Docket 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 SUPREME COURT

## BRIEF FOR THE RESPONDENT

Team Number: 12

## QUESTIONS PRESENTED

I. 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.

II. 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).

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Pertinent constitutional and statutory provisions appear in the appendix to this brief. App., *infra.*

# STATEMENT OF THE CASE

## I. FACTUAL HISTORY

Howard Sprague ("Petitioner") is a licensed family therapist that works with clients in various areas, including sexuality and gender identity. *Sprague v. North Greene*, 2023 WL 12345, 3 (14th Cir. 2023). Petitioner does not work for a religious institution, yet he professes his work is influenced and informed by his Christian beliefs and viewpoint. *Id.* Petitioner 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 identity. *Id*. Petitioner also believes that sexual relationships are beautiful and healthy only if they occur between a married, heterosexual couple. *Id.*

The State of North Greene ("Respondent") has enacted laws prohibiting state licensed health care providers from practicing any form of conversion therapy on children. *Id.* Petitioner's appeal concerns Respondent's law that subjects licensed health care providers to discipline if they practice conversion therapy ("SOGICE therapy")[1] of any kind including only spoken or written therapy on patients under 18 years of age. *Id.*

Respondent requires health care providers to be licensed before they may practice in North Greene. *Id.* Chapter 45 of Title 23, North Greene's "Uniform Professional Disciplinary Act," lists actions that are considered "unprofessional conduct" for licensed health care providers and subjects them to disciplinary action for such conduct. *Id.* at 4. 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.* (quotations omitted).

[1] Also referred to as "SOCE therapy" in this context.

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. *Id.* (citing N. Greene Stat. § 106(d)). N. Greene Stat. § 106 ("§ 106"), 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."

*Id.* 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 and protect the physical and psychological well-being of minors. *Id*. Comments made by the Act's legislative sponsors acknowledge the complexity of the issue injunction with various religious beliefs. *Id.* at 9.

The legislature explicitly specified that N. Greene Stat. § 106(d) may not be applied to speech by licensed health care providers that does not constitute conversion therapy, or religious practices or nonlicensed counselors under the auspices of a religious denomination, church, or organization. *Id.* at 4. Additionally, Respondent's 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 out of state providers.

## II. PROCEDURAL HISTORY

In August of 2022, Petitioner brought suit in the U.S. District Court for the Eastern District of North Greene, seeking to enjoin enforcement of N. Greene Stat. § 106(d). *Sprague* at 5. Petitioner sought a preliminary injunction, which Respondent opposed, filing a motion to dismiss Petitioner's complaint. *Id.* The district court denied Petitioner's motion for preliminary injunction and granted Respondent's motion to dismiss. *Id*.

On January 15, 2023, the Fourteenth Circuit affirmed the district court's ruling, holding that N. Greene Stat. § 106(d) does not violate Petitioner's free speech or free exercise rights under the First Amendment of the United States Constitution. *Id*. at 11.

Shortly after, the Supreme Court of the United States granted certiorari on two issues: (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; and (2) whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Smith*.

## DECISIONS BELOW

The district court opinion citation is *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The Court of Appeals opinion citation is *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023).

## SUMMARY OF THE ARGUMENT

N. Greene Stat. § 106 prohibits licensed health care providers from conducting a medical procedure, and therefore regulates conduct that incidentally involves speech. It does not prohibit licensed health care providers from engaging in "inherently expressive" speech or from "communicating a message[.]" It is also content- and viewpoint-neutral. As such, rational basis review applies. In enacting the statute to protect minors from harm, the legislature relied on the American Psychological Association's opinions that conversion therapy is harmful. There is a rational relation between the legislature's basis for § 106 and the government's interest in the well-being of its youth.

Even if the court were to find that § 106 regulates speech or was not content- or viewpoint-neutral, it withstands strict scrutiny. The statute is narrowly tailored to serve compelling state interests. North Greene has compelling interests in both the well-being of its youth and in regulating state-licensed professionals. The legislature thus narrowly tailored § 106 to be a regulation of a specific medical procedure conducted by state licensed health care providers, all forms of which create risks of harm. It also only regulated the treatment as it relates to minors. Nonlicensed providers and counselors operating under the auspices of religious organizations were excluded from § 106. Thus, the statute is neither over-inclusive nor under-inclusive, and goes only as far as necessary in serving North Greene's compelling interests.

N. Greene Stat. § 106 comports with the Free Exercise Clause because it is a neutral law of general applicability that advances a compelling interest of protecting the physical and psychological wellbeing of minors while being narrowly tailored. The law does not distinguish between secular and religious motives for the regulated activity, does not permit any activity that is comparable to the regulated activity in relation to the compelling interest advanced by the statute,

and does not grant the state any discretionary authority to grant exemptions that would encourage the state consider the religious motivation of specific individuals. As such, § 106 is generally applicable: it does not target or elevate a religious group or allow the state to do so via its mechanisms.

The law does not facially discriminate against any religious practice and does make accommodations for religious activity. The legislative and administrative history of the law do not betray any hostility against religion. The record does not demonstrate any discrimination in the enforcement of § 106 based on the religious character of regulated activities, and comments by legislators which touch on religious faith demonstrate respect for religious faith even while decrying specific practices. As such, § 106 is neutral even though it may primarily burden religious speech: it does not target religious practices or any activity for its religious motivation.

