No. 23-2020

IN THE

SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

Brief for the Respondent

Team 23

ISSUES PRESENTED

I. Would the Supreme Court hold that the regulation of prohibiting the practice of conversion therapy on minors is a violation of the First Amendment when the Supreme Court has previously held that regulating the conduct of professionals for the greater good is constitutional and not an infringement of speech?

II. Is a law neutral and generally applicable if it prohibits the practice of religious and secular conversion therapy under the auspices of a state-issued license but specifically permits the practice of such therapy by religious counselors and organizations, and, if so, should *Employment Division v. Smith* be overturned?

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The decision of the District Court of the Eastern District of North Greene is *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The decision of the Fourteenth Circuit Court of Appeals, *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023), is found at pages 2-16 in the Joint Appendix.

STATEMENT OF THE CASE

Conversion therapy is a technique by which therapists, counselors, and social workers attempt to change an individual's sexual orientation or gender identity. R. 3. Because of the potential harm this technique poses to minor patients, conversion therapy is opposed by the American Psychological Association (APA). R. 4. Like other states, Respondent, the State of North Greene, requires health care providers to be licensed in order to practice. R. 3. Title 23 of the state's general statutes regulates businesses and professions. *Id*. Chapter 45, the Uniform Professional Disciplinary Act (the "Statute"), specifically pertains to licensed health care providers and includes actions considered to be "unprofessional conduct" by such practitioners, subjecting them to disciplinary action. *Id*. In 2019, the legislature amended the Statute to add "performing conversion therapy on a patient under age eighteen" to the list of unprofessional conduct. *Id*. The legislature specifically defined conversion therapy to include "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same sex." *Id*.

The Statute exempts therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization" from its regulations. *Id.* Additionally, the statute regarding unprofessional conduct may not be applied to

> (1) speech by licensed health care providers that 'does not constitute performing conversion therapy, (2) [r]eligious practices or

> counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers, and (3) [n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization.

Id. To this end, the Statute does nothing to prevent licensed health care providers from expressing their own views and opinions about conversion therapy, sexual orientation, or gender identity, including to minors. *Id.* Nor does it prevent practitioners from communicating with the public about conversion therapy or referring minors to counselors practicing under the religious organization umbrella or providers in another state not subject to such statutes. *Id*. In passing the Statute, the legislature found it necessary to protect "the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth . . .." *Id.*

Petitioner Howard Sprague is a licensed family therapist. R. 3. He professes to be a deeply religious individual, espousing such beliefs that the only beautiful and healthy sexual relationships are those between a married man and woman. *Id.* He also believes that a person's assigned sex at birth is "a gift from God" that should not be changed. *Id.* He has practiced for more than twenty-five years and claims that many of his clients seek his services because "he holds himself out as a Christian provider." *Id.* Although Petitioner does not work for a religious institution, he asserts that his work in helping clients with issues including sexuality and gender identity is informed by his "Christian" beliefs. *Id*.

In August 2022, Petitioner filed suit against the State of North Greene in District Court. R. 5. Petitioner sought an injunction against enforcement of the Statute, alleging that it violated his free speech and free exercise rights under the First Amendment, in addition to those of his clients. *Id*. The District Court denied Petitioner's motion for a preliminary injunction and granted Respondent's motion to dismiss. *Id.* On appeal, the Fourteenth Circuit affirmed, holding the

Statute did not violate Petitioner's rights under the Free Speech and Free Exercise Clauses of the First Amendment. R.3. Petitioner then filed for a writ of certiorari, which this Court granted. R. 17.

SUMMARY OF THE ARGUMENT

Conversion therapy assumes that members of the LGBTQ+ community suffer from an illness that needs to be cured. Peer-reviewed research has revealed this practice to be ineffective and, worse, actively harmful. LGBTQ patients who receive conversion therapy experience higher suicide rates than similar patients who receive other forms of evidence-backed therapy. For this reason, conversion therapy is vigorously opposed by medical experts and organizations like the American Psychological Association

Respondent joined twenty states and the District of Columbia in protecting the welfare of its citizens by enacting legislation to ban the practice of conversion therapy on minors by therapists practicing under state-issued licenses. Petitioner is a family therapist who practices under a license issued by Respondent. He also professes to deeply felt religious convictions that his gay and transgender patients are violating God's design, and he wishes to employ conversion therapy to bring these patients into line with this design. He has challenged the Statute as violating his First Amendment rights by preventing him from employing conversion therapy on his minor patients under the auspices of his state-issued license.

