No. 23-2020

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE
Petitioner,

v.

STATE OF NORTH GREENE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourteenth Circuit

Team 32
Brief for Respondent

QUESTIONS PRESENTED

I. Whether the Fourteenth Circuit correctly held that a state law restricting state-licensed therapists from performing conversion therapy on minors does not violate the Free Speech Clause of the First Amendment.

II. Whether the Fourteenth Circuit correctly held that a neutral and generally applicable state law rationally related to a legitimate government interest does not violate the Free Exercise Clause of the First Amendment to necessitate overturning decades of Supreme Court precedent under *Employment Division v. Smith*, 494 U.S. 872 (1990).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Circuit Court Cases

United States District Court Cases

Statutory Provisions

Constitutional Provisions

United States Supreme Court Briefs

Journal Articles

Cases from Foreign Jurisdictions

CITATION TO THE OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2023 WL 12345 and is found on pages 2–16 of the record. The opinion of the District Court is reported at 2022 WL 56789.

CONSTITUIONAL AND STATUTORY PROVISIONS

This case involves the First Amendment to the United States Constitution, enforceable onto the states through the Due Process Clause of the Fourteenth Amendment. The relevant provisions of the First Amendment provide that a state shall not create a law "prohibiting the free exercise" of religion or "abridging the freedom of speech." U.S. CONST. amend. I.

This case also involves N. Greene Stat. § 106(d), which was enacted by the North Greene General Assembly in 2019. This Section added "[p]erforming conversion therapy on a patient under the age eighteen" to their existing list of actions constituting "unprofessional conduct." The relevant definitions and exceptions to this section of the statute are found at N. Greene Stat. § 106(d) and 106(e)(1)-(2) and are discussed in detail in the statement of the case.

STATEMENT OF THE CASE

I. Factual History

a. Conversion Therapy is Widely Discredited

Conversion therapy is a mental health treatment that seeks to convert or change a person's sexual orientation from gay to heterosexual or to change a person's gender identity from transgender to cisgender. R. at 3, n. 2. Although the name implies that this conversion effort is advanced through traditional talk therapy, treatment of homosexual and transgender patients can include a range of pseudoscientific practices and psychological interventions. *Id.*

In recent years, the American Psychological Association ("APA") has denounced the teaching of conversion therapy in the education of psychologists and therapists as well as its use in treating patients. R. at 4. Instead, the APA encourages therapists to use approaches that provide patients with acceptance and support. *Id.* With the position of these experts in mind, the North Greene General Assembly enacted N. Greene Stat. § 106(d) ("the Statute") to protect the

"physical and psychological well-being" of its children, regardless of their sexual orientation or gender identity. *Id.*

b. In order to protect its children from harm, North Greene deemed the performance of conversion therapy on minors by licensed healthcare providers unprofessional under N. Greene Stat. § 106(d).

The State of North Greene, like many jurisdictions, regulates its healthcare industry through laws requiring health care professionals to become licensed before they can practice in the state. R. at 3. The licensure requirement protects the public from unqualified providers that may pose a risk to patient safety. R. at 4. In addition to the statutory licensure scheme, the state's Uniform Professional Disciplinary Act ("UPDA") provides for disciplinary action against licensed providers who engage in conduct the UPDA deems "unprofessional." R. at 3-4. However, the UPDA exempts certain professionals like social workers, therapists, and counselors from its requirements if those professionals "work under the auspices of a religious denomination, church, or religious organization. R. at 4.

In 2019, the state legislature amended the UPDA to include the act of "performing conversion therapy" on patients under the age of eighteen in the list of unprofessional conduct. R. at 4. The amendment definitively prohibits therapists from performing conversion therapy on minor patients no matter if those patients seek the treatment for religious or non-religious reasons. R. at 9. The state enacted this prohibition through Section 106(d) with the intent of regulating the professional conduct of licensed therapists based on its "compelling interest" in protecting children from the harms associated with conversion therapy. R. at 4. During legislative debate over the amendment, several Senators spoke about the trauma of conversion therapy they had either experienced personally or were made aware of through their constituents. R. at 9. The Senators who shared their thoughts acknowledged that while the topic of conversion therapy could implicate difficult conversations about religion, their intent in sponsoring the

UPDA amendment was to eliminate a medical treatment that had been widely discredited and discouraged by the medical community. *Id.*

c. The narrow scope of North Greene's regulation.

Section 106(e)(1) of the statute defines conversion therapy as "a regime that seeks to change an individual's sexual orientation or gender identity" and includes any "effort to change behaviors or gender expressions" as well as efforts to "eliminate or reduce sexual or romantic attractions or feelings" towards people of the same sex. R. at 4.[1] The legislature was clear that its definition of conversion therapy does not include therapies and counseling methods aimed at providing patients with support and acceptance and methods that facilitate "identity exploration and development" without attempting to change clients' sexual orientation or gender identity. R. at 4.

Like the exemptions created under the UPDA, the state legislature set out three circumstances where Section 106(d) does not apply, including (1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." *Id.* Through this exemption, the legislature narrowed the reach of the law so that licensed therapists who are not associated with a religious institution and therefore required to adhere to Section 106(d)'s prohibitions are still allowed to engage in speech *and* conduct related to conversion therapy. *Id.* Additionally, because the legislature expressly specified that the statute only applies to speech while a provider is performing conversion therapy on minors,

[1] The definition also includes the broad range of practices known as reparative therapy, which is another name commonly used to describe conversion therapy. *Id.*; R. at 3, n. 2.

therapists are not prohibited from performing conversion therapy on adults nor are they prohibited from expressing their views on the subject to minor patients or the general public. *Id.* Further, the statute does not prohibit a therapist from referring minor patients seeking conversion therapy to providers practicing in another state or those practicing with religious institutions in North Greene so long as they are not performing the therapy on minors themselves. *Id.*

II. Procedural History

Nearly three years after the North Greene General Assembly passed the prohibition on the performance of conversion therapy, Petitioner filed suit against the state in the United States District Court for the Eastern District of North Greene. R. at 5. Petitioner sought to enjoin the enforcement of the Statute on the grounds that it violated his constitutional rights under the Free Speech and Free Exercise Clauses of the First Amendment as well as the constitutional rights of his patients. *Id.* The state of North Greene opposed Petitioner's motion for preliminary injunction and filed a motion to dismiss his complaint. *Id.* The District Court sided with the state denying Petitioner's request for injunctive relief and dismissing his action for failure to state a claim upon which relief could be granted. *Id.* Petitioner then appealed to the United States Court of Appeals for the Fourteenth Circuit. *Id.*

