No. 2023-2024

IN THE

Supreme Court of the United States

THE STATE OF OLYMPUS

Petitioner

v.

MINDY VO

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OLYMPUS

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the United States Constitution guarantees a right of privacy that includes a right to use contraception, including whether *Griswold v. Connecticut* and *Eisenstadt v. Baird* should be revisited?
2. Whether Olympus' "REAP WHAT YOU SOW Act" as applied to Respondent violates the Free Exercise Clause of the First Amendment to the United States Constitution, including whether *Employment Division, Department of Human Resources of Oregon v. Smith* should be revisited?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases on Record

Cases Cited Within Record

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns Respondent's conviction under Olympus' REAP WHAT YOU SOW Act (RWYSA) for the use and distribution of prohibited forms of birth control. The relevant portion of the RWYSA "criminalizes the use, sale, prescription, distribution and/or possession with the intent to distribute of all methods of temporary birth control except for male and female condoms, classifying any violation as a Class A misdemeanor." *Record* at 2.

Respondent challenges her conviction on the grounds that it violates her constitutional right to privacy. Traditionally, the Court decides privacy challenges under the Due Process Clause of the Fourteenth Amendment. *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997). The Fourteenth Amendment states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV.

Respondent also challenges her conviction under the First Amendment, arguing that the law unconstitutionally infringes on her free exercise rights. The First Amendment states:

> 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. U.S. Const. amend. I.

STATEMENT OF THE CASE

According to the Center for Disease Control (CDC), sexually transmitted infections (STIs) are at an "all-time high" in the United States. *Record* at 6. On any given day, over twenty percent of the United States population has an STI. *Id*. In 2018, there were twenty-six million new cases of STIs nationwide. *Id*. STIs had a mortality rate of 4.0 deaths per 100,000 in 2020, and medical costs associated with treating STIs exceeded $16 billion in 2018 alone. *Id*. at 6-7.

This problem is especially pronounced in the state of Olympus. On any given day, thirty-five percent of its population has an STI, and Olympus experiences an average of 600,000 new STI cases per year. *Id*. at 7. The STI crisis has overwhelmed Olympus' health clinics. *Id*. This has led the Olympus Department of Health to declare the state an "at-risk population." *Id*. To combat the rise of STIs, Olympus has tried offering educational campaigns, free testing, and subsidized medical costs. *Id*. However, these efforts have not proven successful. *Id*.

To address the STI crisis, Olympus passed the REAP WHAT YOU SOW ACT (RWYSA). The RWYSA criminalizes the use and distribution of "all methods of temporary birth control except for male and female condoms." *Id*. at 2. This limits the available forms of birth control to barrier contraceptives, which are up to 98% effective at stopping STI transmission. *Id*. at 5. Non-barrier contraceptives, which are banned under the RWYSA, provide no protection at all. *Id*. The RWYSA contains an exception for those who "cannot use condoms for medical reasons or other physical reasons." *Id*. at 2. The Act contains no exceptions other than that.

Respondent is the owner of a pharmacy in Olympus. *Id*. at 2. She is also a member of a minority religion called the Church of Balance. *Id*. The Church encourages members to prevent overpopulation by limiting family size and by using contraception. *Id*. at 3. However, church

doctrine does not require members to use oral contraception as opposed to the male or female condom.

In July 2022, Respondent was arrested after she live-streamed herself ingesting birth control pills and then selling birth control pills to customers. *Id*. at 3. Neither Respondent nor any of the customers she sold birth control to qualify for an exception under the RWYSA. *Id*. Following her arrest, Respondent was charged with the use and distribution of prohibited birth control in violation of the RWYSA. *Id*. She was convicted on both charges. *Id*. Respondent appealed her conviction on the grounds that it violates her right to privacy and the Free Exercise Clause of the First Amendment. On both constitutional issues, she challenges the prohibition on the use and distribution of oral contraceptives.

