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 RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Constitution guarantees a right to 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 of the United States Constitution, including whether *Employment Division v. Smith* should be revisited?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Amendment I.

Congress shall make no law respecting the 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. Constitution, Amendment XIV, Section I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 laws.

REAP WHAT YOU SOW Act §1984(a), Olympus Statutes (2022).

STATEMENT OF THE CASE

On June 29, 2022, the State of Olympus enacted the "Reducing Endemic Afflictions & Poverty While Halting Adultery To Yield Olympus's Unparalleled State of Wholesomeness Act" otherwise known as the "REAP WHAT YOU SOW" Act, hereinafter referred to as the "RWYSA" R. [1]. Under the Olympus statute, the RWYSA criminalizes the usage, sale, prescription, distribution, and/or possession with the intent to distribute all temporary birth control procedures and methods outside of male or female condoms. *Id*. at 2. Any violation of this statute would classify as a Class A misdemeanor, and for each violation of the law, a mandatory fine of no less than $500 and not more than $10,000, including a potential loss of professional licenses associated with the criminal violation and/or up to one year in prison. *Id*. Furthermore, the statute allows for existing implanted devices so long as they remain medically effective, without the possibility of obtaining a new one after expiration. *Id*. The State is also experiencing a drastic increase in the spread of sexually transmitted infections, which is negatively affecting the State economy and tourism rates. *Id*. at 7.

The RWYSA does provide limited exceptions to people who are unable to use condoms for medical or other physical reasons. *Id*. at 2. If provided with an exception, the birth control can only be obtained with a prescription from a state-licensed physician from a public, state-run hospital. Under the RWYSA, private pharmacies and hospitals are not allowed to distribute birth control other than male and female condoms. *Id*. The RWYSA has several associated state interests, including: promoting morality, promoting a "culture of life", encouraging responsibility, saving public money that would have otherwise been spent on the costs associated with treating STIs, and promoting the health of men and women. *Id*. After enacting the RWYSA,

Olympus became the first state since the 1960s to ban most temporary methods of birth control. *Id*.

Mindy Vo, a resident of Olympus and a pharmacy owner, is a member of the Church of Balance, a minority religion which promotes ecological responsibility and advocates for abstinence and the use of birth control to prevent overpopulation. *Id*. at 2, 3. Ms. Vo also suffers from reproductive health issues, including three miscarriages, and during her most recent miscarriage, she developed pre-eclampsia and had to undergo an emergency cesarean section. *Id*. at 2. Her doctor has advised her that sterilization is not appropriate for medical reasons, and that if she were to become pregnant again, she could lose her life. *Id*. at 3.

On July 7, Ms. Vo traveled to a nearby state where non-barrier contraceptives are legal in order to acquire birth control pills both for personal use and to sell in her pharmacy. *Id*. Joined by her minister, she extensively documented this process online through live-streaming. *Id*. On July 13 when she returned to Olympus City, Ms. Vo live streamed herself taking a birth control pill and selling them to customers who do not qualify for exemptions from the RWYSA in her pharmacy. *Id*. She was arrested for the use and distribution of the prohibited birth control, and moved to dismiss her charges at trial, stating that the RWYSA was unconstitutional. Though she pleaded not guilty, she was convicted of violating the RWYSA on both charges, and fined the mandatory minimum of $500 for each charge. *Id*. When Ms. Vo appealed to the Olympus 13th Circuit Court of Appeals, the court overturned her conviction, ruling that the RWYSA violated her constitutional rights to privacy and freedom of religion. *Id*. The State of Olympus now appeals that decision.

SUMMARY OF ARGUMENT

Griswold v. *Connecticut* 381 U.S. 479 (1965) and *Eisenstadt* v. *Baird* 405 U.S. 438 (1972) should be upheld because contraception is a fundamental right, and the RWYSA does not satisfy a strict scrutiny analysis. *Griswold* and *Eistenstadt* have been regarded as landmark cases for substantive due process for centuries, including the cases of *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 576 U.S. 644 (2015). In *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022), the Court held that there are several considerations that should be evaluated when revisiting precedent, including the quality of the decision's reasoning, workability, effect on other areas of the law, concrete reliance interests, and the nature of the Court's error.

When using these considerations to evaluate *Griswold*, they further strengthen its decision. *Griswold*'s decisions are part of a larger picture to the right to privacy, and has been protected by this court time and time again. *Griswold*, 381 U.S. 479. The penumbral theory used in *Griswold* has been supported by numerous privacy related precedent and is rooted in the Constitution. *Id.* Furthermore, *Griswold* has proved to be workable, as it is still cited in other substantive due process cases such as *Lawrence* and *Obergefell. Lawrence*, 539 U.S. 558, *Obergefell*, 576 U.S. 644. Lastly, overruling *Griswold* and *Eisenstadt* would have substantial effect on other areas of the law, specifically disrupting substantive due process cases that rely on their holdings. Overruling these cases would in turn domino onto the cases of *Lawrence* and *Obergefell*, calling into question whether these substantive due process rights still stand after the *Dobbs* considerations.

Furthermore, under the substantive due process analysis from *Washington v. Glucksberg*, 521 U.S. 702 (1997), the right to contraception would still exist because contraception is deeply

rooted in our nation's history and tradition and implicit in the concept of ordered liberty. Birth control has existed in the United States since African women who were enslaved used methods from their homelands, and was legal in all of the United States prior to the 1840s. R [4]. Furthermore, taking away the right to contraception would affect 65% of sexually active American women who use birth control, a substantial amount. R. [5]. This puts millions of men and women who rely on birth control at risk of losing their basic fundamental right.

