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 3

QUESTION PRESENTED

1. Whether a law that regulates a licensed therapist's administration of a harmful psychotherapy on minors violates the Free Speech Clause of the First Amendment of the United States Constitution when the State has the power to regulate professional conduct and a compelling interest in protecting minors?
2. Whether a law that prohibits a licensed therapist from practicing conversion therapy is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990)?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution states:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Section 106(d) of Chapter 45 of Title 23 of the North Greene General Statutes states:

"[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.[1]

Section 106(e)(1)-(2) of Chapter 45 of Title 23 of the North Greene General Statutes states:

(1) "Conversion therapy" means a regime that seeks to change an individual's sexual orientation or gender identity. The term includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. The term includes, but is not limited to, practices commonly referred to as "reparative therapy."

(2) "Conversion therapy" does not include counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity.

Section 106(f) of Chapter 45 of Title 23 of the North Greene General Statutes states:

§ 106(d) does not apply 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."[2]

[1] The record does not contain N. Greene Stat. § 106(d) in its entirety, this is what is available in the record. Record 4.

[2] The record does not contain N. Greene Stat. § 106(f) in its entirety, this is what is available in the record. Record 4.

STATEMENT OF THE FACTS

Howard Sprague ("Sprague") is a licensed family therapist in North Greene who performs conversion therapy—also known as "SOCE" in other states—on his minor patients who are under the age of eighteen. Record 3. Sprague's approach is heavily influenced by his religion. Record 3. North Greene enacted N. Greene Stat. § 106(d) to regulate "the professional conduct of licensed health care providers" and listed performing conversion therapy on a minor as unprofessional conduct in its Uniform Disciplinary Act. Record 3-4. North Greene found that it had a compelling interest in protecting the physical and psychological well-being of minors against "serious harms caused by conversion therapy." Record 4.

The General Assembly noted the consensus of the American Psychological Association ("APA") in enacting § 106(d) because the APA rejects conversion therapy and encourages psychologists to use "an affirming, multicultural, and evidence-based approach" that consists of "acceptance, support, . . . and identity exploration and development." Record 4. North Greene's statute excludes therapists, counselors, and social workers who work under a religious denomination, church, or religious organization. Record 4.

Sprague sued the State of North Greene, seeking a preliminary injunction to enjoin North Greene from enforcing N. Greene. Stat. § 106(d). Sprague alleged that North Greene's law violates his right to free speech and free exercise. The District Court denied Sprague's motion for preliminary injunction and granted North Greene's motion to dismiss, holding that the statute is a constitutionally permissible regulation of professional conduct and was neutral and generally applicable. The Fourteenth Circuit affirmed the District Court's judgment. The State of North Greene asks this Court to affirm the Fourteenth Circuit's holding because it correctly found that the statute did not violate Sprague's free speech and free exercise rights.

SUMMARY OF THE ARGUMENT

"It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756-757 (1982). This Court should affirm the Fourteenth Circuit's decision because it correctly found that the statute is a constitutionally permissible regulation of professional conduct incidental to speech and was neutral and generally applicable.

States may regulate professional conduct that incidentally involves speech and such speech is afforded lesser First Amendment protections. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018). North Greene's statute is a regulation of professional conduct subject to a rational basis standard of review because conversion therapy is part of the practice of psychotherapy—a form of medicine. Even if heightened scrutiny applies, intermediate scrutiny is proper because the statute is content-neutral and viewpoint-neutral as it only regulates professional conduct while allowing Sprague to express his viewpoint on conversion therapy to the public and his patients.

The Free Exercise clause is not violated by a neutral and generally applicable law even if the law incidentally burdens religion. *Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990). North Greene's statute is facially neutral because it does not mention religion and is operationally neutral because it treats all licensed healthcare providers the same regardless of religion. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). Moreover, North Greene's law is generally applicable because it contains no formal system of exceptions and prohibits all licensed healthcare providers from practicing conversion therapy, regardless of whether a provider has religious motivations for practicing conversion therapy or not. *Id.* This Court should uphold *Smith* because it was correctly decided, created a workable standard that applies to all the states, did not

disrupt other areas of the law, and because states have legitimate reliance interests in the continuing validity of *Smith.*

Nonetheless, North Greene's statute survives all standards of First Amendment scrutiny because protecting minors is a compelling government interest and the statute is narrowly tailored. This Court affirms that states have a compelling interest in protecting the physical and mental health of minors. *Ferber*, 458 U.S. at 756-757. Further, North Greene's statute is narrowly tailored because it leaves ample alternative channels for communication regarding conversion therapy to the public and minor patients. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015). This Court should hold that North Greene's statute does not violate the Free Speech or Free Exercise clauses.

ARGUMENT

THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT'S DECISION BECAUSE NORTH GREENE'S STATUTE SURVIVES ALL STANDARDS OF FIRST AMENDMENT SCRUTINY, IS NEUTRAL AND GENERALLY APPLICABLE, AND THE FOURTEENTH CIRCUIT CORRECTLY RELIED ON SMITH TO REACH ITS DECISION.

This Court should affirm the Fourteenth Circuit's decision because North Greene's statute does not violate the Free Speech or Free Exercise clauses. The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech and abridge the free exercise of religion. U.S. CONST. amend. I; *see also NIFLA*, 138 S. Ct. at 2372; *Cantwell v. Connecticut*, 310 U.S. 296, 309-311 (1940). This Court's First Amendment jurisprudence has created three different standards of scrutiny to determine if a law should be upheld. *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015); *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314-15 (1993). The least stringent standard is rational basis review, as laws under rational basis bear a strong presumption of validity. *See Beach Commc'ns, Inc.*, 508 U.S. at 314-15. The most stringent standard of scrutiny is strict scrutiny. *Reed*, 576 U.S. at 163. Under strict

scrutiny, a law must serve a compelling interest and be narrowly tailored to serve that interest. *Reed*, 576 U.S. at 163; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992).

This Court should find North Greene's statute is a regulation of professional conduct that incidentally affects speech and is subject only to rational basis review. Even if this Court applies heightened scrutiny, intermediate scrutiny is proper because North Greene's statute is content-neutral and viewpoint-neutral. Nonetheless, North Greene's statute survives all standards of First Amendment scrutiny because the protection of minors is a compelling government interest, and the statute is narrowly tailored because it only burdens as much speech as is necessary to further its interest.

