ELON UNIVERSITY SCHOOL OF LAW
BILLINGS, EXUM & FRYE NATIONAL MOOT COURT COMPETITION
FALL 2023 PROBLEM

No. 23-2020

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

RECORD ON APPEAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

_____

No. 22-1023

_____

HOWARD SPRAGUE,

Plaintiff-Petitioner,

v.

STATE OF NORTH GREENE,

Defendant-Respondent.

Argued August 1, 2022
Decided January 15, 2023

_____

Appeal from the United States District Court
for the Eastern District of North Greene

_____

Before GRIFFITH, KNOTTS, and HOWARD, Circuit Judges.

HOWARD, Circuit Judge, delivered the opinion of the Court.

Plaintiff Howard Sprague appeals from the District Court's entry of judgment for the Defendant State of North Greene ("the State"), following the denial of Plaintiff's motion for preliminary injunction and the grant of the State's motion to dismiss for failure to state a claim. Plaintiff brought action against the State alleging that the North Greene law prohibiting the practice of conversion therapy on minors by licensed providers violated his free speech and free exercise rights under the First Amendment of the United States Constitution.

We affirm the District Court's judgment and hold that the State of North Greene's licensing scheme for health care providers, which disciplines them for practicing conversion therapy, including talk therapy, on minors, does not violate the First Amendment.

BACKGROUND

Sprague has worked as a licensed family therapist for more than twenty-five years, helping clients with various issues, including sexuality and gender identity. Although he does not work for a religious institution, he professes to be a deeply religious person whose work is influenced and informed by his Christian beliefs and viewpoint. Sprague explains that he grounds human identity in God's design, believing that the sex each person is assigned at birth is "a gift from God" that should not be changed and supersedes an individual's feelings, decisions, or wishes. Sprague also believes that sexual relationships are beautiful and healthy, but only if they occur between a man and a woman committed to one another through marriage. Sprague notes that many of his clients share his religious viewpoints and seek his assistance specifically because he holds himself out as a Christian provider of family therapy services.[1]

The State of North Greene has enacted laws prohibiting health care providers operating under a state license from practicing any form of conversion therapy[2] on children. Sprague's appeal concerns North Greene's law that subjects licensed health care providers to discipline if they practice conversion therapy involving only spoken or written words on patients under 18 years of age.[3]

The State of North Greene requires health care providers to be licensed before they may practice in North Greene. *See* N. Greene Stat. § 105(a). Title 23 of the North Greene General Statutes regulates business and professions, and Chapter 45 of Title 23, North Greene's "Uniform

[1] The parties have stipulated, and we agree with the District Court, that Plaintiff has standing to pursue this constitutional challenge. [NOTE: Standing is not an issue on this appeal and should not be the subject of briefing or oral argument by the parties, though parties should be prepared to answer questions related to standing that the judges might raise in oral argument.]

[2] Conversion therapy encompasses therapeutic practices and psychological interventions that seek to change a person's sexual orientation or gender identity. Within the field of psychology, conversion therapy is also known as "reparative therapy" or "sexual orientation and gender identity change efforts" ("SOGICE"). Because the text of the North Greene law uses "conversion therapy," that is the term used in this opinion.

[3] Sprague only engages in verbal counseling, or what some refer to as "talk therapy," with clients. He does not utilize any physical methods of counseling or treatment with his clients.

Professional Disciplinary Act,"[2] lists actions that are considered "unprofessional conduct" for licensed health care providers and subjects them to disciplinary action. *Id.* §§ 106, 107, 110. Therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization" are exempted from the Chapter's requirements. *Id.* § 111.

In 2019, North Greene's legislature added "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct in the Uniform Disciplinary Act for licensed health care providers. N. Greene Stat. § 106(d). The statute defines conversion therapy:

> (1) "Conversion therapy" means a regime that seeks to change an individual's sexual orientation or gender identity. The term includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. The term includes, but is not limited to, practices commonly referred to as "reparative therapy."
>
> (2) "Conversion therapy" does not include counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity.