The Statute does not violate the Free Speech Clause of the First Amendment. Respondent is entirely within its police power to regulate professional conduct, as the Statute does. Additionally, because the Statute specifically carves out those practitioners under the umbrella of religious denominations or organizations, it is narrowly tailored to achieve its compelling interest and therefore does not improperly target speech.

The Statute also does not violate the Free Exercise Clause of the First Amendment. The lower courts properly applied rational basis review to determine the Statute does not violate the First Amendment's Free Exercise clause. Under *Employment Division, Department of Human Resources of Oregon v. Smith*, a law is only subject to rational basis review if it is neutral and generally applicable, even if the law incidentally burdens some religious conduct. As an initial matter, the evidence in the record does not sufficiently demonstrate that the Statute's burden falls primarily on religious conduct. However, even if the statute does primarily burden religious conduct, the Statute is still neutral and generally applicable and thus subject to rational basis review.

First, the Statute is neutral because its careful definition of the prohibited therapeutic techniques coupled with its painstaking exceptions for practice of such techniques under the auspices of a religious reveal the Statute's object to be harmful, discredited medical care delivered under a state-issued license, not conduct motivated by religious purpose.

Second, the Statute is generally applicable because it does not possess the features that violate general applicability under this Court's precedent–it has no formal mechanism for discretionary exemptions such that secular conversion therapy may be permitted on a case-by-case basis, and it does not underinclude secular conversion therapy or any other secular conduct that similarly undermines the government's interest at the heart of the Statute.

Additionally, this Court should decline Petitioner's invitation to overturn *Smith*. This case does not present a proper opportunity to reestablish the pre-*Smith* rule set forth in *Sherbert v. Verner* because the Statute is still valid under that rule. The Statute does not "substantially burden" religious conduct because it does not coerce anyone to act in violation of their religious convictions–rather, it merely regulates what kind of medical care may be administered under a

state-issued license. Even if the Statute did "substantially burden" religious conduct, it is still justified by the state's compelling interest in preventing harm to minor patients caused by medically discredited therapeutic techniques. Finally, this Court should not overturn *Smith* in favor of a stricter rule than *Sherbert* because doing so would severely impair government at every level in the exercise of its proper powers to redress social issues.

For these reasons, this Court should affirm the lower courts' decisions in rejecting Petitioner's constitutional claims and not overrule *Smith*.

ARGUMENT

Within the First Amendment of the United States Constitution, the Framers established that:

> 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. This Amendment guarantees both the protection of speech and religion, and has been incorporated against the states through the Fourteenth Amendment's Due Process Clause.

When considering if a law restricts speech, a court traditionally applies strict scrutiny to content-based restrictions and considers if the law is "narrowly tailored to serve a compelling state interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). However, this Court has consistently held that conduct, which implicates speech, particularly in a professional realm, does not implicate a First Amendment violation. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). States have the implicit right to regulate professional conduct, which utilizes speech, or even entirely relies on, as part of their inherent police powers. *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910).

When considering if a law restricts the free exercise of religion, a court determines whether the law is neutral and generally applicable. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531 (1993). A neutral and generally applicable law is only subject to rational basis review even if it incidentally burdens religious conduct. *Id.* at 531.

Because the Statute is a valid exercise of Respondent's police power to regulate professional conduct, and because the Statute is neutral and generally applicable, the lower courts correctly applied rational basis review and determined the Statute to be valid. This Court should affirm.

I. North Green's regulation of conversion therapy is not a violation of First Amendment freedoms.

The First Amendment Free Speech clause was not designed to allow for unchecked and unregulated speech in the sphere of professional conduct. Rather, the First Amendment allows for the regulation of professional speech in order to protect the greater good. *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014). Here, although talk therapy, including conversion therapy, is in itself primarily executed by speech, it is a form of medical conduct that the state has the police power to regulate. *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000).

A. The Statute is a lawful regulation of professional conduct.

This Court has consistently held that "[s]tates have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). It is well within the police power of the state to regulate certain trades and professions, "particularly those which closely concern the public health. There is perhaps no

profession more properly open to such regulation than that which embraces the practitioners of medicine." *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910).

Understandably, "most medical treatments require speech." However, a "state may still ban a particular treatment it finds harmful; otherwise, any prohibition of a medical treatment would implicate the First Amendment and unduly limit the states' power to regulate licensed professions." *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022); *see also Pickup,* 740 F.3d at 1229 ("Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment.").

