Docket No. 23-2020

In The

Supreme Court of the United States

October Term, 2023

Howard Sprague,

Petitioner,

v.

The State of North Greene,

Respondent.

On Writ of Certiorari to the Unites States

Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

Attorneys for Respondent
September 26, 2023

QUESTIONS PRESENTED

I. Is medical treatment that includes therapy conversations between licensed health care professionals and clients considered conduct, and does a law preventing such medical treatment when the client is a minor violate the First Amendment of the United States Constitution?

II. Does the government violate the Establishment Clause of the First Amendment when it prohibits licensed health care professionals from engaging in harmful treatment on minors, and should the current standard set in *Employment Division, Department of Human Resources of Oregon v. Smith* that this Court uses as precedent to evaluate the Establishment Clause be overruled?

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STATEMENT OF THE CASE

Factual Background

The State of North Greene ("North Greene") regulates business and professional conduct through its Uniform Professional Disciplinary Act by listing actions that are considered "unprofessional conduct" for licensed health care providers. R. at 3-4. In 2019, the North Greene legislature updated its Uniform Professional Disciplinary Act to include "conversion therapy" on minors to the list of actions considered to be unprofessional conduct. R. at 4. "Conversion therapy" is also referred to as "reparative therapy" or "sexual orientation and gender identity change efforts" ("SOGICE")." R. at 4, n.2. The North Greene legislature defined "conversion therapy" as seeking to change an individual's sexual orientation or gender identity through "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." R. at 4.

Under the statute, North Greene specified three instances where the change in the law does not apply. First, speech by licensed health care providers that is not considered to be performance of "conversion therapy," is still allowed. R. at 4. Second, religious practices or counseling occurring under a religious denomination, church, or organization which does not constitute "performing conversion therapy" may continue. R. at 4. Third, non-licensed counselors performing therapy under a religious denomination, church, or organization is permitted. R. at 4.

The Legislature to steps exercised care to ensure the statute does not prevent health care providers from: 1) expressing their personal views to patients (including minors) regarding conversion therapy, sexual orientation, or gender identity; 2) practicing conversion therapy on patients over the age of eighteen; and 3) referring minors seeking conversion therapy to counselors practicing under a religious organization or counselors in another state. R. at 4.

North Greene's legislature asserted the enacted changes to § 106(d) are constitutional, because it possesses "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." R. at 4. Certain members of the legislature, including North Greene State Senators Floyd Lawson and Golmer Pyle, addressed the legislative body during the legislative process of passing this law. R. at 8-9. Senator Lawson discussed his reasons for enacting the bill, and Senator Pyle spoke about his personal experience with conversion therapy by sharing his own daughter's negative experience with conversion therapy, with it being ineffective and stressful on his daughter, his family, and himself. R. at 9. The legislature also looked to the American Psychological Association (APA) opinions explaining reports of harm, such as depression, suicidal thoughts or actions, and substance abuse. R. at 7. The North Greene legislature enacted this statute to respond to its concern with minors receiving conversion therapy. R. at 4.

Procedural History

Howard Sprague filed suit against the State of North Greene in August of 2022. R. at 5. Mr. Sprague alleged his free speech and free exercise rights under the First Amendment were violated by North Greene's prohibition of conversion therapy on minors. R. at 5. The plaintiff's allegations arose from his use of conversation therapy on minors, despite being a licensed health care professional that does not work in a religious institution. R. at 3. The plaintiff sought a preliminary injunction, and North Greene filed a motion to dismiss the complaint. R. at 5. The Eastern District of North Greene denied the plaintiff's motion for preliminary injunction and rejected the plaintiff's constitutional claims, granting North Greene's motion to dismiss. R. at 5.

On appeal, the Fourteenth Circuit affirmed the decision of the Eastern District of North Greene, concluding that the plaintiff's First Amendment rights were not violated by North Greene's statute. R. at 5. The Fourteenth Circuit Court of Appeals held North Greene statute was neutral, generally applicable, and rationally related to a legitimate government interest. R. at 7. In affirming both the denial of the plaintiff's motion for preliminary injunction and the granting of North Greene's motion to dismiss, the Appeals Court found North Greene's statute banning conversion therapy did not violate the plaintiff's free speech or free exercise rights under the First Amendment. R. at 10-11.

SUMMARY OF THE ARGUMENT

Free Speech Clause

The Free Speech Clause of the First Amendment protects the freedom of speech of individuals. However, the Clause provides less protection when speech involves professional conduct. This Court explained in *National Institute of Family and Life Advocates v. Becerra* there are two instances "where states regulate professional conduct that incidentally involves speech," with the professional conduct is given less protection. The North Greene statute prohibits licensed health care providers from practicing conversion therapy on minors, which regulates the professional conduct of licensed health care providers.