The RWYSA infringes on that fundamental right and must be analyzed under a strict scrutiny analysis, which it does not satisfy. While the State may now argue that their compelling interest is public health, the State argued at the lower court of Olympus that their interest was promoting morality. R [10]. Morality is not a compelling, nor even a legitimate interest that a State can have when enacting legislation. Furthermore, the RWYSA is not narrowly tailored to meet any interest. There are several reasons why there are high STI rates in Olympus, and while low condom use is cited, non-barrier birth control is not one of them. R [7 n.15]. In fact, the State further goes to make access to condoms inaccessible, closing several clinics that provided free condoms. *Id*. Even if the Court decides that there is no fundamental right to contraception, the RWYSA would still fail a rational basis analysis. Morality is not a legitimate interest, however if the Court decides they do have a legitimate interest in preserving public health, banning oral contraceptives is not rationally related to their interest because it is impossible to enforce condom usage per the *Lawrence* decision. *Lawrence*, 539 U.S. 558. We request that this Court affirm the decision of the Olympus State Supreme Court and uphold *Griswold* and *Eisenstadt*.

Prior to *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), this Court established a rule for religious exemptions from laws through the *Sherbert-Yoder* test, requiring that any law burdening religious exercise undergo a strict scrutiny analysis.

Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The *Smith* standard disrupted this balancing system of government interests and individual religious exercise. *Smith*'s reasoning relied on an overruled case and limited previous free exercise cases' application solely to unemployment benefits and "hybrid rights." Following the *Smith* decision, this Court moved away from applying the *Smith* standard, and instead re-introduced a *Sherbert-Yoder*-like analysis that directly undermined *Smith*. *Smith* must be overruled, and this Court should return to applying the *Sherbert-Yoder* test to free exercise cases.

If this Court were to decide against overruling *Smith*, the RWYSA would fail an analysis of neutrality and general applicability. Facial neutrality is not final, and laws can fail to be neutral in subtle or covert ways. *Church of the Lukumi Babalu Aye*, *Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). At trial, the State of Olympus argued that it had an interest in morality when it passed the RWYSA. R. [10]. As a member of the Church of Balance, Ms. Vo believes in the use of birth control to prevent overpopulation. R. [3]. The State of Olympus is subtly stigmatizing the Church of Balance by arguing a moral opposition to one of the Church's core beliefs.

A law is not generally applicable when it refuses to include religious hardship in a system of existing individual exemptions without a compelling reason. *Fulton v. City of Philadelphia*, *Pennsylvania*, 141 S.Ct. 1868, 1877 (2021). One of the exemptions granted from the RWYSA is an exemption for those who cannot use condoms for "other physical reasons" (see: R. [2]), which is not defined in the record. Individualized exemptions exist when the State evaluates the specific reasons an individual has in seeking an exemption. *Fulton*, 141 S.Ct. at 1877. The vagueness of "other physical reasons" requires this exact evaluation by Olympus, and by excluding Ms. Vo from this system of exemptions, the RWYSA is not generally applicable.

The RWYSA burdened Ms. Vo's religious exercise by declaring a moral opposition to her religious beliefs and excluding her from a system of individual exemptions. It must now undergo a strict scrutiny analysis, which it does not satisfy. The State must first prove a compelling interest to specifically deny a religious exemption. *Fulton*, 141 S.Ct. at 1881. Ms. Vo is a married woman whose religious beliefs include an opposition to abortion. R. [2, 3]. She has had a series of reproductive health issues, and if she becomes pregnant again, her life is at risk. *Id*. at 3. Following her religious beliefs, to prevent a pregnancy, she must rely on a double barrier of condom use and non-barrier birth control. The RWYSA has endangered her life by prohibiting access to one half of her necessary barrier against a fatal pregnancy.

Even if this Court were to find that Olympus' interest in reducing the spread of STIs is compelling, the RWYSA also fails to be narrowly tailored to that interest. Individuals with exemptions under the RWYSA (see: *Id*. at 2) are still capable of spreading STIs. Additionally, Olympus listed several factors that possibly contribute to the spread of STIs, including but not limited to sharing needles and high poverty rates. *Id*. at 7 n.15. Olympus has not addressed how it will address these factors in its regulatory scheme. If the objective of the RWYSA is to incentivize condom use, that interest has also been undermined by the closure of clinics that provided free condoms due to spending cuts. *Id*. The RWYSA is not narrowly tailored by any means to the State's asserted interest, and we request that this Court affirm the decision of the Olympus State Supreme Court and overrule *Smith*.

ARGUMENT

I. GRISWOLD V. CONNECTICUT AND EISENSTADT V. BAIRD SHOULD BE UPHELD BECAUSE CONTRACEPTION IS A FUNDAMENTAL RIGHT, AND THE REAP WHAT YOU SO ACT DOES NOT SATISFY A STRICT SCRUTINY ANALYSIS.

