No. 22-2020

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 RESPONDENT

Team 30

Counsel for Respondent

QUESTIONS PRESENTED

"Conversion therapy" means an attempt to change a person's sexual orientation to heterosexual or to change a person's gender identity to correspond to their sex assigned at birth. Faced with scientific evidence that this treatment causes harm to minors and lacks medical benefit, North Greene enacted § 106 of the Uniform Professional Disciplinary Act.

1. Whether a state law that disciplines licensed therapists for performing a scientifically disfavored treatment on minors, but does not prohibit discussion of such treatment, unconstitutionally restricts speech?
2. Whether a state law that applies to all licensed therapist, regardless of religion, violates the Free Exercise Clause merely because some therapists want to perform the treatment for religious reasons? And if so, whether it is appropriate to overturn *Employment Div v. Smith* in this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Other Authorities

OPINIONS AND ORDER

The opinion and order of the United States Court of Appeals for the Fourteenth Circuit is reproduced at R. at 2–16. The opinion and order of the United States District Court for the Northern District of Greene are published at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involved the First Amendment's Free Speech Clause, prohibiting states from enacting laws "abridging the freedom of speech." U.S. Const. amend. XIV, § 1. This case also involved the First Amendment's Free Exercise Clause, prohibiting states from enacting laws that "restrict the free exercise [of religion]." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

1. North Greene Found Conversion Therapy to be Scientifically Discredited and Possibly Dangerous

In 2019, North Greene's legislature sought to amend the Uniform Professional Disciplinary Act ("UPDA") to include performing conversion therapy on minors as "unprofessional conduct." R. at 4. Conversion therapy involves therapeutic practices and psychological treatments that seek to change a person's sexual orientation or gender identity. R. at 3. The legislature found it had a "compelling 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. at 4.

North Greene relied, in part, on the American Psychological Association's ("APA") study on conversion therapy. *Id*. The APA rejects conversion therapy "in any stage of the education of psychologists," and instead suggests that psychologists should engage in "an affirming, multicultural, and evidence-based approach," that includes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework." R. at 4, 7. Though the legislature had some evidence that conversion "talk" therapy is safe and effective, the legislature continued relying on the APA's opinion to the contrary. R. at 7. The APA finds conversion therapy to be ineffective and to have harmful effects on minors, including depression, suicidal thoughts or actions, and substance abuse. R. at 4, 7. North Greene's law addresses "the scientifically documented increased risk of suicide and depression from having a licensed mental health provider try to change a minor." R. at 10.

The state legislature also relied on the experiences of constituents, family, and friends. R. at 9. During the bill debate, one sponsor, Senator Floyd Lawson, emphasized that he hoped to

stop the "barbaric practices" of conversion therapy, specifically citing constituent stories of electroshock therapy and induced vomiting. *Id*. Another Senator, Golmer Pyle, detailed his support for the bill by touching on his experience in raising a gay daughter. *Id*. He contrasted this with a story of a friend who felt pressured to worship and "pray the gay away." *Id*. However, the family found conversion therapy ineffective and stressful. *Id*.

Senator Pyle, in reflecting on his own faith, understood how his colleagues with certain religious beliefs may struggle to support the bill. *Id*. Though individuals with primarily conservative religious preferences resort to conversion therapy, the North Greene legislators understood that communities seek conversion therapy for religious or secular reasons. R. at 9, 15. No matter the reason for seeking it, conversion therapy presents the same harms. R. at 9.

2. North Greene Amends the Uniform Professional Disciplinary Act to Combat the Potentially Harmful Effects of Conversion Therapy on Minors

Title 23 of the North Greene General Statutes regulates businesses and professions in North Greene. R. at 3-4. Like other states, North Greene requires healthcare providers to be licensed to practice in the community. *See* N. Greene Stat. § 105(a); R. at 3. The UPDA defines certain conduct for healthcare providers as "unprofessional." N. Greene Stat. §§ 105(a), 106, 107, 110; R. at 3-4. The legislature amended the UPDA in 2019 to protect children's physical and psychological well-being by restricting healthcare professionals from performing conversion therapy on "a patient under age eighteen." N. Greene Stat. § 106(d); R. at 4, 7, 8. The statute defines conversion therapy:

> (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.

N. Greene Stat. § 106(e)(1)-(2); R. at 4.

Section 106 grants certain exceptions. First, it exempts therapists, social workers, and counselors who "work under the auspices of a religious denomination, church, or religious organization," from this chapter's requirements. N. Greene Stat. § 111; R. at 4. Second, the UPDA does not apply to (1) speech by licensed therapists that does not constitute the act of 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); R. at 4.

The amendment does not prohibit licensed therapists from performing conversion therapy on adults. *See* N. Greene Stat. § 106(d); *see* R. at 8. Nor does it prohibit licensed therapists from expressing their personal or professional views on conversion therapy with their minor patients and the public. R. at 4. Licensed therapists can also refer minors to counselors practicing "under the auspices of a religious organization" or healthcare providers in other states. *Id.*

3. Petitioner's Challenge to the Uniform Professional Disciplinary Act

Petitioner is a family therapist licensed in North Greene. R. at 3. He helps clients with various issues, including those involving sexual orientation and gender identity. *Id.* His treatment does not involve physical methods, but only "verbal counseling." *Id.* Patients often come to Petitioner because of his strong Christian beliefs. *Id.* He articulates his beliefs in his practice, including the idea that human identity is in God's design and that a person's sex assigned at birth is "a gift from God" and should not change under any circumstance. *Id.*

Petitioner brought this challenge arguing that § 106 violated his First Amendment rights. The district court denied Plaintiff's motion for preliminary injunction and granted the State's motion to dismiss for failure to state a claim. *Id.* The Fourteenth Circuit affirmed. *Id.* Applying a

rational basis review, the circuit court upheld § 106 and reasoned that it did not violate the Free Speech Clause because the law regulates conduct, not speech. To support this conclusion, the court pointed to the longstanding history of state regulation of medical practices including therapy. R. at 6-7. The circuit court also reasoned that the UPDA did not violate Petitioner's Free Exercise right because the neutral and generally applicable statute passes rational basis review. Remaining faithful to this Court's precedents in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah* ("*Lukumi*") and *Emp. Div., Dep't of Hum. Res. of Or. v. Smith* ("*Smith*") the Fourteenth Circuit found the UPDA did not violate the First Amendment.