N. Greene Stat. § 106(e)(1)-(2). The legislature expressly specified that N. Greene Stat. § 106(d) may not be applied to (1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene Stat. § 106(f).

The North Greene General Assembly's stated intent for enacting N. Greene Stat. § 106(d) was to regulate "the professional conduct of licensed health care providers." It found that it had "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." The General Assembly pointed to the position of the American Psychological Association ("APA"), noting that the APA opposes conversion therapy "in any stage of the education of psychologists" and instead "encourages psychologists to use an affirming, multicultural, and evidence-based approach" that includes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework."

The North Greene statutes do not prevent health care providers from communicating with the public about conversion therapy; expressing their personal views to patients (including minors) about conversion therapy, sexual orientation, or gender identity; practicing conversion therapy on patients over 18 years old; or referring minors seeking conversion therapy to counselors practicing "under the auspices of a religious organization" or health providers in other states.

Procedural History

Sprague brought suit against the State of North Greene[4] in August 2022, seeking to enjoin enforcement of N. Greene Stat. § 106(d). He alleged that North Greene's prohibition on practicing conversion therapy on minors violates his free speech and free exercise rights under the First Amendment, as well as those of his clients. Sprague sought a preliminary injunction, which the State of North Greene opposed, and the defendant filed a motion to dismiss his complaint.

The District Court denied Sprague's motion for preliminary injunction and granted the State's motion to dismiss. While concluding that Sprague had standing to assert his claims, the court rejected his constitutional claims and dismissed the action.[5]

Sprague appealed, and this Court has jurisdiction under 28 U.S.C. § 1291.

STANDARD OF REVIEW

In reviewing the District Court's dismissal for failure to state a claim, we credit all factual allegations in the complaint as true and construe the pleadings in the light most favorable to Sprague, the non-moving party. Dismissal is proper if there is a lack of a cognizable legal theory, or an absence of sufficient facts alleged under a cognizable legal theory. The denial of a motion for preliminary injunction is reviewed for abuse of discretion.

DISCUSSION

At the outset, we make clear that the resolution of the constitutional questions raised by Sprague does not require this Court to assess the appropriateness or efficacy of conversion therapy or to resolve the disagreement between the parties, medical professionals, or society in general regarding conversion therapy or the wisdom of the North Greene laws regarding same. Instead, the Court today is charged with answering only whether the North Greene law impermissibly infringes on Sprague's free speech and free exercise rights under the First Amendment. For the reasons explained below, we conclude that Sprague's First Amendments rights have not been violated.

Free Speech Claim

We begin by analyzing Sprague's challenge to North Greene's law that it violates his right

[4] The parties have stipulated, and we agree, that Defendant is properly before this Court. This Court has jurisdiction over the Defendant and service on the Defendant was properly achieved. [NOTE: These issues should not be the subject of briefing or oral argument by the parties, though parties should be prepared to answer questions that judges might raise in oral argument.]

[5] The District Court's Memorandum opinion is unpublished. Its citation is *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). [NOTE: Citations to the District Court's opinion may be just to the Record on Appeal pages, or to this WL citation. If the WL citation is used, then the Record page number can be used as the WL star number.]

to free speech by regulating what he, as a licensed health care provider, can say to minor clients within the confines of the counselor-client relationship. The State of North Greene does not lose its power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through administering medications, setting bones, performing surgery, or the like. We conclude that, by regulating medical treatment performed by Sprague for clients in the State of Greene, the State has not violated Sprague's First Amendment rights.

Initially, we must decide whether the First Amendment requires heightened scrutiny of N. Greene Stat. § 106(d). This determination turns on whether the statute regulates speech or conduct. In reaching this decision, we are guided by the Ninth Circuit's analysis in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014).[6] While acknowledging that Sprague's therapy falls on a continuum between speech and conduct and thus is entitled to some First Amendment protection, we conclude that it falls on the end of the continuum toward conduct and is entitled to lesser protection.

