



March 10, 2006

Washington State Board of Pharmacy  
P.O. Box 47863  
Olympia, WA 98504-7863

Dear Board Members:

The Alliance Defense Fund is America's largest legal alliance committed to defending the right to speak and act in accordance with one's religious, ethical, and moral beliefs. The Alliance Defense Fund advocates for these rights through training, funding, and litigation. We write at the request of citizens of Washington in support of the proposed conscience clause that is intended to protect pharmacists from forced compliance with procedures that would violate their inalienable rights of conscience.

The right to conscience is a fundamental right recognized in both the United States and the Washington Constitutions. No citizen can be forced to yield that right when he or she enters the profession of his choice.

The general rule is that pharmacists have a legal and ethical obligation to fill prescriptions to facilitate medical treatment. However, those legal and ethical obligations do not require a pharmacist to issue medications intended to be used in a manner that would violate the pharmacist's freedom of conscience. Pharmacists, like all other licensed professionals in Washington, should not be forced to give up their profession because their conscience does not allow them to participate in every act the law permits.

We urge you to adopt a policy that protects the rights of conscience of all pharmacists in the state of Washington, which allows them to act in accordance with their religious, moral, and ethical convictions. We are not suggesting that any medication be banned, only that pharmacists who have a sincerely held conscientious objection to the distribution and use of certain medications—commonly contraceptives—be protected.

**The Washington Pharmacy Board should not require pharmacists to dispense contraceptives against the convictions of their conscience.**

Washington pharmacists have a fundamental right to abstain from dispensing contraceptives.

The federal Constitution does not permit the states to discriminate against pharmacists who have a conscientious objection to dispensing contraceptives. The federal Constitution protects religious persons from actions disfavoring their religious speech or place in the community,

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particularly penal or quasi-penal actions. *See Falor v. Rhode Island*, 345 U.S. 67 (1953) (Ban on religious meetings in public park unconstitutional); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Larsen v. Valente*, 456 U.S. 228 (1995) (solicitation statute with adverse impact on minority religious groups prohibited). For this reason, any action of government that makes a person's standing in the community dependant on their religious status or religious profession likely violates the Equal Protection Clause of the United States Constitution. *See Church of the Lukumi Babalu Aye*, 508 U.S. 520 (1993) (municipality violated Equal Protection Clause by enacting health ordinance that targeted religiously motivated conduct).

To target pharmacists who refrain from dispensing contraceptives in violation of their conscience violates the First Amendment by punishing them for their convictions.

The Supreme Court, in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), held that the right to religious belief is an "absolute" right and made clear that there is both freedom to believe and freedom to act. Because the right to believe and profess is absolute, the Supreme Court on numerous occasions has specifically warned against attempts to coerce belief. *McDaniel v. Patty*, 435 U.S. 618, 626 (1978). And absent eminent danger of lawless action, it is beyond the purview of the state to punish or restrict conduct motivated by religious and conscientious belief. *See e.g., Cantwell v. Connecticut, supra* (striking down conscience-based ordinance that purported to regulate public religious solicitation); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (observing that "freedoms of speech and of press, of assembly, and of worship... are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."); *Torasco v. Watkins*, 367 U.S. 488, 496 (1961) (striking down requirements that all office holders in the State of Maryland declare a belief in the existence of God; a "religious test for public office unconstitutionally invades the appellants freedom of belief and religion and therefore cannot be enforced against him"); *Wooley v. Maynard*, 430 U.S. 705, 713 (1977) (prohibiting New Hampshire from forcing its citizens to display the state motto, "Live Free or Die," on automobile license plates over their religious objections. In *Maynard* the Court said, "[T]he state may [not] constitutionally require an individual to participate in the dissemination of an ideological message."). Thus, the State, acting through the Pharmacy Board, may not subject pharmacists to sanctions for refusing to participate in dispensing contraceptives or for refusing to refer patients to another pharmacist who he or she knows would dispense contraceptives.

The "freedom of conscience" encompasses the pharmacists' right to abstain from dispensing contraceptives. The constitution of the state of Washington, Article 1 § 11 reads:

"Absolute freedom of conscience in *all matters* of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or be disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to exclude acts of

licentiousness or justify practices inconsistent with the peace and safety of the state...[N]o religious qualification shall be required for any public office or employment. . . .

(emphasis added).

The Washington constitution plainly states that all matters of conscience shall be guaranteed to every individual. The execution of professional activity is nowhere stated as an exception. Section 11 specifically states that no religious qualification for public office or employment shall be required. It logically follows that no qualification shall be put on religious belief because of the exercise of one's professional duties pursuant to state licenses.

The only qualification that section 11 places on the freedom of conscience is for acts of licentiousness or practices that are inconsistent with the peace and safety of the state. A sincerely held conscientious objection exercised by a small number of pharmacists is certainly not an act of licentiousness and could not remotely be characterized to threaten the peace and safety of the state.

Washington statutory law similarly protects these constitutional principals. For example, RCW 9.02.150 protects any person from participating in an abortion and does not require that they refer a soliciting patient to an abortion provider. It is common knowledge that many view abortion and the prevention of pregnancy as moral equivalents. The pharmacists should enjoy the same respect to his right of conscience as the physician or healthcare worker who objects to participating in colorably immoral acts.