> It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949). In *Ohralik v. Ohio State Bar Association*, Ohio brought disciplinary action against a lawyer for his personal, verbal solicitation of a customer, claiming it violated the ethics regulations established by the state. 436 U.S. 447 (1978). The Supreme Court upheld this regulation because, a "state did not lose power to regulate commercial activity deemed harmful to the public merely because speech was a component of activity." *Id.* States have the right to regulate conduct, even when this conduct is speech, when it means setting a professional standard that furthers the interests of the state and its people. *See also Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), (holding that where states compelled speech from abortion practitioners it was not in violation of the First Amendment but rather a medical regulation of conduct).

Here, much like in *Ohralik v. Ohio State Bar Association*, the state is regulating conduct that is predominantly speech, but the speech itself is conduct. The National Institute of Mental Health defines talk therapy as "a variety of treatments that aim to help a person identify and change troubling emotions, thoughts, and behaviors." NATIONAL INSTITUTE OF MENTAL HEALTH, https://www.nimh.nih.gov/health/topics/psychotherapies (last visited Sep. 25, 2023). The University of New Mexico defines treatment as " the provision, coordination or management of health care and related services by one or more health care providers." THE UNIVERSITY OF NEW MEXICO HEALTH SCIENCES, https://hsc.unm.edu/about/administrative-departments/privacy-office/treatment-definition.html (last visited Sep. 25, 2023). Talk therapy is conduct; it is a provision, coordination, or management of healthcare. *See Nat'l Ass'n for Advancement of Psychoanalysis*, 228 F.3d at 1054 ("[T]he key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech.... That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection.") This Court has noted that "[w]hile it is possible to find some kernel of expression in almost every activity a person undertakes ... such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin,* 490 U.S. 19 (1989), *quoted in Las Vegas Nightlife, Inc. v. Clark County,* 38 F.3d 1100, 1102 (9th Cir. 1994). It is a medical treatment that the Supreme Court has consistently held, states not only have the power to, but should regulate for the greater welfare of the people.

> The First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate

Pickup, 740 F.3d at 1228. The Fourteenth Circuit correctly characterized conversion therapy as conduct and held the Statute did not infringe on Petitioner's First Amendment rights, but regulated an anachronistic, ineffective medical treatment–a regulation this Court would support.

B. The opinion below is consistent with precedent concerning the First Amendment and protected speech even if intermediate scrutiny is triggered because it is narrowly tailored to achieving a compelling interest.

Nearly every aspect of medical treatment, from scheduling a routine appointment to a doctor delivering their opinion about mysterious symptoms, involves speech. However, just because medical professionals rely on verbal communication to perform their duties does not mean every visit triggers a First Amendment claim for their patients. The Court has been very specific that government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting *Police Dep't of Chicago v. Mosley*, 408 U. S. 92, 95, 92 S. Ct. 2286 (1972)). Content-based laws are those that target speech because of the idea or message expressed, and they are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* However, this is distinguished from states exercising their police power to regulate the rules of professional conduct and licensing of medical providers. "[T]he physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992). Further, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

Nat'l Inst. Of Family & Life Advocates v. Becerra was filed in response to the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT

Act) which required pro-life centers that primarily served pregnant women to provide certain notices. 138 S. Ct. 2361, 2368 (2018). Licensed clinics falling under the FACT Act were required to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call." *Id.* The legislative history of the FACT Act included from its author that "unfortunately . . . 'there are nearly 200 licensed and unlicensed' crisis pregnancy centers in California [that] 'aim to discourage and prevent women from seeking abortions,'" suggesting the intent behind these notices. *Id.* The petitioners argued that these required notices infringed their freedom of speech. *Id.*

The Court held that the licensed notice was a content-based regulation. *Id.* at 2371. It reasoned that "[b]y compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'" *Id.* (quoting *Riley v. National Federation of Blind of N. C., Inc.*, 487 U. S. 781, 795, 108 S. Ct. 2667 (1998)). It further reasoned that by requiring those employed by the licensed clinics "to inform women how they can obtain state-subsidized abortions" when in fact the clinics were pro-life centers who wished to dissuade women from taking such action, the content of their speech was plainly altered. *Id.* It also reasoned that California's provided state interest, "providing low-income women with information about state-sponsored services," was not sufficiently tailored and "wildly underinclusive." *Id.* at 2375.