In deciding whether the District Court erred in dismissing Petitioner's claims, the Fourteenth Circuit did not consider the efficacy of conversion therapy and instead limited its focus only to the constitutional questions raised by Petitioner's assertion that Section 106(d) impermissibly infringed on his First Amendment rights. *Id.* The Fourteenth Circuit affirmed the District Court's dismissal, holding that North Greene's licensing scheme for healthcare providers, which prohibits the performance of conversion therapy on minors, did not violate the First Amendment. R. at 3. In considering Petitioner's free speech claim, the Court acknowledged that talk therapy falls on a continuum between speech and conduct but ultimately concluded that

speech in these circumstances fell on the conduct end of the continuum. R. at 6. Thus, any effect the law had on Petitioner's speech was merely incidental and was only subject to a rational basis review, which the law satisfied. R. at 7.

The Court then turned to Petitioner's free exercise claim and considered the text of Section 106(d), the circumstances surrounding its enactment, and its real-world operation. R. at 7-9. The Court concluded that Section 106(d) was a neutral law of general applicability because it targeted the practice of conversion therapy, not the religious exercise of those wishing to perform it on minors, without a mechanism for exceptions and without allowing secular conduct while prohibiting religious conduct. R. at 10. Petitioner then filed a timely appeal with this Court, again challenging the constitutionality of Section 106(d). R. at 17.

SUMMARY OF THE ARGUMENT

Acting within its broad authority to regulate the practice and licensing of health care professionals as part of its "power to protect the public, health, safety, and other valid interests…," the State of North Greene enacted laws prohibiting therapists and counselors operating under a state license from practicing conversion therapy on patients under the age of eighteen. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). N. Greene Stat. § 106(d) targets this specific form of therapy due to its harmful nature, regardless of practitioners' personal religious beliefs.

I. Free Speech Claim

The Fourteenth Circuit correctly held that North Greene's prohibition on the practice of conversion therapy does not infringe on Petitioner's right to free speech under the First Amendment. The Statute regulates the conduct, not the speech, of licensed professionals. The law only targets the performance of conversion therapy on minors. R. at 4. It does not prevent mental health providers from discussing their views on conversion therapy. *Id.* Consequently, the Statute regulates the conduct of psychologists and any effect on their speech is incidental. This Court should, therefore, apply rational basis review to North Greene's regulation of the

treatment of minors. The Statute survives rational basis review because it is rationally related to the legitimate purpose of protecting the physical and psychological well-being of minors.

Even if this Court is not convinced that the North Greene law regulates only conduct, the Statute survives heightened scrutiny. If this Court finds that the Statute does not discriminate on conduct, but has an incidental burden on speech, it should apply intermediate scrutiny. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). If this Court finds that the Statute is a content-based regulation of speech, it should apply strict scrutiny. *See Sable Commc'ns of Cal. v. F.C.C.*, 492 U.S. 115 (1989). The Statute survives both because it is narrowly tailored to achieving a compelling state purpose. This Court has repeatedly held that the protection of the physical and psychological well-being of minors is a compelling purpose. The Statute regulates only the treatment of minors by licensed therapists, which is the least restrictive possibility given the purpose of the Statute. R. at 4. Consequently, the North Greene regulation is narrowly tailored to achieving a compelling purpose and passes heightened scrutiny. Whether this Court determines that the Statute regulates conduct or speech, this Court should affirm the Fourteenth Circuit's holding that the Statute does not violate the Free Speech Clause of the First Amendment.

II. Free Exercise Claim

Petitioner's free exercise claim is also meritless. The Fourteenth Circuit correctly held that N. Greene Stat. § 106(d) is neutral and generally applicable and does not target religious practices. In fact, the law expressly excludes religious practices from its reach by exempting professionals working with religious institutions from the entire Chapter's requirements. Fundamentally, the Statute neutrally regulates only professional practices because it is directed at a therapeutic practice, not a religious rite, and it applies to all health care professionals, no matter their religion or nonreligion, without a mechanism for exceptions and without allowing secular conduct while prohibiting religious conduct.

Additionally, *Employment Division v. Smith* should not be overruled by this Court. *Smith* is rooted in historical support from both the Founders debates and this Court's pre-*Smith*

decisions which applied the language and principles which eventually became the rule set forth in *Smith*. Moreover, because *Smith* positively satisfies the stare decisis factors considered by the Court when deciding whether to overrule precedent, the decision should stand as a matter of law.

ARGUMENT

I. This Court should affirm the Fourteenth Circuit because the North Greene Statute does not violate the Free Speech Clause of the First Amendment.

The Fourteenth Circuit correctly determined that the North Greene Statute did not violate the Free Speech Clause of the First Amendment. First, the Statute is a regulation of professional conduct. This Court has held that a regulation of conduct is subject to rational basis review, even if there is an incidental effect on speech. *Giboney v. Empire Story & Ice Co.*, 336 U.S. 490, 502 (1949); *Planned Parenthood v. Casey*, 505 U.S. 833, 883 (1992). Here, the North Greene law regulates the performance of conversion therapy on patients, which is clearly a course of conduct. R. at 4. Under the Statute, a therapist's freedom to speak to clients about conversion therapy remains intact. *Id.* Thus, the Statute should be reviewed under rational basis review. The regulation of performing conversion therapy on minors is rationally related to the legitimate purpose of protecting the physical and mental well-being of minors.

If this Court finds that the North Greene statute regulates speech and not conduct, the Statute still survives a constitutional challenge because it does not discriminate based on the content or viewpoints expressed by therapists. Content-based discrimination occurs when the government excludes a message based on its ideas or messages conveyed. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The Statute does nothing to exclude any message from the private or public communications of therapists. R. at 4. It merely excludes the performance of conversion therapy minors. *Id.* The Statute does not restrict a therapist’s ability to express ideas to patients, whether they are minors or adults, about the merits of conversion therapy. *Id.* Thus,

this Court should affirm the Fourteenth Circuit's holding that the North Greene Statute does not violate the First Amendment.