SUMMARY OF THE ARGUMENT

States have a compelling government interest in protecting children within its borders from harmful medical practices. Conversion therapy has been scientifically discredited by various medical associations, including the APA, as a practice that leads to increased risks of suicide and depression among minors. North Greene, in exercising its interest in protecting children, enacted § 106 of the UPDA to restrict a licensed therapist's ability to practice conversion therapy on minors, while also protecting their ability to observe their religion. This Court should affirm the Fourteenth Circuit's judgment and hold that § 106 of the UPDA violated neither the Free Speech clause nor the Free Exercise Clause of the First Amendment.

I. Section 106 of North Greene's UPDA is consistent with the Free Speech Clause of the First Amendment. The UPDA is a typical licensing regime regulating medical professionals. Courts have historically considered medical regulations, especially those directed at children, constitutional even when such regulations impose incidental restrictions on rights. As a continuation of this traditional practice, § 106 only prevents licensed therapists from using conversion therapy, a scientifically discredited and potentially dangerous treatment, on minors. Section 106 is a law governing professional conduct, not content-based speech. Therefore, it is

entitled to a more deferential review under the Free Speech Clause. The law does not restrict therapists' pure speech. Licensed therapists may perform conversion therapy on adults and advocate for conversion therapy in their personal and political speech. Because § 106 governs conduct, it is constitutional under either the rational basis or intermediate scrutiny standards. It asserts an important government interest and restricts no more speech than necessary. Even if § 106 was a content-based speech restriction, it would be constitutional as a narrowly tailored law asserting a compelling government interest in protecting the health and welfare of children.

II. Section 106 of North Greene's UPDA is also consistent with the Free Exercise Clause of the First Amendment. Under the standards outlined in *Smith*, the UPDA articulates a neutral and generally applicable law by requiring compliance for all state licensed therapists. The text and legislative history reflect a concerted effort to address conversion therapy's harmful effects on minors. In practice, the UPDA applies across the medical profession and does not target or discriminate against any one religion. The North Greene legislature pursues its objective by refusing to create individual exemptions and by equally treating religious practice and secular activity with a comparable government interest.

Regardless of whether the *Smith* decision was right or wrong, this Court should not use this case as a vehicle to reconsider its constitutionality. Even if this Court overrules *Smith* and applies the *Sherbert v. Verner* test, this case will come out the same way. Further, under the doctrine of *stare decisis*, the *Smith* decision is workable and based on quality reasoning.

ARGUMENT

I. Section 106 of the UPDA, Enacted in Response to the Rise of Depression and Suicide Among LGBTQ+ Minors, is Not an Unconstitutional Speech Restriction.

The Free Speech Clause prohibits laws "abridging the freedom of speech . . . ." U.S. Const. amend. I; *Gitlow v. New York*, 268 U.S. 652, 664-67 (1925). This Court recently

emphasized a constitutional provision's "history and tradition" is crucial to interpreting its meaning. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246 (2022). While freedom of speech is an important right, this Court has never held states cannot regulate expressive activities. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). Indeed, history highlights that the constitutionality of a state law impacting speech depends on the content and context of the expression. *New York v. Ferber*, 458 U.S. 747, 757 (1982); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992). A state's power to pass a law incidentally affecting expression is at its highest when it enacts the statute to effectuate a compelling interest. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-26 (2010).

A. Section 106 is a Constitutional Regulation of Professional Conduct Under *NIFLA*.

1. State Regulation of Medical Treatment is Rooted in History and Consistent with the First Amendment

Since the founding, states have exercised broad police powers to regulate activities to protect the health and welfare of their citizens. *See, e.g.*, *New Orleans Gas Light Co. v. Drainage Com. Of New Orleans*, 197 U.S. 453, 460 (1905) (stating protection "of the public health and welfare is one of the most important purposes for which the police power can be exercised."). States, "from time immemorial" implement such protections through licensing regimes to ensure specialized professionals are qualified to work in their field. *Ohralik*, 436 U.S. at 460; *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). The history of state licensing regimes is especially apparent in the context of medical professionals. *See Barsky v. Board of Regents*, 347 U.S. 422, 450 (1954) (noting the longstanding practice of state regulation of the medical profession). State licensing of doctors is well accepted because patients "ordinarily have no choice but to place their trust in these professionals, and, by extension, in the State that licenses them." *King v. Governor of NJ*, 767 F.3d 216, 232 (3d. Cir. 2014); *See Dent*, 129 U.S. at 122-23. States may

continuously monitor doctors and impose new regulations in response to scientific developments because medicine is a constantly changing field. *See Barsky*, 347 U.S. at 451.

Medical professions are "subject to reasonable licensing and regulation by the State" even though such laws may implicate their First Amendment speech rights. *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) overruled on other grounds by *Dobbs*, 142 S. Ct. at 2242. Due to the practical necessity of ensuring safe treatment, medical licensing laws burdening speech are constitutionally permissible when such regimes are "deeply rooted" in history and "American tradition." *Brown v. Entm't Merchs. Ass's*, 564 U.S. 786, 791 (2011) (citing *U.S. v. Stevens*, 559 U.S. 460, 470 (2010)); *King*, 767 F.3d at 232 ("[T]o handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm."). Because scholarly works show a history of state licensing of medical professionals dating back to the colonial era,[1] medical regulations implicating free speech concerns are more permissible than similar regulations in other contexts. *See Barsky*, 347 U.S. at 451. This notion is true even for therapists whose practice necessarily involves, sometimes exclusively, speech. *King*, 767 F.3d at 232.