SUMMARY OF ARGUMENTS

Olympus has not violated Respondent's right to privacy by limiting the available forms of birth control to those most effective at stopping STI transmission. Under the Fourteenth Amendment, citizens enjoy certain fundamental rights. However, the Court has never ruled that those rights include a right to choose one's preferred form of birth control, and the Court should not recognize such a right here.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court found that there was a broader right to contraception. *Id*. at 485. In that case, the Court ruled that a Connecticut statute was unconstitutional because it prohibited citizens from using "any drug, medicinal article or instrument for the purpose of preventing conception." *Id*. at 480. The Court reasoned that by restricting access to all forms of contraception, Connecticut had unconstitutionally invaded the realm of marital privacy. *Id*. at 485. In *Eisenstadt v. Baird*, 405 U.S. 438 (1971), the Court affirmed *Griswold* and extended its protections to unmarried couples. *Id*. at 453-454.

Griswold is good law, and it is not necessary for the Court to revisit that case. However, it is inapplicable here because the RWYSA does not place a ban on all forms of contraception. Under the RWYSA, citizens can exercise their right to contraception by using the male or female condom. *Record* at 2. As such, the RWYSA does not run afoul of the decisions in *Griswold* or *Eisenstadt*. By challenging the RWYSA, Respondent is not asking the Court to simply apply *Griswold*. Respondent is asking the Court to extend *Griswold*. Because of this, *Washington v. Glucksberg*, 521 U.S. 702 (1997) controls this case.

In *Glucksberg*, the Court laid out a two-prong test that applies when the Court is asked to recognize a new fundamental right or extend an existing one. Under that analysis, the Court first requires a "careful description" of the asserted fundamental right. *Glucksberg*, 521 U.S. at 721

(quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Then, it determines whether the asserted right is "deeply rooted in this Nation's history and tradition." *Id*. (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)). In Due Process analysis, the Court uses history and tradition as "guideposts for responsible decisionmaking." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), as cited by *Glucksberg*, 521 U.S. at 721. This avoids the danger of the Court transforming Due Process analysis into "the policy preferences of the Members of this Court." *Moore*, 432 U.S. at 502, as cited by *Glucksberg*, 521 U.S. at 720.

Under the first prong of the *Glucksberg* test, the right at issue is the right to use one's preferred form of contraception. While Respondent has claimed a broader right to contraception, *Glucksberg* requires a more careful definition of the right. An analysis of the history and tradition of that right demonstrates that it is not deeply rooted. Throughout its history, the United States has consistently regulated, restricted, and prohibited access to various forms of contraception. By 1965, twenty-six states had bans on the use of contraceptives by unmarried women. *Record* at 4. The lower court relied on *Obergefell v. Hodges*, 576 U.S. 644 (2015) in arguing that history and tradition are not dispositive. However, even applying *Obergefell* analysis here, there are no legislative trends to support a right to choose one's preferred form of contraception. As such, there is no fundamental right that has been infringed upon by the RWYSA. The Act does not violate Respondent's constitutional right to privacy.

On the Free Exercise issue, the RWYSA is constitutional because it satisfies the *Smith* test. In *Smith*, the Court ruled that laws that place an incidental burden on religious practice are not subject to strict scrutiny if they are neutral and generally applicable. *Employment Division v. Smith*, 494 U.S. 872, 878-882 (1990). Under the neutrality requirement, laws may not target specific religious groups or discriminate against religion more broadly. Under general

applicability, laws may not contain a system of individualized exemptions or treat secular conduct more favorably than comparable religious conduct.

The lower court raised concerns about *Smith*'s standing as good law. However, stare decisis analysis demonstrates that *Smith* should not be revisited. Under *Janus v. State, County, and Municipal Employees*, 138 S.Ct. 2448, 2478 (2018), as cited by *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1912 (2021) (Alito, J., concurring in the judgment), the Court "will not overturn a past decision unless there are strong grounds for doing so." To justify overturning a prior case, several relevant considerations or stare decisis factors must weigh in favor of overruling precedent. Four of those factors are a case's "reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down." *Fulton*, 141 S.Ct. at 1912 (Alito, J., concurring in the judgment). Here, none of those factors weigh in favor of overturning *Smith*.

Under *Smith*, the RWYSA is constitutional because it is both neutral and generally applicable. The law is neutral because unlike the city ordinances in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993) the Act was not designed to "target" a particular religious group or religion more broadly. Instead, it was passed to address a public health emergency. The RWYSA is generally applicable because it does not contain a system of individualized exceptions like the city contracts in *Fulton*. It also does not treat secular conduct as more favorable than comparable religious conduct. The only exception contained in the law is a medical one. *Record* at 2. The Court has never struck down a law because of a medical exception. As such, the RWYSA satisfies the *Smith* test and is not subject to strict scrutiny.