As a neutral law of general applicability, § 106 does not violate the Free Exercise Clause of the First Amendment. Additionally, in the interest of maintaining consistent, final, and functional holdings that maintain a balance between the Establishment Clause and the Free Exercise clause, this Court should not abandon the current precedent which permits neutral laws of general applicability to burden religious speech if they are rationally related to a legitimate government interest.

## ARGUMENT

### I. N. GREENE ST. § 106 IS CONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE BECAUSE IT REGULATES A MEDICAL PROCEDURE AND SURVIVES ANY LEVEL OF SCRUTINY.

Petitioner alleges that N. Greene St. § 106 violates his free speech rights under the Constitution. The First Amendment to the Constitution declares "Congress shall make no law… abridging the freedom of speech." U.S. Const. amend. I. However, the United States Supreme Court has recognized and reaffirmed that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). Because § 106 is simply a regulation of a medical procedure—a dangerous and ineffective one—involving speech, it is constitutional under *NIFLA*.

#### a. N. Greene Stat. § 106 regulates conduct that incidentally involves speech.

*NIFLA* positively referenced the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which held constitutional a law that infringed upon speech "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. In contrast, the *NIFLA* court held a law unconstitutional which was "not tied to a medical procedure at all… [and] applie[d] to all interactions between a [provider] and its clients." *NIFLA*, 138 S. Ct. at 2373. As such, what matters when analyzing whether a statute violates a practitioner's free speech is not whether the statute impacts speech at all, but whether the law impacts speech that is "part of the practice of medicine" or "tied to a medical procedure[.]" If the affected speech falls under the latter characterization, it is less protected. *Casey* at 884.

North Greene's Professional Disciplinary Act subjects licensed health care providers to disciplinary action for "unprofessional conduct[.]" *Sprague* at 3. N. Greene Stat. § 106(d) added

"[p]erforming conversion therapy on a patient under age eighteen" as unprofessional conduct under the Act. As the Court of Appeals noted:

> 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.

*Id.* at 4. Both Supreme Court and Circuit Court holdings support the finding that § 106 only regulates professional conduct that incidentally involves speech.

The 9th Circuit determined that a law prohibiting SOGICE therapy to minors did not implicate the First Amendment.[2] *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). In *Pickup*, the Court found that the SOGICE ban only regulated conduct.[3] *Id.* at 1229. They noted that the law at issue did "nothing to prevent licensed [providers] from discussing the pros and cons of SOGICE" and "merely prohibits licensed mental health providers from engaging in SOGICE with minors." *Id.* It highlighted that "the Supreme Court emphasized that it 'extended First Amendment protection only to conduct that is inherently expressive.'" *Id.* at 1230 (quoting *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,* 547 U.S. 47, 66 (2006) ("*FAIR II*")). It concluded that the SOGICE ban did not prohibit any "inherently expressive" speech, but instead a "professional practice" which "does not implicate the First Amendment." *Id.* Finally, the Court

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[2] The 3rd Circuit upheld a similar SOGICE ban but incorrectly ruled that it regulated "professional speech" and was therefore abrogated by *NIFLA*. (*King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014)). The 11th Circuit incorrectly analyzed and misapplied the law when it held a similar SOGICE ban regulated speech. (*Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 876 (11th Cir. 2020).

[3] Importantly, *Pickup* was not abrogated by *NIFLA* because the court discussed but did not rely on the "professional speech" doctrine, instead concluding that SOGICE therapy was "professional conduct," the regulation of which only "ha[s] an incidental effect on speech." *Id.* at 1228-1229.

held that "the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone[,]" because reaching any other conclusion "would, in fact, make talk therapy virtually immune from regulation." *Id.* at 1231 (citations and quotations omitted).

Where "the conduct triggering coverage under [a] statute consists of communicating a message[,]" the Supreme Court held that the statute regulated speech and not conduct. *Holder v. Humanitarian L. Project*, 130 S.Ct. 2705, 2724 (2010). In *Humanitarian*, the Court analyzed 18 U.S.C. § 2339B(a)(1) which makes it a crime to provide "material support… to a terrorist organization." *Id.* at 2707. The plaintiffs wanted to provide "material support" to terrorist organizations "in the form of speech." *Id.* at 2724. This speech included "engag[ing] in political advocacy on behalf of" the terrorist organizations and telling terrorist organizations how to "petition… the United Nations for relief." *Id.* at 2729 (quotations omitted).

In essence, these activities consisted of communicating a message and advocating on behalf of or endorsing the terrorist organization. As such, the Court found the law to be a content-based regulation of speech but upheld it as constitutional. *Id.* at 2723, 2730. N. Greene § 106 does not prevent petitioners from telling their minor patients who wish to receive SOGICE therapy how to "petition… [authorities] for relief." Nor does it prevent petitioners from advocating for endorsing those same patients in the political arena, perhaps to push for a greater acceptance of SOGICE therapy. In fact, it explicitly allows "support"—the very conduct banned by § 2339B—to these patients. Petitioners simply cannot go further than that "support" to actually administer SOGICE therapy itself. *Sprague* at 4.

