No. 22-2020

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

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

RESPONDENT'S BRIEF

Respondent Team 31

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QUESTIONS PRESENTED

1. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause of the First Amendment of the United States Constitution.

2. Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

STATEMENT OF THE CASE

PROCEDURAL HISTORY

In August 2022, Appellant, Howard Sprague filed legal action against Appellee, the State of North Greene in the Eastern District Court of North Greene. Sprague's claim sought a preliminary injunction to enjoin enforcement of North Greene Statute § 106(d). The claim alleged that North Greene's statutes prohibition on conversion therapy for minors violates his as well as his clients First Amendment rights of free speech and free exercise. The State of North Greene opposed the claim and filed a motion to dismiss Sprague's Complaint. The District Court denied Sprague's action for preliminary injunction and granted North Greene's motion to dismiss for failure to state a claim.

Following the dismissal, Sprague filed a timely appeal to the Court of Appeals for the Fourteenth District. On January 15, 2023, the Court of Appeals for the Fourteenth Circuit affirmed the District Court's judgment to dismiss Sprague's claim and held that North Greene Statute § 106(d) classification and regulation of conversion therapy on minors as it relates to licensed health care professionals, does not violate the First Amendment.

Following the Court of Appeals decision, Sprague filed a timely petition for a Writ of Certiorari asking the Supreme Court to address the infringement of two First Amendment rights, free exercise and free speech rights as they apply to the North Greene statute and the Supreme Court decision Employment Division v. Smith, 494 U.S. 872 (1990). The Supreme Court granted certiorari for both questions.

STATEMENT OF FACTS

Sprague is a licensed family therapist who conducts therapy services for clients with regard to various issues. R. at 3. Sprague believes that human identity is determined by God and therefore should not be changed. R. at 3. Sprague also believes that sex is only appropriate between a man and a woman after they get married. R. at 3. Although many patrons seek Sprague's services because of his religious views, the institution itself is not a religious one. R. at 3. Sprague's services include conversion therapy, which refers to the practice of changing another person's sexual and gender identities. R. at 3.

The State of North Greene passed N. Greene Stat. § 106(d) with the intent to regulate professional conduct by prohibiting state licensed health care providers from practicing conversion therapy on children. R. at 4.

N. Greene Stat. § 106(d) defines conversion therapy as "a regime that seeks to change an individual's sexual orientation or gender identity. R. at 4. 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" and further explains that conversion therapy does not involve "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. R. at 4.

N. Greene Stat. § 106(d) provides carve outs and therefore is not applicable to speech by licensed health care providers that falls under its conversion therapy definition, or religious practices or counseling under the auspices of a religious denomination, church, or organization assuming that it does not constitute performing conversion therapy by licensed health care

providers or unlicensed counselors acting under the auspices of a religious denomination, church, or organization." R. at 4.

The American Psychological Association ("APA") opposes the use of conversion therapy by psychologists, instead advocating for the affirmation and acceptance of the client's sexual and gender identities. R. at 4. Health care providers can still speak with the public about conversion therapy; vocalize their personal views on conversation therapy, sexual orientation, or gender identity to all patients, including minors; conducting conversion therapy on adults; or referring minors seeking conversion therapy to people not subject to the law. R. at 4.

SUMMARY OF ARGUMENT

1. North Greene Statute § 106(d) should be subject to rational basis analysis because it regulates conduct and not speech. Conversion therapy is not inherently expressive conduct since an observer would not conclude that conversion therapy is communicative. Rational basis is satisfied since the law is rationally related to their interests in protecting children. Alternatively, strict scrutiny would also be satisfied as well since the law is narrowly tailored as adults would still be able to receive conversion therapy services.
2. North Greene Statute § 106(d) is valid under the existing tests found in *Smith*. The statute satisfies both prongs of the *Smith* test, where neutral and generally appliable laws are viewed under rational basis scrutiny. The statute is both facially and operationally neutral and it treats secular and religious conduct equally with no formal mechanisms for individualized exceptions. Additionally, North Greene Statute § 106(d) is built on the public health goal of protecting our youth from the severe harms of conversion therapy.