**Washington should not force pharmacists to dispense  
contraceptives against their freedom of conscience.**

Opponents of a right to conscience clause that would protect pharmacists contend that the statutory right to contraception transcends all barriers, be they religious, moral, ethical, or constitutional. This is extreme, unnecessary, and untrue. A conscience clause that protects pharmacists does not remotely make contraceptives unavailable or operate to ban contraceptives. On the other hand, if opponents of a conscience clause prevail on this issue, the right of professionals to act according to the dictates of their conscience will be banned. Not only would it be unconstitutional, but it is manifestly unjust to condition the practice of one's profession on renouncing one's convictions.

**Refusal to dispense contraception is not discrimination against women.**

Opponents of a conscience clause often make the illogical claim that a pharmacist who refuses to dispense contraceptives is motivated out of a desire to intentionally harm women. This, of

course, ignores the obvious fact that some pharmacists refusing to dispense contraceptives are women. In addition to being illogical, it is a straw-man argument that has been rejected by the United States Supreme Court. In *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), the Supreme Court recognized that activity motivated by conscientious opposition to abortion is not invidious discrimination against women as a class. *Ibid.* at 271. The court rejected the argument that because "voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class." *Id.* Likewise here, even if women are the only persons who seek contraception, it does not follow that the pharmacist is acting against women as a class. The pharmacist is opposed to the health risk associated with the ingestion of contraceptives and with the effect that it has in blocking conception or causing an abortion. That conviction is motivated by a rejection of the effects of contraception, not discrimination against women. As noted previously, a conscience clause seeks to protect the pharmacists' freedom of conscience and does not operate to ban contraceptives or to intentionally harm women.

Conscience clause opponents also appeal to RCW 18.64.160 (5), which allows the pharmacy board to discipline the pharmacist for dispensing less than the prescribed dose of medicine. But the pharmacist that objects is not agreeing to fill the prescription and then changing the medication or the dose. The pharmacist is only asking that he not be required to participate in an act that is grossly antithetical to his moral, ethical, and professional convictions. Opponents of a conscience clause also contend that a pharmacist's objection is "unprofessional." Such an objection is no more unprofessional than a healthcare professional refusing to participate in an abortion. To the contrary, such ethical respect for the origin of human life is the epitome of professional integrity. It would be unprofessional and unconstitutional to force a pharmacist to fill prescriptions antithetical to his convictions, especially where the prescription can be filled elsewhere.

**Failing to recognize the pharmacists' right of conscience conflicts with  
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j).**

Title VII requires employers to make a reasonable accommodation for an employees religious observances and practices that conflict with employer requirements, unless the employer can show more than a minimal burden in making an accommodation. To make a *prima facie* case of a failure to accommodate, an employee must demonstrate that he holds a sincere religious belief that conflicts with an employment requirement; that he has informed the employer about the conflict; and that he was discharged or disciplined for failing to comply with the conflicting employment requirement. The employer must then make a good faith effort to accommodate the conflicting religious belief or practice. See *Tooley v. Martin Marietta Corp.*, 648 App.2d 1239 (9<sup>th</sup> Cir. 1981). Adopting a conscience clause essentially recognizes the federal policy in Title VII, which requires employers to make reasonable accommodations of sincerely held religious, moral, and ethical beliefs and practices. Under the Supremacy Clause of the United States

Constitution, at a minimum, the Pharmacy Board cannot adopt a policy that conflicts with Title VII.

**The American Pharmacists Association recognizes a pharmacists' right of conscience.**

In 1998 the American Pharmacists Association, after fully considering the issue, adopted an official policy affirming the right of conscience of pharmacists. That policy states in full:

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

Consistent with the deliberations and conclusions of the American Pharmacists Association, the Washington Pharmacy Board should also adopt an official policy affirming the right of conscience of pharmacists in the State of Washington.

**Recommendation for the Washington Pharmacy Board**

Opponents argue that conscience clauses should be rejected because there are only a few individual pharmacists that object to the dispensing of contraceptives. If that is true, a few pharmacists can hardly effect the dispensing of contraceptives in the state of Washington. The opponents have no qualms about urging this Board to force and to penalize pharmacists into dispensing contraceptives against their religious, ethical, and moral objections. When it comes to terminating pregnancies, there is no room for religious, ethical, and moral objections according to the conscience clause opponents. In their world it is all or nothing, one must stand, the other must fall. But a conscience clause, which is not a ban on contraception, respects the right of women to access contraceptives, and allows pharmacists to maintain their moral integrity in carrying out their profession. It is incredible that the opponents of a conscience clause seek to have this Board revoke the professional licenses of those pharmacists who are committed to care for the public in accordance with the dictates of their conscience. Such a position is extreme and harsh; will not be tolerated by the United States and Washington Constitutions, and should be rejected by this Board in favor of a conscience clause.

To respect the rights of both patient and pharmacist, we urge the Board to establish an express policy recognizing a pharmacist’s right of conscience to abstain from dispensing contraceptives. To protect the right of conscience, the pharmacy board should adopt a policy that clearly allows pharmacists to refrain from filling contraceptive prescriptions, and which protects them from being forced to make referrals to pharmacists that will prescribe contraception.

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Very truly yours,

A handwritten signature in cursive script that reads "Byron J. Babione".

Byron J. Babione,

Senior Legal Counsel  
Alliance Defense Fund  
15333 N. Pima Rd. Ste. 165  
Scottsdale, AZ 85260  
(480) 444-0020  
(480) 444-0028 fax  
[bbabione@telladf.org](mailto:bbabione@telladf.org)