In *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017), Florida passed a law that, among other things, prevented medical professionals from questioning patients about gun

ownership if irrelevant to safety concerns, recording patients' responses to those questions, and harassing patients about gun ownership. *Id.* at 1302-03. The Court held that the law abridged medical professionals' freedom of speech rather than regulated professional conduct. *Id.* at 1307. The Court found it unconstitutional to regulate speech "about a certain topic… restrict[ing] [the speaker's] ability to communicate and/or convey a message[.]"[4] *Id.* If § 106 prevented providers from talking to patients about SOGICE therapy, recommending SOGICE therapy to them, or even harassing patients who disagreed with the provider's perspective on SOGICE therapy, then it would be comparable to *Wollschlaeger* and overturned. However, it does none of those things, and instead regulates a medical procedure itself.[5]

The holdings in all these cases support the conclusion that § 106 is a constitutional regulation of professional conduct. It does not prohibit Petitioner from "communicating a message[.]" *Humanitarian* at 28. Nor does it ban "inherently expressive" speech. *Pickup* at 1230 (citations omitted). To the extent that it effects speech, that effect is incidental to the regulation of a medical procedure and "[i]t has never been deemed an abridgement of speech… to make a

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[4] The *Wollschlaeger* Court compared the case to *Conant v. Walters*, 309 F.3d 629 (9th Cir. 200), where a federal regulation that prohibited physicians from recommending medical marijuana to their patients was held to be a content- and viewpoint-based regulation of speech. *Wollschlaeger* at 1310. Similarly in *Wollschlaeger*, preventing providers from discussing gun ownership with patients was held to be a regulation of speech. *Id.* at 1307.

[5] The 11th Circuit, in *Otto*, shied away from any analysis between the therapy ban at issue and the ban in *Wollschalaeger* because "the enterprise of labeling certain… communication as 'speech' and others 'conduct' in unprincipled and susceptible to manipulation." *Otto* at 861. However, because one ban limited any discussion on a topic and the other prohibits the practice of a medical procedure, the distinction is important and must be drawn. Indeed, "[w]hile the drawing the line between speech and conduct can be difficult, this court's precedents have long drawn it… and the line is long familiar to the bar." *NIFLA* at 2373 (citations and quotations omitted).

course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language*." FAIR II* at 62.

*i. N. Greene Stat. § 106 is content-neutral and viewpoint-neutral.*

If a law limits speech "because of the topic discussed or the idea or message expressed[,]" it is considered content-based and is subject to strict scrutiny. *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015) (citations omitted). Laws that discriminate based on "the specific motivating ideology or the opinion or perspective of the speaker" are viewpoint-based regulations which likewise must withstand strict scrutiny. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

N. Greene Stat. § 106 does not restrict Petitioner's ability to discuss a topic or express a message. It does not prevent Petitioner from advocating in favor of SOGICE in public or with his patients, recommending SOGICE to patients, referring patients to providers in jurisdictions that allow SOGICE, or prevent minors from being exposed to information about SOGICE. Compare *Virginia v. Black*, 538 U.S. 343 (2003) (ban on cross burning with the intent to intimidate was content-neutral because it did "not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics'") with *R. A. V. v. St. Paul*, 505 U.S. 377 (1992) (ban on cross burning with intent to intimidate "on the basis of race, color, creed, religion or gender" found to be content-based) and *Wollschlaeger*, 848 F.3d at 1307 (law discussed above was ruled content-based).

A principle that can be drawn from these cases is that in order to be content-based, a law must not only touch on a type of speech but also either (1) prevent speakers from asking about, voicing opinions on, or even harassing others on a specific topic (*Wollschlaeger*) or (2) look at the reasons for or bases of that speech (*Black*). This aligns with and provides a helpful

elaboration of the rule expressed in *Reed*: where a law prevents speakers from asking about, voicing opinions on, or even harassing others regarding a specific topic, that law is likely discriminating "because of the topic discussed[.]" If a law seeks to regulate speech based on the reasons for or bases of that speech, that law is likely discriminating "because of… the idea or message expressed." *Reed* at 163.

As explained above, § 106 does not seek to limit the discussion of SOGICE therapy. Additionally, it does not single out any SOGICE therapy that is performed on the basis of any specific topics. There could be multiple bases for administering SOGICE: a therapist may want to perform SOGICE solely because of a patient's gender identity or sexual orientation and try to convince the patient to undergo the procedure based on that reason; the therapist may likewise have no basis for performing SOGICE therapy other than the fact that a patient has requested it. The statute does not differentiate depending on the basis for conducting the procedure, and only looks to the intent to perform the procedure. Therefore, it is content-neutral.

Similarly, § 106 does not discriminate based on viewpoint. Petitioner's admitted viewpoint is "that the sex of each person is assigned at birth" which "should not be changed[,]" and "sexual relationships are beautiful and healthy" only if they occur between a married heterosexual couple. *Sprague* at 3. N. Greene Stat. § 106 applies to *all* licensed health care providers and defines "conversion therapy" as "a regime that seeks to change an individual's sexual orientation or gender identity… [including] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." *Id.* at 4.

Petitioner may wish to conduct SOGICE therapy on patients so they may align with his personal views. To wit, Petitioner would administer SOGICE to change a minor's sexual

orientation from homosexual to heterosexual, or change a minor's gender identity to align with the minor's sex. Certainly, this conduct is punishable under § 106. However, it would be equally punishable for a licensed health care provider to conduct SOGICE to convert a heterosexual minor to homosexual, or to change a minor's gender identity away from their sex.