Moreover, the statute does not violate the Free Exercise clause because it is neutral, both facially and in operation, and is generally applicable. Even if the statute was not found to be neutral or generally applicable, for the reasons stated previously, it survives strict scrutiny. Finally, *Smith* should not be overruled because it does not betray constitutional principles; is properly grounded in history, precedent, and the Constitution; created a workable standard applicable to all the states; did not distort background legal doctrines; and states have a legitimate reliance interest in the continuing validity of *Smith.*

I. NORTH GREENE'S STATUTE IS A REGULATION OF PROFESSIONAL CONDUCT, SUPPORTED BY A RATIONAL BASIS, AND EVEN IF HEIGHTENED SCRUTINY APPLIES, THE STATUTE SURVIVES ALL STANDARDS OF FIRST AMENDMENT SCRUTINY BECAUSE IT IS CONTENT-NEUTRAL, VIEWPOINT-NEUTRAL, AND NARROWLY TAILORED.

This Court has historically recognized that the right to free speech is not absolute, and the government may restrict certain types of speech. *See, e.g.*, *Chaplinksy v. New Hampshire*, 315 U.S. 568, 572 (1942) ("fighting words"); *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250, 266-67 (1952) (defamation). To determine the constitutionality of a restriction on speech, courts first ask whether the law regulates conduct or

speech to apply the proper standard of review. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011)*; Holder v. Humanitarian L. Project*, 561 U.S. 1, 26-27 (2010).

The First Amendment is only applicable when there is a limitation placed on speech or expressive conduct. *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 62, 66, 70 (2006); *see also Virginia v. Hicks*, 539 U.S. 113, 123-24 (2003) (upholding the constitutionality of a trespass ordinance on the grounds that it prohibits non-expressive conduct and not protected speech). Regulations restricting conduct and certain categories of speech that fall outside the scope of the First Amendment's protection are reviewed under the rational basis standard. *See Beach Commc'ns, Inc.*, 508 U.S. 314-15; *see also Virginia v. Hicks*, 539 U.S. at 123-24.

North Greene's statute is a regulation of professional conduct subject to lesser protections under the First Amendment and thus subject to a rational basis standard of review. Alternatively, if this Court applies heightened scrutiny, intermediate scrutiny is proper because North Greene's statute is content-neutral and viewpoint-neutral. Lastly, North Greene's statute survives all standards of First Amendment scrutiny because protecting minors is a compelling government interest and the statute is narrowly tailored.

A. North Greene's Statute Is a Regulation of Professional Conduct Subject to Rational Basis and Is Constitutionally Valid Under that Standard.

States may regulate professional conduct, even if that conduct incidentally involves speech. *NIFLA*, 138 S. Ct. at 2372; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022). Professional speech incidentally implicated by a regulation of professional conduct is afforded lesser First Amendment protections. *NIFLA*, 138 S. Ct. at 2372; *Casey*, 505 U.S. at 884.

1. This Court's precedent affirms that regulations of professional conduct that incidentally involve speech are an exception to First Amendment scrutiny.

Speech that is inherently a "part of the practice of medicine" constitutes professional speech incidental to professional conduct that is afforded lesser First Amendment protections. *NIFLA*, 138 S. Ct. at 2372; *Casey*, 505 U.S. at 884. In *NIFLA*, this Court created a First Amendment framework distinguishing constitutionally protected speech uttered by professionals and unprotected professional speech incidental to professional conduct. 138 S. Ct. at 2373. *NIFLA* evaluated the constitutionality of a California mandate that compelled pro-life clinics to give notice about free state-provided abortions. *Id.* The *NIFLA* Court held that the law was not a regulation of professional *conduct* because the mandated notice was "not tied to a [medical] procedure at all," but applied broadly to all interactions between a clinic and its clients. *Id.*

NIFLA reaffirmed that the government may constitutionally regulate professional speech incidental to professional conduct. 138 S. Ct. at 2372 (citing *Casey*, 505 U.S. at 884). While the *NIFLA* Court declined California's assertion that this exception applied to its notice requirement, *NIFLA* did not abolish the exception. *Id.* at 2373. In *Casey*, this Court rejected a free speech challenge to Pennsylvania's informed-consent statute that compelled physicians to offer information aimed at dissuading an abortion. 505 U.S. at 884. Because informed consent was inherently "part of the *practice* of medicine," the statute regulated conduct rather than speech, despite being implemented solely through verbal means. *Id.* Therefore, *Casey* established that where a physician's speech is implicated, "but only as part of the practice of medicine," it is "subject to reasonable licensing and regulation by the State." *Id.*

Here, talk-therapy is itself a "part of the practice of medicine" and thus falls within the First Amendment exception for professional speech incidental to professional conduct. *See NIFLA*, 138 S. Ct. at 2372; *see also Casey*, 505 U.S. at 884; Record 4. The instant case is distinguishable

from *NIFLA* where the notice requirement was "not tied to a [medical] procedure at all," because North Greene's statute regulating conversion therapy is directly tied to the medical practice of psychotherapy. 138 S. Ct. at 2372; Record 4. Additionally, the instant case is analogous to *Casey*. *See Casey*, 505 U.S. at 884; Record 3-4. Like in *Casey*, where this Court determined an informed consent provision is inherently part of the practice of medicine (abortion), talk-therapy is also inherently part of psychotherapy—a form of medicine. *See Casey* 505 U.S. at 884; Record 3-4. Like *Casey*, the instant case here thus regulates conduct, despite being implemented solely through speech. *See Casey*, 505 U.S. at 884; Record 3-4.

Moreover, the statute does not restrict a licensed health care provider's ability to publicly speak discuss conversion therapy. Record 4. If the statute did restrict the speaker in such ways, it would trigger heightened scrutiny. *See Casey*, 505 U.S. at 884; Record 4. However, because the statute only restricts Sprague's ability to practice a medical treatment, it is a constitutionally permissible regulation of professional speech incidental to conduct that is not afforded full protection by the First Amendment. *See Casey*, 505 U.S. at 884; Record 4. North Greene's statute implicates a licensed therapist's right not to speak only as part of the practice of medicine, which is licensed and regulated by the state, even if administered solely through speech. *See Casey*, 505 U.S. at 884; Record 4. Accordingly, North Greene's statute is subject to rational basis review.

2. North Greene's statute is rationally related to the state's legitimate interest in safeguarding the health and welfare of minors.