Furthermore, this Court's decision in *Smith* should not be overturned given the lack of feasible alternatives and will lead to a chaotic and highly litigious jurisprudence.

ARGUMENT

I. A LAW THAT PROHIBITS A PERSON FROM CONDUCTING "CONVERSION THERAPY" ON A MINOR DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE THE LAW REGULATES CONDUCT AND NOT SPEECH AND WOULD SATISFY BOTH RATIONAL BASIS REVIEW AND STRICT SCRUITINY ANALYSIS

"Congress shall make no law . . . abridging the freedom of speech . . .." U.S. Const. amend. I. Although the First Amendment provides protection to speech, the government "does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). This Court in *Ohralik* stated the limits to the First Amendment, holding that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id*. Conduct-based laws may be subject to the First Amendment when the conduct itself communicates a message, has an expressive element, or has a strong nexus to a protected First Amendment activity. *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 895 (9th Cir. 2018). However, in all those circumstances, the conduct must be "inherently expressive" to warrant First Amendment protection. *Id*. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006).

When a governmental law implicates the First Amendment in a content-based manner, the government has the burden of proving that the government has a compelling state interest

and that the challenged regulation is in furtherance of that compelling interest. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 156 (2015). If a regulation of conduct is not subject to the First Amendment, then the court will apply rational basis review, and therefore consider whether the state has a legitimate interest, and whether the law has a rational relationship to that interest. *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014), abrogated by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018).

A. A Law That Prohibits a Health Care Provider from Conducting a Talk Therapy Form of Conversion Therapy is Subject to Rational Basis Because the Law Regulates Conduct and Not Speech Since the Conduct is Not "Inherently Expressive."

A form of conduct must be "inherently expressive" to receive protection under the First Amendment. *Rumsfeld*, 547 U.S. at 64–65. In *Rumsfeld*, the Court held that the government requiring that law schools provide equal access to military recruiters did not implicate the First Amendment. *Id.* at 64. Prior to the law's passage, higher education institutions expressed their disagreement with U.S. military policy by denying of military recruiters' access to their campuses. *Id*. at 51. However, the schools' conduct was only expressive because of the speech used to explain it. *Id*. at 66. Without the speech component to explain the schools' actions, a person observing military recruiters conducting interviews off campus would not know whether the military recruiter's placement off-campus was caused by the law school's views, practical obstacles such as the all the interview rooms being occupied, or whether it was because on the military recruiter's own volition. *Id*.

Out of *Rumsfeld*, the courts have determined whether a form of conduct is inherently expressive depends on whether an observer seeing the conduct in context but without additional spoken explanation would infer a communicative message and (2) whether an observer would infer other noncommunicative explanations for the conduct. *See The Bail Project, Inc. v.*

Commissioner, Indiana Department of Insurance, 76 F.4th 569 (7th Cir. 2023)(The Seventh Circuit held that a restriction on nonprofits' ability to pay the cash bonds of certain criminal defendants did not fall under the First Amendment because an observer would not understand that the nonprofits payment of bail were communicative of their opposition to the cash bail system); *See also Norwegian Cruise Line Holdings Ltd v. State Surgeon General Florida Department of Health,* 50 F.4th 1126 (11th Cir. 2022)(The Eleventh Circuit found that Florida's ban on cruise ship companies requiring COVID-19 vaccination proof did implicate the First Amendment because an observer seeing a patron entering cruise ship A instead of cruise ship B would not have any idea that cruise ship B is expressing disapproval of the unvaccinated passengers); *See also Minnesota Voters All. v. Walz*, 492 F. Supp. 3d 822, 837–38 (D. Minn. 2020)(The District Court held that refusal to wear a mask indoors during a government-imposed mask mandate was not inherently expressive conduct because of the other explanations an observer could conclude such as a person being exempt from the requirement or simply because the person forgot their mask at home.) The legislative intent to regulate a form of conduct does not transform the conduct into expressive conduct. *The Bail Project, Inc.*, 76 F.4th at 578.