N. Greene Stat. § 106 is viewpoint neutral because it does not discriminate based on any viewpoint. It simply prohibits the practice of a specific medical procedure – regardless of the viewpoint the practitioner wishes to validate. Thus, § 106 should only be subjected to rational basis review. See *Casey* at 884 (holding that speech that is "part of the practice of medicine" is "subject to reasonable licensing and regulation by the State"). See also *Pickup* at 1231 (holding a similar ban regulated conduct and applying rational basis review).

Under rational basis review, a statute "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interest." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284, (2022) (citations omitted). N. Greene's legislature "enacted the statute to protect the physical and psychological well-being of minors… and to protect [them] against… serious harms caused by sexual orientation change efforts." *Sprague* at 7. The District Court noted the legislature "relied on the opinions of the American Psychological Association" to pass a statute banning a medical procedure found to be ineffective and dangerous, and held that the "law is rationally related to a legitimate government interest." *Id.* Based on the foregoing, this Court should reach the same conclusion.

**b. Even if the court applies heightened scrutiny, § 106 withstands strict scrutiny**.

If the Court is nevertheless persuaded that § 106 does not regulate "speech tied to a medical procedure" and instead regulates "speech as speech" *NIFLA* at 2373–74, it matters not: § 106 withstands strict scrutiny.

To defeat strict scrutiny, the government must show that the law in question is "narrowly tailored to serve compelling state interests." *Reed* at 163 (citations omitted). Accordingly, § 106 furthers the State's compelling interest and is narrowly tailored to serve that compelling interest.[6]

*i. N. Greene has a compelling interest in safeguarding minors from harm addressed by § 106.*

There is no question 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) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (recognizing that "protecting the physical and psychological well-being of minors" is a compelling government interest); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (stating "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens"). Based on this precedent, it is no surprise that the Supreme Court "ha[s] 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." *Ferber* at 757.

The stated intent for enacting § 106 was to "protect[] the physical and psychological well-being of minors" from the "serious harms caused by conversion therapy" by regulating "the professional conduct of licensed health care providers." *Sprague* at 4. The state considered the opinion of the American Psychological Association ("APA") when enacting § 106. *Id.* The APA "opposes conversion therapy in any stage of the education of psychologists" because "conversion therapy has not been demonstrated to be effective and that there have been anecdotal reports of

[6] Even Judge O'Scannlain's dissent, despite asserting that a similar ban regulated speech, noted the ban "may very well constitute a valid exercise of California's police power[.]" *Pickup* at 1221.

harm, including depression, suicidal thoughts or actions, and substance abuse" associated with the practice. *Id.* at 4, 7 (quotations omitted).

Based on the APA's determination that SOGICE therapy is shown to harm the "physical and psychological well-being" of patients who underwent the procedure, the State acted to further its compelling interest in protecting minors from that harm. While it is not in the record below, there is other evidence that supports enacting § 106:

> [T]he American Academy of Pediatrics has "contraindicated" SOCE, "since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation"; the APA, in 1998, noted the "great" risks associated with SOCE, including "depression, anxiety, and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient"; an office of the World Health Organization ("WHO") has called SOCE an "unjustifiable practice[ ]" that "represent[s] a severe threat to the health and human rights of the affected persons"; the U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, found that SOCE "may put young people at risk of serious harm"; and so on.

*Otto* at 876 (J. Martin, dissenting).

The legislature may have had some evidence that SOGICE is safe. *Sprague* at 7. However, there is no constitutional compulsion for a state to wait until it has unassailable certainty before acting to protect the "well-being of its youth[,]" especially if gathering more proof on the matter would produce the very harm the state is attempting to prevent. *FCC v. Fox Television Stations,* 556 U.S. 502, 519 (2009). There is substantial evidence that SOGICE poses severe risks, and the state has a compelling interest in protecting minors from those risks. Thus, § 106 withstands the first prong of strict scrutiny.

*ii. N. Greene § 106 is narrowly tailored to further the state's compelling interest.*

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests[.]" *McCullen v. Coakley*, 134 S. Ct. 2518, 2540 (2014).

N. Greene § 106 is narrowly tailored in that it only prohibits state-licensed health care providers from performing a specific medical procedure on minors. It is not over-inclusive for encompassing non-aversive SOGICE therapy because the evidence relied upon in enacting § 106 shows that *all* forms of SOGICE therapy are harmful. While excluding non-aversive SOGICE therapy would "burden… less speech[,]" doing so would fail to address a large portion of the potential harm the state is attempting to prevent. Since the goal is to prevent serious harms associated with a specific medical procedure, allowing any form of that procedure to be administered by licensed healthcare providers would be counterproductive. Additionally, petitioner has pathways to exception from § 106 if he so wishes. North Greene's legislature expressly excluded from § 106 "[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 "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." *Sprague* at 4. As such, § 106 goes no further than necessary in preventing the harms of SOGICE therapy.

