

2007-2008
National Health Law
Moot Court Competition

Transcript of Record
Docket No. 07-1967

Supreme Court of the United States
October Term, 2007

Frank GOODY,
Petitioner,

v.

LINCOLN DEPARTMENT OF
PROFESSIONAL REGULATION,
Respondent.

SPONSORS:

Southern Illinois University School of Law

*Southern Illinois University School of Medicine,
Department of Medical Humanities*

American College of Legal Medicine

American College of Legal Medicine Foundation

IN THE DISTRICT COURT OF WILLIAMS COUNTY

STATE OF LINCOLN

FRANK GOODY,)	
)	
Plaintiff,)	
)	
v.)	Civ. No. WMS – 06 – 8714
)	
LINCOLN DEPARTMENT OF)	
PROFESSIONAL REGULATION,)	
)	
Defendant.)	

Memorandum Opinion and Order

Francis Oakley, District Judge.

I. Factual and Procedural Background

Plaintiff, Frank Goody, is a Lincoln-licensed pharmacist and owner of Goody’s Olde Tyme Apothecary (Goody’s) located in Smallsville. The rural town of Smallsville has a population of 900; the neighboring City of Biggsville is located 45 miles to the east and has a population of about 65,000. Goody’s is the only pharmacy in Smallsville, providing its patrons with prescribed medications, over-the-counter remedies, and knickknacks crafted by Frank’s wife Betty. Goody’s has been in the Goody family for three generations, and Plaintiff is the only pharmacist on duty.

On November 5, 2005, LK, a 17-year-old resident of Smallsville, feared pregnancy after a prophylactic failure with her boyfriend the night before. She contacted her physician, received a valid prescription for the emergency contraceptive Plan B,¹ and traveled to Goody’s. After exchanging pleasantries, LK handed Plaintiff the prescription and started toward the waiting area. As she stepped back from the counter, Plaintiff called to her and said that he did not have the medication in stock. Aware of the time-sensitive nature of the medication, LK asked if it was possible to order it for the following day. Plaintiff returned the written prescription to her and responded, “I will never dispense these pills. You will have to find someone else to help you kill your baby. On judgment day, I don’t want your baby’s blood on my hands.” Taken aback, LK asked for the location of the nearest pharmacy. Plaintiff responded, “If you’re old enough to have sex, you can figure it out.”

¹ Plan B is an emergency contraceptive (also called the “morning after pill”) that can prevent pregnancy if taken within 72 hours of unprotected sex. Plan B is not an abortifacient like RU-486; it will not work if the woman is pregnant. Plan B is only available with a valid prescription.

LK left Goody's visibly distraught and traveled over an hour to a retail chain pharmacy in Biggsville, where she received the medication. LK later filed a complaint with the Lincoln Department of Professional Regulation (Department), citing both Plaintiff's refusal to stock or dispense emergency contraceptives and his unsolicited commentary.

The duty to dispense contraceptives upon receipt of a valid prescription is codified in Lin. Rev. Stat. § 15.1720 (2007). (The texts of the relevant statutes are set forth in the appendix to this opinion.) This duty requires a pharmacist to dispense the medication, if in stock, or order the contraceptive pursuant to standard procedures. If the patient prefers, the prescription shall be transferred to another pharmacy that can accommodate the prescription. Otherwise, the prescription must be returned to the patient. (For convenience, this opinion refers to section 15.1720 as the Must Dispense Rule.) Violation of the Must Dispense Rule may result in administrative discipline, including the imposition of fines and revocation of the pharmacist's professional license.

When dispensing valid prescriptions for contraceptives, Lincoln-licensed pharmacists owe a corresponding duty to refrain from making any "statement regarding religious, moral or ethical objections to use of the prescribed contraceptive." Lin. Rev. Stat. § 15.1721 (2007). (For convenience, this opinion refers to section 15.1721 as the Counseling Provision.) Violation of this duty can result in the same administrative penalties. *Id.*

The Must Dispense and Counseling Provision were passed by the Lincoln Legislature in the aftermath of Governor Terrence Bradshaw's Request for Rulemaking (Request) issued on April 5, 2005. The Governor issued the Request after a number of Lincoln pharmacists refused to dispense emergency contraceptives and accompanied the refusal with verbal statements of moral or religious disapproval of the woman's decision to seek such treatment. The Request asked the Department to amend the Lincoln pharmacy licensing regulations to impose the same requirements as now appear in the Must Dispense and Counseling Provision. The Request noted the purpose behind the Governor's proposed amendment:

If a woman goes to a pharmacy with a prescription for birth control, the pharmacist cannot consult God to decide who they will sell it to and who they will not. The State of Lincoln regulates the practice of pharmacy in this State, not the religious right. Further, a pharmacy is not a pulpit, and a pharmacist is not a preacher. The pharmacy must be expected to accept and fill prescription for contraceptives in the same manner as they would fill any other prescription. No delays. No hassles. No sermon on the counter. The physician and patient have conferred and made their treatment decision — the pharmacist has one course of action: Just fill the prescription.

When the Department concluded that it did not have statutory authority to issue the requested rules, the Governor submitted proposed legislation to the Lincoln Legislature.² With the

² The proposed bill was identical to the current text of §§ 15.1720 and 15.1721, with one exception. The proposed bill contained an additional provision, § 15.1722, that required state-licensed pharmacists annually (1) to file a disclosure statement with the Department that listed, among other things, their religious affiliation, and (2) to certify that their religious beliefs will not interfere with performance of their professional duties. Proposed § 15.722 was deleted from the final bill approved by the Lincoln Legislature.

proposed bill, the Governor included a Message to the Lincoln State Legislature that explained the bill's purpose using the same words quoted above from the Governor's Request. State Senator Peter Pouncey introduced the bill with the following words:

I am proud to stand with Governor Bradshaw on this important public health issue. We must guard against any breach in the wall separating Church and State, especially in the realm of health care.

And Rep. John Ward, Speaker of the Lincoln House of Representatives, introduced the bill in that chamber with the following remarks:

The physician-patient relationship is one with ancient roots, and this State must stand ready to defend it against outside attack, whatever the source. Once a patient has decided upon a lawful course of treatment with her physician, it is the duty of all others in the health care system – indeed, in society at large – to ensure that that decision is carried out.

The Lincoln Senate approved the bill without debate, as did the Lincoln House. The bill became law on June 1, 2005.

At the Department hearing on LK's complaint, which took place on January 11, 2006, Plaintiff did not dispute the content or nature of the exchange with LK on November 5, 2005. The parties stipulated that Plaintiff holds a sincere religious belief, central to his faith, that prevents him from stocking or dispensing contraceptives or aiding a person in obtaining contraceptives. Indeed, the parties further stipulate that Plaintiff has never stocked contraceptives at Goody's and has no plans to do so in the future.

The Department ruled that Plaintiff violated his duty to dispense contraceptives, Lin. Rev. Stat. § 15.1720 (2007), and the prohibition of "statements regarding religious, moral, or ethical objection to use" of prescribed contraceptives, Lin. Stat. Rev. § 15.1721 (2007). As punishment, the Department suspended Plaintiff's pharmacist license indefinitely. Plaintiff was entitled to apply for reinstatement after six months, the application to include a statement affirming Plaintiff's intent to abide by all state pharmacy regulations including the Must Dispense and Counseling Provision. In briefing, Plaintiff tells this Court that as long as the Must Dispense and Counseling Provisions are in effect, he will not be able to sign the required affirmation and so will be effectively barred from the practice of pharmacy in Lincoln.

Pursuant to Lin. Rev. Stat. § 15.1800, a pharmacist may appeal an adverse decision of the Department to a district court for *de novo* review. Plaintiff filed in this Court, arguing only that sections 15.1720 and 15.1721 violate his First Amendment rights incorporated against the states by the Fourteenth Amendment. Specifically, Plaintiff argues that the Must Dispense Rule violates the Free Exercise Clause of the First Amendment and the Counseling Provision violates the First Amendment's guarantee of free speech.

II. The Must Dispense Rule

The State asserts that the Must Dispense Rule is a neutral law of general applicability and, therefore, does not need to be justified by a compelling government interest to survive a challenge under the First Amendment. Although the State is correct in reciting the standard of *Employment Division v. Smith*, 494 U.S. 872 (1990), the State fails in its hasty assumption that the Must Dispense Rule is neutral and of general applicability.