Finally, even if the Statute is a content-based regulation of speech, it is narrowly tailored to achieving a compelling purpose. This Court has long held that the protection of minors is a compelling purpose. See *N.Y. v. Ferber*, 458 U.S. 747, 756 (1982). The Statute is narrowly tailored as it only affects the performance of conversion therapy on minors by licensed mental health professionals and maintains a therapist's freedom to discuss and perform conversion therapy in other contexts. R. at 4. As such, this Court should affirm the Fourteenth Circuit's holding that the Statute does not violate the Free Speech Clause even if the regulation is subject to strict scrutiny.

a. The North Greene Statute is a constitutional regulation of professional conduct.

1. This Court should apply rational basis review to the North Greene Statute because the Statute regulates the conduct, not the speech, of state-licensed professionals.

The First Amendment prohibits the government from restricting expression based on its content. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). But this prohibition on content-based speech regulation does not render a state powerless in regulating the conduct of its citizens, even if that conduct incidentally involves speech. See *Giboney v. Empire Story & Ice Co.*, 336 U.S. 490, 502 (1949) ("but 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."); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("it is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing

incidental burdens on speech."). In fact, this Court has held that a state regulation of conduct that incidentally burdens speech is subject to rational basis review. *Sorrell*, 564 U.S. at 567 (2011).

The state's power to regulate conduct is particularly important when such conduct is carried out by licensed professionals, whose licenses act as a stamp of approval by the state. When licensed individuals engage in the practice of their profession, especially in the medical professions, their patients place their health and well being in the hands of the professional treating them. *See Watson v. State of Md*., 218 U.S. 173, 176 (1910). As such, "the State bears a special responsibility for maintaining standards among members of licensed professions." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 469 (1978). That responsibility should not subside merely because speech is incidentally involved. *See Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) ("[t]he power of the government to regulate the professions is not lost whenever the practice of a profession entails speech.").

This Court has twice held that a state may regulate the conduct of licensed professionals without being subject to strict scrutiny, even if that conduct is carried out through speech. *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (overturned on other grounds); *Ohralik*, 436 U.S. at 456–57. First, in *Ohralik*, this Court held that the state is permitted to discipline lawyers for the in-person solicitation of clients, and such regulation is subject to a lower level of scrutiny. *Id.* at 456. The Court recognized that while regulating the solicitation of clients necessarily regulated speech, the transaction was best characterized as a business transaction with a subordinate speech component. *Id*.

Second, in *Planned Parenthood v. Casey*, this Court held that a state law requiring physicians to receive signed consent from their patients before performing an abortion did not offend the First Amendment. 505 U.S. at 887. In *Casey*, this Court recognized that while the

physicians' speech implicated the First Amendment, such speech was only implicated "as part of the practice of medicine, subject to reasonable regulation by the state." *Id.* at 884.

Following this precedent, the Ninth Circuit in *Pickup v. Brown* characterized a law subjecting licensed mental health providers to discipline for performing conversion therapy on minors as conduct rather than speech. 740 F.3d 1208, 1231 (9th Cir. 2013).[2] Central to this characterization was the fact that the bill only regulated the treatment of minor clients and not the therapists' ability to communicate with the public or even their clients about the merits of conversion therapy. *Id.* As such, the court applied rational basis review to the state's regulation of conduct and held that the Statute did not violate the First Amendment. *Id.*

In contrast, this Court has held that a California law requiring pro-life health clinics to notify their patients of the availability of state-administered free or low-cost abortions was an unconstitutional regulation of speech, rather than conduct. *Nat'l Inst. of Family Life Advoc. v. Becerra* (*NIFLA*), 138 S.Ct. 2361, 2373 (2018). The Court reasoned that the notices required under the law were unrelated to medical procedures or treatments of a patient. *Id.* at 2373–74. Accordingly, this Court held that the law was an unjustified content-based regulation of speech rather than a regulation of professional conduct. *Id.* at 2371. The Court in *NIFLA*, however, reiterated that the state may regulate conduct, even if the regulation has an incidental effect on speech. *Id.* at 2361.

[2] The respondents recognize that the Eleventh Circuit declined to follow *Pickup* in *Otto v. City of Boca Raton, Fl.*, 981 F.3d 854 (11th Cir. 2020). While the law at issue in *Otto* restricted the performance of conversion therapy, those laws were local county and city ordinances that did not relate to the regulation of the conduct of licensed professionals. *Id.* at 854. Further, the Eleventh Circuit has since affirmed a licensing scheme regulating the conduct of licensed dietician professionals. *See Del Castillo v. Sec'y, Fl. Dep't of Health*, 26 F.4th 1214 (11th Cir. 2022). *Otto* is thus distinguishable from the case at hand.

Unlike the law at issue in *NIFLA*, the North Greene Statute regulates the conduct, not the speech, of licensed mental health professionals. The relevant portions of the Statute impose a discipline on mental health professionals for only one course of action: "*performing* conversion therapy on a patient under the age eighteen." N. Greene Stat. § 106(d) (emphasis added); R. at 4. The Statute does not prevent licensed mental health professionals from: 1) Discussing their personal views regarding conversion therapy and gender identity with patients (minor or otherwise); 2) Practicing conversion therapy on patients over the age of 18; 3) Referring minors to counselors who are permitted to practice conversion therapy for treatment; 4) Discussing conversion therapy with the general public; or 5) Performing conversion therapy under the auspices of a religious organization. N. Greene Stat. § 106(e)(1)–(2); R. at 4. Like the laws at issue in *Casey* and *Pickup*, the Statute only affects speech that is necessary for the treatment of patients. *Id.*

The Statute defines conversion therapy as "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." N. Greene Stat. § 106(d)(1); R. at 4. Of course, such efforts must necessarily be carried out through speech. But to treat talk therapy as distinct from other professional modes of treatment would ignore this Court's longstanding practice of regulating the speech of medical professionals during the treatment of their patients. *NIFLA*, 138 S.Ct. at 2373 ("longstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct'") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). For example, doctors must speak or refrain from speaking to comply with informed consent laws. This Court characterized informed consent laws as conduct regulations with an incidental burden on speech. *Casey*, 505 U.S. at 883. Similarly, the Statute regulates only the

treatment of patients, which is conduct. R. at 4. Any burden on speech is incidental to the Statute's regulation of conduct. As such, this Court should review the Statute under rational basis review.[3]

2. The North Greene Statue is rationally related to a legitimate government purpose.

When undergoing rational basis review, this Court must uphold the Statute if it is rationally related to a legitimate government purpose. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2284 (2022). Laws relating to health and welfare have a "strong presumption of validity." *Id.* at 2284 (Quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Thus, a law regulating the conduct of licensed professionals should be upheld unless there is no rational basis "on which the legislature could have thought that it would serve a legitimate purpose." *Id.* This Court has not disputed that protecting minors is a legitimate–and even compelling–purpose. *Ferber*, 458 U.S. at 756. Thus, a statute that is rationally related to the physical and psychological well-being of a minor, such as the Statute at issue today, will survive rational basis review.

