No. 23-2020

IN THE
SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
for the Fourteenth Circuit
No. 22-1023

BRIEF FOR PETITIONER

Team 14
Attorneys for Petitioner
September 25, 2023

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Regulations

Constitutional Provisions

STATEMENT OF JURISDICTION

National Moot Court Competition specifies that no formal statement of jurisdiction is required.

QUESTIONS PRESENTED

I. The First Amendment's Freedom of Speech clause gives individuals the right to voice their viewpoints freely without government interference. Should the Supreme Court allow a content-based restriction prohibiting the speech and viewpoint of a licensed healthcare provider from giving talk therapy to their clients in light of North Greene's prohibition on conversion therapy for minors, as mandated in N. Greene Stat. § 106(d), which infringes on Howard Sprague's ability to freely speak on his viewpoints in violation of his First Amendment rights?

II. The First Amendment's Free Exercise Clause gives individuals a license to practice their religion freely without government interference, so long as that exercise does not infringe on public morals or a compelling government interest. Should the Supreme Court reevaluate the precedent set in *Employment Division v. Smith* in light of North Greene's prohibition on conversion therapy for minors, as mandated in N. Greene Stat. § 106(d), which burdens Howard Sprague's free exercise of religion in violation of his First Amendment rights?

STATEMENT OF THE CASE

This case revolves around the constitutionality of North Greene's prohibition on conversion therapy for minors, a legal challenge brought forth by Plaintiff-Appellant Howard Sprague ("Sprague"). Sprague is a licensed family therapist whose Christian faith informs his therapeutic approach. The legal dispute arises from a North Greene statute that prohibits licensed healthcare providers from engaging in conversion therapy with patients under the age of eighteen. The statute exempts therapists, counselors, and social workers who are working for a religious denomination, church, or religious organization.

I. Procedural History

Sprague brought suit against the State of North Greene ("the State"), seeking to enjoin enforcement of N. Greene Stat. § 106 ("the Statute"). R. at 5. Sprague alleged that the statute unconstitutionally restricted his free exercise of religion and freedom of speech in violation of the First Amendment. R. at 5. The District Court concluded that Sprague did have constitutional standing to bring this claim against the State. R. at 5. The State moved to dismiss, requiring a showing that Sprague failed to state a legally cognizable claim or failed to allege sufficient facts therein. R. at 5. The District Court granted the state's motion to dismiss. R. at 5.

On appeal, the Fourteenth Circuit affirmed the District Court's dismissal of Sprague's claims. R. at 3. The Fourteenth Circuit held that the statute did not violate Sprague's First Amendment rights to free exercise of religion or freedom of speech. R. at 3.

II. Statement of the Facts

Howard Sprague privately counseled his clients for over twenty-five years as a licensed therapist in North Greene. R. at 3. His career spans various therapeutic domains, including counseling individuals dealing with issues related to sexuality and gender identity. R. at 3. While

Sprague was not counseling under the auspices of any religious institution, his therapeutic approach was deeply rooted in his Christian faith. R. at 3. His convictions concerning human identity, sexual orientation, and the sanctity of traditional marriage between a man and a woman significantly influence his counseling methods. R. at 3. Many of his clients come to him specifically for religious counseling consistent with their own religious beliefs. R. at 3. Both of these beliefs influence his counseling and draw clients to him with similar religious convictions. R. at 3.

The statute was enacted to promote the rights of minors experiencing gender and sexuality identity struggles but substantially targeted and burdened the free exercise of religion. This law categorically bans licensed healthcare providers—including therapists—from practicing conversion therapy on patients under the age of eighteen. The law defines conversion therapy as any practice or treatment by a healthcare provider that "seeks to change an individual's sexual orientation or gender identity." R. at 4; N. Greene Stat. § 106(d)(1). Sprague counseled his clients in line with his religious convictions, including the belief that the sex assigned at birth is a God-given gift that should not be altered. R. at 3. In Christianity, respect for the sex assigned at birth is an important aspect of the faith. As a result of this statute, Sprague must either counsel minors in a manner that promotes "acceptance, support, … and identity exploration and development" in a manner inconsistent with his religious beliefs. R. at 4; N. Greene Stat. § 106(d)(2). Failure to adhere to these new restrictions on his practice as a therapist will result in the loss of his licensure. R. at 3.