Even if the Court were to overturn *Smith* and apply strict scrutiny, the law still meets constitutional muster. That is because it furthers a compelling government interest and is

narrowly tailored to that end. The compelling interest is in protecting public health and saving public money. The law is narrowly tailored because it still allows citizens to use the forms of contraception that are effective at stopping the spread of STIs. *Record* at 5. As such, it represents the "least restrictive" means of achieving the state's interest. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981), as cited by *Lukumi*, 508 U.S. at 578 (Blackmun, J., concurring in the judgment). Thus, even if the Court subjects the RWYSA to the highest level of scrutiny, it still represents a constitutional use of state power.

Respondent's challenge to her conviction for the use and distribution of prohibited birth control fails under both the right to privacy and the Free Exercise Clause of the First Amendment. As such, the Court should reverse the decision of the lower court and find the RWYSA constitutional as applied to Respondent.

ARGUMENT

I. The RWYSA does not violate Respondent's right to privacy by limiting the available forms of birth control to those effective at stopping STI transmission.

Since its founding, the United States has affirmed the states' power to legislate on subjects such as health, safety, and morality. The State of Olympus constitutionally exercised that power when it passed the RWYSA to curtail the transmission of STIs.

While Respondent has claimed a violation of her right to privacy, the RWYSA does not infringe on any fundamental right. It allows citizens to exercise the broader right to contraception recognized in *Griswold v. Connecticut* and *Eisenstadt v. Baird* by permitting the use and distribution of the male and female condom. In addition, any asserted right to use one's preferred form of contraception fails under *Washington v. Glucksberg*. Such a right is not rooted in this nation's history and tradition. It is also unsupported by modern legislative trends. As such, the RWYSA does not violate any of Respondent's fundamental rights, and the rational basis test applies.

A. There is no fundamental right to use one's preferred form of contraception.

The Due Process Clause of the Fourteenth Amendment seeks to balance the competing legitimate interests of the state with the liberty interests of the citizen. In protecting liberty interests, the Court weighs the scale heavily in favor of rights considered so deeply rooted in the nation's history as to be determined fundamental. As the Court reasoned in *Flores*, 507 U.S. at 302, as cited by *Glucksberg*, 521 U.S. at 721, the Fourteenth Amendment "forbids the government to infringe ... 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

However, the right of a person to access their preferred method of contraception is no such fundamental liberty interest.

1. ***Griswold v. Connecticut* established a right to contraception generally, not a right to use one's preferred form of contraception.**

In *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the Court recognized a right to use contraception generally, but it never established a right to use one's preferred form of contraception. The right to contraception recognized in those cases referred to an individual's right to have the option of contraception. The Court never acknowledged a right to specific contraceptive products.

Sixty-three years before the test laid out in *Glucksberg*, the Court reflected the language that a right must be deeply rooted in this nation's history and tradition to be considered fundamental. In cases as early as *Snyder v. Com. of Massachusetts*, 291 U.S. 97 (1934), the Court ruled that the Due Process Clause protects liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 105, as cited by *Griswold*, 381 U.S. at 487. At the core of this language is the understanding that the Court does not create rights. It recognizes them.

In *Griswold,* the right considered deeply rooted in this nation's history was not a right to access one's preferred type of contraception but rather the right of married individuals to choose whether to beget children. The Connecticut Statute in question banned all forms of temporary birth control—entirely removing from married individuals the option of contraception. *Griswold*, 381 U.S. at 480. In his concurring opinion, Justice Goldberg describes the liberty interest of contraception as a necessary component of the right of married individuals to choose whether to have children. *Id*. at 487 (Goldberg, J., concurring). He cites *Meyer v. State of Nebraska*, 292

U.S. 390 (1923), which recognized that the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also (for example,) the right * * * to marry, establish a home and bring up children * * *.'" *Id*. at 399, as cited by *Griswold*, 381 U.S. at 388 (Goldberg, J., concurring). Connecticut's prohibition on contraception violated citizens' fundamental rights because it did not afford married individuals the choice of whether to beget children. Thus, it unconstitutionally infringed on citizens' right to privacy.