The North Greene General Assembly's stated purpose is to promote the physical and psychological well-being of its youth. R. at 4. Specifically, the General Assembly enacted the statute to protect its youth from "serious harms caused by conversion therapy." *Id.* To achieve this purpose, the General Assembly sought the ability to impose discipline on licensed therapists who perform conversion therapy on minors. *Id.* The Statute's prohibition of performing

[3] Applying rational basis review is not contrary this Court's holding in *Holder v. Humanitarian Law Project*, as that case is distinguishable from the present case. 561 U.S. 1 (2010). In *Humanitarian Law*, this Court held that although a federal statute preventing the provision of support materials to terrorist organizations regulated conduct, the statute was still subject to strict scrutiny. Id. at 27. This Court reasoned that the statute was a prohibition on expressive conduct, which is afforded heightened scrutiny under the First Amendment. Id. at 27 (relying on *Texas v. Johnson*, 491 U.S. 397 (1989).) The North Greene Statute does not regulate expression because it allows licensed mental health professions to share their views on conversion therapy. R. at 4. It merely prohibits the treatment of minors using conversion therapy. R. at 4.

conversion therapy on minors is rationally related to achieving its purpose of protecting minors. As such, this Court should affirm the Fourteenth Circuit's holding that the North Greene Statute is a constitutional regulation of conduct.

b. Even if the North Greene Statute regulates speech, it is not a content-based regulation of speech.

If this Court finds that the North Greene Statute is a regulation of speech rather than conduct, it should apply intermediate scrutiny because the Statute is not a content-based regulation of speech. The Court reviews content-based regulations of speech under the lens of strict scrutiny. *Police Dep't of Chicago v. Mosely*, 408 U.S. 92, 96 (1972). Content-based restrictions are those that exclude speech based on the idea or message expressed. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Such laws are presumptively unconstitutional. *Id.* at 382.

In contrast, regulations of speech that are unrelated to the message's content are reviewed using intermediate scrutiny. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). A regulation of speech survives intermediate scrutiny if it is "narrowly tailored to serve a significant government interest, and... leave[s] open ample alternative channels for the communication of the information." *Clarke v. Cmty. For Creative Non-violence*, 468 U.S. 288, 293 (1984). As this Court has written, laws that impose incidental burdens on speech are "in most instances content-neutral." *Id.* at 643. This principle was reiterated by the United States District Court for the District of Maryland in *Doyle v. Hogan*. 411 F.Supp.3d 337 (D. Md. 2019) (vacated on other grounds). In *Doyle*, the court applied intermediate scrutiny to a law restricting mental health care practitioners from engaging in conversion therapy with minors. *Id.* at 346. *Doyle's* decision to apply intermediate scrutiny relied on Fourth Circuit precedent applying intermediate scrutiny to conduct regulations that had an incidental effect on speech. *See Cap.*

Assoc. Indus., Inc. v. Stein, 922 F.3d 198 (4th Cir 2019). Thus, if this Court is inclined to apply heightened scrutiny to the North Greene Statute, intermediate scrutiny is the proper standard.

The North Greene statute does not discriminate based on conduct, and any effect the Statute has on speech is incidental. The Statute does not prohibit the Petitioner from discussing conversion therapy with his clients, regardless of their age. R. at 4. It merely prohibits the treatment of minors using conversion therapy. *Id.* The Statute does not "suppress unpopular ideas" or "manipulate the public debate." *Turner*, 512 U.S. at 641. In fact, the Statute makes clear that mental health providers in North Greene are free to discuss their views on conversion therapy with their patients or the general public. R. at 4. Further, the North Greene law does not regulate religious-based organizations. *Id.* As such, the Statute has no impact on a psychiatrist's ability to express messages concerning the validity of conversion therapy with their patients. *Id.* Thus, the North Greene law is not a content-based regulation of speech. Accordingly, if this Court is inclined to characterize North Greene's statute as a regulation of speech rather than conduct, it should apply intermediate scrutiny as this is not a content-based regulation.

The North Greene statute passes intermediate scrutiny because it serves a legitimate government interest that is narrowly tailored to serve that interest. As stated above, this Court has recognized that the protection of minors is a legitimate government interest. *Ferber*, 458 US at 756. To protect minors, North Greene restricted therapists from performing conversion therapy on individuals under the age of eighteen. R. at 4. This restriction is narrowly tailored as it is the least restrictive alternative to achieving the state's purpose. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968). Finally, the Statute provides therapists with "ample alternatives" to communicate about conversion therapy with their patients. *Clarke*, 468 U.S. at 293; R. at 4. Therapists remain free to discuss conversion therapy with their minor patients, adult patients, and the general public. *Id.*

They are also free to perform conversion therapy on adult patients. R. at 4. he only restriction is performing conversion therapy on minors, which is legitimately related to the protection of minors. *Id.* Consequently, even if the Court finds that the North Green statute is a regulation of conduct, the Court should uphold the Statute because it is a content-neutral regulation that passes intermediate scrutiny.

c. The North Greene Statute survives even the strictest level of scrutiny because it is narrowly tailored to achieving a compelling government interest.