The longstanding history of states ensuring the safety and development of children reinforces the permissibility of medical regulations when any restriction on expressive activities is directed towards minors. *See Entm't Merchs. Ass's*, 564 U.S. at 794; *Erznoznik v. Jacksonville*, 422 U.S. 205, 212 (1975) ("It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."). Based on this history, courts "have sustained legislation aimed at protecting the physical and

[1] *See* Nissa M. Strottman, *Public Health and Private Medicine: Regulation in Colonial and Early National America*, 50 Hastings L.J. 383, 383-96 (1999); Whitfield J. Bell Jr., *Medical Practice in Colonial America*, 31 Bulletin of the History of Medicine 442, 442-453 (1957).

emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 757.

North Greene's UPDA continues this country's long history of permissible medical regulation. Just as regulatory regimes have done since the founding, the UPDA requires healthcare providers to be licensed and subjects them to professional discipline for "unprofessional conduct." N. Greene Stat. §§ 105(a), 106, 107, 110. These provisions are rooted in the American tradition of states protecting the health and safety of their citizens by ensuring medical practitioners in their borders are qualified and effective. *See supra* note 1. Section 106(d) of the UPDA similarly protects the health of North Greene citizens by banning conversion therapy on minors. N. Greene Stat. § 106(d). North Greene has the power, the moral obligation, and social duty to use police powers to protect its citizens from conversion therapy, a scientifically discredited treatment likely to harm LGBTQ+ minors.[2] Because § 106(d) only affects the treatment of minors, North Greene's ability to constitutionally regulate conversion therapy, despite any incidental effect on speech, is at its highest. N. Greene Stat. § 106(d).

2. Section 106 of the UPDA is a Regulation of Professional Conduct Entitling it to a More Deferential Review Standard Than Comparable Regulations of Speech.

This Court reviews regulations of professional conduct with less exacting scrutiny than similar regulations of speech. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("NIFLA"). In redefining the standard applicable to speech in professional contexts, this Court expressed, "[s]tates may regulate professional conduct that incidentally involves

[2] *See* R. at 4; Kathleen Stoughton, *Toxic Therapy: Examining the Constitutionality of Conversion Therapy Bans in Light of Otto*, 30 Am. U. J. Gender Soc. Pol'y & L. 81, 82–85 (2021) (youths receiving conversion therapy are "92% more likely to experience lifetime suicidal ideation, 75% more likely to attempt suicide that results in significant injuries, and 88% more likely to attempt suicide that results in minor injuries" compared to other LGBTQ+ kids).

speech." *Id.*; *see Captial Associated Indus. v. Stein*, 922 F.3d 198, 207 (4th Cir. 2019) (holding *NIFLA* clarified when "states have broader authority to regulate the speech of professionals than of non-professionals"). Courts justify this lower standard of review because "[s]peech made in professional contexts is not always pure speech" *Chiles v. Salazar*, 2022 WL 17770837, *7 (D. Colo. 2022) (internal citations omitted). This principle is especially apparent in the context of therapy sessions, where treatments often take the form of conversations. *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014). *See NIFLA*, 138 S. Ct. at 2372; *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022) (noting *NIFLA* "did not say that speech in the professional context can never get intermediate scrutiny."). Whether a law regulates speech or conduct is a fact-intensive inquiry considering several factors. *Tingley*, 47 F.4th at 1072-75.

Unlike restrictions imposed through novel state prohibitions, professional regulations rooted in history and implemented through a traditional licensing regime are regularly considered conduct restrictions. *Compare Barsky*, 347 U.S. at 450-52 (holding a traditional licensing regime gives states broad authority to selectively regulate medical practices even if it differentiates based on content), *with Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 928-32 (5th Cir. 2020) (holding state surveyor licensing regime not deeply rooted in history did not permit speech regulations of non-licensed people doing surveying). In *NIFLA*, this Court concluded a professional licensing regime restricted speech—not conduct—partly because it was not "rooted in historical practice." *NIFLA*, 138 S. Ct. at 2373. This conclusion signifies that similar regulations rooted in tradition are more likely to be considered conduct restrictions. *Id*. The long history of constitutional state medical regimes suggests that restricting medical treatments are likely regulations of conduct despite their potential to incidentally limit speech. *See Watson v. Maryland*, 218 U.S. 173, 177-

80 (1910) (upholding a state's physician licensing regime as constitutional due in part to the long history of regulation of doctors by the state).

A licensing regime is a conduct regulation when it prohibits a specific professional practice due to its harm, not because of its message. *See Ohralik*, 436 U.S. at 456 ("State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070-71 (9th Cir. 2020). In making the conduct or speech evaluation, this Court considers whether the law specifically targets a harmful action while allowing similar expression that does not create the same harm. *Ohralik*, 436 U.S. at 457 (holding the prohibition of in-person legal solicitation in hospitals to stop the evil of pressuring potential clients while allowing general advertisement that did not create the same harm was constitutional). Thus, considering the context in which a state regulates speech is key to determining constitutionality. *See R.A.V.*, 505 U.S. at 385; *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-30 (1995) (holding a content-based restriction preserving a limited public forum can be permissible even if the same law in another context would be unconstitutional).

A law deals with conduct, not speech, when it restricts harmful speech-based medical treatment while allowing alternative communication about the treatment. *See Pickup*, 740 F.3d at 1229. Recognizing the importance of context, courts differentiate between laws regulating "a treatment that takes the form of speech or doctor-patient communication about treatment." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1309 (11th Cir. 2017). While the former deals with medical treatment and thus is motivated by the patient's best interests, the latter is more in line with viewpoint expressive speech that typically gets the highest Free Speech protections. Because the purpose of a doctor-patient relationship "is to advance the welfare of the clients,

rather than to contribute to the public debate," regulation of treatment in the form of speech is more permissible. *Pickup*, 740 F.3d at 1228; *Chiles*, 2022 WL 17770837 at *22 (noting speech "in the context of licensed professional counseling—is distinguishable from, for example, political speech."). Therefore, a licensing regime restricting treatment in the form of speech regulates conduct, even if a similar non-treatment restriction would be unconstitutional.