III. Standard of Review

All factual allegations alleged in the complaint are taken as true and the pleadings must be construed in a light most favorable to Sprague, the non-moving party, on appeal. R. at 5. The Fourteenth Circuit correctly applied an abuse of discretion standard to review the motion to dismiss. R. at 5.

SUMMARY OF THE ARGUMENT

This Court must reverse the Fourteenth Circuit's ruling on the freedom of speech issue because North Greene's statute is a content-based restriction of speech rather than conduct. N. Greene Stat. § 106(d) restricts a licensed healthcare provider's ability to perform conversion therapy on a patient under the age of eighteen. N. Greene Stat. § 106(d)(1) defines conversion therapy as therapy targeted to changing an individual's sexual orientation or gender identity. N. Greene Stat. §106(d)(2) further clarifies that conversion therapy does not include healthcare services that seek to provide social support, acceptance, and identity exploration. This clarification is not a content-neutral restriction because it is based on what is being said by the speaker. While courts may constitutionally regulate conduct, that regulation cannot directly burden free speech without restricting constitutional freedom of speech. Because the statute targets the content of speech, the statute directly and substantially burdens free speech. More than a regulation of healthcare provider's conduct, the statute restricts the content of Sprague's speech rather than his conduct. Because North Greene is attempting to restrict free speech, the statute must survive strict scrutiny by showing a compelling government interest and narrow tailoring.

This Court must also reverse the Fourteenth Circuit's decision granting the State's motion to dismiss because North Greene's statute unconstitutionally restricted Sprague's free exercise of religion. The District Court erred in applying the rational basis test to the statute. Strict scrutiny must apply because the statute was not a neutral law of general applicability. While the statute is facially neutral, the application of the statute burdens primarily religious conduct in practice. Even if heightened scrutiny was properly applied to the statute, it does not survive strict scrutiny because it is not the most narrowly tailored means of achieving the compelling state interest of

protecting the rights of minors to explore their sexual and gender identities. While North Greene does have a legitimate interest in protecting the rights of minors to explore their sexual and gender identities, prohibiting all state-licensed therapists from counseling their clients on inconsistent religious grounds is not the most narrowly tailored means to achieve that goal. Moreover, the State failed to proffer sufficient evidence that conversion therapy is pejorative to the mental health of minors to justify a compelling interest.

Therefore, this Court must reverse the lower courts and hold that the State of North Greene's statute is an unconstitutional constraint on free speech and free exercise of religion under the First Amendment.

ARGUMENT AND AUTHORITIES

Free Speech Claim

The Fourteenth Circuit erred in applying the rational basis test to N. Greene Stat. § 106. The First Amendment of the United States Constitution provides that "Congress shall make no law… prohibiting… or abridging the freedom of speech," U.S. Const. amend. I. Because the statute prohibited state-licensed healthcare providers from counseling their clients in a manner consistent with their faith, the statute regulated the content of Sprague's speech rather than his conduct. Regulating the content of speech rather than the associated suspect conduct is a substantial burden on the constitutional right to free speech and triggers heightened scrutiny. This statute must survive strict scrutiny to be constitutional under the First Amendment.

This Court should reverse and apply strict scrutiny because the statute targets the content of the therapist's speech and not the conduct. Narrow tailoring places the burden on the State to show a compelling government interest in prohibiting conversion therapy, as well as showing that the statute is the least restrictive means of achieving that legitimate goal. The statute is not narrowly tailored because it does not use the least restrictive means of achieving that goal. While this Court has recognized protecting children as a compelling government interest, North Green failed to meet the burden of proof showing that this statute will achieve that goal or that the goal is compelling. Therefore, this Court must reverse the lower court's decision and hold that this statute is an unconstitutional prohibition on freedom of speech pursuant to the First Amendment.