The North Green statute passes even the strictest of scrutiny levels because it is narrowly tailored to achieving a compelling government interest. *See Sable Commc'ns of Cal. V. F.C.C.*, 492 U.S. 115 (1989). The North Greene General Assembly found that there was 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. The legislature's determination that the protection of minors is a compelling purpose aligns with this Court's decisions finding a compelling purpose of protecting minors. *Ferber*, 458 US at 756 ("[the Supreme Court has] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights"); *Sable*, 492 U.S. at 126 ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) ("the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one."). This Court has also found that the states have a compelling interest in the practice of professions within their boundaries. See *Fl. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) ("'states have a compelling interest in the practice of

professions within their boundaries.'") (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)).

Further, the North Greene statute is narrowly tailored to achieving its compelling purpose because it is no more restrictive than necessary. The only restriction in the Statute is a prohibition on performing conversion therapy on minors, which the General Assembly found exposed minors to "serious harm." R. at 4. The Statute does not prevent psychologists from discussing, or even performing, conversion therapy in other contexts. *Id.* For example, the Statute does nothing to prohibit a counselor from performing conversion therapy on a minor while "work[ing] under the auspices of a religious denomination, church, or religious organization." *Id.* Moreover, licensed healthcare providers in North Greene are in no way inhibited from referring a patient to a licensed therapist who practices in another state. *Id.* Because the Statute only prevents the performance of conversion therapy on minors, and only applies to licensed mental health professionals, the Statute is narrowly tailored. As such, even if this Court finds that North Greene's Statute discriminates based on the content of speech, it should still affirm the Fourteenth Circuit's holding because the Statute is narrowly tailored to achieving a compelling government purpose.

II. Petitioner's Free Exercise claim fails because N. Greene Stat § 106(d) is neutral and generally applicable to all licensed therapists and survives rational basis review.

N. Greene Stat. § 106(d) is a neutral law of general applicability rationally related to a legitimate government interest, and the Fourteenth Circuit correctly affirmed the dismissal of Petitioner's free exercise claim. Under the Free Exercise Clause of the First Amendment, States are prohibited from enacting laws that prohibit a person's free exercise of their chosen religion. U.S. CONST. amend. I; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, the Free Exercise clause 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) (*"Employment Division v. Smith*") (quoting *U.S. v. Lee*, 455 U.S. 252, 263 n. 3 (1982)). When a law is determined to be neutral and generally applicable, alleged free exercise violations are analyzed under a rational basis test, which requires only that the law be rationally related to a legitimate government interest. *Stormans, Inc., v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). Thus, a neutral and generally applicable law "need not be justified by a compelling interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531. Because the Statute is neutral and generally applicable with, if anything, an incidental burden on religious practice, this Court need only conduct a rational basis review.

a. The North Greene Statute is facially and operationally neutral.

The text, history, and operation of N. Greene Stat. § 106(d) all conclusively point to its neutrality. A law is not neutral if it was created with the objective of infringing upon or otherwise restricting certain practices merely because they are religiously motivated. *Lukumi*, 508 U.S. at 533. Neutrality can be determined by examining a statute's text for references to religious practice without a "secular meaning discernible from the language or context." *Id.* The North Greene statute passes this test and is neutral on its face because it makes no reference to religion or religious practice, except to provide an exemption for therapists and counselors "work[ing] under the auspices of a religious denomination, church, or religious organization." R. at 4. The exemption for religious-affiliated counseling is exactly the kind of mindfulness towards religion that shows the law was intended to be neutral. Therefore, the exemption for religious counselors supports the conclusion that the legislature intended only to regulate licensed health care providers engaging in conduct deemed dangerous to its community. R. at 8.

The exemption provided in N. Greene Stat. § 106(f) is similar to the exception created by the Colorado legislature when it passed the Minor Therapy Conversion Law prohibiting mental health professionals from practicing conversion therapy on minors identifying as gay, lesbian, bisexual, transgender, or gender non-conforming. Colo. Rev. Stat. Ann. § 12-245-217 (West); *Chiles v. Salazar*, No. 1:22-cv-02287, 2022 WL 17770837, at *1 (D. Colo. Dec. 19, 2022). The Mental Health Practice Act, of which the Colorado law is a part, contains an express exemption for "a person engaged in the practice of religious ministry" who does not hold themselves out publicly as a licensed professional. Colo. Rev. Stat. Ann. § 12-245-217(1). Like the Colorado exemption, N. Greene Stat. § 106(f) gives health care professionals a choice: provide services akin to conversion therapy through a religious institution or practice under a state-issued license and refrain from performing conversion therapy on minors. R. at 4. Petitioner cannot have it both ways. In sum, and contrary to his assertions, the North Greene statute, on its face, only forbids Petitioner from practicing conversion therapy in his capacity as a licensed health care professional.

Nevertheless, this Court, in *Lukumi*, provided that the neutrality inquiry must not end with the text but go on to uncover any "'subtle departures from neutrality.'" 508 U.S. at 534 (quoting *Gillette v. U.S.*, 401 U.S. 437, 452 (1971)). The inquiry into the subtleties of a law's neutrality is achieved by analyzing the "circumstances of the law's enactment," which includes the legislative history, background, and any events that preceded the legislation. *Id.* at 540. The context and legislative history of the Statute do not demonstrate any intent to suppress religious beliefs or practices. See *Lukumi*, 508 U.S. at 534-40. Contrary to Petitioner's assertion, the statute's neutral, secular purpose is obvious: the legislature enacted § 106(d) based on evidence that conversion therapy is wholly ineffective and harmful to minors. R. at 4.

Further, Petitioner makes no allegation that even remotely shows that the legislature targeted religious practices through the enactment of the Statute. Petitioner urges this Court to find a lack of neutrality by analogizing individual comments made by North Greene legislators to this Court's decision in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n.*, 138 S.Ct. 1719 (2018). However, as the court below correctly noted, these comments do not rise to the level of hostility and religiously motivated animus that were present in *Masterpiece*. R. at 9.