A state law prohibiting therapists from using conversion therapy as a treatment while allowing them to discuss it outside the medical context is a regulation of conduct. *See Chiles*, 2022 WL 17770837 at *19. Most circuit courts to address the constitutionality of talk conversion therapy restrictions concluded such statutes were conduct regulations deserving more deferential review. *See Tingley*, 47 F.4th at 1074; *King*, 767 F.3d at 224. *But see Otto v. City of Bova Raton*, 981 F.3d 854, 861 (11th Cir. 2020). Crucial to the analysis in *Tingly* and *King* were legislative findings on the lack of efficacy and the potential danger of conversion therapy. *See Tingley*, 47 F.4th at 1074; *King*, 767 F.3d at 224. Additionally, the laws in *Tingly* and *King* only restricted conversion therapy as a medical treatment while allowing therapists to advocate for the treatment in their personal lives and discuss it generally with patients. *Id*.

Contrary to the dissent's argument below, an exception for gender-affirming treatment in a law prohibiting conversion therapy does not make the law a content-based regulation of speech. R at 12-13; *see Otto*, 981 F.3d at 864. The record lacks evidence that gender-affirming therapy inflicts the same harms as conversion therapy. *Supra*, note 2. Thus, a state's decision to restrict one but not the other adheres to science, not viewpoint or content discrimination. *See Tingley*, 47 F.4th at 1073-74. To advance their interest in health and welfare, states may selectively regulate different medical treatments based on their relative efficacy. *Id*. Indeed, because the prohibition's purpose is to stop the harms of conversion therapy specifically, not

exempting gender-affirming therapy would make the law more constitutionally suspect. *Ohralik*, 436 U.S. at 457.

Section 106(d) of the UPDA governs professional conduct, not speech, under *NIFLA*. The UPDA is a typical medical licensing regime deeply rooted in American history and tradition. *See supra* I.A.1. As a threshold matter, the section's historic roots suggest the restrictions it imposes on medical professionals are conduct regulations. Regarding § 106(d) specifically, this initial presumption is bolstered by evidence that the legislature intended to eliminate the harm inflicted by conversion therapy, not to restrict therapist speech or viewpoints. *See* R. at 4; Stoughton, *supra* note 2, at 82-85. North Green's stated purpose for enacting § 106(d) was to "regulate the professional conduct of licensed health care providers," and "protect[] its minors against exposure to serious harms caused by conversion therapy." R. at 4. This purpose is further supported by legislative findings that medical experts consider conversion therapy ineffective and dangerous to minors. *See* R. at 3-4; Stoughton, *supra* note 2, at 82-85.

Section 106(d) specifically targets the harm North Greene sought to remedy and does not restrict therapists' pure political speech. Section 106(d) only restricts therapists from performing conversion therapy on minors. N. Greene Stat. § 106(d). The law does not restrict therapists' ability to perform conversion therapy on adults. *Id*. While therapists may engage in gender affirming treatment, this is a constitutionally proper exemption given the lack of scientific evidence that such treatment creates the same harm as conversion therapy. N. Greene Stat. § 106(e)(2). Thus, § 106(d) only restricts professional activity within the scope of the harm the legislature sought to alleviate based on scientific research.

Additionally, § 106(f)(1) explicitly exempts speech by therapists that "does not constitute performing conversion therapy." N. Greene Stat. § 106(f)(1). Like the statutes upheld in *Tingley*

and *King*, North Greene's law allows therapists to discuss and advocate for conversion therapy in any context outside the therapeutic treatment of minors, such as during the political process. R. at 4. Therapists may discuss conversion therapy with their minor clients and suggest treatment outside of North Greene or from any of the non-licensed religious counselors exempted from § 106(d). *Id*. In this way, the law targets only speech as treatment and not doctor-patient discussions about treatment. N. Greene Stat. § 106(f)(3). Thus, § 106(d) does not restrict the "pure political speech" of therapists, rather it allows for ample communication regarding conversion therapy outside of the context where it is harmful.

Because § 106 is a licensing regime rooted in history, only restricting speech in the medical treatment context and specifically targeting harmful activity while allowing for communication about conversion therapy outside of therapy, it is a regulation of conduct.

3. Section 106 Passes Intermediate Scrutiny.

Regulations of professional conduct "receive more deferential review," than typical content-based regulations of speech. *NIFLA*, 138 S. Ct. at 2372.[3] After *NIFLA*, circuit courts have applied both intermediate scrutiny and rational basis review to regulations of professional conduct. *Compare Sprague v. North Greene*, 2023 WL 12345, *7 (14th Cir. 2023) (applying rational basis review), *with Tingley*, 47 F.4th at 1075 (applying intermediate scrutiny). A conduct restriction meeting intermediate scrutiny will naturally pass the more deferential rational basis review and be constitutional.

A law implicating freedom of speech passes intermediate scrutiny if it "advances [an] important government interest[] . . . and does not burden substantially more speech than

[3] Because the NIFLA Court concluded the regulation at issue was directed at speech, not conduct, it did not articulate the specifics of this more deferential review. *NIFLA*, 138 S. Ct. at 2373.

necessary to further those interests." *Pac. Coast Horseshoeing Sch.*, 961 F.3d at 1068; *see U.S. v. O'Brien*, 391 U.S. 367, 376-77 (1968). When determining if a law advances an important government interest, courts look to both the asserted purpose of the statute by legislators and how the statute operates in practice. *See, e.g.*, *O'Brien*, 391 U.S. at 376-78. This Court has emphasized "[s]tates [have] great latitude under their police powers to legislate as to the protection," of the welfare of their citizens because a state's interest in peoples' health is "substantial." *E.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal citations omitted).

A law restricts speech no more than necessary when it only limits expression directly related to the interest asserted by the enacting state. *Tingley*, 47 F.4th at 1075. Courts are particularly wary of laws that limit "pure political speech," which is at the "heart" of the First Amendment's protection. *Holder*, 561 U.S. at 25-26 (noting pure political speech, the expression of one's beliefs is strictly protected). Courts that apply intermediate scrutiny to laws prohibiting conversion therapy have found them constitutional when they prohibit the performance of the treatment, but for robust discussion of it. *See Tingley*, 47 F.4th at 1075; *Pickup*, 740 F.3d at 1229 (stating the law did not restrict "pure political speech"); *Chiles*, 2022 WL 17770837 at *18-19.