Under rational basis, a statute has a "strong presumption of validity." *Beach Commc'ns, Inc.*, 508 U.S. at 314; *see also Romer v. Evans*, 517 U.S. 620, 632 (1996). "The rational basis test asks (1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve it." *Beach Commc'ns, Inc.*, 508 U.S. at 314. Under rational

basis review, the state is not required to produce evidence demonstrating the rationality of the statute or be motivated by the rational justification. *Id.* at 314-15; *see also Romer*, 517 U.S. at 632. Instead, the challenger bears the burden "to negate every conceivable basis which might support [the statute]." *Beach Commc'ns*, 508 at 314-15.

Regulations on conversion therapy are rationally related to the government's legitimate interest in safeguarding the health and welfare of minors. *See, e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022) (upholding Washington's regulation on conversion therapy under rational basis review); *Pickup v. Brown*, 740 F.3d 1208, 1232 (9th Cir. 2014) (upholding California's regulation on SOCE under rational basis review), *abrogated on other grounds by NIFLA*, 138 S. Ct. at 2372. In *Tingley*, the court upheld Washington's law prohibiting conversion therapy on minors by licensed therapists. 47 F.4th at 1078. *Tingley* determined that the statute regulated professional conduct incidentally involving speech because therapists were still free to recommend SOCE, thus any effect the statute had on free speech rights were only incidental. *Id.* Accordingly, *Tingley* applied rational basis review and held that protecting the "physical and psychological well-being of minors" from "exposure to serious harms caused by conversion therapy" is undoubtedly a "legitimate state interest." *Id.* at 1078. Thus, Washington acted rationally by preventing licensed therapists from practicing conversion therapy on minors. *Id.*

Here, North Greene's statute is rationally related to the state's interest in protecting the physical and psychological well-being of minors. *See Id.*; *see also Pickup*, 740 F.3d at 1232; Record 4. The instant case is indistinguishable from *Tingley* and *Pickup* because North Greene's statute regulates conversion therapy on minors. *See Tingley*, 47 F.4th at 1073; *see also Pickup*, 740 F.3d at 1231; Record 4. Like the states in *Tingley* and *Pickup*, North Greene has a compelling interest in protecting minors against serious harms caused by conversion therapy. *See Tingley*, 47

F.4th at 1073; *see also Pickup*, 740 F.3d at 1231; Record 4. Additionally, this Court does not need to address whether SOCE does in fact cause "serious harms" because it is sufficient that such harms could "reasonably be conceived to be true by the governmental decisionmaker." *See Pickup*, 740 F.3d at 1231; Record 4. Thus, North Greene acted rationally and the law is constitutionally valid.

B. Even if this Court Applies Heightened Scrutiny, Intermediate Scrutiny Is Proper, and the Statute Is Constitutionally Valid.

If a law regulates speech, courts determine whether the regulation is "content-based" or "content-neutral" to apply the proper level of scrutiny. *NIFLA*, 138 S. Ct. at 2372; *see also Reed*, 576 U.S. at 165. This Court only applies intermediate scrutiny to content-neutral regulations with incidental effects on speech, whereas content-based and viewpoint-discriminatory regulations of speech are reviewed under the more stringent standard of strict scrutiny. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Reed*, 576 U.S. at 163. Under intermediate scrutiny, a law is upheld if it (1) "advances important governmental interests unrelated to the suppression of free speech" and (2) "does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997); *see also O'Brien*, 391 U.S. at 377.

1. North Greene's statute is content-neutral.

A content-based law "applies to particular speech because of the topic discussed or the idea or message expressed" and is unrelated to the suppression of free speech. *Reed*, 576 U.S. at 163; *Cantwell*, 310 U.S. at 309-311. A law is content-based when it compels individuals to speak a particular message. *NIFLA*, 138 S. Ct. at 2366; *Reed*, 576 U.S. at 156. In *NIFLA*, this Court held that notice requirements compelling pro-life clinics to provide notice about free state-provided abortions are a content-based regulation. 138 S. Ct. at 2366. This Court reasoned that by

compelling petitioners to speak a particular message through advertisements about abortion–the exact practice the petitioners opposed–the state altered the content of the petitioner's speech. *Id.*

Here, North Greene's statute is content-neutral because it does not restrict Sprague's ability to communicate a particular message. *See NIFLA*, 138 S. Ct. at 2366; Record 4. North Greene's statute is a stark contrast from the notice requirement in *NIFLA* because the statute does not restrict advocacy for conversion therapy or compel Sprague to advocate against it. *NIFLA*, 138 S. Ct. at 2366; Record 4. To the contrary, the statute allows Sprague to express his viewpoint on conversion therapy to the public and his patients. *NIFLA*, 138 S. Ct. at 2366; Record 4. Sprague may even recommend conversion therapy to his minor patients. *NIFLA*, 138 S. Ct. at 2366; Record 4.

Moreover, Sprague is only prohibited from administering conversion therapy on his minor patients–within the psychotherapist-patient relationship—as a medical treatment. *NIFLA*, 138 S. Ct. at 2366; Record 4. Unlike *NIFLA*, licensed health care providers in North Greene retain their First Amendment right not to speak a particular message because they do not have to speak against conversion therapy. *NIFLA*, 138 S. Ct. at 2366; Record 4. Because the statute does not restrict Sprague's ability to communicate a particular message, North Greene's statute is content-neutral and unrelated to the suppression of free speech. *NIFLA*, 138 S. Ct. at 2366; Record 4.

2. North Greene's statute is viewpoint neutral.

Viewpoint discrimination extends beyond being content-based. *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 828-29 (1995). "The test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed." *Matal v. Tam*, 582 U.S. 218, 248 (2017); *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). A statute exhibits viewpoint discrimination when it selectively targets and prohibits a specific standpoint or perspective. *Boos*

v. Barry, 485 U.S. 312, 313 (1988). In *Boos*, this Court struck down a District of Columbia statute that criminalized the display of any sign criticizing a foreign government within five hundred feet from its embassy. *Id.* at 312. *Boos* reasoned that the display clause of the statute was unconstitutional because it singled out one perspective—*criticism* of foreign governments—for prohibition while excluding praise for foreign governments. *Id*.