In *Pickup*, the court examined a law very similar to the one at issue here and engaged in an extensive discussion of medical professionals' free speech rights, ranging from their engagement in public dialogue which would be afforded the greatest protection, to counseling patients to rely on quack medicine, which would not be protected speech. *Id.* at 1228. The *Pickup* court determined that the law "regulate[d] conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. Senate Bill 1172 merely prohibits licensed mental health providers from engaging in SOCE with minors." *Id.* at 1229-30 ("As we have explained, SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship. The statute does not restrain Plaintiffs from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic.").

Sprague contends that because his treatments consist entirely of speech, the Uniform Professional Disciplinary Act necessarily places restrictions on his speech based on the content and viewpoint of his words. While the Act may touch on speech, it is primarily concerned with the conduct of treating patients with certain health conditions. If the State of North Greene's prohibition on licensed health care providers practicing conversion therapy on minors is an unconstitutional content-based restriction on the speech of licensed health care professionals, then this would preclude other reasonable "health and welfare laws" that apply to health care professionals and impact their speech. *Dobbs v. Jackson Women's Health Org.*, —— U.S. ——, 142 S. Ct. 2228, 2284 (2022). It would also undercut longstanding medical malpractice laws that restrict treatment and the speech of health care providers. *See also* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950 (2007) (contending that "doctors are routinely held liable for malpractice for speaking or

[6] Sprague contends that the *Pickup* decision is contrary to the United States Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*, —— U.S. ——, 138 S. Ct. 2361 (2018) ("*NIFLA*"). However, despite abrogating the professional speech doctrine, the Court nevertheless affirmed that there are some situations in which speech by professionals is afforded less protection under the First Amendment. *Id.* at 2372. This is such a case.

for failing to speak" without First Amendment concern, such as by "failing to inform patients in a timely way of an accurate diagnosis" or by "failing to give patients proper instructions").

The practice of psychotherapy is not different from the practice of other forms of medicine simply because it uses words to treat ailments. This type of regulation has a longstanding history that provides support for the State's position and our decision today. Whether children with a mental health condition go to a primary care physician and seek anti-depressant pills, or a therapist and seek psychotherapy, or a psychiatrist and seek both, the State may regulate the licensed provider's treatment of those health conditions. That some of the health providers falling under the sweep of N. Greene Stat. § 106(d) use speech to treat those conditions is "incidental." *NIFLA*, 138 S. Ct. at 2372. The treatment can be regulated all the same.

Because we conclude that the North Greene law regulates conduct, and that any effect it may have on free speech interests is merely incidental, it is subject to only rational basis review. *Id*. at 1231. Thus, the statute must be upheld if it bears a rational relationship to a legitimate state interest. *See Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 884 (1992) (a plurality of three justices, plus four additional justices concurring in part and dissenting in part, applied a reasonableness standard to the regulation of medicine where speech may be implicated incidentally), overruled on other grounds by *Dobbs*, 142 S. Ct. 2228.

The General Assembly indicated that it enacted the statute to protect the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and to protect its minors against exposure to serious harms caused by sexual orientation change efforts. The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using conversion therapy, including talk therapy, on persons under 18. The legislature relied on the opinions of the American Psychological Association, which concluded that conversion therapy has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. While the legislature also had before it some evidence that conversion therapy, and particularly talk therapy, is safe and effective, we cannot say that the legislature acted irrationally by relying on the contrary opinion from the APA.

We conclude that the North Greene law is rationally related to a legitimate government interest in regulating the medical profession. Accordingly, we hold that Sprague's First Amendment free speech rights were not violated and affirm the trial court's order denying his motion for preliminary injunction and granting the State of North Greene's motion to dismiss.

Free Exercise Claim

We next turn to Sprague's contention that North Greene's law infringes his free exercise rights under the First Amendment. Because the statute is a neutral law of general applicability, we analyze it under rational basis review and conclude that the statute is rationally related to a legitimate government interest. Accordingly, we affirm the District Court's dismissal of Sprague's free exercise claim.