Likewise, the above carve-outs do not make § 106 under-inclusive. It bears repeating that § 106 only regulates a medical procedure, and states have the authority to regulate the practices of licensed health care providers. See *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (declaring "[s]tates have a compelling interest in the practice of professions within their boundaries, and ... they have broad power to establish standards for licensing practitioners and regulating the practice of professions"). This authority is diminished when applied to religious

organizations or individuals acting under the auspices of religious organizations. *Sprague* at 4. To start, the exemptions recognize and respect the constitutional rights of North Greene's constituents. Speech that "does not constitute performing conversion therapy" is allowed in recognition that proscribing speech further than that which is tied to the medical procedure would offend petitioner's free speech rights. Religious practices, counseling, and non-licensed counselors acting under the auspices of a religious organization are also exempted. This exception recognizes that these constituents are not operating under a state-issued healthcare license and are counseling under the auspices of religious practice. As such, any attempted regulation would risk violating constituents' Establishment Clause rights.

This Court should not require a state to cast such an over-broad net, especially since the result would be a requirement that a state's regulation must risk violating more constitutional rights to be found constitutional in the first place. Instead, the Court should find that § 106 is narrowly tailored as it proscribes a single harmful medical procedure from being administered to minors by state-licensed healthcare providers.

**c. N. Greene § 106 is a well-established constitutional regulation and holding otherwise would upheave significant precedent.**

Respondent is not asking this court to ignore or change precedent in upholding § 106 as constitutional. There are many medical procedures that are carried out solely or partly through speech which are regulated by the government. Not only can states regulate licensed health care providers, they have a compelling interest in doing so which is often exercised. States regulate whether licensed health care providers may prescribe certain medications. It is impossible to prescribe medication without speech. However, these sorts of regulations exist across the nation.

States may also compel speech for medical professionals. In *Casey*, the Court upheld compelled speech in the form of an informed consent requirement. *Casey* at 884. Some states

compel health care providers to report cases of certain diseases. (N.J. Admin. Code § 13:35-6.24; ARSD 44:20:02:01). Speech is the only means by which either informed consent can be asked for and received. Likewise, speech is the vehicle through which mandatory disease reporting is delivered. Despite completely regulating the speech of licensed health care providers, these laws are commonplace.

Finally, if the court were to find § 106 as a regulation on speech because "talk therapy" is only carried out through speech, then it would create an entire area of mental health care which is incredibly difficult, if not almost impossible, to regulate. Any regulation on "talk therapy" performed by licensed health care providers would have to survive strict scrutiny, which is a "demanding standard." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

As the district Court pointed out below, its "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." *Sprague* at 11. Thus, upholding § 106 as constitutional should be a comfortable decision for this Court.

## II. A NEUTRAL AND GENERALLY APPLICABLE LAW WHICH BURDENS RELIGIOUS SPEECH IS CONSTITUTIONAL IF IT RATIONALLY RELATES TO A LEGITIMATE GOVERNMENT INTEREST.

N. Greene Stat. § 106 is a permissible restriction on speech as it is a generally applicable and neutral law which serves the compelling government interest of protecting minors.

Under the Free Exercise Clause of the First Amendment, the government shall make no law prohibiting the free exercise of religion. U.S. Const. Amend. 1. However, this Court has long held "while freedom of religious belief is absolute, freedom of religious practice is subject to restraint." *Reynolds v. United States*, 98 U.S. 145, 166 (1879). To permit such freedom, the Court asserted, "would be to make the professed doctrines of religious belief superior to the law

of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." *Id*. at 167. As Justice Scalia later wrote, "We cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule … would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 888 (1990). This Court in *Smith* held that "the right of free exercise 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).'" *Id.* at 879. (citing *United States v. Lee*, 455 U.S. 252, 263 (1982)).

These two requirements – neutrality and general applicability – were further expanded upon as separate, though interrelated requirements, and "failure to satisfy one requirement is a likely indication that the other has not been satisfied,". *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Neutrality is determined by the object of the law, and general applicability involves categories of selection. *Id.* at 532. In other words, neutrality is violated if a law targets a religious practice, while general applicability is violated if a law targets or elevates a religious group.

If a law fails to be either neutral or generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531-2. A plaintiff bears the burden to demonstrate an infringement of his rights under the Free Exercise and Free Speech Clauses; if this burden is met, the defendant may still show that its actions were nonetheless justified and tailored consistent with the constitutional law. See, e.g.,

*Kennedy v. Bremerton School District*, 142 S. Ct. 2407; *Fulton v. Philadelphia*, 141 S.Ct. 1868, 1876–1877, 1881; *Reed* at 171, (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Lukumi* at 546; *Sherbert v. Verner*, 374 U.S. 398, 403, (1963).

**a. A law can be generally applicable even if it primarily burdens religious speech.**

North Greene Stat. § 106 is generally applicable even if it primarily burdens religious speech, as it is not underinclusive and does not include discretionary authority for the government of North Greene to grant exemptions to individual organizations. The statute does not condone any secular activity of a type that is similar to the religious conduct it prohibits. Additionally, the only exceptions to the statute are universal remit for counselors and practitioners affiliated with religious organizations, which do not invite the government of North Green to consider the particular reasons for a person's conduct. As such, regardless of incidental burdens primarily on religious speech, the statute is generally applicable.

*i. N. Greene Stat. § 106 is not underinclusive by condoning secular activity of a similar nature to religious activity that it restricts.*

"All 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. The Free Exercise Clause 'protect[s] religious observers against unequal treatment,'" *Lukumi* at 542. (citing *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 148 (1987)). Under this principle, the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief[.]" *Id*. at 543. "A government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,'" *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2423 (2022). Government regulations are not generally applicable "whenever

they treat any comparable secular activity more favorably than religious exercise[,]" with "comparable" judged "against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S.CT. 1294, 1296 (2021). However, determining whether two activities are comparable "does not require that the State equally treat apples and watermelons." *Id.* at 1298 (Kagan, J., dissenting).