In that case, this Court concluded that comments made by members of the Commission were "inappropriate" and a violation of "the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece*, 138 S.Ct. at 1731. There, members of the Commission criticized the baker for injecting his religious beliefs into his business practices and for using his religion to "justify" his alleged discrimination of same-sex couples. *Id.* at 1729. Shockingly, one commissioner even described the baker's religious beliefs as "one of the most despicable pieces of rhetoric that people can use," before comparing his beliefs to those used to defended slavery and the Holocaust. *Id.*

Petitioner's assertion that the comments of North Greene Senators are anything close to the misconduct that occurred in *Masterpiece* is both unfounded and completely at odds with the record and the truth. For example, Senator Floyd Lawson said that *his* reason for sponsoring the bill was to end the "barbaric practices," like electroshock therapy, associated with conversion therapy that he was made aware of through his constituents. R. at 9. Petitioner cannot conflate this statement to show a hostility toward religion. Another Senator whose own daughter is gay shared that he was told by a friend with experience on the subject that conversion therapy was dangerous and ineffective. *Id.* Moreover, that Senator went on to discuss his own religious beliefs and recognized the dilemma that some of his religious colleagues may face when

deciding whether to support the bill. *Id.* These were not comments about any specific person or specific case. Thus, the precedent to follow is that which has repeatedly cautioned against the weight of arguments relying on the statements of legislators or their motivations for enacting a certain statute. See *Dobbs,* 142 S.Ct. at 2256 (quoting *O'Brien*, 391 U.S. at 383).

Finally, a law's neutrality can be determined by examining its real-world operation. *Lukumi*, 508 U.S. at 535. If a law, by its design, works to target religious conduct, its neutrality fails. *Cross Culture Christian Cent. v. Newsom*, 445 F.Supp.3d 758, 769 (E.D. CA 2020) (citing *Lukumi*, 508 U.S. at 535). N. Greene Stat. § 106(d) is operationally neutral because it applies to all licensed therapists, regardless of religion or nonreligion.

The North Greene statute is analogous to the rules challenged in *Stormans v. Wiesman*, 794 F.3d 1064 (2015) (*Stormans II*). In *Stormans II*, pharmacists and a pharmacy owner challenged two administrative rules regulating the conduct of individual pharmacists and requiring pharmacies to deliver "lawfully prescribed" medications to customers. *Id.* at 1072. They objected on religious grounds to providing emergency contraceptive medications. *Id.* at 1073. Both rules were upheld because they prescribed and proscribed the same conduct for all pharmacists and for all pharmacies to ensure customers received safe and timely access to prescribed medications. *Id.* at 1077. Like the rules in *Stormans II,* the Statute here proscribes the same conduct–the performance of conversion therapy–for all health care professionals licensed to practice in the state. R. at 4. Further, like the protections behind the administrative rules in *Stormans II,* § 106(d) seeks to protect the physical and psychological well-being of minor patients, regardless of whether the conversion therapy is religiously motivated. R. at 4.

The circumstances of this case are distinguishable from those of *Lukumi*. There, members of the Santeria religion challenged the neutrality of city ordinances restricting the slaughter of

animals. 508 U.S. at 524-25. Because ritualistic animal sacrifices are a prescribed form of devotion for Santeria followers, members claimed the ordinances targeted their religious practice. *Id.* This Court agreed, holding that because the ordinance, in practice, only prohibited the sacrificial slaughter of animals by Santeria followers, it was not operationally neutral. *Id* at 536. However, in this case and contrary to Petitioner's assertion that conversion therapy is usually sought for religious reasons and provided by practitioners of the Christian faith, the legislative history and evidence presented before the North Greene legislature show that conversion therapy is sought for both religious and nonreligious reasons. R. at 9. Thus, the Statute operates to prohibit conversion therapy on minors regardless of whether those patients seek it for religious or nonreligious reasons. *Id.*

In sum, the Statute satisfies all inquiries into its neutrality. The text of the law is devoid of any reference to religion or religious conduct, therefore making it neutral on its face. Further, the circumstances surrounding its enactment and the exemption for religious counseling show it was created, not to target religious practices, but to protect the children of North Greene. Finally, the actual operation of the law prohibits "the same conduct … for all" regardless of religious motivation. *Stormans II*, 794 F.3d at 1077.

b. N. Greene Stat § 106(d) is general applicable to all licensed therapists.

The Statute in this case satisfies the requirement that a law purportedly burdensome to religious exercise must be generally applicable to all people. The determination of general applicability simply asks whether the law provides for unequal treatment of religious observers. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020). This Court's decision in *Fulton v. City of Philadelphia* established two ways that a law is generally applicable. 141 S.Ct. 1868, 1877 (2021). First, a law is generally applicable if it does not provide "'a mechanism for individualized exemptions'" that would give the government the opportunity to evaluate the

specific reasons behind a person's conduct. *Id.* (quoting *Employment Division v. Smith*, 494 U.S. at 884). Second, a law is generally applicable if it does not prohibit certain religious conduct without prohibiting similar secular conduct that would impede the same interests the government puts forth as a justification for regulating the religious conduct. *Id.* It follows that if the pursuit of the government interest is targeted "'only against conduct motivated by religious belief' but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest," then the law fails to satisfy the general applicability requirement. *Storman's II*, 794 F.3d at 1017 (quoting *Lukumi*, 508 U.S. at 545).

Petitioner has failed to present a valid argument, much less a convincing one, that the law is not generally applicable due to a mechanism for exceptions. While the Statute clearly does not contain a formal discretionary-based system for individual exceptions, Petitioner argues that the statute contains "vague terms" that could lead to a system of exceptions. R. at 10. Petitioner's argument ignores that fact that North Greene's statute does not contain any provisions that could be interpreted as individualized exceptions, and it does not give the State any discretion in enforcing the Uniform Professional Disciplinary Act. For any person to be in violation of the statute, they must be (1) a healthcare provider (2) that is licensed in the State of North Greene (3) who performs "conversion therapy on a patient under the age of eighteen." R. at 4. There is no case-by-case exception for determining which professionals will be subject to discipline for performing conversion therapy, and certainly nothing that allows the State to analyze whether there were religious motivations by those professionals.

This Court stated in *Lukumi* that "[a]ll laws are selective to some extent, but categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice," and that "inequality results when…the government interests [the legislature] seeks to

advance are worthy of being pursued only against conduct with a religious motivation." 508 U.S. at 542–543. North Greene's law does not even mention religion whatsoever. On the contrary, the North Greene legislature went so far as to explicitly exclude "[t]herapists, counselors, and social workers who 'work under the auspices of a religious denomination, church, or religious organization'" from any of Chapter 45's requirements to protect its citizens' the religious freedoms. R. at 4 (quoting North Greene Stat. § 111). The law not only survives general applicability with respect to being free from individualized exceptions but goes a step further to protect the religious beliefs of individuals whose work is foundationally planted in religion by fully exempting them from the Chapter's requirements.