The State of North Greene passed N. Greene Stat. § 106(d) to prohibit licensed health care providers conducting conversion therapy on children which the statute defines as "a regime that seeks to change an individual's sexual orientation or gender identity" through efforts to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex."

An observer seeing a health care provider using talk therapy to change a minor child's gender expression or sexual orientation would not, without additional explanation, understand that the health care provider is expressing a message when doing so. The institution the

Petitioner is employed at is not a religious one. An observer would not understand that the use of conversion therapy is necessarily communicating any sort of message about that human sexuality, gender identity and what it ought to be because there are alternative, reasonable conclusions the observer could come to.

An observer may believe, for example, that a health care provider conducting conversion therapy may be doing not because they believe it is the moral thing to do, but just as a service to increase revenue for the health care provide. The Petitioner's employer is a health care institution which, despite it not being a for-profit business, may still be seeking revenue for the institution and therefore offers services irrespective of any views on the importance or morality of those services. For example, a health care organization offering therapy services for Post-Traumatic Stress Disorder is not necessarily sending the message that the health care provider believes that PTSD is such a crisis that their provider's views that the provider is therefore personally motivated by that moral imperative to act.

An observer could conclude that the health care provider is conducting that form of therapy because it is simply in their profession. The Petitioner's employer does not just offer conversion therapy, but other services as well. Therefore, an observer could conclude it is being offered since it is part of a health care provider that conducts general practice.

Additionally, an observer may believe that the health care providers offer conversion therapy services not because of their intent to communicate their views, but rather because the service, if effective, could avert a minor who identifies as a homosexual or transgender from a lifetime of stigma. They may have no opinion on human sexuality or gender identity but are willing to supply a demand on the part of any individual who seeks to change their own identity for their own reason.

B. North Greene's Ban on Conversion Therapy for Children Would Satisfy Rational Basis Review, and Alternatively, Would Satisfy Strict Scrutiny Analysis Because Protecting Children from Harmful Practices is Compelling State Interest, and the Ban is Narrowly Tailored to Address that Interest

If a law regulates speech, then it is subject to the First Amendment and therefore the burden on the government to prove that the law serves a compelling state interest and the law is narrowly tailored to serve that interest. *Reed*, 576 U.S. at 156. If a law regulates conduct that incidentally affects speech, then the law is not subject to the First Amendment and therefore the government needs the law to be rationally related to legitimate state interest. *Pickup*, 740 F.3d at 1231.

Under rational basis review, there is no doubt that "protecting the well-being of minors is a legitimate state interest." *Id*. Under rational basis analysis, the Court is not required to conclude whether conversion therapy actually harms children, only that reasonably be conceived to be true by the government. *Id*.

The North Greene legislature relied on the American Psychological Association which opposed the use of conversion therapy by psychologists, instead holding the position that psychologists use an approach based on evidence that supports and accepts identity exploration and development. The American Psychological Association reports support that the use of conversion therapy has led to harm to children, including depression, substance abuse, and suicidal thoughts and actions. The court does not need to credit all these claims, but it reasonable that North Greene was acting rational when they relied on the American Psychological Association's opinions in their decision to ban conversion therapy for minors.