A. Griswold and Eisenstadt should be upheld because contraception is a fundamental right.

Griswold v. Connecticut, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972), have been regarded as landmark cases of substantive due process for centuries, being cited in several decisions preceding them. After this Court ruled in favor of overruling *Roe v. Wade*, 410 U.S. 113 (1973) because the right to an abortion is not a fundamental right, the question as to what other substantive due process cases should also be revisited has arisen. *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228 (2022). The *Dobbs* court correctly noted that overruling precedent is a monumental decision, and identified factors that should be taken into consideration in overruling precedent, which include: the quality of the decision's reasoning, workability, effect on other areas of the law, concrete reliance interests, and the nature of the Court's error. *Id*. at 2280-2265. The State of Olympus fails to prove that *Griswold* and *Eisenstadt* meet any of these considerations. Irrefutably, the *Dobbs* considerations further affirm the significance *Griswold* and *Eisenstadt* carry in the legal sphere in terms of their significance for all substantive due process rights alike. For the purposes of this analysis, we will address each of the considerations the *Dobbs* court uses.

Turning first to the quality of the court's reasoning, the findings of *Griswold* are part of a larger picture of the right to privacy- a right that may not be explicitly included in our

Constitution, but has been protected by this Court time and time again. This right to privacy includes the rights to same sex sodomy and same sex marriage. *Lawrence v. Texas*, 539 U.S. 558 (2003), *Obergefell v. Hodges*, 576 U.S. 644 (2015). *Griswold* and *Eisenstadt* have been long-standing precedent for over six decades, coexisting with other substantive due process cases. Although many disagree on the validity of the penumbral theory, arguing its inconsistency with other substantive due process formats, this theory bases itself in years worth of precedent, relying on twenty one separate cases regarding privacy. *Griswold*, 381 U.S. at 484. Such privacy related protections that *Griswold* bases itself on include the freedom to associate and similarly, the right to association according to their belief. *NAACP V. State of Alabama*, 357 U.S. 449 (1958), *as cited in Griswold*, 381 U.S. at 483; *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, *as cited in Griswold*, 381 U.S. at 483. By looking at various examples of substantive due process, as they tie in with constitutional provisions, this Court found windows of privacy extending to contraceptives.

Turning to the workability, this Court has protected the right to privacy as it extends to contraceptives for years, citing that the right to protect against infringement by the State for what is done within the comfort of one's home is part of substantive due process protection. *Griswold*, 381 U.S. 479; *Lawrence*, 539 U.S. 558; *Obergefell*, 576 U.S. 644. This is justified because contraception is private to one's life, and exclusive to the "intimate relation of husband and wife." *Griswold*, 381 U.S. at 482. Even in Ms.Vo's case, where she live-streamed herself taking birth control, that action does not make the choice of taking birth control less intimate. R. [3]. Justice Stevens concluded in his dissent in *Bowers v. Hardwick,* which became controlling in *Lawrence*, "individual decisions concerning the intimacies of physical relationships, even when not intended to produce offspring, are a form of 'liberty' protected by due process." *Bowers v.*

Hardwick, 478 U.S. 186 (1986) (Stevens, J., dissenting), *as cited in Lawrence*, 539 U.S. at 560. By infringing on the privacy of Ms. Vo to decide how she chooses to protect her body, the State is effectively denying her due process under the 14th Amendment.

Lastly, overturning *Griswold* and *Eisenstadt* would disrupt substantive due process cases that rely on their holdings. Landmark cases such as *Lawrence* and *Obergefell* would be next to fall under review by this Court if *Griswold* and *Eisenstadt* are overruled. These cases reference *Griswold* and *Eisenstadt* as prime examples of substantive due process, and use their rulings to justify finding the fundamental right to same sex sodomy and same sex marriage. *Lawrence*, 539 U.S. 558, *Obergefell*, 576 U.S. 644. Just as the previously considered fundamental right to abortion was struck down by this Court through *Dobbs*, if we allow the cases of *Griswold* and *Eisenstadt* to be overruled by the *Dobbs* considerations, the door to overruling other substantive due process cases would be opened. Through the *Dobbs* Court considerations, it is clear that *Griswold* and *Eisenstadt* are necessary to preserve the long history of how privacy is defined in our precedent. This is further strengthened by the fact that the Court in *Dobbs* explicitly concludes that these considerations should not be applied to the substantive due process cases previously cited, stating, "The exercise of the rights at issue in Griswold, Eisenstadt, Lawrence, and Obergefell does not destroy a potential life". *Dobbs*, 142 S.Ct. 2228 at 2261.

Along with outlining considerations in overruling precedent, the *Dobbs* court affirmed the correct standard to use when determining whether a fundamental liberty interest is at stake is the two prong test that was outlined in *Washington v. Glucksberg*, 521 U.S. at 721(1997) which inquires whether the right that is being proposed is "deeply rooted in this nation's history and tradition and implicit in the concept of ordered liberty" and whether the right asserted is a "carefully described right". Although *Griswold* uses the penumbral theory to find the

fundamental right to contraception, the asserted right to privacy as it extends to contraception would also satisfy the *Glucksberg* analysis.

Turning to the first prong of history and tradition, birth control has a long history of existing in our nation. Birth control was legal in all of the United States prior to the 1840s. R. [4]. Birth control in the United States has existed since African women who were enslaved used methods from their homelands. R. [4]. The existence of birth control in the United States, regulated or unregulated, is an affirmative statement by the government that indicates that birth control usage is allowed in the nation's history and tradition. Although there was a period of time after the 1840s where birth control bans were common, the record states that one of the main motivations for bans on birth control was a concern for morality. R. [4]. This Court has held that morality is not a valid justification for banning a fundamental liberty. *Lawrence* held that, "the fact that a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice". *Lawrence*, 539 U.S. at 560.