For similar reasons, the North Greene law also passes the second test for general applicability because it does not consider secular conduct in a light more favorable than that of religiously motivated conduct. In *Tandon v. Newsom*, this Court held that a California law regulating the number of households that could gather at one time was not generally applicable because it allowed comparable secular activities, like gatherings at hair salons and movie theaters, to bring together more than three households at a time. 141 S.Ct. 1294, 1297 (2021). This Court also stated that the determination of "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Id.* at 1296. This is accomplished by analyzing the risks the activities present in undermining the government's interest, not the reasons for participating in such activities. *Id.*

In this case, the North Greene law was created to "regulate 'the professional conduct of licensed health care providers." R. at 4. Adopting the position of the American Psychological Association, the North Greene legislature found a compelling interest in "protecting the physical

and psychological well-being of minors," particularly those in the LGBTQ+ community, from "exposure to serious harms caused by conversion therapy." *Id.* The legislature determined that this goal was best accomplished by deeming conversion therapy on minors unprofessional conduct, regardless of whether a particular professional is motivated by religious convictions.

Contrary to Petitioner's assertion, the exemption for those working under the "auspices of a religious denomination, church, or religious organization," lends more to the conclusion that North Greene is not treating any comparable secular activity more favorably than a religious activity. *Id.* In fact, the exemption ensures religious exercise is protected by limiting the regulation of professional conduct to only that of therapists practicing in a secular context. This points to only one logical conclusion–the North Greene law is generally applicable to all who practice under a North Greene healthcare license, regardless of their religious motivations or beliefs.

c. Because this law is neutral and generally applicable, rational basis review must be applied.

Under rational basis review, this Court must uphold the North Greene law if it is rationally related to a legitimate government purpose. *Stormans II*, 794 F.3d at 1084. The Petitioner carries the burden of "'negat[ing] every conceivable basis which might support [the law]." *Id.* Petitioner failed to do so in the lower courts and will be similarly unable to do so here.

The North Greene General Assembly is wholly within its prerogative to regulate the conduct of professionals by prohibiting them from engaging in certain conduct that threatens the health and welfare of its citizens, and particularly, its children. Recently, the United States District Court of Colorado found that the State had a "legitimate and important" interest in protecting minors from "harmful therapy known to increase suicidality." *Chiles*, 2022 WL 17770837, at *9; *see also Tingley v. Ferguson*, 47 F.4th 1055, 1078 (11th Cir. 2022) (finding the state's interest

was "without a doubt" legitimate when it sought to protect minors from harms caused by conversion therapy). Indeed, research has shown that therapy involving sexual orientation change efforts is correlated with the dramatic increase in suicide attempts by LGBTQ+ youths. *See Otto v. City of Boca Raton, Fl.*, 41 F.4th 1271, 1286 (11th Cir. 2022) (Rosenbaum, J., dissenting). There is no question that protecting the lives of North Greene's children from the physical and psychological harms associated with conversion therapy is a legitimate, if not compelling, state interest.

The Statute also rationally serves the state's important interests. Like the states in *Tingley* and *Chiles*, North Greene acted "rationally" in deciding to "protect the physical and psychological well-being of its minors by preventing state-licensed health care providers from practicing conversion therapy on them." *Chiles*, 2022 WL 17770837, at *9 (quoting *Tingley*, 47 F.4th at 1078). Additionally, the fact that the law only prohibits the practice of conversion therapy on minors further supports the conclusion that the law rationally serves the state's interest. Therefore, the law rationally serves North Greene's legitimate, if not compelling, interest in protecting the health and welfare of minor LGBTQ+ children by only regulating professionals acting under state-issued licenses and by deeming their practice of conversion therapy on minors unprofessional.

III. *Employment Division v. Smith* is valid legal precedent for Free Exercise claims and should not be overruled.

Petitioner urges this Court to reexamine and ultimately overturn *Employment Division v. Smith* and more than thirty years of precedent established under its principles. 494 U.S. 872. The dissenting opinion of the Fourteenth Circuit in *Sprague v. North Greene* also called for the end of *Smith,* arguing that "[b]ecause there is no historical analogue of censoring religious counseling...the Supreme Court [should] overrule *Smith* and restore a historically based standard

that genuinely protects religious exercise." 2023 WL 12345, at *16 (14th Cir. 2023). The reality is that the legislative and judicial histories of the First Amendment and well-established principles of stare decisis support *Smith* being upheld by this Court. To hold otherwise would not only offend history dating back to our nation's founding era, but also years of this Court's precedent established well before *Smith's* existence.

a. History from both the Founding Fathers and this Court's pre-*Smith* cases support the rule that neutral and generally applicable laws are valid.

Criticisms from the Fourteenth Circuit's dissenting opinion largely relied on the notion that there was a lack of historical evidence to support the analysis explained in *Smith*. However, that position is misplaced, and the historical evidence shows that even the Founding Fathers knew that the free exercise clause was not meant to override laws protecting the general public. As early as 1789, several state constitutions contained their own versions of a free exercise clause, showing how important the preservation of that right was to the earliest Americans. See Br. of First Amend. Scholars as Amici Curiae in Supp. of Resp't at 6, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (No. 19-123). Interestingly, though, these early state constitutions also contained caveats to the protection of free exercise which "reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions." *Id.* Many of these constitutions emphasized that religious exercise could not be used in ways which disturbed the peace or safety of the public.[4] Even as the issue was debated by the First Congress who discussed the idea of creating religious exemptions from some laws, there was

[4] Interestingly, Professor Philip Hamburger points out that, at the time, "peace" in the legal sense was widely encompassing and that, "every breach of law is against the peace." Philip A. Hamburger, Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. rev. 915, 918 (April, 1992) (quoting Queen v. Lane, 87 Eng. Rep. 884 (Q.B. 1704)).

never any suggestion that "the Free Exercise Clause itself would require [religious] exemptions," and "the legislative history...contains no persuasive evidence that it was understood to mandate religious exemptions from generally applicable laws." Steven J. Heyman, *Reason and Conviction: Natural Rights, Natural Religion, and the Origins of the Free Exercise Clause*, 23 U. Pa. J. Const. L. 1, 115 (2021). As such, our nation's early history fails to suggest that the Free Exercise Clause was meant to reach so far as to allow individuals with certain religious convictions to violate laws which are otherwise neutral and generally applicable to all people.