The Must Dispense Rule concededly makes no explicit reference to religious or moral objection to dispensing contraceptives. That is not the end of the inquiry, however, because the true motivation of a legislative act must be found in the context of its passage. The United States Supreme Court has been clear that facial neutrality is not determinative, and that the Free Exercise Clause “forbids subtle departures from neutrality and covert suppression of particular religious beliefs.” *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). The Must Dispense Rule goes to the heart of the contentious debate over abortion and the government cannot lend its hand to one side of the debate. *See, e.g., Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994).

The statements of Governor Bradshaw and Senator Pouncey show bias against religion generally, and specifically against denominations that consider contraception immoral. The Lincoln Legislature’s silence in the face of such inflammatory rhetoric spoke loudly its acquiescence. There is no doubt in this judicial mind that the Must Dispense Rule is not neutral toward religion.

Because the Must Dispense Rule fails the standard developed in *Smith*, the State has the difficult burden of showing the statute is narrowly tailored to meet a compelling state interest. Strict scrutiny is often the death knell for challenged state action, and the same is true today.

The State of Lincoln asserts that the Must Dispense Rule is well tailored to the compelling purpose of securing the constitutional right of access to emergency contraceptives. This argument fails because *Griswold v. Connecticut*, 381 U.S. 479 (1965), established a right of couples to *use* contraceptives, and left aside laws that regulate the manufacture and sale of contraceptives. *Id.* at 485. Consequently, regulation of the public interaction between pharmacist and patient does not implicate the constitutional privacy interest recognized in *Griswold*.

Pharmacists in Lincoln are forced to participate in a practice contrary to deeply held religious beliefs or risk losing their professional licensure. This is hardly an incidental burden on religion. Indeed, many states currently have so-called conscience clauses that exempt health care service providers, such as Plaintiff, from performing health care related services that violate their conscientious religious beliefs.³ By comparison, the Must Dispense Rule imposes precisely the “covert suppression of particular religious beliefs” warned of in *Lukumi*. By weighing in on the pro-choice side of the abortion debate, the State of Lincoln has infringed the free exercise rights

³ See National Conference of State Legislatures, Pharmacist Conscience Clauses: Laws and Legislation <http://www.ncsl.org/programs/health/ConscienceClauses.htm> (collecting state laws on the issue of pharmacist conscience clauses).

of countless licensed pharmacists. Because Lincoln has done so in a manner that is not narrowly tailored to serve a compelling interest, the Must Dispense Rule violates the Free Exercise Clause.

III. The Counseling Provision

If the Must Dispense Rule can be characterized as “Just Fill It,” then the Counseling Provision can be characterized as “Just Shut Up!” Because the State may not silence its citizens in this manner, the Counseling Provision violates the First Amendment.

A. Commercial Speech

The Department first argues that the Counseling Provision is entitled to deferential review as commercial speech. If the Department is correct, the Counseling Provision need only satisfy the following test:

First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

See Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, 564 (1980). We reject this argument because the speech at issue is not commercial speech. *Central Hudson* narrowly defined commercial speech as “speech *proposing* a commercial transaction.” *Id.* at 562 (emphasis added). The speech targeted by the Counseling Provision, however, occurs during the pharmacist-patient relationship, *after* a transaction has been proposed and accepted. *Central Hudson* does not apply.

B. Content-Based Regulation of Speech

The State of Lincoln has an undisputed right to regulate trades and professions in the interest of the public. This interest is most acute in those professions that entail special expertise, where the average citizen must rely on the expert’s superior knowledge and honest dealing. That said, a professional does not surrender her free speech rights in exchange for a professional license. In reviewing government regulation of professional speech, then, courts must strike the appropriate balance between safeguarding the public and the professional’s constitutional rights.

The United States Supreme Court struck just such a balance in *Legal Services Corp v. Velasquez*, 531 U.S. 533 (2001). *Velasquez* addressed a federal restriction on lawyers who received funding from the Legal Services Corporation (LSC). The LSC distributes funds to support legal representation of indigent litigants in non-criminal matters. Federal law prohibited lawyers who accepted LSC funds from advocating the invalidity or unconstitutionality of a state or federal welfare law. This restriction meant that a lawyer would have to either forgo representation of a client whose matter raised such issues, or withdraw from representation if such an issue arose. The federal government defended the restriction as a permissible regulation of the use of federal funds. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

The *Velazquez* Court struck down the LSC funding condition as violating the lawyer's free speech rights. Specifically, the condition was a content-based regulation of the lawyer's private speech. *Velasquez*, 531 U.S. at 542. Further, the condition was "aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 549. The same is true here. The Governor and State Legislature cannot countenance religious, moral, and ethical objection to their preferred point of view – easy access to contraceptives. Rather than add their voice to the debate, these state actors have chosen to silence their opponents. We agree with the United States Supreme Court that courts must carefully guard against laws and regulations that effectively shield the government's preferred view from criticism.