Like the Ninth Circuit Court of Appeals decision in *Pickup v. Brown*, North Greene's statute focuses on restricting the conduct of providing conversion therapy to minors, not on restricting the speech of licensed healthcare providers. Because the statute regulates conduct, it is analyzed under rational basis review. Furthermore, the North Greene legislature has a legitimate government interest in protecting minors from the harms associated with conversion therapy—depression, suicidal thoughts, suicidal actions, and substance abuse—that is rationally related to enacting the statute preventing conversion therapy. Even if the North Greene statute is analyzed under heighted scrutiny, the statute is narrowly tailored to its compelling government interest in preventing harm to minors caused by conversion therapy.

Free Exercise Clause

The Free Exercise Clause of the First Amendment protects the freedom to express and practice one's religion, but does not relieve one from abiding by a valid neutral and generally applicable law. North Greene's statute is neutral because the text is facially, its purpose is to

prevent harm to minors and not to restrict religious practices, and the real-world effect applies to all minors experiencing conversion therapy for any reason. Additionally, the statute is generally applicable because the law does not prohibit religious conduct while permitting secular conduct and does not provide a mechanism for individualized exemptions. In fact, the North Greene statute created exemptions for religious organizations to continue practicing conversion therapy, while prohibiting all secular practices of conversion therapy on minors.

This Court should affirm its decision in *Employment Division, Department of Human Resources of Oregon v. Smith* because the factors outlined in Dobbs support upholding the decision. The reasoning of the lack of any error in *Smith*, the workability of the standard by Circuit Courts and Courts of Appeals, the minimal impact on other areas of law stemming from the decision, and the concrete reliance individuals and state and local governments place on the framework, all weigh in favor of affirming Smith. Overturning *Smith* would cause unworkable concerns, resulting in unequal exemptions granted by the courts. Smith provides a framework that allows for heightened compelling interest scrutiny and avoids the pitfalls of forcing courts to become arbiters of religious sincerity and importance and should therefore be affirmed. Even if the Court decides to overturn the holding in Smith, the North Greene statute is still constitutional because North Greene narrowly tailored their interest in protecting minors by prohibiting conversion therapy only on minors.

STANDARD OF REVIEW

In reviewing a lower court's findings concerning the First Amendment de novo, this Court is obligated to "make an independent examination of the whole record" to make sure the judgment does not infringe on the free exercise. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

This Court reviews de novo both a denial of a preliminary injunction and a grant of a motion to dismiss. When reviewing a respondent's motion to dismiss that is granted, this Court must "accept true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002).

ARGUMENT

I. N. Greene Stat. § 106(d) does not violate the Free Speech Clause of the First Amendment under rational basis or strict scrutiny.

"The framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think.'" *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2310 (2023) (quoting *BSA v. Dale*, 530 U.S. 640, 660-66 (2000)). Since its creation, our society has permitted certain restrictions on our freedom of speech that may be "outweighed by the social interest in order and morality." *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). When analyzing whether speech may be restricted, the Court traditionally applies strict scrutiny for content-based laws, but has also provided less protection for professional conduct in two scenarios: (1) "where a law requires professionals to disclose factual, noncontroversial information in their 'commercial speech,'" or (2) "where states regulate professional conduct that incidentally involves speech." *National Institution of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2365-66 (2018) (quotation omitted). The North Greene statute falls under the second scenario.

A. The North Greene statute regulates professional conduct acknowledged by this Court that is afforded less protection under the First Amendment.

This Court has found it is not a restriction of freedom of speech to make "conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Further, the State does not lose its authority in regulating commercial activity that is depicted as harmful to the public just because speech is a part of the harmful activity. *Id*. at 456. Though the Court has struggled with making a distinction between speech and conduct, it has done so before. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949); *Planned Parenthood of*

Southeastern Pa. v. Casey, 505 U.S. 833, 884 (1992) (where the opinion discussed that the law was regulating speech solely "as part of the practice of medicine, subject to reasonable licensing and regulation by the State"), overruled on other grounds by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228. This is reflected in both the Ninth Circuit case, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), and in the present case.

In *Pickup*, Plaintiffs wanted to enjoin the enforcement of a bill that banned state-licensed mental health providers from participating in "sexual orientation change efforts" (SOCE) with patients who were minors. 740 F.3d at 1221. The court found the bill was not unconstitutional under the First Amendment, because it regulated the conduct of psychoanalysis done by licensed mental health providers, not their speech. *Id*. at 1226. It further held speech communicated during psychoanalysis does have constitutional protections, but is not protected from any and all regulation. *Id*. The court made the distinction that though doctor-patient communications are afforded substantial protection, the "government has more leeway to regulate the conduct necessary to administering treatment itself." *Id*. at 1227. Further, therapists are not granted extra protection because the main mechanism in their treatment is through spoken words. *Id*.