Section 106 of the UPDA overcomes intermediate scrutiny. The law's asserted purpose and practical effect is to protect "minors against exposure to serious harms caused by conversion therapy." R. at 4. The law's purpose and effect fit squarely within the important government interest in protecting the health and welfare of state citizens. Petitioner does not dispute North Greene has an important interest in protecting the safety and well-being of children, including from the harms of depression and suicide associated with conversion therapy. R. at 13-14.

Section 106 also restricts speech no more than necessary to carry out this important interest. As discussed, § 106(d) only prohibits performing conversion therapy as a treatment on

minors. N. Greene Stat. § 106(d). Thus, the scope of the law's restriction is limited to circumstances in which legislative findings and scientific research show conversion therapy causes harm. R. at 4. The law restricts no more speech than necessary. It expressly exempts any other discussion of conversion therapy outside of treatment and in no way infringes on therapists' pure political speech. N. Greene Stat. § 106(f)(1). Therapists like Petitioner can perform conversion therapy on adults, can counsel minors to explore the treatment in other jurisdictions or from religious organizations, and can advocate for conversion therapy in the political arena. R. at 4. Therefore, § 106 passes intermediate scrutiny and is a constitutional regulation of professional conduct.

B. Section 106, Which has Explicit Carve-Outs for Political and Recommendatory Speech, Passes Strict scrutiny if it is a Content-Based Regulation.

Courts use strict scrutiny to evaluate laws impacting the content of the professionals' speech that do not fit into one of the exceptions articulated in *NIFLA*. *NIFLA*, 138 S. Ct. at 2372-73. For a law to overcome strict scrutiny, it must be "justified by a compelling state interest and [be] . . . narrowly tailored" to meet that interest. *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2422 (2022). Although laws survive strict scrutiny "only in rare cases," it is not an impossible burden to carry. *Lukumi*, 508 U.S. at 546. Indeed, this Court has held laws impacting free speech rights can overcome strict scrutiny if properly drafted. *Holder*, 561 U.S. at 25-26. To do this, a law must target a "specifically identife[d] [] actual problem in need of solving" that a statute less restrictive of speech would not address. *Entm't Merchs. Ass'n*, 564 U.S. at 799.

A law remedying a specific threat to children's safety survives strict scrutiny because "[i]t 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. A law is narrowly tailored if the government can show the law does not restrict speech unrelated to the

compelling interest asserted, and where no exceptions suggesting animus towards a particular message exist. *See Reed v. Town of Gilbert*, 576 U.S. 155, 171-72; *Lukumi*, 508 U.S. at 546. While the only circuit to apply strict scrutiny to a law prohibiting conversion therapy concluded the statute was unconstitutional, the specific law did not have an explicit carveout permitting speech related to conversion therapy outside of the treatment context. *Otto*, 981 F.3d at 859-60 (holding the purpose in protecting children was compelling but law was not narrowly tailored).

Section 106 of North Greene's UPDA overcomes strict scrutiny. The goal of § 106, seen in both the asserted legislative purpose and its effect, is to protect the health and well-being of minors in North Greene. R. at 4. Even the dissent below recognized protecting children is a clear, compelling interest. R. at 14. Further, the Eleventh Circuit in *Otto* explicitly held that protecting children from physical and mental harm is a compelling state interest. Unlike the law in *Otto* however, North Greene's statute is narrowly tailored. The key difference between the two laws is North Greene's explicit exemption for any speech that "does not constitute performing conversion therapy." § 106(f)(1). Section 106 does not restrict speech unrelated to their compelling interest in protecting the welfare of minors, which is jeopardized by receiving conversion therapy treatment. As discussed, the law does not restrict therapist's pure political speech and allows for ample expression supporting conversion therapy. *See supra* I.A.3. Additionally, North Greene's law does not have exceptions suggesting animus towards a particular message. While gender affirming therapy from the definition of prohibited treatments, this reflects a lack of scientific evidence that this treatment causes harm. This definition does not show animus towards conversion therapy. N. Greene Stat. § 106(e)(2). Were such treatments included in the prohibition, the law would be less narrowly tailored in that it would restrict speech unrelated to the compelling interest asserted. Thus, § 106 of North Greene's UPDA

survives strict scrutiny and is constitutional under the First Amendment even if it is considered a regulation of speech.

II. Section 106, which Exempts Therapists Affiliated with Religious Organizations, Complies with the Free Exercise Clause under *Smith*.

The Free Exercise Clause allows states to regulate licensed therapists' practices through laws that are neutral and generally applicable. *Smith*, 494 U.S. at 878. The First Amendment protects against laws "respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. Const. amend. I. These protections not only ensure "the right to believe and profess whatever religious doctrine one desire[s]," they guarantee certain beliefs do not receive "special disabilities on the basis of religious views or religious beliefs." *Smith*, 494 U.S. at 877; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458 (2017). However, the right to free exercise has never been absolute. *Smith*, 494 U.S. at 878-79 ("We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (upholding government programs that incidentally affect religious practice but " have no tendency to coerce individuals into acting contrary to their religious beliefs."); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940) ("The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities."). Instead, a neutral, generally applicable law passing rational basis review may implicate religious activities without violating the Free Exercise Clause. *Smith*, 494 U.S. at 878; *see also, Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012) (distinguishing

between regulations of "outward physical acts," and regulations "that affect[] the faith and mission of the church itself."); *Stormans, Inc. v. Wiseman*, 794 F.3d 1064, 1076 (9th Cir. 2015).

A. Section 106 is a Neutral, Generally Applicable Law Subject to Rational Basis Review.

1. Section 106 is Facially and Operatively Neutral.

A law with no intent to discriminate based on religion but with the sole objective of protecting minors from scientifically discredited therapy treatments is neutral. *See Lukumi*, 508 U.S. at 533. Neutrality is rooted in the objective of a law. *Id.* A law is neutral and purports with the purposes of the Free Exercise Clause when the statute demonstrates no intent to discriminate against or restrict religious practices. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. at 2422 ("A policy can fail [the neutrality] test if it 'discriminates on its face' or if a religious exercise is otherwise its 'object.'") (quoting *Lukumi*, 508 U.S. at 533); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature."). The text, legislative history, and operation of a law indicate its objective. *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *Lukumi*, 508 U.S. at 533-40. Here, each point to the neutrality of § 106.