If the Court decides that the First Amendment is implicated by N. Greene Stat. § 106(d) and therefore strict scrutiny would apply, the statute will still satisfy strict scrutiny analysis. The

state interest in protecting children from harmful materials does not justify limiting the speech so broadly that it prevents an adult audience from being exposed to it. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 563 (2001). In *Lorillard Tobacco Co.*, the Court found that preventing tobacco use by children was a compelling state interest but also found a First Amendment interest on the part of the tobacco companies to distill truthful information about their tobacco products to adults. *Id*. at 564. The law at issue in *Lorillard Tobacco Co. v. Reilly* attempted to prevent tobacco advertising from being seen by children, prohibiting both the advertising of tobacco within 1,000 feet of a school or playground and lower than 5 feet of retail establishments. *Id*. at 565 – 567. The Court found that both these prohibitions were not narrowly tailored to prevent children from using tobacco because it necessarily limited the tobacco companies from advertising tobacco products to adults. *Id*. However, the regulation that required retailers to keep the tobacco products behind store counters was narrowly required to the state's interest because adults were not prevented from having access to the tobacco products. *Id*. at 569. The State's attempt to prevent minors from using tobacco products before they reach an age where they are capable of risk assessment for tobacco use, and other adult activities was understandable. *Lorillard Tobacco Co.*, 533 U.S. at 570–71.

Even if conversion therapy can be harmless in some situations or have some benefits, North Greene has a compelling interest in preventing its use on children who are unable to properly assess the risks. *Pickup*, 740 F.3d at 1232. Like Tobacco use, the risk to children can be deadly since the American Psychologist's Association has also found instances of suicidal actions and thoughts from children exposes to conversion therapy.

North Greene's law is also narrowly tailored to address the concern. Unlike the tobacco advertising regulations in *Lorillard Tobacco Co.* that prevented adults from engaging with the

tobacco companies protected First Amendment speech. North Greene's law, however, explicitly limits its reach to people under 18. Adults fully have the opportunity to seek and receive conversion therapy services. The petitioner and anyone else seeking to practice conversion therapy is still free under the law to advocate for conversion therapy, including referring patients to providers not subject to the law as well as putting up advertisements for its use.

II. NORTH GREENE STATUTE § 106(D) IS CONSTITUTIONAL BECAUSE IT IS A NEUTRAL AND GENERALLY APPLICABLE LAW MEANT TO COMBAT THE SERIOUS HARMS CONVERSION THERAPY HAS ON YOUTH. MOREOVER, SMITH SHOULD NOT BE OVERTURNED BECAUSE IT WOULD LEAD TO INEFFICIENT JURISPRUDENCE.

The first words of this great nations First Amendment to the Constitution are "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." However, the right to exercise one's religion freely, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). In Smith, the court codified that laws of neutral and general applicability are valid even when incidentally burdening religion and reviewed under rational basis scrutiny. *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999). Under rational basis scrutiny the court will review the challenged law or statute and assess if the means of achieving the legislature's goal is rationally related to its end. *Id*. It is clear in this case that North Greene Statue § 106(d) satisfies rational basis scrutiny because of its thoughtful mechanism sought to end conversion therapy on youths, a monumental public health concern for the legislature and public. The court, in cases after *Smith*, has further expounded on the meanings of "neutrality" and "general applicability".

In determining what is neutral, this Court has ruled, that beyond facial neutrality if the operation of the law or object of its purpose is to restrict religious exercise because of the religious motivation, the law is not neutral. *Church of Lukumi Bablu Aye v. City of Hialeah*, 508 U.S. 533, 533 (quoting *Smith* at 878-879). When determining neutrality, the court will also look at the legislative history and historical background leading up to enactment. *Id* at 538. Additionally, laws lack facial neutrality when it refers to religious practice without a discernible secular meaning separate and distinct from the religious practice. *Id* at 534. In *Fulton,* the court analyzed general applicability under a two-prong threshold. First, whether the law creates a mechanism for the government to consider individualized exemptions based on persons conduct. *Fulton v. City of Phila.,* 141 S. Ct. 1868, 1877 (2021). Second, if it prohibits religious conduct while permitting comparable secular conduct. *Id*. Comparability, for purposes of the general applicability test are predicated against the "government interest that justifies the regulation at issue" and the risks posed by the prohibited conduct as opposed to its reasoning. *Tandon v. Newsom,* 141 S. Ct. 1294, 1296 (2021). Both the neutral and general applicability tests are interrelated and failure of one is a likely indication that the other will be failed. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (quoting *Lukumi* at 531). Failing either the neutrality or general applicability requirements will trigger strict scrutiny for law that burdens religious exercise. *Kennedy v. Bremerton Sch. Dist*., 142 S. Ct. 2407, 2422 (2022) (quoting *Lukumi* at 546). Strict scrutiny would require the law to be narrowly tailored to advance a compelling government interest. *Id*. Although North Greene Statute § 106(d) is a neutral and generally applicable statute, it satisfies strict scrutiny because of the careful construction to only prohibit certain modes of therapy and baked in exemptions for religious conduct.