Much like in *Pickup*, North Greene Stat. § 106(d) is focused on restricting the conduct of providing conversion therapy to minors, not the speech of licensed healthcare professionals. Conversion therapy encompasses several practices and interventions to change a person's sexual orientation or gender identity, also known as "reparative therapy" or "sexual orientation and gender identity change efforts" ("SOGICE"). R. at 3. The statute does not regulate opinions or information about conversion therapy shared between the medical professional and the patient, and instead only prevents the performance of conversion therapy on minors. Medical professionals are allowed to perform conversion therapy on consenting adults, and discuss their opinions,

thoughts, and beliefs on conversion therapy with all patients. Further, the statute creates an exemption for religious practices occurring under a "religious denomination, church, or organization." R. at 4.

Petitioner is a licensed family therapist who works in a non-religious institution not covered under the exemption of the statute, and only engages in verbal or talk therapy. R. at 3. But as noted in Pickup, just because the form of treatment is through spoken word, does not mean that Petitioner's freedom of speech is being infringed upon or regulated, only his conduct. If the statute regulated speech including any information of conversion therapy in all institutions, there might be a possible instance of unconstitutionality. In this case there is not, as there are exemptions to the statute, and availability for speech that includes information, thoughts, opinions, and even recommendation of conversion therapy. This shows, much like in *Pickup*, that the statute is not a regulation of speech, but of conduct and should be reviewed under a rational basis.

B. The N. Greene Stat. §106(d) is constitutional under rational basis.

Since the North Greene statute regulates conduct and rational basis is used, the statute is found constitutional if there is a rational relationship to a legitimate state interest. *Casey*, 505 U.S. at 884. The General Assembly enacted the statute to protect children from the physical and psychological risks and exposure to serious harms caused by sexual orientation change efforts, especially in lesbian, gay, bisexual, and transgender youth. R. at 7. Opinions from the American Psychological Association ("APA") were relied on by Legislators when looking at the rationality of the statute. *Id*. The APA concluded conversion therapy was ineffective and resulted in reported depression, suicidal thoughts or attempts, and substance abuse in minors. *Id*. Accordingly, this Court should consider the protection of the well-being of minors a legitimate state interest, and find N. Greene Stat. § 106(d) passes scrutiny under rational basis and is therefore constitutional.

C. North Greene's statute remains constitutional even under heightened scrutiny.

Despite the North Greene statute falling right into the description of one of the accepted circumstances of professional conduct affording a lower level of scrutiny, even under heightened scrutiny the statute remains constitutional. When analyzing a statute under strict scrutiny, the Court must consider whether there is a compelling state interest and whether statute is narrowly tailored to that compelling state interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

The dissenting opinion applies strict scrutiny because it believes the statute is content-based. R. at 12. The mere assertion that a law or statute is content-neutral is not enough when the statute is facially discriminatory based on content. *Id*. The dissent was misplaced in believing the only reason the State would restrict medical professionals from conducting conversion therapy with minors stemmed from the State's disapproval of conversion therapy. If true, the State would have banned all performance of conversion therapy, not only with minors, but at all institutions under any circumstance. The State would have also prevented or restricted talk of conversion therapy with minors such as opinions, recommendation, beliefs, and thoughts on conversion therapy. For the reasons mentioned above, the North Greene statute is not content-based, but if the Court concluded it was, the statute would still pass strict scrutiny.

1. The North Greene statute contains a compelling state interest.

North Greene's compelling interest is the safeguarding of minor's psychological and physical well-being. *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). Legislation has reflected the importance of protecting the physical and emotional well-being of children and this Court has reflected the same belief. *See Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (holding that a statute prohibiting a minor to distribute religious materials on the street was constitutional); *Brown*

v. Entm't Merchs. Ass'n, 564 U.S. 786, 849 (2011) (holding that the well-being of its youth is a compelling interest). Accordingly, North Greene's compelling interest satisfies the first prong of strict scrutiny.

2. The North Greene statute is narrowly tailored to a compelling interest.

The dissent disregards any argument of whether the statute is narrowly tailored. The dissent merely states that the compelling interest alone is not enough to pass strict scrutiny, which is agreeable. R. at 14. Continuing with the analysis, the statute is narrowly tailored. Regarding the First Amendment, the "fit matters" and while it does not have to be perfect, the fit must be reasonable, "one whose scope is in proportion to the interest served[.]" *Ams. For Prosperity Found v. Bonta*, 141 S. Ct. 2373, 2384 (2021). In this case, the statute refers only to conversion therapy to minors, not to all individuals like a blanket provision. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000) (holding that a blanket ban is not constitutional if the "protection can be accomplished by a less restrictive alternative."). Conversion therapy can be discussed as a possible treatment for a minor, information about conversion therapy can be given to minors, and in certain organizations conversion therapy can be done on minors, the statue only prevents licensed health care providers unaffiliated with religious organizations to conduct conversion therapy on minors. The statute is narrowly tailored to the compelling interest of the mental, emotional, and physical well-being of minors as supported by APA's conclusions that conversion therapy causes exposure to serious harm and that conversion therapy is has not been demonstrated as effective treatment. R. at 7. Further, North Greene's statute is not unconstitutional under strict scrutiny.