Beginning with the text, the language of § 106 is facially neutral. A law's text is facially neutral when it does not "refer[] to a religious practice . . ." or relies on a "secular meaning" to describe worship. *Lukumi*, 508 U.S. at 533. Section 106 contains purely secular language, devoid of "strong religious connotations." *Id.* As the Fourteenth Circuit correctly noted, the only mention of religion appears in § 106(f) which excludes counselors affiliated with religious organizations from the requirements of §106(d). R. at 6.

Like the text of the statute, legislative history is relevant but not dispositive in assessing neutrality. *Lukumi*, 508 U.S. at 533-34, 540. While statements made preceding the passage of §

106 may provide guidance on neutrality, these remarks are not universally reliable in evaluating the extent of intentional discrimination. *Dobbs*, 142 S. Ct. at 2256 ([W]e have been reluctant to attribute [an individual legislator's motive] to the legislative body as a whole."); *Masterpiece Cakeshop*, 138 S. Ct. at 1730 (noting disagreement on whether statements made by lawmakers should be used to determine if a law intentionally discriminates on the basis of religion). Nonetheless, the circumstances surrounding the passage of § 106 reinforce its neutrality.

Senator Floyd Lawson spoke on the importance of eradicating therapeutic methods he considered "barbaric" including shock therapy and induced vomiting. R. at 8-9. During debates, Senator Golmer Pyle detailed his personal experience with conversion therapy. R. at 9. He explained how his friend was encouraged to "pray the gay away" when the friend's child came out as gay. *Id.* Acknowledging some fellow legislators may disagree with § 106 based on their religious beliefs, Senator Pyle ultimately rejected the effectiveness of conversion therapy and sponsored the bill, despite his own religious beliefs. *Id.* Based on his friend's experience, conversion therapy was "ineffective and stressful" on the child and family. *Id.*

Even supposing remarks by *two* State Senators reflected the *entire* legislature, these comments do not rise to the level of bias required to fail neutrality. In *Lukumi*, legislators in the City of Hialeah specifically condemned the Santeria religion, describing it as "a sin, foolishness, an abomination to the Lord, and the worship of demons." *Lukumi*, 508 U.S. at 533-34, 541 (internal quotations omitted). Likewise, in *Masterpiece Cakeshop*, Commissioners questioned the petitioner's religious beliefs calling them "despicable." *Masterpiece Cakeshop*, 138 S. Ct. at 1729. These comments reveal that legislators were targeting specific beliefs and practices fueled by "religious motivation." *Lukumi*, 508 U.S. at 533-34, 542.

Unlike the governing bodies in *Lukumi* and *Masterpiece Cakeshop*, the North Greene legislature does not condemn or question any religious beliefs and practices. R. at 8-9. Both Senator Larson's and Pyle's comments focus on the characteristics of conversion therapy and the harmful impact it has on minors. *Id.* These comments do not suggest certain religious beliefs or modes of worship are invalid or inferior. *Id*. Senator Pyle even recognized the importance of deeply held religious convictions that guide people. R. at 9. As lawmakers, the legislature's role is not to question citizens' faith and worship. *See Lukumi*, 508 U.S. at 542. Rather, the legislature properly focused its discussion on the issue: the danger associated with practicing conversion therapy on minors. *Id*. The Senators' comments cannot be taken to disparage a particular religion because the discussion suggests no intent to condemn religious practices or beliefs. The remarks reinforce the neutrality of § 106 and the goal of eliminating the use of a dangerous therapeutic practice on minors.

Section 106 is also operationally neutral. An "adverse impact" is not necessarily enough to conclude that a law is impartial in practice. *Id*. at 535. Rather, a statute is neutral in operation when no intentional discrimination that targets religious activities exists. *Id*. (finding the ordinances at issue were unequal in operation when certain religious practices were prohibited but nearly identical secular practices were permitted); *see also*, *Trinity Lutheran Church*, 582 U.S. at 458 ("denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion…."); *Niemotoko v. Maryland*, 340 U.S. 268, 273 (1951) (upholding a challenge against city officials who rejected one religious group's request to use public park but accepted another's request).

Here, the legislature did not target religious beliefs or practices. Section 106 makes no operational distinction between practitioners who provide conversion therapy for religious

reasons and those who do not. Minors and their families pursue conversion therapy for a variety of reasons, including religious, societal, and familial. R. at 9; *Tingley*, 47 F.4th at 1087. Section 106 does not regulate *only* religious motives. R. at 9-10. Rather, the statute bars all licensed therapists from practicing conversion therapy on minors, regardless of the motive. *Id*. That § 106 may adversely impact religious therapists is not sufficient to make it unconstitutional. *Lukumi*, 508 U.S. at 535. Further, § 106 does not mandate therapists act contrary to their religious beliefs. R. at 4. The law only prevents them from using conversion therapy on minors. *Id*. It does not require them to engage in gender-affirming treatment. *Id*. Section 106 comports with the goals of neutrality, to ensure certain beliefs are not being disadvantaged or targeted.

The text, legislative history, and operation of § 106 suggest the objective of the law is not to restrict or prohibit religious practices. Instead, the statute was enacted in direct response to evidence by the APA that conversion therapy is detrimental and potentially dangerous for minors. *Id*. at 10. Conversion therapy's potential for harm is evidenced by the increased risk of suicide and depression in minors who receive the treatment. *Id*. Had the North Greene legislature aimed to specifically target religious use of conversion therapy, it would have enacted § 106 years ago when the practice developed.[4] The North Greene legislature's own intent for the statute "was to regulate 'the professional conduct of licensed health care providers.'" *Id*. at 4. This objective, on paper and in practice, ensures the neutrality of § 106.