The *Eisenstadt* Court reached a similar conclusion. It ruled that a Massachusetts Statute banning all forms of contraception for unmarried persons was unconstitutional because it infringed on "the decision whether to bear or beget a child." *Eisenstadt*, 405 U.S. at 453. As such, *Eisenstadt* affirmed the idea that contraception "is necessary in making the express guarantees" of planning one's parenthood "fully meaningful." *Griswold*, 381 U.S. at 483. The right to contraception stems from a right to decide whether to have children.

The RWYSA does not infringe on Respondent's right to contraception because it allows her to decide whether to have children. The record is clear that the RWYSA is not a total ban on contraception. *Record* at 2. The RWYSA allows for all forms of barrier contraception, sterilization, and already implanted birth control devices. *Id.* As such, it allows Respondent to exercise her constitutionally protected right to choose whether to beget children. The RWYSA does not run afoul of the Court's rulings in *Griswold* and *Eisenstadt*.

Here, Respondent's primary objection is not that she does not have access to contraception or that she does not have a choice over whether to beget children. The Respondent is perfectly capable of wearing a female condom. *Id.* Rather, Respondent's claim centers on her inability to access her *preferred* form of contraception. Therefore, Respondent is not asking the Court to apply its reasoning in *Griswold* and *Eisenstadt* but to extend it.

2. An asserted right to use one's preferred form of contraception does not pass the test set out in *Washington v. Glucksberg*.

When the Court is asked to extend a right and enter "unchartered" territory, to use the language of *Collins*, 503 U.S. at 125, as cited by *Glucksberg*, 521 U.S. at 720, the Court has long held that it should "exercise the utmost care." *Id*. That is because in Due Process analysis there is always the danger of the Court allowing "the liberty protected by the Due Process Clause" to be "subtly transformed into the policy preferences of the Members of this Court." *Moore*, 431 U.S., at 502 (plurality opinion), as cited by *Glucksberg*, 521 U.S. at 720. To protect against this possibility, the Court uses history and tradition as "guideposts for responsible decision-making." *Collins*, 503 U.S. at 125, as cited by *Glucksberg*, 521 U.S. at 721.

As such, only those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and so "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed" are protected under the Due Process analysis. *Snyder*, 291 U.S. at 105, as cited by *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring); *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), as cited by *Glucksberg*, 521 U.S. at 721. Respondent's asserted right is not fundamental because it is not rooted in this nation's history and tradition.

i. The right at issue is a right to choose one's preferred form of contraception.

Here, the right at issue is the right to use one's preferred form of contraception. Although Respondent has claimed a broader right to contraception, the Court's analysis demands a more careful definition of the right. *See Glucksberg*, 521 U.S. 702 (1997); *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990), as cited by *Glucksberg*, 521 U.S. at 724. In *Glucksberg,* Respondents asserted a generalized "liberty of competent, terminally ill adults to make end-of-

life decisions free of undue government interference." *Glucksberg*, 521 U.S. at 724. However, the Court ruled that the liberty interest needed to be more carefully defined as "a right to commit suicide with another's assistance." *Id*.

In *Cruzan,* Respondents similarly attempted to assert a broad "interest in making decisions about how to confront an imminent death." *Cruzan*, 497 U.S. at 279, as cited by *Glucksberg*, 521 U.S. at 723-724. However, the Court again rejected the asserted interest as overly broad and more carefully defined the interest as a "right to refuse hydration and nutrition." *Id*.

The Court should apply the same standard here. The asserted liberty interest cannot be, as Respondent has claimed, a broad right to contraception, as established in *Griswold* and *Eisenstadt*. As argued above, the RWYSA does not conflict with that right. Rather, the asserted liberty interest must be defined as a person's right to choose a specific method of contraception based on their preference.

ii. A right to choose one's preferred form of contraception is not deeply rooted in this Nation's history and tradition.

In *Glucksberg,* Justice Rehnquist's initial inquiry was not whether assisted suicide, or even suicide itself, had existed since the nation's founding, but whether laws surrounding the practice supported or denounced it. *Glucksberg*, 521 U.S. at 710. It was his analysis that suicide had "always been a crime" in the State of Washington and that American laws regarding suicide had "consistently condemned" assisted suicide that brought him to his conclusion. *Id*. at 706-707, 719. Therefore, under *Glucksberg*, the question is not merely whether a practice has existed since the nation's founding, but whether legislation has endorsed and enshrined it.