II. The Petitioner fails to "discharge his burdens" under the Establishment Clause of the First Amendment, as the North Greene statute is a neutral law of general applicability.

The United States Constitution protects the free exercise of religion through the First Amendment's safeguards against making any law that prohibits the "free exercise" of religion. However, this Court has consistently held this right does not allow a person to be relieved of the obligation to comply with a valid and neutral law "on the ground that the law proscribes conduct that his religion prescribes." *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990). Under the precedents of this Court, "a plaintiff bears certain burdens to demonstrate an infringement of his rights" of the Free Exercise Clause. *Kennedy v. Bremerton School Dist.*, 595 S. Ct. 2407, 2421 (2021). A plaintiff may satisfy his burden under a Free Exercise claim by showing how the government has burdened his sincere religious practice with a law that is not neutral or generally applicable. *Id.* at 2421-22. Here, the plaintiff has not "discharged his burdens" because the North Greene statute is neutral and generally applicable. *See id.* at 2421. Whether the law is neutral and generally applicable or not establishes the standard of review for analysis of the law. If the law is neutral and generally applicable, it is analyzed under rational basis review. Strict scrutiny review only applies when a law fails to be neutral and generally applicable, "even if the law incidentally burdens religious practice." *Tingley v. Ferguson*, 47 F.4th 055, 1084 (9th Cir. 2022). Otherwise, rational basis review applies. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) ("*Lukumi*"); *Tingley,* 47 F.4th 055 at 1984.

A. The North Greene statute is neutral because the text is neutral on its face, the purpose is not to restrict religious practices, and the real-world effect applies to all.

To determine if a law is neutral, courts look at the purpose of enacting the statute, including background and legislative history, the text of the statute, and the effect of the statute in the real world. *See Lukumi*, 508 U.S. at 533, 540. In evaluating a law's purpose, if the purpose is to "restrict

practices *because* of the religious motivation of those performing the practices," then the law is not neutral. *Tingley*, 47 F.4th at 1085. For a law to be neutral "on its face," it must not discriminate against religious practices in the text of the statute and must not refer to a religious practice that does not have a secular meaning. *See Lukumi*, 508 U.S. at 533. When looking at the purpose of the legislature, legislative history, including statements from members of decision-making bodies, can be relevant to the intent of the statute. *Id.* at 540. The real-world effect of a law "is strong evidence of its object," but even if adverse effects result, social harm may be a legitimate concern of the legislature that does not prove targeting or discrimination. *Id.* at 535.

1. The purpose of the North Greene statute is to prevent harm minors experience from conversion therapy, not prohibit religious practices.

First, the North Greene legislature enacted this statute to prevent the harm minors experience from conversion therapy, not to "restrict practices *because* of their religious motivation." *Tingley*, 47 F.4th 055 at 1085. In *Tingley*, the Ninth Circuit Court of Appeals found a law banning conversion therapy on minors in the state of Washington to be neutral because the purpose of the law was to prevent harm to minors. *Id.* The Ninth Circuit Court of Appeals explained that Washington was regulating conversion therapy "*only* within the confines of the counselor-client relationship" of licensed providers, not providers acting in a religious capacity. *Id.* (quoting *Welch v. Brown*, 834 F.3d 1041, 1045 (9th Cir. 2016) (affirming that a California law prohibiting state-licensed providers from practicing sexual-orientation change efforts did not violate plaintiffs' First Amendment rights, as the law was neutral.) Because the law prohibited conversion therapy on minors "regardless of the motivations for seeking," the court explained the purpose of the law was not to target religion. *Id.*

Here, North Greene is not infringing upon or restricting religious practices of conversion therapy, as the statute creates exemptions for religious organizations utilizing this practice of

conversion therapy. North Greene's purpose is "to regulate the professional conduct of licensed health care providers," not target religious practices who also practice conversion therapy. R. at 4. North Greene's statute is similar to the law in *Tingley*, where the Washington legislature enacted a law prohibiting conversion therapy on minors, because the State's purpose is to prevent harm to minors and not to target religious practices of conversion therapy.