Not only would birth control pass an analysis of history and tradition in the United States, but under the *Obergefell* standard of analysis, birth control is still considered a fundamental right. *Obergefell* looked at foreign examples of history and tradition to find the fundamental liberty of same sex marriage because the Court decided that it was not deeply rooted in our nation's history and tradition. *Obergefell*, 576 U.S. 644. However, because other nations around us have concluded that same sex marriage is a fundamental right, this Court recognized that it is vital that the United States follows the times and come to the same conclusion. *Obergefell*, 576 U.S. at 664. Birth control has existed for centuries around the globe, dating back to 1850 B.C.E.,

along with a well documented history of women in other countries such as Greece, Rome, India, and Persia using different forms of birth control. R. [4].

Turning to the liberty interest at stake in the second prong of the *Glucksberg* analysis, if access to birth control was taken away, neither liberty nor justice would exist without it. 65% of sexually active women use birth control, and only 13% of that 65% rely on male condoms. R. [5]. Holding that there is no inherent right to contraceptives in order for the state to forcibly assert one kind puts women like Ms.Vo who may suffer with similar reproductive health issues at risk of being completely unprotected. Taking away birth control would violate Ms.Vo's right to personal autonomy and be an explicit violation of liberty. The Court decided in *Rochin v. People of California* that the Court can forbid state action which 'shocks the conscience,' sufficiently to 'shock itself into the protective arms of the Constitution,'. To take away the right to contraception from 65% of American women is a "shock of the conscience" and explicitly goes against the concept of ordered liberty. *Rochin v. People of California*, 342 U.S. 165 (1952), *as cited in Griswold*, 381 U.S. 479. The right to contraception is so embedded in the liberty of this land that there is a history of women fighting for the right to legally use birth control. R. [5]. Taking away that right puts the women in the United States who rely on birth control for hormone regulation, prevention against pregnancy in the event of sexual assault, and prevention against pregnancy for women with reproductive health issues which Ms.Vo herself at has is undoubtedly at risk and therefore must be protected by this Court.

B. The REAP WHAT YOU SOW Act infringes on the fundamental right to privacy because it does not satisfy a strict scrutiny analysis.

When assessing whether a law that is restricting a fundamental right is constitutional, that law must satisfy a strict scrutiny analysis. The State fails to meet the standards of strict scrutiny

if, as stated in *Zemel v. Rusk*, "such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause". *Zemel v. Rusk*, 381 U.S. 1 (1965), *as cited in Griswold*, 381 U.S. at 504. In order to satisfy a strict scrutiny analysis, the statute must present a compelling interest that is as narrowly tailored as possible. The RWYSA is by no means compelling nor narrowly tailored, and the State has failed to meet this standard, which is why it must be struck down by this Court.

First turning to the compelling prong, the State argues that due to the public health concerns regarding the rates of STIs in Olympus, they have compelling reason to revoke a fundamental right from all of their citizens. R. [7]. However, public health is a pretextual interest that obscures the true intent behind this legislation. This Court held in *Eisenstadt* that to view contraceptives as immoral is the antithesis of "sensible legislation… and conflicts with fundamental human rights". *Eisenstadt*, 405 U.S. at 453. The RWYSA's acronym states its intent, "Reducing Endemic Afflictions & Poverty While Halting Adultery to Yield Olympus's Unparalleled State of Wholesomeness",' insinuating that one of the State's interests, if not the main interest, is morality. R. [1]. The State does not attempt to hide this, as they even argue their interest in banning contraception is morality at the lower court. R. [10]. Morality is not a compelling, nor even a legitimate interest a State can have when enacting legislation. Furthermore, when analyzing the steps that the State took prior to enacting the RWYSA, it cannot be reasonably argued that health is their compelling interest. The State closed several clinics that provided the citizens of Olympus free condoms. R. [7 n.15]. By enacting legislation that bans the use of non-barrier contraception, and going further to then limit access to the only

form of birth control legal, the State makes it clear that increasing condom use is not their goal. Rather, the State's main priority is imposing their morality upon the citizens of Olympus.

Turning to the second prong of strict scrutiny, the RWYSA is by no means narrowly tailored. In order to meet the narrowly tailored requirement, the statute must prove that although it may substantially burden a constitutionally protected (or "fundamental") liberty, the statute may be sustained only if "narrowly tailored to serve a compelling state interest," *Reno v. Flores*, 507 U.S. 292 (1993), *as cited in Glucksberg*, 521 U.S. at 767. The statute is structured in a way that burdens Ms.Vo's fundamental right to contraception far more than it should. Despite Ms.Vo's record of complicated childbirth, she does not qualify for any exceptions. This record includes 2 miscarriages, and a third and final pregnancy ending in an emergency cesarean which her child did not survive. R. [2]. Through this, she developed preeclampsia as part of the complications from her most recent pregnancy. R. [2]. Ms.Vo's doctor has advised her that if she does become pregnant again, her next pregnancy could result in her death. R.[2]. For Ms.Vo, the State is limiting her choice of how she wishes to protect herself. Though the State argues that Ms.Vo can use condoms to prevent pregnancy, with the threat of death if she were to become pregnant again, and due to her religious beliefs preventing her from the option of having an abortion in that case, she must use all means possible to prevent pregnancy. The State might argue that Ms.Vo could use condoms, but due to her medical history and her sincerely held beliefs that prevent her from getting an abortion, she needs a double barrier to prevent herself from an unwanted pregnancy. By combining both condom usage and birth control, Ms.Vo can be a responsible citizen and protect herself, all of which can be done without banning contraception.