2. Section 106 is Generally Applicable.

A law applying to all licensed therapists regardless of religious affiliation is generally applicable. *See Lukumi*, 508 U.S. at 545. Statutes fail general applicability in one of two ways: (1) allowing states "to consider the particular reasons for a person's conduct" through a formal

[4] Elvia R. Arriola, The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual, and Transgendered Youth, 1. J. Gender Race & Just. 429, 456 (1998).

exemption system or (2) enforcing prohibitions against "religious conduct while permitting secular conduct." *Fulton*, 141 S. Ct. at 1877. Section 106 does neither.

First, the statute creates no mechanism to allow individualized exemptions within the law. R. at 4. In *Fulton*, a city ordinance dictated the status of foster care providers but allowed exemptions "granted by the Commissioner… in his/her sole discretion." *Fulton*, 141 S. Ct. at 1878. The unilateral authority vested in a government official to make individualized determinations undermined the general applicability of the law. *Id*. at 1878 ("The creation of a formal mechanism for granting exceptions renders a policy not generally applicable . . .because it invite[s] the government to decide which reasons for [noncompliance] are worthy of solicitude.") (internal quotations omitted). Likewise, city officials, given sole authority to approve park permits, violated the Establishment Clause when their decisions were based on a groups' religious affiliations. *Niemotoko*, 340 U.S. at 272-73.

Here, § 106 is clear. Licensed therapists who practice conversion therapy on minors are subject to disciplinary action for engaging in unprofessional conduct. R. at 4. No part of the act allows for appeals, exemptions, or reconsiderations. *Id*. Nor does § 106 give any governing body the authority to hear individual cases. Petitioner's argument that § 106 creates the possibility for exemptions is speculative and misses the point. *Id*. at 10. Section 106 does not create any process for the legislature to allow these exceptions. *Id*. at 4. While the UPDA does allow petitioners who are affiliated with religious organizations to practice conversion therapy, this is not the individualized exception process rejected in *Fulton*. Without a formal mechanism for making individualized determinations, general applicability is satisfied.

Further, § 106 treats religious and secular conduct equally. The comparability of religious and secular conduct is based on "the asserted government interest that justifies the regulation at

issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). For instance, a school official was penalized and ultimately fired for failing to monitor students while he delivered a brief prayer; however, other school faculty received no punishment for failing to monitor students. *Kennedy*, 142 S. Ct. at 2413. Likewise, a cake decorator was disciplined for refusing to decorate a cake for a gay couple's wedding; however, other decorators were allowed to refuse decorating cakes with messages with which they personally disagreed. *Masterpiece Cakeshop*, 138 S. Ct. at 1730. Finally, Covid-19 regulations prevented in-person religious gatherings above a certain number of participants; however, commercial, retail, and dining establishments were not subject to the same limitations. *Tandon*, 141 S. Ct. at 1297. In each case, the law at issue failed general applicability because the secular activity permitted was the exact same as the religious conduct prohibited. *Kennedy*, 142 S. Ct. at 2413; *Masterpiece Cakeshop*, 138 S. Ct. at 1730; *Tandon*, 141 S. Ct. at 1297. Allowing these secular activities undermined the interest the government sought to advance when it prohibited a comparable religious practice.

The circuit court correctly found no evidence of "a comparable secular activity that undermines North Greene's interest in enacting N. Greene Stat. § 106(d) but is permitted under law." R. at 10. Concerns surrounding the use of gender-affirming therapy are not comparable with the concerns for conversion therapy. Stoughton, *supra* note 2. While these practices may seem similar, they are legally distinct. *See Tandon*, 141 S. Ct. at 1296. Gender affirming therapy promotes acceptance of gender identity and sexual orientation for LGBTQ+ individuals. Its critics focus on "anecdotal reports of regret" as evidence of its harm. R. at 10. On the other hand, conversion therapy advocates for the reversion of a minor's gender or sexual identity. North Greene relies on scientific studies highlighting the "increased risk of suicide and depression" that results from conversion therapy. *Id*. While regret is a valid and serious emotion, it is not on par

with the severity and impact of suicide and depression. The record does not demonstrate a government interest in combating regret comparable with the interest in saving children's lives. Nor does petitioner point to any other comparable secular interest as evidence of unequal treatment. Therefore, § 106 is generally applicable.

Section 106 is a neutral and generally applicable law that triggers rational basis review. R. at 7; S*tormans*, 794 F.3d at 1076. The statute is rationally related to the legitimate government interest in preventing harmful therapeutic practices on minors. *See supra* I.A3. Therefore, § 106 is constitutional under the Free Exercise Clause standard articulated in *Smith*.

B. It is Not Appropriate to Overturn *Smith* in This Case.

1. The Outcome of this Case does not Change Regardless of whether *Smith* is Overruled.

If this Court overrules *Smith*, the outcome of this case does not change. If *Smith* is overruled, then the standard articulated in *Sherbert v. Verner* applies, and any incidental burden on the free exercise of religion may be justified by a compelling state interest. *Sherbert v. Verner*, 374 U.S. 398, 403 (1963). A state may regulate actions or conduct that conflict with the public interest; pose some substantial threat to public safety, peace, or order; or violate "important social duties . . . even when the actions are demanded by one's religion." *Id*.; *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961); *see, e.g.*, *Reynolds v. United States*, 98 U.S. 145, 166 (1878).

Not all burdens on religion are unconstitutional. *Bowen v. Roy*, 476 U.S. 693, 702 (1986). The Court rejects Free Exercise challenges when a law substantially impacts the operation of religious activities but does not prevent individuals from observing their religious tenets. *See id*. at 705-06 (quoting *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983)). Courts compare the nature of the burden on religious activities to the compelling government interest.

See id. at 707. "[S]afeguarding the physical and psychological well-being of a minor" is a compelling state interest. *Ferber*, 458 U.S. 756-57 (internal quotations omitted).