While the court has the opportunity to overturn the *Smith* decision in this case, it should decline to do so as it did two terms ago; "But we need not revisit that decision." *Fulton* at 1877. This Court's hesitation in revisiting *Smith* is quite understandable given the floodgates that would open with cases which relied on the *Smith* ruling. Moreover, it would immediately create an unstable judicial environment as there is no suitable test to supplant *Smith* and all individuals with legitimate religious obligations will have actionable claims against any law that would restrict that obligation no matter how necessary the law. For these reasons the court should not overrule *Smith*, nor should they deem North Greene Statute § 106(d) unconstitutional.

A. North Greene Statute § 106(d) is Constitutional because it is both facially and operationally neutral.

Per the rule in *Smith* and its progeny, North Greene Statute § 106(d) is to be reviewed on whether it is neutral and generally applicable. Furthermore, given the incidental burdens presented by the statute on religious exercise, the means of enactment must be rationally related to satisfying the statute's public health goal. Addressing neutrality, the statute is clearly facially neutral. The statute in its effect makes conversion therapy on minors unprofessional conduct for licensed health care providers with very specific religious exceptions. The act of making conduct prohibited to all actors within a professional field of work is at its core neutral, and there is no language targeting religious conduct while allowing secular conduct.

Though facially neutral, the test for facial neutrality goes beyond and examines the legislative history and background of the law's genesis. In this instance Petitioner will likely point to comments made by North Greene senators to undermine the credibility of the statue. However, taken into context these comments are fair and do not rise to the level of violating neutrality. The primary driver for the statute's enactment is the American Psychological

Association ("APA") stance against conversion therapy of any kind and the data showing the physical and psychological harm conversion therapy presents to LGBTQ youth. The Court has also keenly recognized the importance of protecting our LGBTQ communities; "Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1727 (2018).

Keeping in mind that the primary driver is public health concern for our youth, North Greene State Senator Floyd Lawson, one the statutes bill sponsors, stated that his goal with the bill was to eliminate "barbaric practices" described to him by constituents. Though Lawson's reasoning had no indication of religious animus, State Senator Golmer Pyle's on its face may suggest hostility. State Senator Pyle denounced "pray the gay away" and the idea of using "worship" in conversion therapy to affect a conversion, however, State Senator Pyle's position is bred from his own experience with that type of therapy and his daughter who suffered as a result.

Contrasting the North Greene legislature's comments with those in *Masterpiece Cakeshop*, where the legislative history was indicative of a neutrality violation, it is evident North Greene Statute § 106(d) is neutral facially and operationally. In *Masterpiece Cakeshop*, a Colorado Civil Rights Commission was tasked with handling a discrimination charge made by an individual who was denied a wedding cake by a business, *Masterpiece Cakeshop*, because it was a homosexual wedding. *Id* at 1723. Although, they had originally ruled in favor of the couple challenging, it was reversed when looking at the comments made by the commission when denying Masterpiece Cakeshop's right to not serve the homosexual couple. *Id*. Some comments include and that "[one] cannot act on his religious beliefs if he decides to do business in the state" and "[if] he law's impacting his personal belief system, he needs to look at being

able to compromise." *Id* at 1729. Among other statements the commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. *Id*. It is clear in this case why the Court found the legislative comments to be violative of neutrality, and the legislative comments in this present case when paralleled with those of the Colorado are nowhere near the level required to be violative of neutrality.