The Free Exercise Clause of the First Amendment prevents Congress from making a law

"prohibiting the free exercise" of religion and applies to the States through the Fourteenth Amendment. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531 (1993). But this right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) ("*Employment Division v. Smith*"). Strict scrutiny applies only when a law fails to be neutral or generally applicable, even if the law incidentally burdens religious practice. *Lukumi*, 508 U.S. at 531. Otherwise, we apply rational basis review. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (*"Stormans II"*).

We initially conclude that North Greene's law satisfies neutrality. Accordingly, Sprague fails to "discharge[] his burdens" at the first step of our Free Exercise Clause inquiry. *Kennedy v. Bremerton Sch. Dist.*, —— U.S. ——, 142 S. Ct. 2407, 2422 (2022).

Of course, where the purpose of a law is to restrict practices because of the religious motivations of those performing the practices, the law is not neutral. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 894. The object of North Greene's law is not to target religion. The State's exemption for counselors practicing in a religious capacity shows that it intended to regulate health care providers only to the extent they act in a licensed and non-religious capacity. The State explained that it restricted licensed providers from performing conversion therapy on minors because of the demonstrated harm that results from these practices, not to target the religious exercise of health care providers. *Cf. Kennedy*, 142 S. Ct. at 2422 (noting that the school district admitted that it "sought to restrict [the coach's] actions at least in part because of their religious character").

Furthermore, the text of the law is neutral on its face. *See Lukumi*, 508 U.S. at 533. A law fails to be neutral if "it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* North Greene's law prohibits therapists from practicing conversion therapy on minors. It makes no reference to religion, except to clarify that the law does not apply to practice by religious counselors. In addition, the law's express protection for the practice of conversion therapy in a religious capacity is at odds with Sprague's assertion that the law inhibits religion.

Contrary to Sprague's suggestion, the circumstances surrounding the enactment of N. Greene Stat. § 106(d) do not undermine its facial neutrality. Beyond examining a law's neutrality on its face, we also look at the circumstances of the law's enactment, including the historical background, precipitating events, and legislative history. *Lukumi*, 508 U.S. at 540; *see also Kennedy*, 142 S. Ct. at 2422 n.1.

Sprague relies primarily on comments from North Greene legislators to show that the law is tainted with anti-religious animus. He analogizes to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, —— U.S. ——, 138 S. Ct. 1719 (2018), in which the Supreme Court determined that comments by members of the Colorado Civil Rights Commission evinced a lack of neutrality under the Free Exercise Clause. *Id.* at 1723–24. However, the comments in this case do not rise to the level of those in *Masterpiece Cakeshop*.

One sponsor of the bill, North Greene State Senator Floyd Lawson stated during debate on

the bill that his intent in sponsoring the bill was to eliminate "barbaric practices" and modes of treatment that his constituents had described to him, including using electroshock therapy and inducing vomiting. Nowhere does Senator Lawson mention religion, and his comments do not demonstrate a hostility toward religion.

Sprague points to another bill sponsor, State Senator Golmer Pyle, who denounced those who try to "worship" or "pray the gay away," as showing a hostility towards or desire to inhibit religious practices. However, taken in context, Senator Pyle's comments do not express a hostility toward religion, but rather represent the Senator's contrasting his own experience having a daughter who is gay, with those of a friend who told him he had thought he could "pray the gay away" but instead found the conversion therapy to be ineffective and stressful on his child and the parents. Senator Pyle went on to speak about his own religious faith and acknowledged that this issue is complicated and would be difficult for some of his colleagues to support due to their religious convictions. Given that context, these comments do not evidence any anti-religious sentiment or hostility toward religion.