The Court disagreed with the Ninth Circuit not applying strict scrutiny due to that Circuit's conclusion that the notice regulated "professional speech," which some Courts of Appeals have recognized as "a separate category of speech that is subject to different rules." *Id.* "These courts define 'professionals' as individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime," however, the Court has not recognized such a separate category of speech. *Id.* Holding that the licensed notice

likely violated the First Amendment, the Court did recognize that "under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372.

Even if the Court disagreed with the Ninth Circuit's application of intermediate scrutiny, the Statute would still survive the challenge of strict scrutiny if applied. "[T]his Court will find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988).

Here, the Statute simply "added '[p]erforming conversion therapy on a patient under age eighteen' to the list of unprofessional conduct in the Uniform Disciplinary Act for licensed health care providers." Unlike the FACT Act's required notice of state-sponsored abortion, the Statute merely addresses regulated professional conduct. The Statute fully defines exceptions for "(1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene Stat. § 106(f). The FACT Act provided no such exception, as it altered the speech of pregnancy crisis center employees by requiring them to provide information about the same option they served to dissuade. The Statute is clearly sufficiently narrowly tailored as it simply aims to regulate the professional conduct of licensed health care providers, which this Court has held that States may do.

The California legislative history described the number of pregnancy crisis centers as "unfortunate," demonstrating that the FACT Act was at least in part motivated to discourage the mission of such centers. The North Greene legislature's intent in creating the Statute was to follow the recommendation of the American Psychological Association, which opposed conversion therapy. R. 4. The FACT Act's compelling interest of providing low-income women with state-sponsored service was not sufficient and underinclusive. The North Greene legislature provided a very compelling state interest "in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." R. 4.

The Statute targets conduct, not content. It does not alter the medical community's speech; it regulates professional conduct in health care. However, should the Court somehow find it a content-based regulation, it would withstand the test of a strict scrutiny analysis.

II. The Statute is neutral and generally applicable because it narrowly targets harmful therapeutic practices administered under the auspices of a state license while allowing for religious practice of conversion therapy in other contexts. Moreover, the Court should not use this case as a vehicle to overturn *Smith*.

The First Amendment Free Exercise Clause does not "relieve an individual of the obligation to comply with a valid and neutral law of general applicability . . . ." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, , 494 U.S. 872, 879 (1990). As this Court has long recognized, citizens of a political society owe political responsibilities which cannot be relieved by "mere possession of religious convictions which contradict" those responsibilities. *Minersville Sch. Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-95 (1940). To permit citizens to excuse compliance with laws based on religious convictions would be to make those convictions "superior to the law of the land[.]" *Reynolds v. U.S.*, 98 U.S. 145, 167 (1878). "Government could exist only in name under such circumstances." *Id.*

Thus, longstanding precedent has established that a law is not subject to strict scrutiny if it is neutral and generally applicable, "even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. To determine if a law is neutral, a court must examine the face of the law, its purpose, and its operation to determine if religious conduct is the law's "object[.]" *Id.* at 533, 540, 535; *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2021). To determine if a law is generally applicable, a court looks to whether the law provides for individual exceptions depending on an individual's motivations for their conduct, *Smith*, 494 U.S. at 884, and whether it substantially underincludes secular conduct that "undermines the government's asserted interests in a similar way[,]" *Fulton*, 141 S. Ct. at 1877. In this case, the Fourteenth Circuit properly applied this precedent and determined the North Greene law to be neutral and generally applicable. It then applied rational basis review and held the law to be valid. This Court should affirm, and decline Petitioner's invitation to overturn *Smith*.

A. The Statute does not primarily burden religious conduct.

Although the ultimate inquiry of the *Smith* analysis is not into the proportion of a law's burden that falls on religious conduct relative to secular conduct, evidence of a disproportionate burden on religious conduct can be considered as evidence that such conduct is the law's object. *Lukumi*, 508 U.S. at 535. That is exactly how the Fourteenth Circuit examined the Statute in the proceeding below. *Sprague*, 2023 WL 12345, at *9-10. It first concluded the law was neutral on its face and in its purpose. *Id.* at *8. Then, turning to the Statute's real-world operation, the court noted the paucity of evidence in the record demonstrating that the Statute's effect fell primarily or overwhelmingly on religious conduct. *Id.* at *9. Rather, the record demonstrated that patients seek and counselors provide conversion therapy for secular reasons as well as religious reasons.