This law is a ban on nearly all forms of contraception, only leaving one option for the women in the State. Women who are not able to get abortions, such as Ms.Vo are especially burdened by the RWYSA. The State is effectively intruding on the privacy of every person in Olympus, ignoring the physical and mental strains this law places upon its citizens. Denying birth control as a right only creates a stigma against it, as held in Lawrence: "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons". Through enforcing morality, the State wishes to stigmatize birth control, which in any case would directly go against their goal of reducing the STI rates.

By banning all non-barrier forms of birth control, the State has failed to narrowly tailor this act. There is no proof that banning all non-barrier forms of contraception will even be effective. The State of Olympus is effectively throwing a rock in a pond and hoping that it floats. There is no possible way the State would be able to enforce such an act, because if they did, they would explicitly go against the right to privacy as it pertains to intimate conduct. *Lawrence* protects people from unwarranted governmental intrusions that, "[touch] upon the most private human conduct, sexual behavior, and in the most private of places, the home". *Lawrence*, 539 U.S. at 567. Contraception, in most cases, is directly related to sexual behavior. Rather than forcing a condom mandate upon its citizens, the State is still effectively doing the same thing through an informal condom mandate, cutting around the corners of our fundamental liberties by explicitly going against protected human conduct of intimacy held in *Lawrence*. *Lawrence*, 539 U.S 558. Not only are they impacting every single person in Olympus, but they are potentially going against their own goal of promoting health by encouraging more unsafe sex, due to the lack of access to condoms and the complete prohibition of non-barrier birth control.

Furthermore, unprotected sex is not the only means by which STIs are being spread. The State of Olympus has listed many other variables that contribute to the STI rate, which include "a larger than average population of people under age 25; a confluence of lack of education and high poverty rates in much of the state; low rates of condom use; high rates of drug use, including shared needles; and less monogamy, especially given the rise of several new and popular dating services based in Olympus". R. [7 n.15]. These are all issues that the State of Olympus could address without imposing on a fundamental right, however the State chose to explicitly target the right to privacy as it pertains to contraception. The Court in *Griswold* held that "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Griswold*, 381 U.S. at 453. By taking away Ms.Vo's ability to decide how to protect herself against pregnancy, the State is going against years of privacy related precedent, and putting contraception as a whole at risk. Therefore, the RWYSA must be struck down by this court.

Even if the Court holds that there is no fundamental right to contraception, the RWYSA will still fail a rational basis analysis. In order to satisfy a rational basis analysis, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center*, *Inc*., 473 U.S. 432 (1985), *as cited in Lawrence*, 539 U.S. at 579. Morality is not an interest that can be considered compelling nor legitimate interest. However, public health is a legitimate interest. *Glucksberg*, 521 U.S. at 702. If this Court were to find that public health was the legitimate interest, the RWYSA would still fail the rational basis analysis because it is not rationally related to the interest of protecting public health. Banning all birth control in the hopes that citizens will in turn

start using condoms in response is not only irrational, but impossible to enforce. It also does not directly address the STI endemic, rather it only addresses one of the possible contributors. There is no evidence in the record stating which factor out of the list of variables is contributing to the STI endemic most. Thus, without that evidence available, the state could be addressing the least common way that STIs are currently being spread.

The Courts have a duty to abide by our Constitution, and to stand with those whose fundamental rights are being infringed upon by a State's attempt to enforce laws embodying morality upon its citizens. If the Court overrules *Griswold* and *Eisenstadt*, all substantive due process cases are at risk of being overruled as well. By revoking the fundamental right to privacy as it extends to contraception, the doors to banning all kinds of contraception, barrier or non-barrier, are opened, and thus privacy regarding the intimacies of making personal decisions regarding children will be called into question. The RWYSA does not satisfy a strict scrutiny nor a rational basis analysis, and for those reasons, the ruling of the lower court should be affirmed.

II. EMPLOYMENT DIV., DEPT. OF HUMAN RESOURCES OF OREGON V. SMITH MUST BE OVERRULED AND THE REAP WHAT YOU SOW ACT AS APPLIED TO RESPONDENT VIOLATES THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

A. Smith must be revisited and overruled.

Free exercise jurisprudence dates back as far as 1878 with the case of *Reynolds v. United States*, 98 U.S. 145, 162 (1878). In *Reynolds*, this Court clarified that the Free Exercise Clause was written by the Framers to protect religious people from the state-sanctioned punishment for belief in non-majority religions that took place in the pre-Constitution colonies and States. The *Reynolds* decision established a clear line between religious belief, which the government may

not regulate under any circumstance, and religious conduct, which the government may regulate. *Id*. at 163. Nearly a century later, the *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that a Seventh-day Adventist could not be denied unemployment compensation because she refused to work during her Sabbath), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a compulsory school-attendance law burdened Amish families) decisions set precedent for granting religious exemptions under both civil and criminal laws through the Free Exercise Clause in circumstances of unemployment compensation and compulsory school-attendance laws enforced by fines, respectively. The *Sherbert-Yoder* test, named after the cases that established it, balances state interests and religious freedoms by requiring any law found to burden religious exercise be evaluated under a strict scrutiny analysis. *Yoder*, 406 U.S. at 215. Three decades following *Sherbert* and *Yoder*, *Employment Div*., *Dept*. *of Human Resources of Oregon v*. *Smith*, 494 U.S. 872 (1990) undermined that long standing precedent by rejecting the *Sherbert-Yoder* test in favor of a standard that complicated how this Court evaluated the Free Exercise Clause.