These isolated comments from North Greene legislators speaking for themselves about the experiences of friends and constituents who underwent conversion therapy come nowhere close to the hostility contained in the comments at issue in *Masterpiece Cakeshop*. In addition, these comments were made not during the adjudication of a specific case involving Sprague, as was the case in *Masterpiece Cakeshop,* as part of a lengthy legislative history that does not show a hostility toward religion, nor the purpose of targeting religious practice. The Court in *Masterpiece Cakeshop* acknowledged the distinction between hostile comments made by an adjudicatory body when deciding a case in front of it and comments made by a legislative body when debating a bill, and explained that it could not "avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of [the plaintiff's] case." *Id.* at 1730. The Supreme Court has "long disfavored arguments based on alleged legislative motives" because such inquiries are a "hazardous matter." *Dobbs*, 142 S. Ct. at 2255–56 (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). The Court has "been reluctant to attribute those motives to the legislative body as a whole" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 2256 (quoting *O'Brien*, 391 U.S. at 384).

In addition to the object, text, and legislative history, we also consider the real-world operation of a law to determine if it is neutral. *Lukumi*, 508 U.S. at 535. Sprague contends that North Greene's law is not operationally neutral because the North Greene General Assembly knew the law would prohibit counseling usually sought for religious reasons and provided by those of the Christian faith. But the legislative history and evidence before the General Assembly show that the legislators understood that people seek conversion therapy for both religious and secular reasons, and that the harm from conversion therapy is present regardless of why people seek it.

The North Greene law prohibits health care providers from performing conversion therapy on minors, whether those minors seek it for religious or non-religious reasons: "[t]he same conduct is outlawed for all." *Stormans II*, 794 F.3d at 1077 (quoting *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995)). The law prohibits, or more accurately deems "unprofessional," the practice of conversion therapy by all licensed providers, whether for religious or secular

motivations, on clients who are under the age of 18, regardless of the client's religious or secular motivations. As such, the North Greene law is a neutral law targeted at preventing the harms associated with conversion therapy, and not at the religious exercise of those who wish to practice this type of therapy on minors.

Sprague has also failed to carry his burden of establishing that North Greene's law is not a law of general applicability. Broadly speaking, there are two ways a law is not generally applicable. *Fulton v. City of Philadelphia*, —— U.S. ——, 141 S. Ct. 1868, 1877 (2021). The first is if there is a "formal mechanism for granting exceptions" that "invite[s] the government to consider the particular reasons for a person's conduct." *Id.* at 1879 (internal quotation marks and citation omitted). The second is if the law "prohibits religious conduct while permitting secular conduct" that also works against the government's interest in enacting the law. *Id.* at 1878. Neither applies here.

N. Greene Stat. § 106(d) does not provide a formal and discretionary mechanism for individual exceptions. Sprague contends that the vague terms in North Greene's law will lead to a discretionary system of individual exemptions, with officials likely exempting secular, value-neutral counseling while punishing faith-based counseling. This speculation does not meet Sprague's burden. There is no provision in the North Greene law for individual exceptions that would allow secular exemptions but not religious ones. In fact, there is no exemption system whatsoever, not even one that affords some minimal governmental discretion.

Nor does the North Greene law treat any comparable secular activity more favorably than religious exercise. *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1296 (2021); *see also Stormans II*, 794 F.3d at 1079 ("A law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect."). Sprague is unable to identify comparable secular activity that undermines North Greene's interest in enacting N. Greene Stat. § 106(d) but is permitted under the law. Whether secular and religious activity are "comparable" is evaluated "against the asserted government interest that justifies the regulation at issue" and requires looking at the risks posed, not the reasons for the conduct. *Id.* at 1298.

We do not find Sprague's contention that gender-affirming therapy "can lead to the very types of psychological harms" North Greene says it wants to eliminate by prohibiting conversion therapy persuasive. North Greene's law is not targeted toward anecdotal reports of "regret" from "sex reassignment surgery" about which Sprague's complaint warns. Instead, the law is targeted toward the scientifically documented increased risk of suicide and depression from having a licensed mental health provider try to change a minor. These harms are not comparable. *See Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) ("[T]he law does not require that the State equally treat apples and watermelons."). Sprague is unable to show that North Greene's law permits secular conduct that undermines the same interest it asserted in enacting N. Greene Stat. § 106(d). Accordingly, North Greene's law is neutral and generally applicable.