Legislative history, including the circumstances of the law's enactment, may also be consider to evaluate the government's purpose for enacting a law. *Tingley*, 47 F.4th at 1085. Comments by officials have been reviewed by this Court before in *Masterpiece Cakeshop, Limited v. Colorado Civil Rights Commission.* In *Masterpiece Cakeshop Limited*, this Court examined public comments by government officials involving a free exercise challenge by a cake shop owner who refused to sell wedding cakes to same-sex couples because of his religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1726, 1729-30 (2018) ("*Masterpiece*"). These comments included remarks explaining how people cannot act on their religious beliefs while doing business in the state and how people must compromise their religious beliefs to continue business practices. *Id.* at 1729. Since these comments were made by commissioners who were adjudicating the specific case of the plaintiff, this Court found that these comments amounted to actual "animus" against the plaintiff's religious beliefs. *Id.* at 1730, 1737.

Here, the legislative history of North Greene's statute indicates that members of North Greene's legislature feel strongly about the adverse effects of conversion therapy on minors. Unlike in *Masterpiece*, no anti-religious animus is present in the comments by the North Greene legislators. Comments from North Greene senators centered on their personal experiences with conversion therapy on minors and focused on explaining the negative effects on minors the current statute is trying to prevent. Specifically, comments made by State Senator Golmer Pyle explained

his first-hand knowledge about his daughter experiencing negative effects of conversion therapy. R. at 9. Additionally, the statements cited as evidence for anti-religious sentiment occurred during the general legislative process in enacting the law, whereas the comments made by legislators in *Masterpiece* were made by an adjudicatory body in deciding the plaintiff's case. This Court has "been reluctant to attribute" statements made by legislators to the whole governing body like the statements made by the North Greene legislators because legislators' statements do not necessarily equate to the motivation behind other legislators enacting the law. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2256 (2022).

2. The text of the North Greene statute is neutral on its face.

The North Greene statute is neutral on its face. For a law to be neutral "on its face," it must not discriminate against religious practices in the text of the statute and must not refer to a religious practice that does not have a secular meaning. *See Lukumi*, 508 U.S. at 533. In *Lukumi*, this Court decided, with respect to the neutrality of the Florida ordinances, the text of the statute was facially neutral. *Id.* at 533-34. Specifically, the Florida ordinances prohibited the "rituals" and "sacrifices" of animals. *Id.* at 535-37. This Court found that because the mention of "sacrifice" and "ritual" have secular meanings applied in the ordinances and the statute defined the terms secularly, the ordinances are textually neutral. *Id.* at 533-34.

In contrast, the North Greene statute prohibits "conversion therapy," but is referring to both the secular and religious use of the word. The statute does not make any reference to religion to define "conversion therapy." The only mention of religious practices is to explain the exemptions in allowing religious organizations to continue practicing conversion therapy. The North Greene statute presents a strong case for textual neutrality, because like the ordinances in *Lukumi,* because the religious words used in North Greene's statute have secular meaning. Although conversion

therapy can be a religious practice, a secular meaning exists because nonreligious health care providers practice it, and nonreligious clients undergo its treatment.

3. The real-world effect of the North Greene statute contributes to its neutrality.

Additionally, the real-world effect of the law contributes to its neutrality. The effect of a law "is strong evidence of its object[,]" but even if adverse effects result, social harm may be a legitimate concern of the legislature that does not prove targeting or discrimination. *Lukumi*, 508 U.S. at 535. In *Lukumi*, the city issued ordinances outlawing all killings of animals but had multiple exemptions deeming animal killings necessary, such as hunting, slaughter of animals for food, and eradication of pests. *Id.* at 536. However, there were no exemptions for any religious sacrifices of animals, making the real-world effect of the ordinance targeted against religion. *Id.* at 535. This Court determined that the real-world operation of the ordinances discriminated against religious sacrifices. *Id.* at 537-38. In amending § 106(d), the North Greene legislature focused on eliminating the social harms associated with conversion therapy on minors for all, whether for religious or nonreligious motivations. Unlike in *Lukumi*, where the only banned form of killing animals was religious sacrifices, all minors in North Greene under the age of eighteen are unable to undergo conversion therapy. The North Greene statute does not create any exemptions for any minors who are seeking conversion therapy. All licensed health care providers will be prevented from performing conversion therapy on any minor, whether the minor is seeking the therapy for nonreligious purposes or religious purposes. Also, the North Greene statute does not prevent licensed health care providers from referring minors seeking conversion therapy to religious counselors or health providers in other states. R. at 4. Therefore, the real-world effect of North Greene's statute is to regulate the conduct of nonreligious health care providers within the state of North Greene, resulting in a neutral statute that does not target religious practices.

B. The North Greene statute is generally applicable because it does not prohibit religious conduct while permitting secular conduct and it does not provide a mechanism for individualized exemptions.