Worse yet, the Counseling Provision discriminates based on the pharmacist's viewpoint by prohibiting "religious, moral, or ethical objections." Such naked viewpoint discrimination impermissibly presses the State's thumb on one side of the speech scale. *See RAV v. City of St. Paul*, 505 U.S. 377, 391 (1992). Such distortion of the marketplace of ideas merits the strictest First Amendment scrutiny.

C. Strict Scrutiny

Strict scrutiny need not detain us long. As discussed above, the State must show that its action is narrowly tailored to serve a compelling government purpose. Here, the asserted purpose of the Counseling Provision is to protect the privacy and psychological well being of the patient from verbal attack by contrarian pharmacists. This argument fails. The Supreme Court has ruled that protection of such peace of mind is not an interest that will support a content-based regulation of speech. *See The Florida Star v. B.J.F.*, 491 U.S. 524 (1989). Further, the Counseling Provision is not narrowly tailored because, on its face, the statute punishes even the pharmacist who responds to a patient question that invites a religious, moral, or ethical response regarding use of a contraceptive. Thus, the Counseling Provision fails strict scrutiny, and so violates the First Amendment's guarantee of free speech.

IV. Conclusion

This Court concludes that both the Must Dispense Rule and the Counseling Provision violate the First Amendment and so are void. Violations of those Rules were the only misconduct for which the Department disciplined Plaintiff. Because the record contains no remaining grounds to support discipline, the Department's order of suspension is REVERSED, and a decision dismissing the disciplinary proceeding against Plaintiff is RENDERED.

IT IS SO ORDERED

Francis Oakley, District Judge

Dated: April 14, 2006

Statutory Appendix to the Trial Court Opinion

Lin. Rev. Stat. § 15.1720 (2007). Duty to Dispense Contraceptives.

(a) Upon receipt of a valid, lawful prescription for a contraceptive, a pharmacy must dispense the contraceptive, or a suitable alternative permitted by the prescriber, to the patient or the patient's agent without delay, consistent with the normal timeframe for filling any other prescription. If the contraceptive, or a suitable alternative, is not in stock, the pharmacy must obtain the contraceptive under the pharmacy's standard procedures for ordering contraceptive drugs not in stock, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. However, if the patient prefers, the prescription must be transferred to a local pharmacy of the patient's choice under the pharmacy's standard procedures for transferring prescriptions for contraceptive drugs, including the procedures of any entity that is affiliated with, owns, or franchises the pharmacy. Under any circumstances an unfilled prescription for contraceptive drugs must be returned to the patient if the patient so directs.

(b) A pharmacist who causes a pharmacy to violate section (a) may be subject to administrative discipline, including fines, suspension, or revocation of professional license.

Lin. Rev. Stat. § 15.1721 (2007). Counseling Regarding Contraceptives.

In dispensing a contraceptive as required under section 15.1720(a), a pharmacist shall not make any statement regarding religious, moral, or ethical objections to use of the prescribed contraceptive. A pharmacist who violates this prohibition may be subject to administrative discipline, including fines, suspension, or revocation of professional license.

THE SUPREME COURT OF THE STATE OF LINCOLN

LINCOLN DEPARTMENT OF)	Supreme Court No. 07-164
PROFESSIONAL REGULATION,)	
)	District Court
Appellant,)	Civ. No. WMS – 06 – 8714
)	
v.)	ARGUED
)	September 1, 2006
GOODY,)	
)	OPINION
Appellee.)	December 15, 2006

Appeal from the District Court for the State of Lincoln,
Williams County, Francis Oakley, Judge

Before: Shapiro, Chief Justice, Baxter, Chandler, Sawyer, and Dennett, Justices.

BAXTER, Justice.

From childhood, one is taught to avoid two subjects in polite conversation — religion and politics. Unfortunately, though this Court considers itself well mannered, this case causes us to violate that time honored dictum. For the State of Lincoln has seen fit to tread the regulatory minefield of religious opposition to contraceptives. Because we see no constitutional bar to the State doing so, we reverse the District Court.