In contrast, North Greene's statute adopts a viewpoint-neutral stance, encompassing all efforts to change a minor's sexual orientation or gender identity, irrespective of a licensed health care provider's perspective. *See Boos*, 485 U.S. at 313; Record 4. Unlike *Boos*, North Greene's statute does not single out one perspective—efforts to change same-sex attraction or non-biological gender identity—for prohibition while excluding efforts to change opposite-sex attraction or biological gender identity. *Boos*, 485 U.S. at 313; Record 4. The statute is worded in a neutral fashion because it defines "conversion therapy" as any efforts to change "an individual's sexual orientation or gender identity." *Boos*, 485 U.S. at 313; Record 4. Because Sprague may offer support for a minor patient's pre-existing gender identity and attraction, the statute is viewpoint-neutral and thus not subject to strict scrutiny.[3]

3. The protection of minors within the medical profession is a substantial government interest.

This Court has historically recognized that a state has a substantial interest in protecting the public from harmful professional practices, especially those implicating the physical and mental health of minors. *See, e.g., Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and … they have

[3] "Conversion therapy does not include counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity." Record 4.

broad power to establish standards for licensing practitioners and regulating the practice of professions."); *Ferber*, 458 U.S. at 756-757 ("It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling."). Here, North Greene's interest in regulating professions within its boundaries, especially as it pertains to the well-being of minors, is undoubtedly a substantial government interest. *See Goldfarb*, 421 U.S. at 792; *see also Ferber*, 485 U.S. at 756-757; Record 4.

4. The statute does not burden more speech than necessary to further North Greene's interest in protecting minors.

A law does not burden more speech than necessary to further its substantial government interest where there are no alternative means for the government to further its interest. *O'Brien*, 391 U.S. at 376-377. In *O'Brien*, this Court held that a criminal prohibition against burning draft cards did not violate the First Amendment under intermediate scrutiny because the government regulation did not burden more speech than necessary in pursuit of the draft system's proper functioning. *Id.* This Court's rationale was that there were "no alternative means" for the government to guarantee the continued availability of draft cards—the government's substantial interest—except for enacting a law that prohibited their intentional destruction. *Id.*

Here, North Greene's regulation is narrowly tailored based on the exact rationale in *O'Brien*. *See O'Brien*, 391 U.S. at 376-77; Record 4. Like the government in *O'Brien*, North Greene has no feasible alternatives to safeguard minors against the harms of conversion therapy because the only means of guaranteeing such protections is by prohibiting the practice as a medical treatment. 391 U.S. at 376-77; Record 4. Other instances of speech, such as a licensed health care provider's viewpoint on conversion therapy are left unrestricted and unburdened. 391 U.S. at 376-77; Record 4. Therefore, like *O'Brien*, North Greene only burdens speech as much as is necessary

to further its substantial governmental interest. 391 U.S. at 376-77; Record 4. Thus, North Greene's statute is constitutionally valid under intermediate scrutiny.

C. North Greene's Statute Survives Even the Stringent Standard of Strict Scrutiny Because the Protection of Minors Is a Compelling Government Interest and the Statute Is Narrowly Tailored.

"Content-based laws ... are presumptively unconstitutional" but will be upheld if the government can prove that the laws "are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163; *R.A.V.*, 505 U.S. at 395. Under strict scrutiny, if the government meets the first prong of proving a compelling state interest, this Court must next determine if the law is "narrowly tailored" to serve the stated interest. *Reed*, 576 U.S. at 171; *R.A.V.*, 505 U.S. at 395.

1. The protection of the health, safety, and wellbeing of minors is sufficiently compelling.

This Court and lower courts agree that states have a compelling interest in protecting the physical and mental health of minors. *See, e.g.*, *Ferber*, 458 U.S. at 756-757; *Tingley*, 47 F.4th at 1078 (stating that states have a compelling interest in "regulating mental health," and "affirming the equal 'dignity and worth' of LGBT people,"). In the instant case, North Greene's interest in protecting the physical and psychological well-being of minors is unquestionably compelling. *See Ferber*, 485 U.S. at 756-757; *Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 868 (11th Cir. 2020) (Martin, J., dissenting); *Tingley*, 47 F.4th at 1078; Record 4.

2. North Greene's statute furthers its compelling interest in protecting minors because there is a direct causal link between conversion therapy and harm to minors.

A regulation furthers the compelling government interest in protecting minors when the state establishes an "'actual problem' in need of solving'" and demonstrates a causal link between the regulated activity and harm to minors. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). In *Brown*, California failed to "show a direct causal link between" playing violent video

games and harm to minors because the research was "based on correlation, not evidence of causation." *Id.* at 799. *Brown* held that the research—completed by a few psychologists—amounts to "ambiguous proof" which does not satisfy strict scrutiny. *Id.* at 799-800.

There is a direct causal link between conversion therapy and harm to minors. *Tingley*, 47 F.4th at 1081 (finding that studies documenting that minors subjected to conversion therapy are "more than twice as likely to report having attempted suicide" constitute evidence of harm to minors); *Pickup*, 740 F.3d at 1232 (finding reports documenting depression, suicidal ideation, and substance abuse as effects of conversion therapy evidence the therapy's harm to minors). SOCE originated when the medical and psychological community viewed homosexuality as an illness.[4] Today, SOCE involves "assertiveness" and "affection training" through "physical and social reinforcement to increase other-sex sexual behaviors."[5] However, several organizations have reported evidence of harms caused to minors by SOCE.[6] The reported harms include "depression, suicidal thoughts or actions, and substance abuse." *Pickup*, 740 F.3d at 1223.

Here, North Greene has established a causal link between conversion therapy and harm to minors. *See Tingley*, 47 F.4th at 1081; *see also Pickup*, 740 F.3d at 1232; Record 4. The evidence demonstrating the harms of conversion therapy to minors in *Tingley* and *Pickup* directly applies to the instant case. *See Tingley*, 47 F.4th at 1081; *see also Pickup*, 740 F.3d at 1232; Record 4. Like the states in *Tingley* and *Pickup*, North Greene enacted a law regulating conversion therapy administered by licensed health care providers to protect minors "against exposure to serious

[4] In 1973, the APA declared homosexuality is not an illness and has since rejected the effectiveness and appropriateness of SOCE therapy. *Pickup*, 740 F.3d at 1223.
[5] Previously, aversive methods such as inducing nausea, utilizing electric shocks, and castration were employed. *Id.*
[6] *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2014) (stating "homosexuality is not an illness and does not require treatment (American School Counselor Association) … SOCE therapy can provoke guilt and anxiety (American Academy of Pediatrics) … [and] contribute to an enduring sense of stigma and self-criticism (American Psychoanalytic Association).").

harms caused by conversion therapy." *See Tingley*, 47 F.4th at 1081; *see also Pickup*, 740 F.3d at 1232; Record 4. Thus, there is a causal link between conversion therapy and harm to minors.