1. This Court consistently held that neutral and generally applicable laws did not violate the Free Exercise Clause before *Smith* was decided.

Contrary to Petitioner's understanding of the law, and perhaps that of the Fourteenth Circuit's dissent in this case, the holding in *Smith* did not re-invent the structure of free exercise jurisprudence, nor did it undermine the protection afforded by the Constitution. For example, in 1878, this Court held that conduct performed in violation of a generally applicable state law was not excusable by asserting that the person's religious beliefs motivated their behavior. *Reynolds v. U.S.*, 98 U.S. 145, 166–67 (1878). The Court upheld a law banning polygamist marriages, despite the defendant's claim that his right to exercise his religion freely had been violated. *Id.* The Court stated that permitting a person to excuse his illegal practices because of his religious belief "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." *Id.* at 167.

Nearly sixty years later, this Court upheld child labor laws against a mother who claimed a religious exception because she wanted her child to be able to sell religious magazines on the street, which violated the child labor laws in Massachusetts. *Prince v. Mass.*, 321 U.S. 158, 168–69 (1944). The Court noted that religious rights are not "beyond limitation" and that "legislation appropriately designed to reach [that] evil[] is within a state's police power," even when such

legislation is against the parents claim, "that religious scruples dictate contrary action." *Id.* In *Gillette v. U.S.*, the Court upheld the Selective Service registration, even though there were individuals whose religious beliefs prohibited them from adhering to acts of war. 401 U.S. at 449–50. The Court held that the conscription laws applied generally to all people, were not created to interfere with religion, and did not produce a "penalty against any theological position." *Id.* at 462. Putting into words the doctrine that *Smith* would eventually articulate, the Court held that when the government's regulations creep into the "sphere" of religion, they must be "secular in purpose, evenhanded in operation, and neutral in primary impact." *Id.* at 450.

Despite the absence of a case clearly holding this line of logic to be rule of law, this Court continued to consistently decide cases on the reasoning that provided the foundation for *Smith's* holding. See *U.S. v. Lee*, 455 U.S. 252, 258–60 (1982) (denying an Amish person's requested exemption from social security taxes due to concern that religious exceptions would undermine this neutral law and others like it); *Tony and Susan Alamo Found. V. Sec'y of Labor*, 471 U.S. 290, 303–06 (1985) (upholding application of Fair Labor Standards Act to religious foundation against the claims that the imposed minimum wage and recordkeeping requirements violated the Free Exercise Clause). Then, only four years before *Smith* was decided, this Court held that, without evidence that the government intended to discriminate against religious beliefs, a state need only show that the law is "neutral and uniform in its application" and that it is "a reasonable means of promoting a legitimate public interest." *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986).

b. The principles of stare decisis further support *Smith* being affirmed by this Court.

As the Chief Justice wrote in his concurring opinion in *June Medical Services LLC v. Russo*, "Respect for precedent '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." 140 S. Ct. 2103, 2134 (2020) (concurring) (quoting *Payne v. Tenn.*, 501 U.S. 808, 827 (1991)). It has been the position of this Court that, while stare decisis is not "an inexorable command," any divergence from precedent has taken place for "articulable reasons, and only when the Court has felt obligated to bring its opinions into agreement with experience and with facts newly ascertained." *Vasquez v. Hillery*, 474 U.S. 254, 265–66 (1986). The four traditional factors considered by the Court are: (1) the quality of the reasoning used in the decision; (2) its consistency with other related decisions; (3) legal developments since the decision; and (4) reliance on the decision. *Ramos v. La.*, 140 S. Ct. 1390, 1405 (2020).

Smith survives under all of these factors. The quality of the reasoning is strong because that reasoning itself was founded on over 100 years of legal precedent in cases involving claims of free exercise violations. It is consistent with related decisions, most notably those involving determinations of the constitutionality of commercial speech regulations. Whereas, under those cases, the Court must determine (1) whether the speech was commercial or political and (2) whether the law was content or viewpoint neutral before applying rational basis, *Smith* directs the Court to determine (1) whether the law was facially and operationally neutral and (2) whether it was a law of general applicability before applying rational basis. The tiered approach of the steps to take before applying rational basis review show that the two areas of First Amendment jurisprudence take the same cautionary steps in arriving at which level of scrutiny to apply to a given situation. The legal developments since *Smith* give further support to upholding that decision. Following the Court's ruling in *Smith*, Congress enacted a statute giving more religious protections to those incarcerated in a government institution and on regulations of land use by

religiously affiliated persons or groups. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* (2000). Keeping within its legislative powers to impose this provision on the states, Congress chose to extend more religious protections than that which is constitutionally required, but that does not reach the level which Petitioner's seek.[5] Finally, the case law following *Smith* shows that it has been relied on greatly to decide issues involving the free exercise of religion and overruling it would create chaos and confusion for the applicability of decisions in both the pre- and post-Smith eras.

CONCLUSION

Because the Fourteenth Circuit correctly determined that N. Greene Stat. § 106(d) does not violate the Free Speech or Free Exercise Clauses, the State of North Greene respectfully asks this Court to affirm the dismissal of Petitioner's constitutional claims.

[5] In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) in response to this Court's decision in *Smith*. The RFRA prohibited the federal or state governments from "substantially burden[ing]" any person's free exercise of religion unless it proves that the burden "is in furtherance of a compelling governmental interest; and [] is the least restrictive means of furthering that interest." 42 U.S.C. § 2000bb–1. This Court held, in *City of Boerne v. Flores*, that the RFRA exceeded Congress' power under the Fourteenth Amendment and noted that Congress has the power to enforce constitutional rights, but not by "changing what the right is." 521 U.S. 507, 508 (1997). As such, RLUIPA was enacted under the Spending and Commerce Clauses and provided heightened religious protections for individuals and claims within its authority to reach. *See Holt v. Hobbs*, 574 U.S. 352, 357 (2015) (discussing the history of both statutes and the Court's interpretation thereof).