In *Lukumi*, a law which forbid religious animal sacrifices on grounds of public health risks, but did not forbid killing of animals in multiple secular practices - such as hunting, fishing, pest extermination, or euthanasia of excess animals - was greatly underinclusive. *Lukumi* at 543-44. In *Kennedy*, a performance evaluation which imposed a post-game supervisory requirement solely on the coach known to publicly pray post-game and not on any other coaching staff demonstrated a requirement which was not "applied in an evenhanded, across-the-board way." *Kennedy* at 2423. In *Tandon*, restrictions on certain gatherings meant to prevent the transmission of illnesses were found to not be generally applicable because they applied to certain at-home religious gatherings but not to certain secular businesses that posed a similar risk of spreading diseases from person to person. *Tandon* at 1297.

Here, Petitioner has not managed to indicate any such underinclusive flaw in § 106. The statute is derived from "a compelling interest in protecting the physical and psychological well-being of minors." *Sprague* at 4. On its face, the statute forbids SOGICE therapy without consideration for whether the therapy is religious or secular in nature. *Id.* at 3. Petitioner has failed to identify any instance of secular SOGICE condoned by statute or in practice. Moreover, Petitioner attempts to claim gender-affirming therapy "can lead to the very types of

psychological harms" § 106 is intended to prevent. *Sprague* at 10.[7] Setting aside questions of factual effectiveness or harm of either SOGICE or gender-affirming care, to hold the two therapies as analogous is something no party to this case would do. Petitioner does not consider SOGICE harmful to minors, else he would not seek to provide such therapy. Petitioner does view gender-affirming care as harmful to minors. Respondent takes the opposite view on both. Each party believes one option is valid medical care while the other is an abusive practice justified only by ideology that should be banned. The core dispute driving this case is that no party views these two practices as analogous with respect to the stated purpose of §106. Equating the two forms of therapy is therefore less appropriate than equating Justice Kagan's apples and watermelons; it is like equating fire and water. Therefore, § 106 does not fail to be generally applicable by being under inclusive.

*ii. N. Greene Stat. § 106 does not include any discretionary authority or mechanism to grant individualized exemptions that would require the government to consider the particular reasons for an individual's conduct.*

If a government policy is not underinclusive, then it may still fail to be generally applicable "if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions." *Fulton* at 1871. In *Fulton*, this Court ruled that a city's foster care contract, which required foster care agencies to agree to certify same-sex couples as foster parents, but which allowed the city to grant individual exemptions from these requirements to agencies at its discretion, was not generally applicable. *Id.* at 1878. In multiple other cases, this Court has demonstrated its aversion to laws which allow officials to

[7] Petitioner also makes references to "sex reassignment surgery," but the record does not establish that such surgeries are legally available to minors under North Greene Law. *Sprague* at 10.

make similar case-by-case determinations. *See, e.g.*, *Sherbert* at 401 (invalidating denial of unemployment benefits where statute allowed officials to evaluate, on a case-by-case basis, whether an employee's termination was for "good cause"); *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940) (invalidating a statute that prohibited solicitation for religious or charitable causes without approval and authorizing the official to determine whether a cause is genuinely religious or charitable).

The discretionary authority to grant individualized exemptions inherently contradicted principles of both neutrality and general applicability. *Fulton* at 1878. Here, there are no individualized exemptions, only universal exceptions for,

> "(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.'"

*Sprague* at 4. It has no discretionary authority for individualized exemptions, nor any discretionary authority that would require North Greene to consider either the particular reasons for an individual's conduct or allow the state to decide which religious groups are to be restricted by the statute.

### *iii. Ruling a law is not generally applicable solely because it primarily burdens religious speech is an unworkable standard that defeats the purpose of general applicability and neutrality.*

"A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Educ. Of Kiryas Joel Village School Dist. V. Grumet* 512 U.S. 687, 696 (1994). "[T]he State may not favor or endorse either religion generally over nonreligion or one religion over others." *Lee v. Weisman*, 505 U.S. 577,

627 (1992) (Souter, J., concurring)." By nature of the "cosmopolitan, religiously diverse society" described in *Smith*, almost no restriction on expression will burden all religious and nonreligious groups equally or proportionately. The overwhelming majority of such regulations burden different groups to different degrees, due to different cultures and doctrines. Just as half of all lawyers graduate in the bottom half of their class, some group, whether religious or non-religious, will be affected most strongly by any governmental policy that touches a religion.

To say that a policy loses general applicability because it primarily burdens either religious groups or religion as a whole is to tacitly raise all religions over nonreligion, as general applicability can only be obtained by ensuring that nonadherents bear the brunt of any government regulation or policy. Alternatively, it is to turn every policy that might intersect with a religion into a never-ending search for perfectly distributed burdens between each religious group and secular society. The first option is to implicitly end general applicability and neutrality as meaningful concepts. The second is to "deem[] presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Smith* at 888.