Id.; *see also Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016) (examining a substantially similar law and concluding that conversion therapy is often sought for secular reasons like "social stigma, family rejection, and societal intolerance for sexual minorities"); American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation* 45-49 (2009) (surveying research and concluding that many clients seek out conversion therapy for secular reasons like "mental health and personality issues, cultural concerns . . . internalized stigma, [and] sexual orientation concerns").

When challenging a law under the Free Exercise clause, the plaintiff has the burden to show a law is not neutral or generally applicable. *Kennedy*, 142 S. Ct. at 2421-22. As the Fourteenth Circuit noted, Petitioner failed to produce evidence sufficient to carry this burden. Instead, the lack of evidence suggesting the Statute's burden falls primarily on religious conduct shows that its object was something else—namely, the harm caused to teen patients by a discredited therapeutic practice, regardless of the motivation for engaging in that practice. *Sprague*, 2023 WL 12345, at *9. For this reason, the Statute is neutral and generally applicable, and the lower court's holding should be affirmed.

B. The Statute is neutral and generally applicable even if it primarily burdens religious conduct.

Under this Court's precedents, the level of scrutiny applied to a given law does not turn merely on the proportion of the overall burden that falls on religious conduct as opposed to secular conduct. Rather, the focus of the "neutral and generally applicable" analysis is the law's object. *Lukumi* is clear that a law's effect in operation is not dispositive of the law's neutrality and generally applicability, but is only evidence of the law's object. 508 U.S. at 535 ("[A]dverse impact will not always lead to a finding of impermissible targeting . . . . [A] social harm may have been a legitimate concern of government for reasons quite apart from discrimination."); *see*

also Kennedy, 142 S. Ct. at 2422 (law is not neutral if it is "specifically directed at religious practice") (emphasis added) (internal quotations omitted); *Smith*, 494 U.S. at 878 (same). Therefore, if a law primarily burdens religious conduct, that fact may be considered evidence that the law's object is the religious conduct. But such evidence can be outweighed by other evidence that the law's object is something else in which the government has a permissible interest. That is the case here.

First, the Statute is neutral even if it primarily burdens religious conduct. In *Lukumi*, the court noted that the law at issue was so carefully drafted that in operation it almost exclusively prohibited religious animal sacrifice while permitting substantially similar secular animal slaughter. 508 U.S. at 535. This meticulous drafting created a "religious gerrymander" from which the Court inferred the law's true object—religious practices. *Id.* at 535-36. Based on that object, the Court held the law was not neutral. *Id.* at 534. The Statute is also carefully drafted—but in the opposite direction. Its description of the conduct it prohibits is not purposely complex in order to encompass as much religious conduct and as little secular conduct as possible. Instead, it narrowly targets performance under a state-issued medical license of a specific kind of therapy that has been shown to harm minor patients, and nothing more. Research indicates conversion therapy can harm minor patients directly, by amplifying feelings of distress, depression, and negative self-image, and indirectly, by consuming time and resources that could instead be allocated toward medically appropriate therapeutic techniques. American Psychological Association, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Effort* (June 2022), https://www.apa.org/about/policy/sexual-orientation. The Statute's language narrowly conforms to the definition of this harmful therapy, and then excludes from the law's contemplation substantially similar therapy performed by

religious and nonlicensed counselors acting under "auspices of a religious denomination church, or organization." N. Greene Stat. § 106(f)(2)-(3). If the Statute draws a "religious gerrymander," it does so in a way that religious conduct falls within the boundaries of permissibility, not without them. Therefore, the Statute is neutral.

Second, the Statute is generally applicable even if it primarily burdens religious conduct. As described above, it does not underinclude equivalent secular conduct that undermines the same governmental interests at the heart of the Statute. And, it provides no avenue for secular counselors to administer conversion therapy, or any other substantially similar therapy that has also been documented as harming minor patients in the same way. On the other hand, the Statute painstakingly carves out exceptions by which religious counselors may advocate for and provide conversion therapy in other contexts, which shows that the Statute's object is not religious conduct but medically deficient care delivered under state-issued licenses.

In short, the Statute's structure does not contain the features that have made other laws fail the test for neutrality and general applicability. In *Fulton*, the City of Philadelphia's practice requiring a religious foster care organization to accept applications from same-sex couples in violation of the organization's religious principles was not generally applicable because the practice allowed the City Commissioner the "sole discretion" to grant individual exemptions to the practice. 141 S. Ct. at 1878. In *Kennedy*, this Court held the school district's requirement that a coach supervise student-athletes after games was a "bespoke requirement specifically addressed to [the coach's] religious exercise" and not generally applicable because the district exempted other coaches from the same supervisory responsibilities. 142 S. Ct. at 2423.

