under the heightened scrutiny afforded by the state constitution, application of the Landmarks Preservation Ordinance to the church violated the church’s state constitutional free exercise rights); *Minn. v. Hershberger*, 462 N.W.2d 393, 397, 399 (Minn. 1990) (holding that “Minnesotans are afforded greater protection for religious liberties against governmental action under the state constitution than under the first amendment of the federal constitution” and that requiring Amish to display certain vehicle decal on their buggies violated state constitution’s freedom of conscience right). *But cf.* *Smith v. Fair Employment & Hous. Comm’n*, 913 P.2d 909, 924, 928–29 (Cal. 1996) (holding that application of a fair housing ordinance prohibiting marital status discrimination to landlord who objected to cohabitation by unmarried couples did not violate the state constitutional provision protecting free exercise and enjoyment of religion even if the provision was interpreted under the more stringent pre-*Smith* test).

²⁶³ *Cf.* *Catholic Charities of the Diocese of Albany v. Serio*, 2006 WL 2970515 (N.Y. Oct. 19, 2006) (holding that state’s contraceptive equity act mandating that health insurance plans that provide prescription drug coverage also cover prescription contraceptives did not violate the state constitution’s free exercise clause); *Catholic Charities, Inc. of Sacramento v. Super. Ct.*, 85 P.3d 67, 91–92, 94 (Cal. 2004) (holding that the state’s contraceptive equity act

III. RECOMMENDATIONS AND CONCLUSION

The problem of refusals to dispense prescription contraceptives in pharmacies is real and urgent. State public accommodations statutes offer an excellent vehicle in many states for challenging these discriminatory practices. State public accommodations lawsuits should ideally be brought solely against the pharmacy, not against the individual pharmacist who refuses to dispense a prescription. Pharmacies are best positioned to make institutional adjustments that ensure the filling of prescription contraceptives while accommodating the views and legal rights of their pharmacist employees. Moreover, a state public accommodations lawsuit will likely have a greater remedial and public relations impact if brought against a pharmacy as opposed to against an individual pharmacist and will result in broader systemic change.

The possibility of using state public accommodations statutes to legally challenge such refusals should not preclude the undertaking of collaboration with pharmacists, pharmacies, and industry groups to create mutually acceptable solutions that will permit pharmacists to honor their religious and ethical beliefs and enable patients to access vital health care in a timely and respectful fashion. As the American Pharmacists Association itself has suggested, pharmacies should work to strike a balance between these two important goals.²⁶⁴ Moreover, the widespread lack of awareness and

mandating that certain employer health and disability plans that cover prescription drugs also cover prescription contraceptives did not violate state constitution's free exercise clause even when reviewed under strict scrutiny).

²⁶⁴ Press Release, John A. Gans, Executive Vice President & CEO, Am. Pharmacists Ass'n, Pharmacists & Physicians: Not Just a Matter of Conscience (June 23, 2005), <http://www.aphanet.org/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=3387> (emphasizing that the organization "supports the pharmacists' ability to choose not to fill a prescription based on moral or ethical values[, and while] recognizing the pharmacist's important role in the health care system, . . . supports the establishment of systems to ensure that the patient's health care needs are served"); see Greenberger & Vogelstein, *supra* note 58, at 1558 (explaining that the American Pharmacists Association's policy on pharmacy refusals does not fully protect a woman's access to prescription contraceptives; however, the policy permits a refusing pharmacist to refer a woman seeking prescription contraceptives to another pharmacy). Because the American Pharmacy Association's policy would effectively deny a woman access to the pharmacy as a place of public accommodation, plus greatly burden a woman seeking timely access to vital medical care, the policy is not consistent with antidiscrimination norms of public accommodation laws. See Letter from Susan C. Winckler, Vice President, Policy and Communications Staff Counsel, to the Editor, *Prevention Magazine* (July 1, 2004), http://www.aphanet.org/AM/Template.cfm?Section=Public_Relations&Template=/CM/HTMLDisplay.cfm&ContentID=2689 (stating that

confusion²⁶⁵ about different forms of prescription contraceptives suggests tremendous room for educational advocacy.

Ultimately, however, guaranteeing women's ready access to contraceptive choice is not an objective that can be sacrificed, but is an ideal of the utmost importance: "the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields."²⁶⁶

"proactively direct[ing patients] to pharmacies where certain therapy is available" is an acceptable course of conduct within the terms of the organization's policy on pharmacy refusals).

²⁶⁵ See *supra* note 20 and accompanying text.

²⁶⁶ United Nations Convention on the Elimination of All Forms of Discrimination Against Women annex, Dec. 1, 1980, 1249 U.N.T.S. 13, 19 I.L.M. 33, 35.