The North Greene statute does not prohibit religious conduct of conversion therapy while permitting secular conduct of conversion therapy. For a law to be generally applicable, it cannot: 1) "prohibit[] religious conduct while permitting secular conduct that undermines" the government's interests in enacting the law, and 2) provide a mechanism for individualized exemptions by the government. *Kennedy*, 142 S. Ct. at 2422. First, the North Greene statute does not treat secular conversion therapy on minors more favorably than religious conversion therapy on minors. Whenever a governmental regulation treats any comparable secular activity as more favorable than a religious exercise, the law is not generally applicable. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). In *Tandon*, the California law enacted pandemic restrictions on group meetings but created exemptions for hair salons, retail stores, movie theaters, and indoor restaurants to operate in violation of the law. *Id.* at 1297. This Court found that the California law was not generally applicable because the law allowed numerous secular exemptions but did not allow any exemptions for religious groups. *Id.* at 1297. Here, North Greene's statute enacts the exact opposite, as all conversion therapy is prohibited on minors, but religious conversion therapy occurring under religious organizations can continue. North Greene's statute is drastically different from the law in *Tandon* because North Greene is only prohibiting the secular activity of conversion therapy on minors while allowing the religious organizations conducting conversion therapy to continue. North Greene's statute prohibits conversion therapy for secular reasons such as minors wanting to avoid social stigma and family rejection and in response to societal intolerance for sexual minorities. *See Welch*, 834 F.3d at 1046. By only prohibiting the secular activity of conversion therapy, North Greene is not favoring secular activities over religious activities.

Second, the North Greene statute does not provide any formal mechanism for individual exemptions. In fact, no individual exemptions will exist, unless the organization is a religious organization. A formal mechanism is defined as one that creates a system of individual exemptions that would be exercised at the discretion of a government official. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878-79 (2021) (finding that the ordinances were not generally applicable because the ordinances created a formal mechanism that granted the Commissioner of the adoption agencies the ability to use her "sole discretion" to allow exceptions to the contract). The terms of the North Greene statute do not create an opportunity for individual exemptions to exist in the future, as the statute expressly specifies only three circumstances the statute does not apply. The North Greene statute also does not take into consideration the reasons for minors who are trying to undergo conversion therapy, as the statute is aimed at trying to prevent the harm and mental health effects of conversion therapy on minors. Unlike the formal mechanism created in *Fulton*, where the Commissioner of the adoption agencies was granted the ability to use her "sole discretion" in allowing exemptions, no formal mechanism is created in North Greene's law that would allow for governmental discretion to grant exemptions. Thus, the North Greene statute is a generally applicable law.

C. This Court should affirm its Decision in *Smith v. Employment Division*.

"Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2262 (2022) (quoting N. Gorsuch, *A Republic, If You Can Keep It*, 217 (2019)). While *stare decisis* is "not an inexorable command", *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (quoting *Payne v. Tennessee*, 501 U.S. 808 (1991)), the doctrine is nonetheless essential to the stability of the law, *Lawrence v. Texas*, 539 U.S. 558,

577 (2003), as it promotes evenhanded decision-making, protects individuals who have acted in reliance on the prior decision, and conserves vital judicial resources by removing the incentive to relitigate settled precedent. *Dobbs*, 142 S.Ct. at 2262. In deciding whether to overturn established precedent, The Court has considered (1) the nature of the error; (2) the quality of the Court's reasoning; (3) the "workability" of the imposed rules; (4) an accounting of any disruptive effect the rule(s) may have on other areas of law; (5) and whether there is concrete reliance on the precedent. *Id.* at 2265.

1. The Stare Decisis Factors Outlined in *Dobbs v. Jackson Women's Health* Support Upholding *Employment Division v. Smith.*

Continued adherence to the *Smith* Framework for Free Exercise Clause challenges is supported by the framework's structure which provides discretion to states to balance free exercise rights and the legislative needs of residents. The workability of the standard by Circuit Courts and Courts of Appeals and the concrete reliance individuals and state and local governments place on the framework provide further support for the Court to affirm *Smith*.

2. The nature of any error in *Employment Division v. Smith* falls in favor of States and their Consitutients, thus favoring affirming.

An "[e]rroneous interpretation of the Constitution is always important, but some are more damaging than others." *Dobbs*, 142 S.Ct. at 2265. Stated differently, the greater the harm caused by an incorrect interpretation of the Constitution, the more justified the Court is in overturning the decision. Decisions incorrectly removing a political issue from the democratic process are a form of error supporting overturning precedent. *Id*. (*Roe* and *Casey* removed abortion, an issue of "profound moral and social importance", from the political process); see also *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruled *Lochner* Era policies which placed freedom of

contract over health, safety, and general welfare and beyond the reach of the states). In addition, decisions outside any reasonable interpretation of the Constitution also support overruling *stare decisis. Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (upheld separate but equal policies which plainly betrayed our nation's commitment to equality before the law); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (overturned *Apodaca*, which directly contradicted the historical understanding and purpose of Sixth Amendment's right to a jury trial by allowing for non-unanimous jury convictions for serious offenses).