Janus v. *State*, *County*, *and Municipal Employees*, 138 S.Ct. 2448 (2018), *as cited in Fulton v*. *City of Philadelphia*, *Pennsylvania*, 141 S.Ct. 1868, 1912, (2021) (Alito, J., concurring) provides four factors to consider before overruling a case: the case's reasoning, its consistency with other decisions, the workability of the rule it established, and developments since the decision was handed down. Because developments since the decision demonstrate *Smith*'s unworkability, they will be evaluated in the same section. Each of these factors illustrate *Smith*'s disruption of precedent, and how this Court has moved away from applying a *Smith* analysis altogether.

Reasoning: In order to separate *Sherbert* from the *Smith* case, the *Smith* majority opinion claimed that previous unemployment exemption cases dealt with religious conduct that was not prohibited by law, and that Oregon's law banning the possession of controlled substances including peyote meant that a *Sherbert* analysis was not applicable. *Smith*, 494 U.S. at 883. This conclusion excludes both the fact that this Court granted religious exemptions from a criminal law punished by a fine in *Yoder*, 406 U.S. at 208, and that neither respondents in the *Smith* case were ever charged, arrested, or convicted of violating the Oregon anti-drug law, despite the State having ample opportunity to do so during the proceedings of the case. *Fulton*, 141 S.Ct. at 1914 (Alito, J., concurring).

Smith sought to further isolate and differentiate free exercise cases like *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *as cited in Smith*, 494 U.S. at 881, and *Yoder*, claiming that they involved a second, hybrid right such as free speech and parental rights, respectively. *Smith*, 494 U.S. at 881, 882. To label these cases as "hybrid rights" as if the free exercise of religion was not the central right at issue fundamentally disregards the religious motivations that were inextricably tied to Mr. Cantwell's speech and the Amish families' decision to remove their children from public school.

The *Smith* Court also argued that continuing to apply the *Sherbert-Yoder* test and strict scrutiny would be "courting anarchy," *Smith*, 494 U.S. at 888, however, there is substantial evidence from the thirty years where *Sherbert-Yoder* was the governing standard that proves otherwise. After Adell Sherbert received her unemployment benefits, the system of unemployment compensation itself did not collapse.

The Respondent does not assert that the States are not allowed to regulate religious conduct in any capacity. States must regulate conduct that goes against the order of their society

and the wellbeing of their citizens, regardless of whether the conduct is secular or religious. *Reynolds*, 98 U.S. at 163. To that end, the *Sherbert-Yoder* test is able to identify when a compelling state interest must be preserved. See: *Gillette v. United States*, 401 U.S. 437 (1971) (holding that opposing a particular war did not exempt an individual from the draft), *as cited in Yoder*, 406 U.S. at 220; *United States v. Lee*, 455 U.S. 252 (1982) (holding that religious belief did not exempt an employer from paying Social Security tax), *as cited in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 566 (1993) (Souter, J., concurring). Additionally, it is not the Respondent's position that an evaluation of neutrality and general applicability in regards to a potential free exercise violation is never necessary. Rather, the neutral and generally applicable standard that *Smith* requires allows the government to prohibit religious conduct with little to no justification, so long as the standard is satisfied. This does not consider the nuanced circumstances in which religious conduct may still be significantly burdened by neutral and generally applicable laws. *Smith*, 494 U.S. at 893 (O'Connor, J., concurring).

Consistency: An analysis of precedent reveals that *Smith* (majority opinion) is inconsistent with free exercise jurisprudence. The *Smith* Court posited that the application of strict scrutiny analysis to a free exercise case was only limited to cases of unemployment compensation, ignoring numerous cases that applied strict scrutiny in circumstances outside of unemployment compensation such as compulsory school-attendance in *Yoder*, 406 U.S. at 207, the draft in *Gillette*, 401 U.S. 437, *as cited in Yoder*, 406 U.S. at 220, and Social Security taxes in *Lee*, 455 U.S. 252, *as cited in Lukumi*, 508 U.S. at 566 (Souter, J., concurring).

The Smith Court revived overruled precedent from *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586 (1940) *as cited in Smith*, 494 U.S. at 879, to justify denying religious

exemptions from neutral and generally applicable laws, despite the fact that *Gobitis* had been overruled by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), as cited in *Smith*, 494 U.S. at 902 (O'Connor, J., concurring) fifty years before the *Smith* (majority opinion) case was decided.

The State of Olympus may claim that cases prior to *Smith* invoked an analysis of neutrality and general applicability to demonstrate that *Smith* and its neutral and generally applicable standard are consistent with precedent. However, this Court in *Yoder* determined that in spite of its general applicability, Wisconsin's compulsory school-attendance law "unduly burdened" Amish families. *Yoder*, 406 U.S. at 220. Had the *Smith* standard been controlling in 1972, the Amish families in the case of *Yoder* would not have their convictions reversed, nor been granted a religious exemption.