As such, § 106 should not axiomatically fail to be generally applicable because it primarily burdens religious speech. North Greene's § 106 bars both secular and religious activities in line with its stated purpose. It does not under-include religious or secular activities in line with that purpose. Nor does the statute allow the state of North Greene to selectively authorize individuals to act in line with their religious beliefs by means of discretionary exemptions to the statute. Therefore, regardless of any incidental burdens or their distribution on different groups, § 106 is a generally applicable law under *Smith.*

**b. A law can be neutral even if it primarily burdens religious speech.**

The Free Exercise Clause "protects religious observers against unequal treatment" and against "laws that impose special disabilities on the basis of religious status." *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021 (2017) (internal quotation marks and alterations omitted). While a burden primarily placed on a religion may seem bigoted, "the constitutional benchmark is 'government neutrality,' not 'governmental avoidance of bigotry.'" *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020). *"*A law burdening religious practice that is not neutral… must undergo the most rigorous of scrutiny." *Lukumi* at 546. N. Greene Stat. § 106 is neutral even if it primarily burdens religious speech. It does not have a religious exercise as its object, target an activity as a result of its religious origin, or function out of animus to any or all religious groups. Nor has it been enforced in an inconsistent or unneutral manner. The law does not discriminate facially or substantively and was not drafted as a pretext to burden religious groups. As such, regardless of incidental burdens primarily on religious speech, the statute is neutral.

*i. N. Greene Stat. § 106 is facially neutral as it does not have a religious exercise as its object.*

"If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Lukumi* at 533. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). "The Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. V. Colorado Civil Rights Com'n,* 128 S.Ct. 1719, 1731 (2018). Courts must meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs. *See Lukumi* at 534-35; *Yick Wo v. Hopkins*, 118 U.S. 356, 373-4

(1886). However, under *Lukumi*, neutral laws can incidentally burden "a particular religious practice" while maintaining their neutrality. *Lukumi* at 531.

Here, § 106 is facially neutral. The portions of the statute which define and govern SOGICE use clinical secular language without overt or subtle implication of religious beliefs. *Sprague* at 4. The restricted behavior does not reference any religion or any religious practices. In *Lukumi*, religiously charged language such as "sacrifice" and "ritual," was not sufficient to strip city ordinances of neutrality. *Lukumi* at 534. Here, § 106 lacks any language with religious connotations. Therefore, § 106 is facially neutral.

*ii. N. Greene Stat. § 106 is substantively neutral as neither § 106 nor its legislative or administrative history provide a context of anti-religious animus or any form of subtle hostility to religion.*

Factors relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop* at 1731. Neutrality can be lost by "official expressions of hostility to religion" that are "not disavowed…by the State[,]" or by "disparate consideration… compared to [other] cases[.]" *Id.* at 1732.

In *Masterpiece Cakeshop*, the Colorado Commission, when considering the petitioner's beliefs, "did not do so with the religious neutrality that the Constitution requires." *Masterpiece Cakeshop* at 1724. In that case, this Court drew comparisons between different cases decided by the Colorado Civil Rights Commission, where bakers who refused to make cakes with religious designs were found to not be discriminatory, while Masterpiece Cakeshop, which refused to make a cake for a same-sex wedding, was found by the Commission to discriminatory. *Id.* The

Court also considered several comments made in public hearings which "disparaged Phillips' *faith* as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust." *Id.* at 1721 (emphasis added). Similarly, in *Lukumi*, a resolution adopted by the city council stated that "residents and citizens of the City of Hialeah have expressed their concern that *certain religions* may propose to engage in practices which are inconsistent with public morals, peace or safety." *Lukumi* at 535. (emphasis added).

Neither a disparity in enforcement nor official expressions of hostility to religion exist in this case. Unlike the petitioner in *Masterpiece Cakeshop*, Petitioner cannot point to other cases of enforcement under § 106 where secular or other religious views led to disparate decision making by North Greene authorities in enforcing the statute. With regard to expressions of hostility, in both *Lukumi* and *Masterpiece Cakeshop*, comments showing hostility to religious beliefs were made openly and unopposed: in a resolution adopted by the city council in one case, and during public hearings in the other. Here, no such comments have been made. One sponsor of the bill, State Senator Floyd Lawson, made comments comparing SOGICE to "barbarous practices," though he made no comments regarding religion or religious beliefs. *Sprague* at 8. Importantly, he made this statement of disapproval of SOGICE during legislative debate: his statements cannot be considered "unopposed," as were comments in *Masterpiece Cakeshop*. *Id.*

Another sponsor of § 106, State Senator Golmer Pyle, made much more nuanced comments regarding SOGICE which did touch on religion. *Sprague* at 9. However, his comments were, again, focused on SOGICE as a practice his experience had led him to believe was ineffective, rather than a criticism of "certain religions" as in *Lukumi*. *Id.* Additionally, Pyle couched his criticism in terms of his own faith, and acknowledged the religious beliefs of his

colleagues which may cause them to disagree with him on § 106. *Id.* Neither Pyle nor Lawson's comments were part of an official resolution. *Id.* Neither comment demonstrated hostility or disrespect to any religion in a manner that would taint § 106. *Id.*

Plaintiff cannot identify any disparity in enforcement or application of § 106 that demonstrates hostility to his religion. The comments which Plaintiff has claimed demonstrate official hostility, do not show a legislative history, administrative history, or contemporaneous statements by members of the decision-making body indicating hostility to religion. Therefore, Plaintiff has not demonstrated animus to his religion that would strip § 106 of substantive neutrality.