In contrast, *Smith* does not remove an issue from the democratic process, but instead allows for states to balance free exercise rights against the reasonable legislative and policy needs of their constituents. The North Greene Legislature's decision to amend its Uniform Disciplinary Act to add conversion therapy to its list of unprofessional conduct illustrates the importance of this process. The Legislature, relying on guidance promulgated by the American Psychiatric Association and strong empirical evidence demonstrating conversation therapies drastically increases the risk of suicide in children, attempted to mitigate this potential for harm while still allowing the practice in certain religious settings and on adults. In the event the North Greene Legislature's decision is ineffective or unpopular with North Greene constituents, constituents can resort to the political process as early as the next election cycle to correct any perceived deficiencies. Lastly, it goes without saying that the present debate over the correct level of scrutiny to apply to claims such as the Appellant's, any error in the *Smith* framework does not amount to the magnitude of harm resulting from failing to uphold equality before the law or the protections stemming from the Sixth Amendment's right to a jury trial.

3. The quality of reasoning employed by the Court in *Employment Division v. Smith* supports affirming.

In analyzing the quality of the reasoning of *Roe v. Wade*, the *Dobbs* Court analyzed the constitutional, historical, and policy considerations used by the majority in *Roe* to support its trimester framework. The Court held Roe's constitutional and historical analysis misread precedent and inaccurately reviewed historical abortion practices, meaning the rationale left supporting its holding - "the relative weights of the respective interests involved," and "the demands of the profound problems of the present day" - made the ruling akin to legislation or regulation, thus making the quality of their reasoning a factor in favor of overruling it. *Dobbs*, 142 S. Ct. at 2268 (quoting *Roe v. Wade*, 410 U.S. at 165). In *Ramos v. Louisiana*, Justice Gorsuch noted "the plurality [in *Apodaca*] spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right[,]" and instead devoted only one paragraph to an "incomplete functionalist analysis." 140 S. Ct. at 1405.

Justice Scalia's majority opinion in *Employment Division v. Smith* comprehensively reviewed free exercise precedent and noted the Court has recognized a State's right to regulate religious practices for nearly 100 years. *Reynolds v. United States*, 98 U.S. 145, 167 (1878). Additionally, he noted the Court has also held generally applicable laws "unconcerned with regulating speech that have the *effect* of interfering with speech", see *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969), and "race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group" are not subjected to a heightened compelling interest analysis, see *Washington v. Davis*, 426 U.S. 229 (1976). Moreover, the majority noted the only instances in which the Court invoked the Free Exercise Clause to strike down neutral and generally applicable laws were hybrid-rights cases (e.g., free speech claims combined with free exercise claims), and further noted no successful hybrid-rights case struck

down a neutral and generally applicable *criminal law*. Lastly, the majority opinion noted the *Sherbert* Balancing Test was historically limited to the employment benefit context and offered strong policy considerations for why it was appropriate to continue the Court's past approach. In summary, *Smith* rests on a comprehensive historical analysis, directly engages with historical understandings of the Free Exercise Clause, and engages in the policy ramifications of changing course. Thus, the quality of the reasoning in *Smith* weighs in favor of its affirmation by this Court.

4. The workability of *Employment Division v. Smith*'s framework supports affirming.

Supreme Court precedents employ another important consideration in deciding whether a precedent should be overruled: whether the rule imposed is workable—that is, whether it can be understood and applied in a consistent and predictable manner by District Courts and Courts of Appeals. *Dobbs* 142 S. Ct. at 2272. For example, *Roe* and its case line were found unworkable because its trimester framework and later undue burden requirements overlapped, produced confusion and disagreement in later cases, and arguably encouraged speculative litigation. See *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) (cost-benefit standard); *Planned Parenthood v. Casey*, 505 U.S. 833, 965 (1992) (overlapping undue burden language).