I

This case is before the Court on direct appeal as authorized under Lin. Rev. Stat. § 2.2000(a). The facts and procedural background of this case are set forth in the District Court’s opinion and so are not restated here.¹ Appellee concedes that he violated both Lin. Rev. Stat. § 15.1720(b), which bars licensed pharmacists from causing a licensed pharmacy to violate its duty to dispense a contraceptive device and Lin. Rev. Stat. § 15.1721, which bars licensed pharmacists from extemporizing while dispensing.² The trial court invalidated both statutory

¹ We note that in August 2006, shortly before argument in this case, the F.D.A. approved over-the-counter status for Plan B for women 18 years of age and older. Press release, United States Food and Drug Administration, FDA Approves Over-the-Counter Access for Plan B for Women 18 and Older; Prescription Remains Required for Those 17 and Under (Aug. 24, 2006), available at <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01436.html>. Women age 17 and younger, such as LK, must still obtain a valid prescription. This regulatory development does not alter our analysis.

² At oral argument, Appellee for the first time raised the issue of whether both the Must Dispense and Counseling Provisions violate a hybrid free exercise-free speech right under the United States Supreme Court’s decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), as well as whether the Counseling Provision is unconstitutionally vague or overbroad. Because Appellee neither raised these issues in the trial court nor argued them in his brief, these issues are waived under both our rules and precedent.

provisions on First Amendment grounds, and the Department appeals to this Court. We reject both First Amendment challenges, and so we reinstate the Department’s disciplinary action.

II

The District Court held that the Must Dispense Rule violates a pharmacist’s right to free exercise of religion under the First Amendment, as incorporated against the states through the Fourteenth Amendment. It is a well established principle in First Amendment jurisprudence that the free exercise of religion embraces two concepts: the freedom to believe and the freedom to act. The first is absolute, but the second remains subject to regulation for protection of society. *Cantwell v. Connecticut*, 310 U.S. 296, 303-304 (1940). Additionally, an individual’s religious beliefs have never been a constitutionally sound excuse from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990).

A neutral law of general applicability does not interfere with First Amendment rights. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990). It is only when the law fails the neutrality standard that it must survive strict scrutiny analysis. The District Court erred in digging beneath the plain language of the statute to invent a discriminatory purpose and thereby invalidate the law.

A statute lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-534 (1993) (finding that ordinance with words such as “ritual” and “sacrifice” failed neutrality standard). Here, the Must Dispense Rule makes no mention of any religious practice. Rather, it speaks in terms of pharmacy practice, which is clearly secular in meaning. The District Court relied on the public statements of Governor Bradshaw and Senator Pouncey regarding the proposed legislation. Their comments, however, did not disparage a specific denomination and, in any event, are irrelevant because the challenged statute is neutral on its face.

The statute is also one of general applicability to pharmacists licensed in the state of Lincoln. The Must Dispense Rule targets conduct not because of its religious motivation, but rather because of the secular harm it causes. *See, e.g., American Life League, Inc. v. Reno*, 47 F.3d 642 (4th Cir. 1995) (upholding Freedom of Access to Clinic Entrances Act as neutral law of general applicability). It makes no difference *why* a pharmacist refuses to dispense a prescribed contraceptive — refusal to dispense is outlawed for *all* licensed pharmacists for *all* reasons.

Further, the refusal to dispense contraceptives, which respondent argues is conduct stemming from his religious conviction, is not akin to conduct inseparable from religious beliefs and so beyond government regulation. The right to refrain from dispensing contraceptives is not like attending services or observing religious holidays or sacraments. Indeed, dispensing prescriptions is the basis of the occupation for which the pharmacist is licensed. The Must Dispense Rule ensures that pharmacists perform their job and ensure women’s access to contraceptives. The only proper situation for a pharmacist to question the decisions made in the physician’s office and temporarily prevent access to a prescribed medication is when a harmful

interaction with the customer's current medication profile is present. The Must Dispense Rule minimizes the incidental burden on the pharmacist's religious beliefs by permitting transfer of the prescription to another pharmacy.