Here, it is indisputable that various forms of contraception have existed in the United States since the founding, but it is also undeniable that the government has consistently restricted, regulated, and prohibited access to its various forms. In 1873, only five years after the ratification of the Fourteenth Amendment, the United States passed the Comstock Act, which banned the mailing of "every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose." *Record* at 4 n.3. This act was not a historical outlier. By the mid-19th century, the majority of state legislatures had enacted laws to either severely restrict or fully ban access to contraceptives. *Id*. at 4. By 1965, twenty-six states had restrictions in place that forbade unmarried women from using birth control. *Id.*

The lower court cited *Obergefell v. Hodges*, 576 U.S. 644 (2015) in arguing that history and tradition are not dispositive. National trends are also relevant in *Glucksberg* analysis. However, the Court should make the same distinction between attitude and legislation that it did in *Glucksberg*. There, the Court recognized that while "attitudes toward suicide" had changed over time, laws still "consistently condemned" that practice. *Glucksberg*, 521 U.S. at 719. Thus, changing attitudes towards a practice do not compel the recognition of a new right if they are not accompanied by legislation.

Turning to modern trends regarding contraceptives, attitudes towards contraception itself may have changed over time, but legislation surrounding it is still restrictive. Ten state legislatures have introduced total bans on contraception, while five have introduced restrictive but less expansive laws. *Record* at 2. In two of the fifteen states, proposed legislation would not even allow for voluntary sterilization. *Id* n.1. Currently, twelve states allow healthcare providers

to refuse to administer birth control to patients, six states allow providers not to dispense birth control, and eight states allow healthcare institutions to refuse to provide services related to birth control. *Id*. at 6 n.9.

Unrestricted access to all forms of contraception does not find its root in this nation's history or its traditions; rather, history and tradition unveil the opposite. The United States has long opposed unfettered access to contraception on the grounds of health, safety, and morality. Thus, Respondent's incidental preference for one particular form of contraception does not endow her with a fundamental right to it. Because the RWYSA does not infringe on any fundamental rights, rational basis is the appropriate level of scrutiny.

B. The RWYSA passes the rational basis test.

Among the most widely recognized interests of the state is the interest in protecting public health. Without the power to promote the health and safety of its citizens, the State is crippled in its ability to fulfill its duties. This interest is so important that the *Cruzan* Court referred to it as "unqualified." *Cruzan*, 497 U.S., at 282, as cited by *Glucksberg*, 521 U.S. 728. The RWYSA is constitutional because it furthers this legitimate interest and is rationally related to that end.

1. **The State of Olympus has a legitimate interest in protecting public health and saving public money.**

The State of Olympus currently leads the nation in the rate of persons with an STI. *Record* at 7. Of the five million people living in the State, an estimated 1,750,000 have an STI. *Id.* In response to this, the Olympus Department of Health has declared the State an at-risk population. *Id*. On any given day, twenty percent of the American population has an STI. In

Olympus, that ratio is thirty-five percent and growing. *Id.* The State sees an average of 600,000 new cases per year. *Id.*

The outbreak has taken a significant human and financial toll. In 2020, 4.5 out of every 100,000 deaths in Olympus were due to STI-related causes. *Id*. In addition, millions of dollars have been spent on STI-related medical expenses. *Id.* The crisis has caused revenue from tourism to sharply decline—tourism-related revenue fell by 25% from 2010 to 2020. *Id.* The State's image has also suffered. Online posts have prompted neighboring states to start handing out free condoms to travelers entering Olympus. *Id.* Given the nature of the crisis, the Olympus legislature has broad discretion in deciding how to curtail this epidemic.

At this point, Olympus has tried several initiatives to curb the spread of STIs. It has offered "educational campaigns, free testing, and subsidized medical costs associated with preventing STIs." *Id.* However, these efforts have proven ineffective.

2. The RWYSA is rationally related to the state's interest.

To curb the spread of STIs, the State of Olympus passed the RWYSA, which "criminalizes the use, sale, prescription, distribution, and/or possession with the intent to distribute of all methods of temporary birth control except for male and female condoms." *Id*. at 2. The Act specifically targets non-barrier forms of contraception because they provide no protection against STI transmission. *Id*. at 5. Studies suggest that barrier forms of contraception, which are allowed under the RWYSA, are up to 98% effective at stopping the spread of STIs. *Id.* As such the RWYSA is rationally related to the state's interest in protecting public health and saving public money, and it represents a permissible use of the state's police power.