As we previously explained with regard to Sprague's free speech challenge, the North Greene law is rationally related to a legitimate government interest in regulating the medical profession. Accordingly, we hold that Sprague's First Amendment free exercise rights were not

violated and affirm the trial court's order denying his motion for preliminary injunction and granting the State of North Greene's motion to dismiss.

CONCLUSION

For the foregoing reasons, we hold that the State of North Greene's law banning conversion therapy does not violate Sprague's free speech or free exercise rights under the First Amendment of the United States Constitution. Our decision to uphold the State of North Greene's law is confirmed by its place within the well-established tradition of constitutional regulations on the practice of medical treatments. The District Court appropriately denied Sprague's motion for preliminary injunction and granted the State of North Greene's motion to dismiss Sprague's claims.

Accordingly, the judgment of the District Court is **AFFIRMED**.

KNOTTS, J., dissenting.

I feel compelled to write separately to explain why I believe the North Greene law violates Sprague's free speech rights and free exercise rights under the First Amendment. I would reverse the District Court and remand this case with instructions that Sprague's motion for preliminary injunction be granted and that his constitutional claims proceed.

Free Speech Claim

The majority has allowed the State of North Greene to evade the First Amendment's ordinary presumption against content-based speech restrictions by saying that the plaintiffs' speech is actually conduct. The Supreme Court has rejected such attempts to regulate speech by recharacterizing it as professional conduct. *See NIFLA*, 138 S. Ct. at 2373–74. I would reject this attempt to relabel controversial speech as conduct as well.

Strict scrutiny ordinarily applies to content-based restrictions of speech, and this case is no different. That means we must consider whether the ordinances are "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Laws or regulations almost never survive this demanding test, and these ordinances are not outliers. Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

A content-based law is one that "applies to particular speech because of the topic discussed or the idea or message expressed." Few categories of regulation have been as disfavored as content-based speech restrictions, which are "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). That is because, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Regulations that are grounded in the content of speech, and that allow the government "to discriminate on the basis of the content" of that speech, "cannot be tolerated under the First Amendment." *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (quotation omitted).

The "mere assertion of a content-neutral purpose" is not enough "to save a law which, on its face, discriminates based on content." *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 642–43 (1994). So, the first question is not about a law's purpose but about its effect—whether it restricts or penalizes speech on the basis of that speech's content. It is not always easy to determine whether a law is content-based—but sometimes, as here, it is.

I cannot see how the law here can be applied without considering the content of the banned speech. Whether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it. And whether the government's disagreement is for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the ordinances based solely on its content.

The State points out that therapists have other, similar avenues of expression. To be sure, the therapists remain free to describe conversion therapy to the public or recommend that a client receive it in another jurisdiction. But the law plainly prohibits the therapists from having certain conversations with clients, who, along with their parents, have consented to such therapy. In any event, the constitutional problem posed by speech bans like this one is not mitigated when closely related forms of expression are considered acceptable. The First Amendment does not protect the right to speak about banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government. And what good would it do for a therapist whose client sought conversion therapy to tell the client that she thought the therapy could be helpful, but she could not offer it? It only matters that some words about sexuality and gender are allowed, and others are not.

The North Greene law not only discriminates based on content, but also on viewpoint. After all, Sprague's counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics. The State obviously holds an opposing viewpoint—one that it surely has the right to promote. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (the Free Speech Clause "does not regulate government speech"); *see also Mech v. Sch. Bd. of Palm Beach Cnty.*, 806 F.3d 1070, 1074 (11th Cir. 2015). But the State cannot engage in "bias, censorship or preference regarding [another] speaker's point of view." *Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992). Viewpoint-based regulations like these are "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