Workability and developments since the decision: The State of Olympus may argue that because Smith has not been officially overruled yet, it must be workable. However, evidence from recent cases indicate that this Court is continually departing from the Smith standard. In the thirty years following the Smith decision, eight Justices have called for Smith to be revisited and overruled. See: *Lukumi*, 508 U.S. at 559 (Souter, J., concurring), 577 (Blackmun, J., and O'Connor, J., concurring); *Fulton*, 141 S.Ct. at 1882 (Barrett, J., and Kavanaugh, J., concurring), 1883 (Alito, J., Thomas, J., and Gorsuch, J., concurring). In her concurring opinion in *Fulton*, Justice Barrett expressed an interest in revisiting *Smith*, however did not see a need to overrule *Smith* in that case specifically because there was no clear consensus on what would replace *Smith*'s neutral and generally applicable standard. In this current case, Respondent has an answer: the *Sherbert-Yoder* test would replace the *Smith* standard. The *Smith* Court argued that many otherwise valid laws would not meet the "compelling interest" prong of strict scrutiny, and

therefore continuing to apply the *Sherbert-Yoder* test would open the floodgates for exemptions, making every citizen a conscience unto themselves *Smith*, 494 U.S. at 890. However, an analysis of precedent reveals that this is purely speculative. This Court granted less religious exemptions before *Smith* was decided (see: *Gillette*, 401 U.S. 437, *as cited in Yoder*, 406 U.S. at 220; *Lee*, 455 U.S. 252, *as cited in Lukumi*, 508 U.S at 566 (Souter, J., concurring)), compared to more post-*Smith* cases ruling in favor of religious exercise. See: *Lukumi*, (majority opinion); *Fulton*, 141 S.Ct. 1868 (majority opinion); *Tandon v. Newsom*, 141 S.Ct. 1294 (2021); *Kennedy v. Bremerton School District*, 142 S.Ct. 2407 (2022).

Petitioner may claim that because the issue of hybrid rights has not reached this Court yet, they are not relevant factors in evaluating Smith's workability. On the contrary, the Courts of Appeals' struggle to establish a unified hybrid rights analysis indicate that the rule Smith established is not workable. *Fulton*, 141 S.Ct. at 1918 (Alito, J., concurring). It would be irresponsible to disregard such evidence simply because it is coming from the lower courts, and it is only a matter of time before the issue of hybrid rights begins to affect the free exercise cases reaching this Court.

The Olympus State Supreme Court's majority opinion correctly recognizes that this Court has revived a *Sherbert-Yoder*-like analysis in recent cases that undermines Smith's central reasoning. R. [13]. This Court ruled in 2021 that strict scrutiny applies in any circumstance where comparable secular activity is treated more favorably than religious exercise. *Tandon*, 141 S.Ct. at 1296. *Kennedy* established that not only does the Free Exercise Clause protect against indirect coercion rather than solely outright prohibitions, but that it also does its most important work by protecting the ability of religious people to live out their faiths in daily lives. *Kennedy*, 142 S.Ct. at 2421. The second most recent free exercise case to reach this Court makes no

mention of *Smith* nor the *Smith* standard in the majority and dissenting opinions. *Carson as next friend of O.C. v. Makin*, 142 S.Ct. 1987 (2022). The *Carson* Court further revived Sherbert analysis by declaring that a State may not withhold public benefits on the grounds that an individual refused to abandon the dictates of their faith. *Carson*, 142 S.Ct. at 1996. This conclusion stands in stark contrast to, and appears to negate the *Smith* holding. *Carson* proves that a modern analysis of the Free Exercise Clause without *Smith* is possible.

B. Even if Smith is applied, the REAP WHAT YOU SOW Act is not neutral and generally applicable.

The Olympus State Supreme Court dissenting opinion by Justice Romero claims that the RWYSA is neutral because it does not specifically mention religious considerations in the language of the law. R. [18]. Respondent acknowledges this initial concern, as the RWYSA appears to be neutral on its face. However, this Court has established that "facial neutrality is not determinative" (see: *Lukumi*, 508 U.S. at 534), and forbids even "subtle departures from neutrality" (see *Gillette*, 401 U.S. 437, *as cited in Lukumi*, 508 U.S. at 437), and "covert suppression of particular religious beliefs." *Bowen v. Roy*, 476 U.S. 693 (1986) (opinion of Burger, C.J.), *as cited in Lukumi*, 508 U.S. at 437. The State of Olympus departed from neutrality when it argued an interest in morality at trial. R. [10]. One core tenet of the Church of Balance's beliefs is the use of birth control in order to prevent overpopulation *Id*. at 3. By associating their ban on contraceptives with morality, The State of Olympus covertly declares this deeply held religious belief to be immoral. The majority opinion of *Yoder* aptly notes that "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Yoder*, 406 U.S. at 223, 224. The State of

Olympus is making this exact assumption by enacting the RWYSA with an interest in promoting morality. R. [10]. The Free Exercise Clause was written with the specific intent to protect minority groups like the Church of Balance from "the vicissitudes of political controversy." *Barnette*, 319 U.S. 624, *as cited in Smith*, 494 U.S. at 902, 903 (O'Connor, J., concurring). Deeming the Church of Balance and its values to be immoral throws them into the vicissitudes of political controversy, when their free exercise rights should have been protected.