Section 106 is constitutional under the *Sherbert* standard because North Greene has a compelling state interest in safeguarding the physical and psychological well-being of children within its borders. R. at 14. North Greene does not contest that § 106 incidentally burdens religion. *See* R. at 15. This burden is minimal compared to the state's interest. Section 106 allows individuals to observe their religious tenets in all contexts outside the specific medical treatment on minors. First, the UPDA allows licensed therapists to discuss conversion therapy with their minor patients and to refer minors to another entity that practices conversion therapy. N. Greene Stat. § 106(f); R. at 4. Second, § 106 does not restrict licensed therapists from conducting conversion therapy on adult patients. *See id*. Third, § 106 allows unlicensed practitioners to perform conversion therapy under the auspices of a religious organization or church. *Id*. Finally, the UPDA allows exceptions for therapists, counselors, and social workers who work under religious organizations. N. Greene Stat. § 111; R. at 4. These carve outs demonstrate North Greene's willingness to allow individuals to observe their religious tenants without subverting the goal of the legislation.

North Greene may regulate actions that substantially threaten public safety. Conversion therapy subjects minors exposed to serious harm. To combat risks of suicide and depression in children, North Green enacted § 106. R. at 4, 7, 9, 10. Further, the law prohibits therapists from acting contrary to their social or, in this case, professional duties to provide proper care and to minimize harm to their patients. *See* N. Greene Stat. §§ 106, 107, 110. North Greene's compelling state interest in protecting the well-being of children outweighs the minimal burden on Petitioner in observing his religion.

2. Smith Should be Upheld Under the Stare Decisis Doctrine

Overruling a precedent should not be taken lightly. *Dobbs*, 142 S. Ct. at 2264. A court will not overrule a precedent unless it has strong grounds for doing so. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). Though not an inexorable command, and weak when the court interprets the Constitution, "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991); *see Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020); *Janus*, 138 S. Ct. at 2478-79.

A court may not overrule a precedent simply because it is "wrong." *See Janus*, 138 S. Ct. at 2478. This court applies several non-dispositive factors in reviewing whether a ruling should stand: (1) the nature of the court's error, (2) the quality of the court's reasoning, (3) the "workability" of the rules the court imposed on the country, (4) the disruptive effect of the precedent on other areas of the law, (5) the absence of concrete reliance, (6) the decision's consistency with other related decisions, and (7) developments since the decision was handed down. *Dobbs*, 142 S. Ct. at 2265; *Janus*, 138 S. Ct. at 2478-79; William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication*, 2002 Utah L. Rev. 53, 76 (2002). Here, considering only the quality of the court's reasoning and the workability of the standard established suffices. *See Payne*, 501 U.S. at 827.

A court can overrule a precedent based on the quality of its reasoning when the case stands on exceptionally weak grounds. *Dobbs*, 142 S. Ct. at 2266. *Smith* is no such case.

The notion of a neutral law of general applicability is not new. This test existed for at least thirty years before *Smith*. *See Braunfeld*, 366 U.S. at 607 (asserting "if the State . . . enact[s]

a *general* law . . . to advance the State's secular goals, the statute is valid" unless the purpose of the law is to "impede the observance of . . . religion[]) (emphasis added); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) ([E]ven under regulations of *general applicability*. . . .[a] regulation *neutral on its face* may, in its application . . . . offend the constitutional requirement for governmental neutrality") (emphasis added); *Bowen*, 476 U.S. at 707 ([i]n the enforcement of a facially *neutral* and *uniformly applicable* requirement . . . the Government is entitled to wide latitude.") (emphasis added). *Smith* did not occur in a vacuum.

A workable rule can be understood and applied in a consistent and predictable manner. *Dobbs*, 142 S. Ct. at 2272. The test in *Smith* is more workable than critics suggest. *See* Margaret Smiley Chavez, *Employing Smith to Prevent A Constitutional Right to Discriminate Based on Faith: Why the Supreme Court Should Affirm the Third Circuit in Fulton v. City of Philadelphia*, 70 Am. U. L. Rev. 1165, 1211 (2021). A long line of cases followed the *Smith* test with little issue. *See Lukumi*, 508 U.S. at 532 (holding that the ordinances fail to satisfy the *Smith* requirements); *Hosanna-Tabor Evangelical Lutheran Church & Sch.*, 565 U.S. at 190 (holding that the ADA's prohibition on retaliation, like Oregon's prohibition on peyote use, is a valid and neutral law of general applicability); *Trinity Lutheran Church*, 582 U.S. at 460 (asserting that "[i]n recent years, when this Court has rejected free exercise challenges, the laws in question have been neutral and generally applicable without regard to religion."); *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729 (holding that the Commission did not give "neutral and respectful consideration" to an individual refusing to sell a cake to a gay couple); *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (holding that because the challenged restrictions were not neutral or generally applicable, they needed to be subject to strict scrutiny). Finally, as recently as 2022, this Court did not struggle to apply the *Smith*. *See Kennedy*, 142 S. Ct. at 2422

(holding that the challenged policies were neither neutral nor generally applicable). The *Smith* standard remains workable.

Past Free Exercise cases show that the *Smith* test is not as disconnected from history as Petitioner would like this Court to believe. Justice Knotts' dissent argues that in recent years, this Court has developed its jurisprudence to realign constitutional interpretation with text and history. R. at 16. Even if the Court follows the decisions in *Kennedy* and *Bruen* and replaces the *Smith* test with history and tradition, § 106 still stands. The Free Exercise Clause is not without limits. *See Fulton*, 141 S. Ct. at 1901-02 (Alito J., concurring). Some pre-founding Colonies recognized a free exercise right subject to limitations of "peace" and "safety." *Id*. By the time of the founding, "more than half of the State Constitutions contained free-exercise provisions subject to a 'peace and safety' carveout . . . ." *Id*. at 1902. Against this backdrop, the compelling state interest should be connected to "safety," as the founders understood it. *See id*. at 1903–04. Even applying a history and tradition test, this case comes out the same way because courts have historically recognized a state's police power to regulate the conduct of professionals to ensure public safety. *Dent*, 129 U.S. at 122 (1889).

This case turns out the same whether *Smith* stays or goes. The state has a compelling government interest proportional to any incidental burden on religion. The *stare decisis* factors weigh in favor of upholding *Smith*. Finally, even if this Court adopts a history and tradition test, this case still stands because of the longstanding history of state's police power to regulate medical practices.

CONCLUSION

For the foregoing reasons, respondent requests the Court affirm the judgment of the Fourteenth Circuit.

Respectfully submitted,

Team Number 30
Counsel for Respondent