In sum, the Must Dispense Rule clearly falls within the scope of *Smith* as a neutral law of general applicability and so withstands a Free Exercise challenge. *See Spiering v. Heineman*, 448 F. Supp. 2d 1129 (D. Neb. 2006) (upholding as neutral and generally applicable a state requirement that newborns be tested for certain metabolic diseases); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (upholding as neutral and generally applicable a state requirement that employers extend non-discriminatory benefits to same sex partners).

III

The District Court held that the Counseling Provision violates a pharmacist's right to free speech under the First Amendment, as incorporated against the states through the Fourteenth Amendment. In doing so, that court badly misapplied United States Supreme Court precedent. The District Court relied on *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), to hold that the State may not regulate the content of pharmacist-customer speech. There are three problems with the District Court's reliance on *Velazquez*. First, *Velazquez* addressed a condition imposed on federal funding. Here, the Counseling Provision is not attached to any state funding, which eliminates the element of coercion posed by the threatened loss of funds.

Second, that case dealt with the practice of law, which is one of the traditional professions. Conversely, the trade of pharmacy has never been accorded the same traditional professional status. For this reason, speech within the pharmacist-customer relationship does not merit the same degree of deference or protection.

Third, in *Velazquez*, the speech restriction struck at the very heart of the professional relationship — the lawyer could not advise her client to pursue certain meritorious claims. The *raison d'être* of the attorney client relationship is to provide legal advice, *see* Model R. Prof. Conduct R. 2. Consequently, *Velazquez* held that the restriction there "alter[ed] the traditional role of the attorneys" funded by the Legal Services Corporation. *Id.* at 544. Here, a pharmacist is simply prohibited from making statements that are wholly irrelevant to the pharmacist-customer relationship. The Counseling Provision leaves the pharmacist free to perform her traditional role — dispensing prescriptions, answering customer questions, and advising on proper dosage, side effects, and related information.

This case is most closely analogous to the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). There, in addition to ruling on the Due Process challenge to the state's abortion regulation, the Court addressed a First Amendment objection to the requirement that physicians provide certain information to patients seeking an abortion. The Court summarily dismissed the argument. *Id.* at 884. Here, the State

of Lincoln is doing no more than in *Casey* — the Counseling Provision is part of the State’s “reasonable licensing and regulation” of the pharmacy trade.³

* * *

Neither the Must Dispense Rule nor the Counseling Provision violates the First Amendment. The District Court’s judgment is REVERSED, and this case is REMANDED for proceedings consistent with this opinion.

CHANDLER, Justice, concurring in part and concurring in the judgment in part.

I join in full the portion of the Court’s opinion that explains why the Counseling Provision does not violate the First Amendment. I too find *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), controlling. Regarding the Must Dispense Rule, however, my analysis differs, so I only concur in the Court’s judgment.

For the reasons discussed by the District Court, I conclude that the Must Dispense Rule is neither generally applicable nor neutral. Unlike that court, however, I believe that the Must Dispense Rule survives strict scrutiny. The right recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), cannot be artificially limited to the mere use of contraceptives. The State of Lincoln has a compelling interest in vindicating this constitutional right. Further, the Must Dispense Rule is narrowly tailored to this purpose, as it allows objecting pharmacists the eminently reasonable alternative of referring a patient to another pharmacy. Thus, like the Court, I conclude that the Must Dispense Rule is constitutional.

³ Because we find *Casey* controlling, we need not address Appellant’s additional argument, rejected by the District Court, that the Counseling Provision regulates commercial speech. We note, however, that the District Court applied what we believe is an overly-narrow definition of commercial speech. Without deciding the precise definition, we note that the Supreme Court itself has signaled greater latitude than admitted by the District Court. *See Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (“ambiguities . . . exist at the margins of the category of commercial speech”); *Central Hudson*, 447 U.S. 557, 561 (1980) (commercial speech includes “expression related solely to the economic interests of the speaker and its audience”).

Supreme Court of the United States

Frank GOODY, Petitioner,

v.

LINCOLN DEPARTMENT OF
PROFESSIONAL REGULATION, Respondent.

No. 07-1967

June 11, 2007

Petition for writ of certiorari to the Supreme Court of the State of Lincoln is granted limited to the following Questions:

- 1) Does Lincoln Revised Statute § 15.1720(b) violate the Petitioner's Right to Free Exercise under the First Amendment?
- 2) What is the proper First Amendment free speech standard of review for a restriction on pharmacist speech, and does Lincoln Revised Statute § 15.1721 satisfy that standard?