II. Respondent is not entitled to a religious exemption from a neutral and generally applicable law under the Free Exercise Clause of the First Amendment.

The First Amendment provides that, "Congress shall make no law… prohibiting the free exercise" of religion. U.S. Const. amend. I. However, the protections afforded by the Free Exercise Clause are not unlimited. In cases as early as *Reynolds v. United States*, 98 U.S. 145 (1878), the Court recognized that the Free Exercise Clause does not protect religious practices "in violation of social duties or subversive of good order." *Id*. at 164. In *Employment Division v. Smith*, the Court ruled that states may place an incidental burden on religion so long as they use neutral and generally applicable laws to do so. *Smith*, 494 U.S. at 878-882.

Here, the RWYSA is constitutional because it satisfies both prongs of the *Smith* test. The Act is neutral because it was not motivated by animus against religion. The RWYSA is also generally applicable because it treats religious and secular conduct equally. Thus, while Respondent may claim that the use and distribution of oral contraceptives is essential to her religious practice, she is not entitled to a religious exemption from the RWYSA under the Free Exercise Clause.

A. *Employment Division v. Smith* is good law and should not be revisited.

In *Employment Division v. Smith*, the Court created a test to balance individual rights against social order. There, the Court recognized that subjecting state laws to strict scrutiny any time they burdened an individual's religious exercise created a dangerous scenario where citizens could exempt themselves from disfavored laws by claiming a religious conflict: "Any society adopting such a system would be courting anarchy." *Smith*, 494 U.S. at 888. Thus, the Court ruled that neutral and generally applicable laws need only satisfy the rational basis test. *Id*. at

878-882. Strict scrutiny was reserved for laws designed to "infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533.

In the years since *Smith* was decided, the Court has applied the *Smith* test repeatedly. *See Lukumi*, 508 U.S. 520 (1993); *Fulton*, 141 S.Ct. 1868 (2021); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021); *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022); *Carson as next friend of O.C. v. Makin*, 142 S.Ct. 1987 (2022). Each time, the Court has found *Smith* adequate to decide the case. Yet, despite this, the lower court has argued that "the precedential value of *Smith* is in doubt" and has urged the Court to "overrule *Smith* and restore religious practice to the preferred position it has always rightfully deserved." *Record* at 13.

The Court should not revisit *Smith* because insufficient stare decisis factors weigh in favor of overturning *Smith* under *Janus*, 138 S.Ct. 2448, as cited by *Fulton*, 141 S.Ct. at 1912 (Alito, J., concurring in the judgment). Under the principle of stare decisis, the Court "will not overturn a past decision unless there are strong grounds for doing so." *Id*. at 2478, as cited by *Fulton*, 141 S.Ct. at 1912 (Alito, J., concurring in the judgment). To justify overturning a prior case, several relevant considerations or stare decisis factors must weigh in favor of overruling precedent. In *Janus*, the Court found that these factors include a case's "reasoning; its consistency with other decisions; the workability of the rule that it established; and developments since the decision was handed down." *Id*. Here, none of these factors weigh in favor of overturning *Smith*.

Regarding *Smith*'s reasoning, some Justices have argued that *Smith* departed from the original meaning of the Free Exercise Clause. *See Lukumi*, 508 U.S. at 574-577 (Souter, J., concurring in part and concurring in the judgment); *Fulton*, 141 S.Ct. at 1894-1912 (Alito, J., concurring in the judgment). However, even those Justices have conceded that the historical

picture is "complex", and that scholarship is "not uniform" when it comes to the Free Exercise Clause's original meaning. *Id*. Given this, *Smith* remains, at the very least, a "permissible reading of the text" of the First Amendment. *Smith*, 494 U.S. at 878. Historical analysis does not weigh against *Smith*'s reasoning.

Moving to the second stare decisis factor, *Smith* is consistent with other decisions. In *Smith*, Justice Scalia explicitly reconciled the ruling with prior cases like *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). He noted that the law in *Sherbert* would fail under general applicability and that *Yoder* dealt with a hybrid rights challenge. *Smith*, 494 U.S. at 881-885. As such, *Smith* does not stand in tension with the Court's other decisions. If anything, overturning *Smith* would create inconsistency and call into question *Smith*'s three decades worth of progeny.