By contrast, the Statute provides no discretion to any government entity or official to grant individual exemptions from the law's application. The only exceptions for which the

Statute provides apply broadly and, indeed, only to religious conduct. Even if the Statute primarily burdens religious conduct under the auspices of a state-issued medical license, it also provides for a safe harbor in which substantially similar religious conduct can be performed under full protection of the law. Under this Court's precedents, these components of the Statute demonstrate its general applicability.

For these reasons, the Statute is neutral and generally applicable even if it primarily burdens religious conduct. This Court should extend rational basis review and find the law to be valid.

C. This case is not a proper vehicle to return to pre-*Smith* precedent because the Statute is also valid under that precedent.

This Court does not decide constitutional questions unless "absolutely necessary" to the decision of a case. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (citing *Burton v. U.S.*, 196 U.S. 283, 295 (1905)). Therefore, this case is only a proper vehicle through which to overturn *Smith* and return to pre-*Smith* precedent if the Statute is invalid under that precedent. But that is not so.

Before *Smith*, the rule articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963), held that laws that "substantially burden" a religious practice must be justified by a compelling government interest. *Smith*, 494 U.S. at 883. But even that precedent held that "incidental effects" of a law which "may make it more difficult to practice certain religions" but which do not "coerce individuals into acting contrary to their religious beliefs" do not constitute a substantial burden on religious conduct. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988). Proving a substantial burden on religious practice is a high bar—indeed, before *Smith*, this Court had never invalidated a governmental action under the *Sherbert* test other than denial of unemployment compensation. *Smith*, 494 U.S. at 883.The Statute does

not substantially burden religious conduct under that framework. The Statute does not coerce religious counselors to provide services that violate their religious convictions. It does not require them to take any action at all. It does not dictate what they may and may not say about conversion therapy outside of the therapist-patient relationship. And it does not restrict the practices of religious organizations. Instead, it merely regulates what kind of medical care may be provided under a state-issued license. This regulation is well within the proper exercise of the state police power, and any "incidental effect" such exercise may have on religious practice cannot invalidate the law under *Sherbert*. And even if the Statute does impose a substantial burden on religious conduct, that burden is justified by Respondent's compelling interest in preventing harm caused to minor patients by medically discredited therapy administered under a state-issued license.

Because the Statute is valid under either precedent, this case is not a proper vehicle through which to overturn *Smith* and resurrect *Sherbert*.

D. Overturning *Smith* for a non-*Sherbert* rule would paralyze government at all levels in the discharge of its normal functions.

A guiding concern under both *Smith* and *Sherbert* was the capacity of the government at all levels to act within its power to redress social problems. *See Smith*, 494 U.S. at 878-79 (excusing illegal conduct because the conduct was animated by religious belief would be to "permit every citizen to become a law unto himself") (internal quotations omitted); *Sherbert*, 374 U.S. at 402-03 (collecting precedent allowing the government to regulate religious conduct that posed "some substantial threat to public safety, peace or order").

Discarding *Smith* in favor of a rule more restrictive of government actions, especially one applying strict scrutiny to neutral and generally applicable laws that nevertheless burden religious conduct in some way, would be to "court[] anarchy[.]" *Smith*, 494 U.S. at 888. It would be to require the government of a diverse population subscribing to nearly every religion in existence to allow individual exemptions to nearly every law—from drug laws, to tax laws, to environmental protection and preservation laws, to traffic laws, to labor laws. *See id.* (collecting cases); *see also Fulton*, 141 S. Ct. at 1882-83 (Barrett, J., concurring). And it would be to require judges in certain cases to peer into the soul of individual litigants to divine true belief or a false face designed to escape the exercise of valid laws. The *Smith* Court recognized that "the First Amendment's protection of religious liberty does not require this." 494 U.S. at 889. This is true now as it was then.

For the reasons above, the Court should hold that the Statute is neutral and generally applicable whether it primarily burdens religious conduct or not. It should decline Petitioner's invitation to overturn *Smith* either in favor of the prior *Sherbert* test or some other rule. Finally, it should affirm the Fourteenth Circuit's holding that the Statute is valid under rational basis review.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.