This Court has underscored that for "some propositions" it is reasonable that the empirical evidence is limited. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009). *F.C.C.* held that a "multiyear controlled study" on minors to analyze if broadcast profanity had any harmful effects would be inappropriate because obtaining such evidence would require exposing children to such profanity. 556 U.S. at 519. This Court reasoned that it is sufficient to know that children imitate what they see, so indecent language in programming would influence children to use such language. *Id.* Thus, *F.C.C.* held that a lack of empirical evidence in certain cases is sufficient.

Like *F.C.C.*, requiring North Greene to provide more evidence would invite unethical studies on minors, reproducing the exact harms North Greene seeks to prevent. 556 U.S. at 519; *Pickup*, 740 F.3d at 122; Record 4. APA reports indicate that conversion therapy can contribute to harmful effects of stigma, self-criticism, depression, suicidal ideation, and substance abuse. *Pickup*, 740 F.3d at 1223; Record 4. Thus, this Court should find that the APA reports are sufficient and requiring additional evidence would be inappropriate. *Fox*, 556 U.S. at 519; *Pickup*, 740 F.3d at 122; Record 4. Thus, North Greene's statute furthers its compelling government interest in protecting minors.

3. North Greene's statute is narrowly tailored because the statute is not under-inclusive or over-inclusive.

A law is not narrowly tailored when it is under-inclusive (fails to regulate enough) or over-inclusive (regulates too much). *Williams-Yulee*, 575 U.S. at 444. However, a law does not need to be "perfectly tailored." *Id.* at 454. While under-inclusivity is concerning, the government "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most

pressing concerns." *Id.* at 449. While "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest," such "cases do arise." *Id.* at 444.

A law is not underinclusive when the regulated activity and a similar unregulated activity implicate different problems. *Williams-Yulee*, 575 U.S. at 450; *see also Otto*, 981 F.3d at 868 (Martin, J., dissenting) (stating that excluding religious officials from the SOCE ban because of Establishment Clause concerns is reasonable). In *Williams-Yulee*, this Court upheld Florida's law prohibiting solicitations by judicial candidates under strict scrutiny because despite the statute's underinclusiveness—prohibiting solicitation by a candidate but not the candidate's campaign committee—the two solicitations implicate different problems. *Id.* Even if the two types of activities share similarities, the state has the discretion to believe that they create significantly different public perceptions. *Id.*

Here, North Greene's statute is not underinclusive because there are distinct issues between licensed professionals and religious counselors. *See Williams-Yulee*, 575 U.S. at 450; *see also Otto*, 981 F.3d at 879 (Martin, J., dissenting); Record 8. Like *Williams-Yulee*, North Greene has the discretion to believe including religious counselors creates significantly different public perceptions and distinct issues *See Williams-Yulee*, 575 U.S. at 450; *see also Otto*, 981 F.3d at 879 (Martin, J., dissenting); Record 8. Because the Establishment Clause precludes the government from engaging in religious activities, the exclusion of religious counselors is reasonable. U.S. CONST. amend. I; *Otto*, 981 F.3d at 879 (Martin, J., dissenting); Record 8. Like *Williams-Yulee*, there is a significantly different public perception associated with licensed professionals acting under the approval of the state versus a religious organization because the regulation aims to prevent the public from perceiving conversion therapy as a state-approved medical treatment. *Williams-Yulee*, 575 U.S. at 450; Record 8.

A law is underinclusive if the government prohibits public dissemination of protected information. *Brown*, 564 U.S. at 794-95. In *Brown*, this Court held that the California law unconstitutionally banned public dissemination of protected information and restricted minors' access to such information. 564 U.S. at 794-95. The instant case is distinguishable from *Brown* because North Greene's statute does not restrict minors' access to information on conversion therapy. *Brown*, 564 U.S. at 794-95; Record 4. North Greene's statue allows licensed health care providers to discuss conversion therapy. *Brown*, 564 U.S. at 794-95; Record 4. Thus, North Greene's statute is not under-inclusive.

A law is not narrowly tailored when the government restricts more speech than is necessary to further its compelling interest. *Gooding v. Wilson*, 405 U.S. 518, 521-23 (1972) (holding that "opprobrious language" used in Georgia's breach of the peace statute was excessively broad and encompassed speech that did not provoke a breach of the peace). North Greene's statute is distinguishable from *Gooding* because Sprague can freely express information regarding conversion therapy to minor patients and the public. *Gooding*, 405 U.S. at 521-23; Record 4. Unlike *Gooding*, where Georgia's statute broadly encompassed speech that was not harmful, North Greene's statute only includes speech that the state has demonstrated to be harmful. *Gooding*, 405 U.S. at 521-23; Record 4. Thus, North Greene's statute is narrowly tailored.

*"*A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachussetts*, 321 U.S. 158, 168 (1944). This Court should find that North Greene's statute survives all standards of First Amendment scrutiny.

II. THIS COURT SHOULD HOLD THAT NORTH GREENE STATUTE § 106(D) IS NEUTRAL AND GENERALLY APPLICABLE AND UPHOLD SMITH BECAUSE IT WAS CORRECTLY DECIDED, CREATED A WORKABLE DOCTRINE FOR FUTURE CASES, AND CONTAINS LEGITIMATE RELIANCE INTERESTS.

Neutral and generally applicable laws that incidentally burden religion do not violate the First Amendment. *Smith*, 494 U.S. at 878. If a law is not neutral or generally applicable, it must withstand strict scrutiny. *Lukumi*, 508 U.S. at 546. In determining whether a law is neutral courts begin with the text, a law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. *Id.* at 533. However, facial neutrality is not enough, the law must be neutral in operation as well. *Id.* at 534. Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021). A law is not generally applicable if it provides a mechanism for individualized exemptions or if it only imposes burdens on religiously motivated conduct. *Id.*; *Lukumi*, 508 U.S. at 543.