It is important to note as well that the Court has generally been hesitant to inquire into the legislative history when assessing legislature's motive in enacting laws; "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). Nevertheless, North Greene Statute § 106(d) is neutral given the foregoing reasons.

B. North Greene Statute § 106(d) is Constitutional because there is no formal mechanism for exceptions, and it treats religious and secular conduct equally.

In addressing general applicability this court applies the test from *Fulton*: whether the law creates a mechanism for the government to consider individualized exemptions or if it prohibits religious conduct while permitting comparable secular conduct. *Fulton* at 1877. Comparability, for purposes of the general applicability test are predicated against the "government interest that justifies the regulation at issue" and the risks posed by the prohibited conduct as opposed to its reasoning. *Tandon* at 1296. North Greene Statute § 106(d) satisfies both these requirements.

The statute on its face does not consider any formal mechanisms that allow for individualized circumstance, rather, the statute has a few baked in exceptions in very specific scenarios. The statute allows for (1) religious practice that does not constitute licensed health care providers performing conversion therapy and (2) non-licensed counselors' action under the

auspices of a religious institution. In fact, under the statute, while any iteration of secular conversion therapy would be prohibited, religious exceptions are allowed in certain iterations, which proves this statute's sensitivity to the First Amendment implications it may have. These exceptions are not established under a formal mechanism for individual conduct rather it broadly takes into certain conduct without consideration for individual conduct.

The statute in this case does not treat secular and religious conduct equally, in its operation it affords higher considerations to religious conduct. Although not treated comparably, the second prong of the test set out in *Fulton*, is meant to root out laws that treat religious conduct less favorably, the opposite of the current circumstance. In *Tandon*, when assessing comparable conduct, the court had to assess whether the secular activities that were treated more favorably presented similar COVID-19 risks as prohibited religious conduct. *Tandon* at 1296. The State in *Tandon* was unable to show why it could not safely permit religious gatherings at home when it had been doing so in secular contexts, this led to California having to lax its regulations. *Id* at 1298. Compared to the case at hand, the North Greene statute treats both secular conduct and religious conduct along the same vein with heightened considerations for the religious iterations of the prohibited conduct. This is distinctly different from the failed general applicability in *Tandon* and is sufficiently "general" under *Fulton*. Therefore, North Greene Statute § 106(d) is generally applicable as it satisfies both prongs of the test.

C. North Greene Statute 106(d) would pass strict scrutiny should it apply because of its religious considerations, narrow definitions, and narrow applications to meet the goal of protecting youth from the harms of conversion therapy.

Although the foregoing reasons have illustrated that the statute is neutral and generally applicable, should the court find either the neutrality or general applicability requirements failed

strict scrutiny will be triggered. *Lukumi at 546*. Under *Lukumi*, to satisfy strict scrutiny in this context the law "must advance "'interests of the highest order'" and must be narrowly tailored in pursuit of those interests". *Id*. North Greene Statute 106(d) satisfies this requirement. First looking at the interest primarily driving the statute, a public health concern. There may be no greater governmental interest in this nation than protecting the safety well-being of our youth, this nation's future. What the statute seeks to protect is just that, protecting minors from the severe harms caused by conversion therapy as advised by the APA, a leading public health authority.

Turning to the tailoring of the statute, it is clear the North Greene legislature was cognizant of the First amendment concerns and constructed the statute in the least restrictive means possible. North Greene Statute 106(d)(1) conversion therapy was narrowly defined as a "regime that seeks to change and Individual's sexual orientation or gender identity" by way of reparative therapy, changing behaviors or eliminate or reduce homosexual attraction and does not include any other forms of therapy. The statute clearly leaves open other forms of therapy to achieve the goals asserted by the Petitioner. There are also the exceptions baked into the statute which clearly show a sensitivity to religious considerations and an attempt to construct the statute in the narrowest manner. The statute also does not prevent licensed professionals from working with patients once they turn 18, refer minors to religious institutions where they can get iterations of conversion therapy, nor does it bar non-codified forms of therapy that can work to achieve the same goal. For these reasons North Greene Statute 106(d) would pass strict scrutiny, if subjected to that level of review.