Overturning *Smith* presents similar unworkability concerns. Because the United States is a "cosmopolitan nation made up of people of almost every conceivable religious preference," 494 U.S. at 888 (citing *Braunfeld v. Brown*, 366 U.S. at 606), courts would inevitably face waves of claims from citizens, of many different religious sects, seeking exemptions. The sheer volume of cases across different jurisdictions would almost certainly result in the unequal granting and denial of accommodations. An equally fundamental concern is the fact courts would be required to evaluate the relative importance and sincerity of a citizen's religious practice under a compelling interest test. In contrast, the task before courts under *Smith* is one of deference for facially neutral

and generally applicable laws argued to curtail free exercise. General applicability means both religious and secular conduct is addressed and affected by the regulation. If a challenged statue's text is either not facially neutral, or the history and commentary surrounding the enactment demonstrates the intent is not neutral, then the Court will apply strict scrutiny. Accordingly, the *Smith* framework both allows for heightened compelling interest scrutiny and avoids the pitfalls of forcing courts to become arbiters of religious sincerity and importance. Thus, workability concerns support affirming *Smith.*

5. *Employment Division v. Smith* does not sufficiently affect other areas of law and presents strong reliance interests thus warranting being affirmed.

"When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine "has failed to deliver the 'principled and intelligible' development of the law that *stare decisis* purports to secure." *Dobbs,* 142 S. Ct. at 2276. Unlike *Roe,* which the Court held detrimentally impacted its application of 3rd party standing doctrines, res judicata, severability of unconstitutional provisions, and first amendment doctrines, *Smith* avoids potentially watering down future compelling interest analyses in other unrelated areas of law. 494 U.S. at 888. Reliance interests - those which people go to great lengths of advanced planning to conform their actions with the law – are greatly implicated by *Smith.* The majority in *Dobbs* recognized a traditional reliance interest was not present in *Roe,* because abortions were largely unplanned. 142 S.Ct. at 2276. In stark contrast, both the legislative and compliance interests associated with complying with Smith's framework are heavily implicated. The North Greene Legislature, like other legislatures, must go to great lengths to draft, propose, amend, and then vote and pass legislation. This process generally occurs after a great deal of time and resources has gone into researching the issue at hand underpinning the law. Private parties and state agencies

undertake similar efforts to tailor their behavior to *Smith*'*s* requirements, and have done so for over 30 years. Accordingly, reliance and effects on other areas of law also favor affirming *Smith.*

In summary, the nature of any error in *Smith*, the workability of the standard by Circuit Courts and Courts of Appeals, the minimal impact on other areas of law stemming from the decision, and the concrete reliance individuals and state and local governments place on the framework each support this Court's affirmation of *Smith*.

D. N. Greene Stat. § 106(d) is Constitutional Regardless of Whether Rational Basis or Strict Scrutiny is Applied, because the Statute is Narrowly Tailored and Supported by the State's Compelling Interest in Preventing Child Suicide.

Under strict scrutiny analysis, the government must prove it has a "compelling state interest" that is "narrowly tailored" to pursuing the interest. *Kennedy*, 595 S. Ct. at 2422. North Greene's "unqualified interest in the preservation of human life" has been expressly recognized by this Court for nearly thirty years and reflects our nation's historical commitment to upholding the sanctity of human life, from prohibiting assisted suicide and euthanasia, to the promulgation of homicide laws. *Washington v. Glucksberg*, 521 U.S. 702, 728-29 (1997) (citing *Cruzan,* 497 U.S. 261, 282 (1990)). Several states have also expressly recognized the preservation of life is an unquestionable compelling interest. *See Kligler v. Attorney General*, 491 Mass. 38 (Mass. 2022); *State v. Mechert-Dinkel*, 844 N.W.2d 13 (Minn. 2014); *Final Exit Network, Inc. v. State*, 722 S.E.2d 722 (Ga. 2012) (recognizing compelling interest in preserving human life).

Suicide is unthinkability tragic, the effects of which are borne for life by the families, friends, and colleagues of victims, and by society at large. Suicide is especially tragic when it involves children, some of whom may have become part of the next generation of attorneys and judges tasked with upholding our legal system. Our Nation is presently faced with a child suicide epidemic, as it is the second leading cause of death for young adults in the United States aged 15

to 24. *Talking to Teens: Suicide Prevention*, APA (Apr. 19, 2018), https://www.apa.org/topics/suicide/prevention-teens.

It is within this historical and societal context that the Court should find N. Greene Stat. § 106(d) is constitutional regardless of whether rational basis or strict scrutiny is applied. N. Greene Stat. § 106(d) was debated and ultimately passed by the Legislature for the compelling interest of "protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth" and is "protecting its minors against exposure to the serious harms caused by conversion therapy." R. at 4. North Greene narrowly tailored its statute in pursuit of this interest by only limiting conversion therapy prohibitions to minors. *Id.*

CONCLUSION

It is for these reasons this Court should affirm the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

/s/_____

Attorneys for Respondent

CERTIFICATE OF SERVICE

We certify that a copy of Respondent's brief was served upon Petitioner, Howard Sprague, hrough the counsel of record by certified U.S. mail return receipt requested, on this, the 26th day of September 2023.

/s/_____

Attorneys for Respondent