The District Court and majority suggest that the ordinances here, even if based on the content of a therapist's speech, fall into a kind of twilight zone of "professional conduct." I disagree with the majority's characterization of this case involving "incidental speech swept up in the regulation of conduct." The North Greene statute is a direct, not incidental, regulation of speech. Talk therapy, consisting entirely of speech, is precluded even though it is not connected to any separately identifiable conduct. There is a real difference between laws directed at conduct sweeping up incidental speech on the one hand and laws that directly regulate speech on the other. The government cannot regulate speech by relabeling it as conduct. What the State of North Greene calls a medical treatment consists entirely of words. If conversion talk therapy is conduct, the same could be said of teaching or protesting—both are activities, after all. Debating? Also an activity. Book clubs? Same answer. It cannot seriously be suggested that such "activities" would not be protected as "speech."

The North Greene law also targets a message: the advice that therapists may give their clients. As the Supreme Court said in another case purportedly addressing conduct, if "the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quotation omitted). The same is true here. If speaking to clients is not speech, the world is truly upside down. The North Greene law sanctions speech directly, not incidentally—the only "conduct" at issue is speech itself.

Because the North Greene law is a content-based regulation of speech, it must satisfy strict scrutiny. Under strict scrutiny, content-based restrictions "are presumptively unconstitutional." *Reed*, 576 U.S. at 163. And they can be justified "only if the government proves that they are

narrowly tailored to serve compelling state interests." *Id*. It is indisputable "that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756–57 (1982) (internal quotation marks omitted). While the government here has a strong interest in protecting children, its legitimate authority to protect children, however, "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794–95 (2011). So, while protecting children is a crucial government interest, speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14.

Additionally, it is not enough for the defendants to identify a compelling interest. To survive strict scrutiny, they must prove that the ordinances "further[ ]" that compelling interest and are "narrowly tailored to that end." *Reed*, 576 U.S. at 171. According to the Supreme Court, it is "rare that a regulation restricting speech because of its content will ever be permissible." *Brown*, 564 U.S. at 799 (internal citation omitted). The government carries the burden of proof and, "because it bears the risk of uncertainty, ambiguous proof will not" satisfy the "demanding standard" it must meet. *Id.* at 799–800 (internal citation omitted).

I do not believe that strict scrutiny is satisfied by the fact that professional societies such as the American Psychiatric Association oppose the speech. Although I do not doubt that these groups are composed of educated men and women acting in good faith, their institutional positions cannot define the boundaries of constitutional rights. They may hit the right mark—but they may also miss it. Professional opinions and cultural attitudes may change, but the First Amendment does not. "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *United States v. Stevens*, 559 U.S. 460, 470 (2010).

I realize that my analysis would allow speech that many find concerning—even dangerous. But consider the alternative. If the speech restrictions in these ordinances can stand, then so can their inverse. Other states could prevent therapists from validating a client's same-sex attractions if the state deemed that message harmful. And the same goes for gender transition—counseling supporting a client's gender identification could be banned. It comes down to this: if Sprague's perspective is not allowed here, then the perspective of the State of North Greene or the American Psychiatric Association can be banned elsewhere. People have intensely personal, moral, religious, and spiritual views about these matters—on all sides. And that is exactly why the First Amendment does not allow communities to determine how their neighbors may be counseled about matters of sexual orientation or gender. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

I would reverse the District Court and hold that the challenged North Greene law violates Sprague's free speech rights.

Free Exercise Claim

The majority's decision ignores the fact that the North Greene law targets overwhelmingly,

if not exclusively, religious speech. The law cannot be said to be neutral and should be held unconstitutional under the Supreme Court's decision in *Lukumi*, 508 U.S. at 534. If my colleagues are correct that the North Greene law is actually insulated from challenge here, then the Supreme Court should reevaluate its jurisprudence regarding the burdens the government may place on an individual's free exercise of religion and overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

The majority takes the position that the North Greene law rains on the religious and the nonreligious alike. However, in reality, the American Psychological Association, which was relied upon by the North Greene General Assembly in adopting the law, acknowledged that most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs. It also described such counseling as a religious practice. Such religious speech is vigorously protected by the First Amendment. *Kennedy*, 142 S. Ct. at 2421 (noting that the First Amendment "doubly protects religious speech"). The Free Speech and Free Exercise Clauses work in tandem to provide overlapping protection.