D. <u>In overturning Smith, the court would open the door to religious challenges and exemptions granted across a wide range of laws.</u>

The court in its history has been reluctant to overturn *Smith* and honorable justices have provided warnings against it. The court also had the chance to revisit *Smith* just two terms ago in *Fulton*, among the countless other cases that provide the opportunity or impetus to overturn it. Justice Frankfurter in *Minersville School Dist. Bd. of Ed. v. Gobitis*, 310 U.S. 586, 594-595 (1940), stated: "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. 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 (footnote omitted)." Chief Justice Waite in *Reynolds v. United States*, 98 U.S. 145 (1879), postulated: "Can a man excuse his practices to the contrary because of his religious belief? To permit 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." Justice Marshall in *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), stated: "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." It is clear within the historical analogue of this Court that there is good reason to not create a system where individuals can continuously object to general regulation behind the shield of religious observance, this is exactly what the decision in *Smith* precisely addresses. Overturning *Smith* would open the door to these types of religious challenges our honorable justices have warned against. Judges in the appellate analogue have also agreed; "[T]he "freedom to act" pursuant to one's religious beliefs "cannot be" absolute; "[c]onduct remains subject to regulation for the protection of society." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1233 (9th Cir. 2020) (quoting, *Stormans, Inc. v. Selecky*, 586

F.3d 1109, 1128 (9th Cir. 2009)). Overturning *Smith* would also leave the court with no workable alternative as strict scrutiny would be inappropriate for facially neutral and generally applicable laws because laws burdening religious exercise will "survive strict scrutiny only in rare cases". *Lukumi* at 546.

The Court in *Smith* gave a vast list of cases that would come under challenge had the neutral and general applicability rule came into effect:

> "The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service, see, e.g., *Gillette v. United States*, 401 U.S. 437 (1971), to the payment of taxes, see, e. g., *United States v. Lee*, supra; to health and safety regulation such as manslaughter and child neglect laws, see, e. g., *Funkhouser v. State*, 763 P. 2d 695 (Okla. Crim. App. 1988), compulsory vaccination laws, see, e. g., *Cude v. State,* 237 Ark. 927, 377 S. W. 2d 816 (1964) drug laws, see, e. g., *Olsen v. Drug Enforcement Administration*, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989), and traffic laws, see *Cox v. New Hampshire*, 312 U.S. 569 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985), child labor laws, see *Prince v. Massachusetts*, 321 U.S. 158 (1944), animal cruelty laws, see, e. g., *Church of the Lukumi Babalu Aye Inc. v. City of Hialeah*, 723 F. Supp. 1467 (SD Fla. 1989), cf. *State v. Massey*, 229 N. C. 734, 51 S. E. 2d 179, appeal dism'd, 336 U.S. 942 (1949), environmental protection laws, see *United States v. Little*, 638 F. Supp. 337 (Mont. 1986), and laws providing for equality of opportunity for the races, see, e. g., *Bob Jones University v. United States*, 461 U.S. 574, 603-604 (1983). The First Amendment's protection of religious liberty does not require this."

Among the multitude of cases, analysis into one is sufficient to illuminate what burden the court will face should it overturn *Smith* in this decision. In *Lee*, an Amish farmer challenged paying his taxes under the theory that it violated his religious beliefs, to which the Court sensibly rejected. *United States v. Lee*, 455 U.S. 252, 255 (1982). However, should *Smith* be overturned a strict scrutiny analysis would be applied, given there is no substitute workable substitute for the rational basis standard. Therefore, this court should not overturn the decision in *Smith*.

CONCLUSION

For the foregoing reasons, this honorable Court should affirm the decision of the Court of Appeal for the Fourteenth Circuit.