I. The Statute is a Content-Based Restriction that Does Not Pass Strict Scrutiny

The District Court erred in holding that North Greene's statute did not restrict Sprague's freedom of speech because the statute regulates the content of therapists' speech rather than their conduct. While statutes that incidentally burden freedom of speech may be valid under the First

Amendment, this statute imposed a substantial burden on Sprague's freedom of speech. Because the statute directly targeted Sprague's ability to counsel consistently with his religious beliefs, the content of Sprague's speech was the basis of the restriction rather than his conduct. While the statute claims to target the conduct of licensed health professionals, in practice the statute burdens free speech between therapists and their clients. The application of this statute affects therapists with opposing views of conversion therapy and prohibits counseling clients harboring beliefs and opinions consistent with their therapist.

When determining whether strict scrutiny applies to a free speech case, this Court considers whether the restriction is content-neutral or if it is content-based. Content-based restrictions receive strict scrutiny, requiring the State to prove a compelling government interest as well as a narrow tailored statute employing the least speech-restrictive means possible. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 157 (2015). Government regulation of speech is content-based if a law regulates what topics, ideas, or messages may be expressed. *Sorrell v. IMS Health, Inc.,* 564 U.S. 552, 563–67 (2011). In *Reed*, the court found that there was content-based restriction of speech when an ordinance limited the content of different signs. *Reed*, 576 U.S. at 164 (2015). The ordinance discriminatorily applied limitations based on the content of certain signs, requiring content-based determinations. *Id*. The Court held that restricting certain messages conveyed on the signs but not others was a content-based restriction on its face. *Id.* The government may not prohibit speech on the basis that the idea is *disagreeable. Texas v. Johnson*, 491 U.S. 397, 414 (1989) (emphasis added). If enforcement of a statute requires authorities to "examine the content of the message," the statute likely restricts freedom of speech. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

North Greene's statute is content-based on its face. The statute restricts licensed family therapists from talking to minors about conversion therapy. The only way to enforce this statute is to know the content of the licensed family therapist's speech. The statute explicitly requires that speech must provide acceptance, support, and understanding of clients. N. Greene Stat. § 106(d)(2). By restricting the content of healthcare providers' speech in North Greene, this statute unconstitutionally restricts freedom of speech and requires the application of strict scrutiny.

A. Applying strict scrutiny

Strict scrutiny requires that the state first prove a compelling government interest in imposing the restriction. North Greene enacted this statute to protect the physical and psychological well-being of minors against abusive or harmful healthcare practices. North Greene alleged that prohibiting conversion therapy specifically protected lesbian, gay, bisexual, and transgender minors from pejorative counseling practices. While the State has a legitimate government interest in protecting minors, it does not constitute a compelling government interest. North Greene only puts forward the American Psychological Association ("APA") position that opposes conversion therapy without additional substantiating evidence. A compelling government interest must have an overwhelming amount of evidence of the harm to restrict speech. *Otto v. City of Boca Raton, Florida,* 981 F.3d 854, 860 (11th Cir. 2020). North Green only puts forward the APA's finding that affirming care is best for children without any substantiating evidence of actual harm felt. There has been no policy research put forward to justify this statute.

Even if the court determines prohibiting conversion therapy to be a compelling government interest, the statute is not narrowly tailored to achieve that goal. Under this statute, speech that would help clients discover their gender identity or sexuality would be chilled. Healthcare

providers could not counsel clients effectively if non-affirming speech came up. As a result, effective counseling and open communication between healthcare providers and patients would be largely diminished. This statute restricts all speech that is contrary to the APA's unsubstantiated views and is therefore not narrowly tailored to achieve a compelling government interest and must be reversed.