These protections apply just as much to professionals like Sprague as to anyone. The Constitution protects "the right to harbor religious beliefs inwardly and secretly" and "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy*, 142 S. Ct. at 2421. Sprague does not surrender his free-exercise rights through his license or through government disagreement with his views.

Given the "special solicitude" the First Amendment gives religious speech, the Supreme Court has directed lower courts to zealously guard against even "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534. Courts must examine a law's "real operation" and discern its true "object." *Id.* at 535. Here, it is fatal that North Greene's law is designed to silence people of faith and their religious beliefs about human sexuality. Laws that burden religious exercise and are the result of "'official expressions of hostility' to religion" must be "'set aside,'" "without further inquiry." *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018)).

Furthermore, the fact that the North Greene law may also prohibit counseling sought for secular reasons does not cure its lack of neutrality. As *Lukumi* held, a law can implicate "multiple concerns unrelated to religious animosity" and still violate neutrality. 508 U.S. at 535. A law does not pass constitutional muster merely by treating "some comparable secular" speech "as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S. Ct. at 1296. No matter a law's impact on secular activity, courts must assess if its "adverse impact" on religious exercise is an incidental flaw or a targeted design. *Lukumi*, 508 U.S. at 535. The majority ignored this principle and, in so doing, effectively neutered *Lukumi* and the First Amendment. I would hold that North Greene's law is not a neutral law of general applicability and that it violates the First Amendment.

The majority's decision illustrates why the Supreme Court's decision in *Smith* should be overruled. The majority interprets *Smith* to allow regulations that, like North Greene's law, outlaw the disfavored speech for all, even if it is grounded in religious faith to the point that nearly everyone recognizes it as overwhelmingly, if not exclusively, religious. It would be like saying a law that prohibits steeples on buildings is "neutral" because it applies against the religious and

non-religious alike. *Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring in the judgment) (the Volstead Act "would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States"). "[N]o matter how severely [such laws] burden[ ] religious exercise," *id.* at 1882 (Barrett, J., concurring), if they "make[ ] no reference to religion" on their face, then the majority would uphold them as "neutral" under *Smith*.

"General applicability" suffers from similar flaws. For the same reasons the majority held the North Greene law to be neutral, it held the law to be generally applicable: the law supposedly applies "evenhandedly" and prevented a hypothetical counselor from providing counseling for "secular reasons." No matter that neither the State of North Greene nor the majority have pointed to any "real" world examples of that. *Lukumi*, 508 U.S. at 535.

Though constitutional interpretation looks to "original meaning and history," *Kennedy*, 142 S. Ct. at 2428, *Smith* did not reconcile its holding with either. *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring in the judgment) (*Smith*'s "interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause"). Instead, *Smith* relied on policy concerns to reach what the Court considered a "permissible" construction, 494 U.S. at 878, 888: that the Free Exercise Clause "offers nothing more than protection from discrimination," *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring). In doing so, *Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., statement respecting denial of certiorari).

In recent years, the Supreme Court has done much to realign constitutional interpretation with text and history. *New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129–31 (2022) (Second Amendment); *Dobbs*, 142 S. Ct. at 2246–47 (Due Process Clause); *Kennedy*, 142 S. Ct. at 2427–28 (Establishment Clause). In the free-exercise context, the best historical evidence establishes that government cannot interfere with religious exercise absent historical analogue. Because there is no historical analogue of censoring religious counseling, this case would provide a good vehicle for the Supreme Court to overrule *Smith* and restore a historically based standard that genuinely protects religious exercise.

For the foregoing reasons, I would reverse the District Court and hold that Sprague's free exercise rights were violated.

No. 22-2020

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

ORDER

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit is GRANTED. The issues before the Court are:

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).