A. Smith Applies to North Greene's Statute Because it Is Neutral and Generally Applicable.

North Greene's statute must be analyzed under *Smith* because it is a neutral and generally applicable law. In *McDaniel v. Paty*, 435 U.S. 618, 620 (1978) McDaniel, a minister, challenged a law that banned ministers or priests of any religion from serving as delegates to a state constitutional convention. Since the law on its face discriminated against him based on his status as a minister, the Court applied strict scrutiny and held that the law violated his Free Exercise rights. *Id.* at 627, 629. Unlike the law at issue in *McDaniel*, N. Greene Stat. § 106(d) makes no mention of religion and therefore satisfies facial neutrality. Record 4.

In *Lukumi*, the Court overruled several ordinances dealing with animal slaughter in part because they were not neutral in operation. 508 U.S. at 535. The Court found that the ordinances were not neutral in operation because in effect they only prohibited members of the Church of

Santeria from slaughtering animals in furtherance of their religious beliefs while allowing sport hunters and others to slaughter animals free of the restrictions of the ordinance, thus creating a religious gerrymander. *Id.* By contrast, N. Greene Stat. § 106(d) is operationally neutral because it treats all licensed healthcare providers the same, regardless of religious beliefs. Record 4. Under the statute, both secular and religious licensed health care providers are disciplined for practicing conversion therapy, unlike the ordinances in *Lukumi* which in effect only punished believers of Santeria. *Lukumi*, 508 U.S. at 535; Record 4. Moreover, the statute explicitly does not apply to health care providers that work under the auspices of a religious denomination, church, or religious organization. Record 4.

In *Fulton*, a Catholic adoption agency that refused to certify same-sex couples for adoption sued the city of Philadelphia because the city refused to renew its contract with the adoption agency citing the non-discrimination provisions in the contract between the city and the adoption agency. 141 S. Ct. at 1875-76. The Court found that the non-discrimination provision in the contract was not generally applicable because it provided for a system of individualized exemptions from the provision based solely on the discretion of the Commissioner of the Philadelphia Department of Human Services. *Id.* at 1878. The Court rejected the city's argument that the availability of exceptions was irrelevant since the Commissioner had never granted one before. *Id.* at 1879. The Court held that the creation of a formal mechanism for granting exceptions renders a policy not generally applicable, regardless of whether any exceptions have been granted because it invites the government to decide which reasons for not complying with a policy have merit. *Id.* By contrast, the N. Greene Stat. § 106(d) contains no exception system, much less one that is based on the discretion of a government official. Record 4. In conclusion, N. Greene Stat. § 106(d) does not violate the Free Exercise Clause because it is neutral and generally applicable.

B. Even if Smith Doesn't Apply, North Greene's Statute Survives Strict Scrutiny Because Protecting the Health of Minors is a Compelling Interest and the Statute Is Narrowly Tailored to Advance that Interest.

Under strict scrutiny, a law will pass constitutional muster only if it serves a compelling interest and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546. If a law is found to be underinclusive or overbroad, it supports finding that the law is not narrowly tailored. *Id.* However, narrowly tailored does not mean perfectly tailored. *Williams-Yulee* 575 U.S. at 454 citing *Burson v. Freeman,* 504 U.S. 191, 209 (1992). Moreover, the strict scrutiny standard used in Free Exercise cases is the same as the one applied in Free Speech cases. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2426 (2022).

It is indisputable that North Greene has a compelling interest in this case. As this Court stated, "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.'" *Ferber*, 458 U.S. at 756-57 citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

In *Williams-Yulee*, a judicial candidate challenged Canon 7C(1) of Florida's Code of Judicial Conduct which prohibited judicial candidates from directly soliciting campaign funds but did allow the candidates campaign committee to solicit campaign funds. 575 U.S. at 441. This Court, after finding that the canon advanced Florida's compelling interest in preserving the integrity of the judicial system, held that the canon was narrowly tailored because although it prohibited judicial candidates from directly soliciting for campaign funds it left open multiple alternative options for candidates to raise campaign funds left judicial candidates "free to discuss any issue with any person at any time… write letters, give speeches, and put up billboards" *Id.* at 452-53. Similarly, the N. Greene Stat. § 106(d) does not prohibit licensed healthcare professionals from discussing conversion therapy with anyone including minor patients or referring minors seeking conversion therapy to counselors practicing under the auspices of a religious organization.

Record 4. In conclusion, N. Greene Stat. § 106(d) survives strict scrutiny because it serves a compelling interest, safeguarding the physical and psychological well-being of minors, and is narrowly tailored to achieve that interest.

C. This Court Should Not Overrule Smith Because it Was Correctly Decided, Created a Workable Doctrine for Future Cases, and Contains Legitimate Reliance Interests.

The doctrine of *stare decisis* is a cornerstone of American jurisprudence and requires that precedents be carefully and respectfully considered. *Dobbs*, 142 S. Ct. at 2261 (2022). Under *stare decisis*, overruling a decision is a "serious matter" that should not "be taken lightly" because *stare decisis* protects reliance interests, reduces incentives for challenging precedents, fosters "evenhanded" decision making, contributes to the integrity of the judicial system, and calls us to respect the judgment of those who have dealt with important issues in the past. *Id.* at 2261-62 (collecting cases on the importance of precedent).

This Court uses multiple factors to determine whether overruling case law is proper. *Id.* at 2264. Generally, these factors are (1) the nature of a decision's error, (2) the quality of a decision's reasoning, (3) the "workability" of the rules imposed by the decision on the country, (4) the decision's disruptive effect on other areas of the law, and (5) the absence of reliance on the decision. *Id.* at 2265; *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). The *Smith* Court correctly decided that a neutral and generally applicable law that incidentally burdens religion does not violate the Free Exercise Clause, which comports with the nation's long held understanding of both the states and the federal government's ability to regulate despite religious objections. *See Reynolds v. United States*, 98 U.S. 145 (1878). The *Smith* doctrine created workable standards that allowed for regulation that only incidentally burdened speech while subjecting regulations that substantially burdened speech to the increased rigors of strict scrutiny. This decision has had a stabilizing effect on other areas of the law by allowing states and the federal government to regulate

with the assurance that as long as the law is neutral and generally applicable, it will not violate the Free Exercise Clause. Finally, *Smith* provides legislative and doctrinal reliance interests.