B. The Statute is a Viewpoint Restriction that Restricts Therapists' Open Speech and Advice to Their Clients on Issues Relating to Gender Identity and Sexuality

Statutes must be neutral to restrict content-based speech on the basis that it expresses a viewpoint contrary to the legislators. Neutral statutes must not restrict free speech "solely on the basis of its religious editorial viewpoint, violated their rights to freedom of speech and press, to the free exercise of religion, and to equal protection of the law." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 827 (1995). The speech restriction must not discriminate against speech based on viewpoint as this is a form of content discrimination. *Id*. At 828. While the government may hold that a specific viewpoint is contrary to public interests, it cannot engage in bias, censorship, or preference over another's viewpoint. *Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992). The First Amendment does not allow the government to regulate speech in ways that favor some viewpoints or ideas at the expense of other ideas and viewpoints. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

North Greene censored healthcare providers due to their unfavorable view regarding conversion therapy. Sprague practices therapy grounded on a religious viewpoint regarding sexuality and gender identity. North Greene favors an alternative approach to gender identity and sexuality, a fact that is readily apparent from a facial reading of N. Greene Stat. § 106(d)(2). The State allows therapists to provide "acceptance, support and understanding of clients… that do not

seek to change sexual orientation or gender identity." The statute adopts and imposes a specific viewpoint relating to these issues. This prohibits a therapist's ability to put forward any contrary perspectives. Therapists who disagree with North Greene's beliefs surrounding gender identity and sexuality would not be able to speak about these issues with minors during their consultations, even if the clients themselves sought counseling consistent with Sprague's beliefs. Sprague's clients go to him specifically because of his religious beliefs and viewpoints. These viewpoints are prejudicially and discriminatorily restricted by this content-based prohibition on speech.

II. This Statute Regulates Speech that a Therapist May Give and Does Not Regulate the Conduct of the Therapist

Legislators may regulate professional conduct only when speech restrictions are merely incidental. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978). While statutes may regulate speech incidentally, the government cannot regulate speech by relabeling it as conduct. *Otto v. City of Boca Raton*, Florida, 981 F.3d 854, 865 (11th Cir. 2020). When a statute restricts the conduct of an individual based on what is being expressed, it becomes a content-based restriction. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). In *Mosley*, the ordinance defined what peaceful picketing was allowed and which type of picketing would be prohibited. *Id.* at 93. The City argued that the statute was limiting a type of conduct with a time, place, and manner restriction. *Id.* The ordinance was found to be unconstitutional and a content-based restriction as the City would not know how to regulate the conduct of the picketers without knowing the content of their demonstration. *Id.* at 95.

North Greene maintains that this was enacted statute to target a "twilight" area covering professional speech and professional conduct. However, professional speech is not a separate category of speech exempt from the rule that content-based regulations of speech are subject to

strict scrutiny. *Nat'l Inst. of Family & Life Advocates (NIFLA) v. Becerra*, 138 S. Ct. 2361 (2018). The statute is not incidentally restricting speech but rather directly targets speech that contains opposing views to the State's. The statute does not prevent healthcare providers from engaging in conduct that negatively impacts minors experiencing sexuality or gender dysphoria, such as shock therapy or forced conversion camps. Rather, the statute imposes limitations on the content of speech itself. The message being expressed by the therapist is the target of the statute. The purpose of the statute is to help children, yet the statute is underinclusive in this regard. North Greene categorizes the content of healthcare providers' speech as "professional speech" or "professional conduct," in a veiled attempt to circumvent constitutional requirements that regulations can only incidentally burden speech if they do not survive strict scrutiny.

This Court has held that failure to inform a patient of a diagnosis or a misdiagnosis may be regulated without a First Amendment free speech analysis. Because those statutes concern the *conduct* of the healthcare provider for failing to diagnose a patient correctly and are not targeting the *content* of speech, the First Amendment is not implicated. The restriction of speech is not incidental to the restriction of conduct in this case. Sprague holds himself out as a Christian counselor and helps people who come to him seeking his therapy services. Sprague is prevented from providing adequate counseling to his clients who seek counseling consistent with their faith over their gender identity and sexuality. Because the statute prohibits Sprague's free speech in a substantial manner that is not incidental to prohibited conduct, the statute is not narrowly tailored and is an invalid restriction on Sprague's First Amendment rights.