On the issue of workability, the Court has applied *Smith* four times in the past two terms alone. *See Fulton*, 141 S.Ct. 1868; *Tandon*, 141 S.Ct. 1294; *Kennedy*, 142 S.Ct. 2407; *Carson*, 142 S.Ct. 1987. Each time, the test has proved adequate to resolve the case.

Developments since *Smith* was decided also support its standing as good law. When questions about how to apply the *Smith* test have arisen, the Court has been able to successfully resolve them. *See, e.g.*, *Tandon*, 141 S.Ct. at 1296 (clarifying that comparability is "concerned with the risks various activities pose, not the reasons why people gather"). Even if the *Smith* test was imperfect when it was initially created, thirty years of jurisprudence have refined it.

As such, all four stare decisis factors outlined in *Janus* point to the same conclusion: *Employment Division v. Smith* should not be revisited. Instead, *Smith* is good law, and its two-prong test controls this case.

B. The RWYSA is constitutional under *Smith* because it is neutral and generally applicable.

Under *Smith*, laws that place an incidental burden on religion are not subject to strict scrutiny so long as they are neutral and generally applicable. *Fulton*, 141 S.Ct. at 1876. Here, the RWYSA is constitutional because it satisfies both of those prongs.

First, the neutrality requirement prohibits states from targeting specific religious groups or discriminating against religion more generally. In *Church of the Lukumi Babalu Aye v. City of Hialeah*, the Court found that city ordinances prohibiting animal sacrifice violated the neutrality requirement because they were clearly designed to "target" members of the Santeria religion. *Lukumi*, 508 U.S. at 535. The ordinances used religious language, such as the words "sacrifice" and "ritual," in their prohibitions against the killing of animals. *Id*. at 534. They also contained exceptions for secular activities like hunting, creating what was in effect a "religious gerrymander." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring), as cited by *Lukumi*, 508 U.S. at 535. The Court wrote: "The burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others." *Lukumi*, 508 U.S. at 536. As such, the ordinances violated *Smith*'s neutrality requirement. In *Kennedy v. Bremerton School District*, the Court considered policies that were more overtly discriminatory towards religion. There, a school district forbade employees from engaging in "religious conduct" while on duty. *Kennedy*, 142 S.Ct. at 2422. While the district's policy did not target a specific religious group, the Court found that it still violated the neutrality requirement by discriminating against religion more broadly. *Id*.

Here, the RWYSA satisfies the neutrality requirement because it was not motivated by animus against Ms. Vo's religion or religion more generally. Instead, it was passed to address a

public health emergency. The state of Olympus is currently experiencing an STI outbreak. Thirty-five percent of its population has an STI on any given day, and the state experiences an average of 600,000 new STI cases per year. *Record* at 7. To stop the spread of STIs, the state has already tried educational campaigns and offered free testing. *Id*. However, these efforts have proven ineffective. *Id*. That is why the Olympus legislature passed the RWYSA. The RWYSA seeks to stop the spread of STIs by limiting the available forms of birth control to the male and female condom, which studies suggest are up to 98% effective at preventing STI transmission, and by banning oral contraceptives, which provide no protection at all. *Id.* at 5. Nothing on the record suggests that the state intended to target Ms. Vo's religion, the Church of Balance, by passing this law. In fact, there is no indication that the state was even aware that the Church of Balance existed when it enacted the RWYSA. The Act contains an exception for those "who cannot use condoms for medical reasons or other physical reasons." *Id*., at 2. However, there are no other exceptions present in the Act. Given that the RWYSA was not religiously motivated and does not create a religious gerrymander like the one in *Lukumi*, the Act satisfies *Smith*'s neutrality requirement.

Under the general applicability prong of the *Smith* test, laws may not contain a system of individualized exemptions or treat secular activity more favorably than comparable religious activity. In *Fulton v. City of Philadelphia*, the Court found that a city contract was not generally applicable because it included "a formal system of entirely discretionary exceptions" that were not available to religious entities. *Fulton*, 141 S.Ct. at 1878. The Court ruled that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884, citing *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (plurality opinion). Thus, if a law allows discretionary

exemptions for secular reasons, it must allow exemptions for religious reasons too. Under general applicability, states are also prohibited from treating secular activity more favorably than comparable religious activity. In *Tandon v. Newsom*, the Court struck down California COVID restrictions because they contained "myriad exceptions and accommodations" for secular activities like visiting retail stores and movie theaters while prohibiting religious activities that posed similar risks. *Tandon*, 141 S.Ct. at 1298.