*iii. If a law loses neutrality merely by primarily burdening religious speech, then litigation over free expression restrictions cannot have finality.*

Language is a living thing. The predominance and importance of different kinds of speech varies massively on a personal and cultural level, with different memetic concepts growing in prominence or falling into obscurity with different segments of the population constantly. As such, if a law or policy can lose neutrality for purposes of analysis under *Smith*, there can never be a final ruling on the constitutionality of a restriction under the Free Exercise Clause.

In 1665, Robert Hooke published his findings on microscopic observations in *Micrographia,* including commentary on fossil wood, and in 1678, he wrote a letter to Martin Lister stating that some petrified specimens "belonged to extinct taxa." *University of California Museum of Paleontology*. (n.d.). *Robert Hooke*. https://ucmp.berkeley.edu/history/hooke.html. If, at the time, a law had been passed forbidding accredited universities from teaching biological models similar to the Aristotelian "great chain of beings" model, which holds that the hierarchy

of species is fixed and unchanging, and that extinction is therefore impossible, it would have burdened both secular and religious institutions, rather than primarily burdening religious speech. However, if such a law held from the late 17th century to the present day, passing from British law into U.S. law, then in the modern United States it would almost exclusively burden religious speech, as the physical possibility of extinction of various species is a well-established fact in secular biological models, but some religious groups still hold to the "great chain of beings."

If a law is axiomatically not neutral under *Smith* solely on the grounds that it primarily burdens religious speech, then the extinction law could have been neutral when passed, but would not be neutral currently. A court could reasonably uphold the law under rational basis review in the 18th century, but reject it under strict scrutiny at some undecided point in the 19th, 20th, or 21st century. If neutrality can be violated merely by cultural shifts, independent of any intent or malice by legislators, then the issue of a law's constitutionality under the Free Exercise Clause can never be settled. Any new plaintiff moving to have a previously settled constitutional law overturned could reasonably argue that, under new facts, the extinction law, or § 106, now regulates speech that is sufficiently unpopular in the secular realm as to primarily burden religious speech, and is thus unconstitutional.

Therefore, in the interest of maintaining consistent and final decisions in litigation, a law should remain neutral under *Smith* even if it incidentally primarily burdens religious speech. As § 106 is both facially and substantively neutral otherwise, it is neutral under the standard set forth in *Smith* despite primarily burdening religious speech.

**c. Smith should not be overturned even though a law can be neutral and generally applicable while primarily burdening religious speech.**

Should this court overturn the "neutral and generally applicable" standard set forth in *Smith*, there are, broadly, two potential approaches that could be taken regarding litigation under the Free Exercise clause: consider all Free Exercise litigation under the standard of strict scrutiny or adopt a new standard that is somewhat more stringent than *Smith's* standard but not on the level of strict scrutiny.

Resorting to strict scrutiny is not workable for reasons put forth by this Court in *Smith*. Multiple religions exist which sincerely believe all secular law is subordinate to divine law or some form of ecclesiastic authority. As such, a plaintiff holding such beliefs could approach theoretically any law or government policy and sue under the Free Exercise Clause as a violation of his sincerely held religious beliefs. While many forms of government regulation should be as narrowly tailored as possible and in service to compelling government interest, governance by strict scrutiny is neither practical nor functional for a broad section of policies.

Drafting a new standard more accommodating to religious speech and practices than *Smith*, contrarily, risks running afoul of the Establishment Clause of the First Amendment. The Establishment Clause and Free Exercise Clause are "both cast in absolute terms" and "if expanded to a logical extreme, would tend to clash with one another." *Walz* at 668-9. The line between the two clauses "cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to ensure that no religion be sponsored or favored, none commanded, and none inhibited," *Id.* To accommodate religion by moving away from neutrality is to, in the words of *Kiryas*, favor religious adherents collectively over non-adherents. It has been repeatedly held by this court that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs. See *Espinoza v. Montana Department of Revenue*, 140.S.CT. 2246, 2254 (2020); *Locke v. Davey*, 540 U.S.

712, 719 (2004); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995). *Trinity Lutheran* at 2019–2020. Conversely, it should not offend the Free Exercise Clause if religious observers and organizations are burdened by neutral government programs.

N. Greene Stat. § 106 does not under-include comparable secular behavior to the SOGICE it prohibits, nor does it grant discretionary authority to any officials to grant exemptions from regulation in a manner that would encourage those officials to examine the particular reasons for a person's conduct. The law does not make any religious practice or religion its facial object, and the context of its passage and enforcement do not show even a subtle departure from neutrality or hostility to religion. As such, § 106 is both generally applicable and neutral under *Smith*. Additionally, the interest of consistent, final rulings, *Smith* should not be amended to allow incidental burdens on religious groups or observers to strip § 106 of neutrality or general applicability. Lastly, to allow for functional governance and avoid creating precedent unbalancing the relationship between the Establishment Clause and the Free Exercise Clause, *Smith* should not be overturned simply because a law which is neutral and generally applicable, such as § 106, may incidentally primarily burden religious speech.

## CONCLUSION

For the aforementioned reasons, Respondent respectfully requests this Court uphold the Fourteenth Circuit's holding.

Respectfully submitted,

Team 12

Counsel for Respondent

# APPENDIX

1. **The First Amendment of the United States Constitution provides:**

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

2. **N. Greene Stat. § 106(e)(1)-(2) provides:**

> (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.