The RWYSA also fails to be generally applicable. This Court has determined that a law is not generally applicable when it creates a system of individualized exemptions that invites the government to consider the particular reasons for an individual's conduct. *Fulton*, 141 S.Ct. at 1877 (majority opinion). Alongside an exemption for individuals who cannot use condoms for medical reasons, the RWYSA also includes exemptions for individuals who cannot use condoms for "other physical reasons." R. [2]. The State of Olympus provides no further elaboration or definition of these "other physical reasons." Respondent does not contest the necessity for medical exemptions, as "All laws are selective to some extent, but categories of selection are of paramount concern" when a law burdens religious exercise. *Lukumi*, 508 U.S. at 543. By excluding clear guidelines as to what qualifies and what does not qualify as "other physical reasons," the RWYSA has created a mechanism for individualized exemptions by inviting the State of Olympus to consider the particular reasons for an individual seeking an exemption's conduct. Furthermore, by refusing to extend this existing system of exemptions for comparable secular conduct to cases of religious hardship such as Ms. Vo's (see: R. [2]), the RWYSA's exemptions are of paramount concern, and not generally applicable.

C. The REAP WHAT YOU SOW Act fails to satisfy strict scrutiny and violates Ms. Vo's free exercise rights.

By advancing a moral opposition to the Church of Balance's beliefs (see: R. [10]) and refusing to include Ms. Vo's case of religious hardship in its system of exemptions (see: R. [2]), the RWYSA has substantially burdened her ability to freely exercise her religion, and must undergo a strict scrutiny analysis. In applying the strict scrutiny test, the government must satisfy two prongs: that the law must advance a compelling "interest of the highest order", and be narrowly tailored in pursuit of that interest. *Lukumi*, 508 U.S. at 546. The RWYSA fails to meet both requirements as applied to Ms. Vo's circumstances, and violates her constitutionally protected free exercise rights.

Olympus does not present a compelling interest in this case. In *Fulton*, this Court ruled that the City of Philadelphia must prove a compelling interest in specifically denying the Catholic Social Services a religious exemption, rather than a general compelling interest in enforcing its non-discrimination policy. *Fulton*, 141 S.Ct. at 1881, 1882. Following this rule, the State of Olympus cannot demonstrate how the RWYSA would be adversely affected if it were to grant Ms. Vo a religious exemption. Olympus may argue that because the RWYSA does not prohibit condoms, Ms. Vo is still able to practice her religious contraceptive use through condom use. However, in addition to her belief in birth control use, Ms. Vo's sincere religious beliefs also include an opposition to abortion. R. [3]. She has also experienced a series of reproductive health issues, including three miscarriages and developing preeclampsia during her most recent miscarriage. Her doctor has advised her that not only is sterilization not appropriate for medical reasons, if she were to become pregnant again, her very life is at risk. *Id*. In order to ensure she does not become pregnant again, Ms. Vo must rely on condom usage and non-barrier

contraceptives together as a double barrier. Under the RWYSA, in the event that a condom breaks, or she is assaulted in a way that results in a pregnancy, Ms. Vo has no way to protect herself from enduring a torturous pregnancy, with nearly full certainty that she and her unborn child will lose their lives. This Court has granted religious exemptions in many circumstances that are far from a life-or-death scenario. See: *Sherbert*, 374 U.S. 398; Yoder, 406 U.S. 205; *Fulton*, 141 S.Ct. 1868. The State of Olympus presents no compelling reason to deny Ms. Vo an exemption in a situation where without an additional layer of protection in addition to condoms, she will be left unsure as to whether she will continue to live another day. Ms. Vo should not have to choose between a criminal conviction for following her religious beliefs and a painful death.

Even if this Court finds that the State of Olympus' interest in addressing the statewide STI issue is compelling, the RWYSA fails to be narrowly tailored to accomplish its interest. In 1993, this Court found that the City of Hialeah's ordinances with a purported public health interest were underinclusive, and left appreciable damage to that supposedly vital interest. *Lukumi*, 508 U.S. at 547. The same underinclusiveness and appreciable damage found in *Lukumi* also exists in this case. Olympus may argue that the State's ability to address the statewide STI crisis was undermined by Ms. Vo's distribution of contraceptives at her pharmacy. R. [3]. However, the exemptions system established under the RWYSA themselves undermine the State's purported objective. Individuals with exemptions for medical or "other physical" reasons (see: R. [2]) are still potential vectors for STI transmission. The State of Olympus does not address in the record how it will ensure that these exempted individuals will not contribute to spreading STIs. Additionally, Olympus provided a list in the record of possible factors contributing to the STI epidemic, including but not limited to: sharing needles, high poverty

rates, low condom use, an increase in sex work in parts of the state, and the closure of several sexual health clinics that offered counseling and free condoms due to spending cuts. R. [7 n.15]. Non-barrier contraceptive use is not included in this list, and the State of Olympus does not provide an explanation as to how its ban on non-barrier contraceptives will directly address the STI crisis. Even if it is assumed that Olympus wishes to incentivize condom use by leaving it as the only contraceptive option, the State cannot rationally expect its citizens who already did not use condoms very often to begin to use them when the State cannot provide adequate access to the very resource it wants its citizens to be using. *Id*. The RWYSA is not narrowly tailored, and the decision of the lower court should be affirmed..

CONCLUSION

The judgment of the Supreme Court of the State of Olympus should be affirmed.

Respectfully submitted,

Counsel for Respondent