1. Smith should be upheld because it did not betray a Constitutional principle.

The nature of the error factor focuses on the concept that while any erroneous interpretation of the Constitution is important to address, some errors are more damaging than others. *Dobbs* 142 S. Ct. at 2265. Under this factor, an erroneous interpretation, standing alone, is not enough to overrule a decision. The decision must either betray a constitutional principle or it must have usurped the people's authority. *Id.* Only where a decision "find[s] in the Constitution principles or values that cannot fairly be read into that document" does the nature of a decision's error support the decision to overrule it. *Id.* citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 787 (1986) (White, J., dissenting).

A classic example of a decision that betrayed a constitutional principle is *Plessy v. Ferguson*, 163 U.S. 537 (1896). As Justice Harlan pointed out in his dissent, *Plessy* betrayed this Court's commitment to equality before the law for all citizens regardless of race. *Id.* at 560 (Harlan J., dissenting). This direct violation of the Equal Protection clause warranted overturning *Plessy*. By contrast, the *Smith* Court built on a constitutional principle that has been recognized for over a century, if a person is allowed to ignore the law based on their religious beliefs, "this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Reynolds* 98 U.S. at 167.

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) is illustrative of the type of precedent that has usurped the people's authority by removing an issue from the people and the democratic process. In *West Coast Hotel*, a female employee filed an action for back wages under the Washington Minimum Wages for Women Act. *Id.* at 388. The hotel responded by relying on

Adkins v. Children's Hosp., 261 U.S. 525 (1923), which had held another minimum wage act invalid because it violated the liberty protected by the Fifth Amendment Due Process clause and the Article I Contract clause. *West Coast Hotel* 300 U.S. at 388. The Court overruled *Adkins* because it wrongly removed the issue of wages from the people and the democratic process by prohibiting states from enacting labor regulations. *Id.* at 398. Moreover, *Adkins* was overruled because it was irreconcilable with a state's legitimate interest in the health and welfare of its people and its ability to pass regulation to advance that interest. *Id.* Unlike *Adkins, Smith* did not usurp the people's authority by removing an issue from the people and the democratic process. Instead, *Smith* gave *more* power to the people and the democratic process by allowing the people's duly elected representatives to pass regulations on issues the people deem important, even if those regulations incidentally burden religion. Based on the foregoing, the nature of the error factor does not support overruling *Smith.*

2. Smith should be upheld because it was properly grounded in the Constitution, history, and precedent.

The quality of reasoning factor has an important bearing on whether a decision should be overruled. *Dobbs* 142 S. Ct. at 2265. Where a decision grounded its decision in the text of the Constitution, history, or precedents, a decision should not be overruled. *Id.*; *Ramos* 140 S. Ct. at 1405. If a decision does not base its reasoning on the text of the Constitution or is ambiguous as to the textual source of its decision, it is not properly grounded in the text of the Constitution. *Dobbs* 142 S. Ct. at 2245, 2267. Courts must determine how consistent a particular decision is with other precedents to determine whether it is properly grounded in precedent. *Ramos* 140 S. Ct. at 1405-06.

In *Dobbs*, this Court overruled *Roe v. Wade*, 410 U.S. 113 (1973) in part because it was not properly grounded on the text of the Constitution, history, or precedent. *Dobbs*, 142 S. Ct.

2245-48, 67-68. The *Dobbs* Court found that *Roe* failed to point out a specific provision of the Constitution that supported its decision, "*Roe* expressed the 'feel[ing]' that the Fourteenth Amendment was the provision that did the work, but its messaged seemed to be that the abortion right could be found *somewhere* in the Constitution and that specifying its exact location was not of paramount importance." *Id.* at 2245 (emphasis in original). Moreover, the *Dobbs* Court held that *Roe* was not properly grounded in history because *Roe* failed to explain why its discussion of ancient civilization was relevant, minimized the history of states passing regulations on abortion, and incorrectly stated the development of the anglo-american common law system's decisions related to abortion. *Id.* at 2267. Finally, the *Dobbs* Court found that *Roe* was not properly grounded in precedent because the precedents it cited were irrelevant since they did not involve the same rights or Constitutional provisions. *Id.* at 2267-68.

By contrast, the *Smith* Court was clear that it based its decision off its understanding of the text of the First Amendment Free Exercise Clause. 494 U.S. at 878. Moreover, *Smith* is consistent with historical understandings of the Free Exercise Clause, while the government could not regulate religious beliefs or opinions, it could regulate actions in order to promote the general welfare even if those actions were carried out for religious reasons. *Reynolds*, 98 U.S. at 164 citing Thomas Jefferson's Letter to the Danbury Baptists. *Reynolds*' historical account of statutes during the era of the Founding Fathers shows further support for *Smith* being properly grounded in history. *Reynolds* showed that only a few months after ratifying the Constitution, recommending an amendment to the Constitution that would explicitly protect the free exercise of religion, and passing its own religious freedom laws, Virginia outlawed polygamy despite polygamy being a practice of multiple religions. *Id.* at 165.

Finally, *Smith* is consistent with this Court's Free Exercise jurisprudence. *Cantwell*, 310 U.S. at 303-04, which made the protections of the Free Exercise clause applicable to the states, was explicit that while the Free Exercise clause's protection of the freedom to believe or not believe in a religion of one's choice was absolute, the freedom to act on those beliefs was not. *Cantwell* stated in no uncertain terms that "conduct remains subject to regulation for the protection of society." *Id. Cantwell* involved a statute that prohibited a person from soliciting money for any alleged religious cause from someone other than a member of the organization for which they were soliciting money unless such religious cause was approved by the secretary of the public welfare counsel. *Id.* at 301-02. While the Court held that the portion of the statute that required approval by the secretary of state was unconstitutional because it was a form of a discretionary exemption system, it affirmed the rest of the statute. *Id.* at 305. The Court explained, "The *general* regulation, in the public interest, of solicitation, which does not involve any religious test and does not *unreasonably* obstruct or delay the collection of funds, is not open to any constitutional objection, even though the collection be for a religious purpose." *Id.* (emphasis added). In this statement, we see the roots of the rule set forth in *Smith*, a general law, neutral towards religion, does not offend the Free Exercise Clause as long as it only incidentally affects religion. Considering the foregoing, the quality of the reasoning factor does not support overturning *Smith*.