The RWYSA satisfies the general applicability requirement because it does not contain a system of individualized exemptions and applies equally to secular and religious conduct. Under the RWYSA, there is no system of individualized exemptions like the one present in *Fulton*. Citizens cannot appeal for discretionary exemptions granted by a state commissioner. As such, the RWYSA avoids the problem Philadelphia faced with its city contracts. That means that the only remaining question is whether the RWYSA treats secular conduct more favorably than religious conduct. It does not. The only exception present in the Act is a medical one. *Record* at 2. That exception is a simple recognition that some individuals cannot follow the law for medical or physical reasons. It does not suggest "unequal treatment" between religious and secular conduct. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring in the judgment), as cited by *Lukumi*, 508 U.S. at 542. While the Court has found other exceptions problematic, it has never struck down a law because of a medical exception. The law in *Smith* itself allowed for the use of peyote, an otherwise controlled substance, when "prescribed by a medical practitioner." *Smith*, 494 U.S. at 874. The Court still upheld that law as generally applicable. Thus, the RWYSA satisfies the second prong of the *Smith* test.

Because the RWYSA is a neutral and generally applicable law, it is constitutional under *Smith*. Respondent is not entitled to a religious exemption from the law, and Olympus is

permitted to place an incidental burden on her free exercise. These facts are dispositive and sufficient grounds to reject Respondent's challenge.

C. Even if the Court were to overturn *Smith*, the RWYSA would still be constitutional because it survives strict scrutiny.

Under *Smith*, the RWYSA represents a constitutional use of the state's police power. However, even if the Court were to overturn *Smith* and apply strict scrutiny, the RWYSA would still meet constitutional muster. Before *Smith*, the Court used a compelling interest standard when deciding Free Exercise cases. Under that standard, laws were subject to strict scrutiny whenever they placed a substantial burden on individuals' religious practice. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). If the Court were to overturn *Smith*, it would likely return to a similar type of analysis. In that scenario, strict scrutiny would likely apply. To meet constitutional muster, the RWYSA would have to further a "compelling" government interest and would have to be "narrowly tailored" toward that end. *Fulton*, 141 S.Ct. at 1881.

The RWYSA survives strict scrutiny because it satisfies both of those prongs. The Act furthers two compelling interests: protecting public health and saving public money. As the record notes, the Act was passed to combat an STI outbreak that has taken "a significant human and financial toll." *Record* at 7. By reducing the spread of STIs, it furthers the interests in protecting human life and saving financial resources. The Act is narrowly tailored because it represents the "least restrictive" means of furthering these interests. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 718 (1981), as cited by *Lukumi*, 508 U.S. at 578 (Blackmun, J., concurring in the judgment). Under the narrow tailoring requirement, laws that sweep too broadly fail strict scrutiny. States must restrict the least amount of conduct necessary to achieve their interests. Here, the RWYSA does this by limiting its prohibition to

those forms of temporary birth control that provide no protection against STI transmission. *Record* at 5. Barrier forms of contraception like condoms are still available. *Id*.

Respondent might argue that she deserves an exemption because she is a monogamous individual who will not contribute to the STI crisis. However, granting her an exemption would frustrate the state's ability to further its interests. If the state granted Respondent an exemption, it would have to grant one to every citizen who claimed to be in a monogamous relationship. In evaluating claims, the state would be forced to take citizens at their word. This would allow citizens who simply disagree with the law to circumvent its enforcement and defeat the law's effectiveness. As such, regulating Respondent's conduct is necessary to achieve the state's interests. The Act is narrowly tailored as it applies to her.

Thus, even if the Court decides to overturn *Smith* and applies strict scrutiny, the RWYSA meets constitutional muster. The Act furthers the compelling interests in protecting public health and saving public money. It also allows for forms of birth control effective at stopping the spread of STIs. Whether under *Smith* or the compelling interest standard, the RWYSA represents a constitutional use of state power. Respondent's Free Exercise challenge should be rejected under either type of analysis.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully Submitted,

Counsel for the Petitioner