3. Smith should be upheld because it created a workable rule applicable to all the states.

A rule imposed by a decision is considered workable if it can be understood and applied in a consistent and predictable manner. *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). In *Montejo*, police asked an indigent who had been appointed counsel, but had not actually met his counsel yet, to go find a weapon they had suspected he used in a murder. *Id.* at 781-82. During the trip to find the murder weapon, the man wrote an inculpatory letter which was later used at trial to convict

him, all before he had actually met his appointed counsel. *Id.* The state supreme court rejected the man's argument that under *Michigan v. Jackson*, 475 U.S. 625 (1986), the Sixth Amendment right to counsel provided that a represented defendant could never be approached by the state and asked to consent to interrogation, even though he had not affirmatively invoked his right to counsel. *Montejo*, 556 U.S. at 782. The state supreme court reasoned that *Jackson*'s protections were not triggered unless and until a defendant had actually requested a lawyer or otherwise asserted his right to counsel, and since the man had stood mute during the appointment of his counsel, he had not triggered the *Jackson* protections. *Id.*

The *Montejo* Court found both of those interpretations of *Jackson* unworkable and therefore overruled it. *Id.* at 797. The Court found that the state's interpretation, requiring an actual invocation of the right to trigger *Jackson*, unworkable because while that interpretation would have worked in states that required an indigent defendant to formally request counsel, it would not work in the majority of states which either automatically appointed counsel after a finding of indigency or allowed a court *sua sponte* to appoint counsel if an indigent defendant had not requested one. *Id.* at 783-84. Meanwhile, the Court found the man's interpretation, that *Jackson*'s protections applied once a defendant was represented by counsel regardless of invocation, unworkable because it departed from *Jackson's* rationale, preventing police badgering after the right to counsel has been invoked, and would prevent police initiated interrogation completely once the Sixth Amendment right to counsel attached, especially in the states that automatically appointed counsel to indigent defendants. *Id.* at 790.

By contrast, *Smith* created a workable rule applicable to all the states. As explained by the Court in *Lukumi*, *Smith* set the rule only for regulations that incidentally burdened religion, the traditional strict scrutiny analysis still applied for regulations that directly targeted religion. 508

U.S. at 531-32. Moreover, the Court in *Lukumi* carefully explained how to analyze the neutrality and general applicability factors established in *Smith*. The Court mandated that under the neutrality factor courts look not only at the facial neutrality of a regulation, but its real world effect on religion as well. *Id.* at 535. Under the general applicability factor, the Court held that a law is not generally applicable if it contains a system of individualized exemptions or if it only imposes burdens on conduct motivated by religious beliefs. *Id.* at 537, 542-43. *Smith* and *Lukumi* together create a workable rule for the states, therefore, the workability factor does not support overruling *Smith.*

4. Smith should be upheld because it has not distorted unrelated legal doctrines.

Where a decision leads to the distortion of unrelated legal doctrines, the effect on other areas of law factor supports overruling the decision. *Dobbs* 142 S. Ct. at 2275. In *Dobbs,* the Court overruled *Roe* and *Casey* in part because of their detrimental effect on other areas of the law. *Id.* Specifically, the Court found that *Roe* and *Casey* had ignored its third-party standing doctrine and diluted the standard for facial constitutional challenges. *Id.* at 2275-76.

Roe and *Casey* led to courts ignoring federal third-party standing rules in the abortion which normally requires that the third-party show that it has a close relationship with the person whose rights it wishes to assert and that some hindrance hampers the right-holder's ability to protect their own interests. *Kowalski v. Tesmer*, 543 U. S. 125, 130 (2004). This typically applies to situations involving parents and their children or guardians and their wards. *June Med. Servs. L.L.C. v. Russo,* 140 S. Ct. 2103, 2173-74 (2020) (Gorsuch, J., dissenting). In the aftermath of *Roe* and *Casey*, courts ignored these standing doctrines and allowed abortion providers to challenge regulations on abortions even though they had no standing on their own, did not have a close relationship with the women whose rights they asserted, and could not show how women were hindered from protecting their own interests in light of the many cases that women have brought

on their own behalf challenging abortion regulations. *Id.* at 2174. By contrast, *Smith* has not affected this Court's standing doctrines. Under *Smith* for a plaintiff to have standing to assert a Free Exercise claim, a plaintiff must show the coercive or burdensome effect the enactment has on them in the practice of their religion. *See e.g. Cornerstone Christian Schs v. Univ. Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) (applying the same standing doctrine under *Smith* as those Free Exercise cases that predated *Smith*).

Moreover, *Casey* diluted the standard for facial constitutional challenges. Outside of the First Amendment context, to bring a facial challenge against an act, the plaintiff must establish that no set of circumstances exist under which the act would be valid, it is not enough that an act might operate unconstitutionally under some conceivable set of circumstances. *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, *Casey* changed that standard by allowing a plaintiff to successfully bring a facial challenge to a statute that required spousal notification before an abortion, even though it was conceded that circumstances exist where the law would be valid. 505 U.S. at 894-95. By contrast, courts applying *Smith* have used the same standard for facial challenges as they did before *Smith.* As the *Lukumi* Court explained, under *Smith*, if a law on its face discriminates against religion, a plaintiff can bring a facial challenge against it just as had been done before *Smith*. *Lukumi*, 508 U.S. at 532-33 (collecting cases). Therefore, the effects on other areas of the law factor does not support overruling *Smith*.

5. Smith should be upheld because legislatures have legitimate reliance interests in its rule.

If overruling a decision will upset reliance interests, the reliance factor does not support overruling it. *Dobbs* 142 S. Ct. at 2276. Reliance interests have added force when the legislature has acted in reliance on a previous decision. *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). In *Hilton*, the Court upheld *Parden v. Terminal Ry. of Ala. St. Docks Dept.*, 377 U.S. 184

(1964), because *Parden* had been on the books for almost thirty years and many states had relied on *Parden* in enacting their worker's compensation law. *Hilton*, 502 U.S. at 202-03. Similarly, over twenty states relied on *Smith* in enacting laws that prohibit conversion therapy. Moreover, just as in *Hilton*, overruling *Smith* would require states to reexamine their statutes. *Id.* at 203.

In conclusion, Smith should not be overruled because it is consistent with long standing constitutional principles. *Reynolds* 98 U.S. at 167. Further, the *Smith* rule is workable since it applies in the same way in every state. Moreover, *Smith* has not had a disruptive effect on the law since it has preserved the standing and facial challenge requirements that existed before it was decided. Finally, state legislatures have placed substantial reliance interests in *Smith.*

CONCLUSION

For the foregoing reasons, we respectfully request this Court to affirm the Fourteenth Circuit Court's judgment.