III. The Court Should Adopt the Eleventh Circuit of Appeals' Approach

Florida passed an ordinance prohibiting therapists from engaging in sexual orientation change efforts (SOCE), which is designed to alter a patient's sexual orientation. *Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 859 (11th Cir. 2020). This ordinance only applied to minors

and explicitly prohibited SOCE. Id. At 860. Any identity-affirming counseling was permissible, however. *Id.* at 861. On appeal, the Eleventh Circuit held that laws that banned SOCE are content-based restrictions that warrant the application of strict scrutiny. *Id.* at 862. This ordinance was found to be content-based and viewpoint-discriminatory because it penalized speech from the speaker's viewpoint. *Id.* The ordinance allows for supportive therapy for transgender minors and bars the speech of therapists who express a different viewpoint. *Id.* The Eleventh Circuit applied strict scrutiny and held that while protecting children is a compelling government interest, Florida failed to prove SOCE was harmful to minors. *Id.* at 869. The Eleventh Circuit found there to be mixed studies showing that there are individuals who have been perceived to have benefited from this type of therapy. *Id.* at 870. The Eleventh Circuit also rejected the notion of a "professional speech" category consistent with *NIFLA*. *Id*.

North Greene's statute is just as restrictive as the city ordinance in *Otto* and restricts the same type of speech, warranting similar treatment to avoid circuit splits and inconsistency on the issue. This Court should also apply strict scrutiny and find that North Green's statute is a content-based restriction inconsistent with the First Amendment because the statute is content-prohibitive and viewpoint-prohibitive. Moreover, North Greene failed to prove that there is actual harm being felt. Further, the Fourteenth Circuit erred in deciding that this type of speech falls into a twilight zone of "professional speech" or "professional conduct." The ruling was inconsistent with this Court's holding in *NIFLA,* that held that there is no "professional speech" exemption for the First Amendment. *NIFLA,* 138 S. Ct. at 2373–74. This statute attempts to mask a content-based restriction as a conduct regulation on therapists, but it does not pass strict scrutiny nor is it consistent with this Court's prior precedent.

Free Exercise Claim.

The Fourteenth Circuit erred in applying the *Smith* rational basis test to N. Greene Stat. § 106 ("the Statute"). The statute, prohibiting state-licensed healthcare providers from engaging in any form of conversion therapy, is not a neutral law of general applicability and is therefore subject to heightened scrutiny. The First Amendment of the United States Constitution protects the free exercise of religion by requiring that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…." U.S. Const. amend. I. Abridging the constitutional right to freely exercise religion must trigger strict scrutiny when the statute burdens religious exercise in a discriminatory manner. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

This Court should reverse and apply strict scrutiny because the statute is not religiously neutral or generally applicable, and the statute is not the most narrowly tailored means of achieving the compelling state interest of protecting the rights of minors to explore their sexual and gender identities. While the government does have a legitimate interest in protecting the rights of minors to explore their sexual and gender identities, prohibiting all state-licensed therapists from counseling their clients on inconsistent religious grounds is not narrowly tailored to achieve that goal. Therefore, this Court must reverse the lower courts and hold this statute as an unconstitutional constraint on the free exercise of religion pursuant to the First Amendment.

I. North Greene's Statute is Unconstitutional Because it is Not a Neutral Law of General Applicability and Requires Heightened Scrutiny

The District Court erred in granting the State of North Greene's motion to dismiss because the statute was not a neutral law that applied generally to both religious and secular groups. The statute did more than incidentally burden Sprague's free exercise of religion because he was forced to either practice therapy in a manner inconsistent with his religious beliefs or lose

his licensure. While the statute was facially neutral, the application of the statute in practice disproportionately restricted Christian counselors and clients from engaging in conversion therapy.

In the post-*Smith* era, this standard of neutrality and general applicability has become convoluted by ambiguous and inconsistent application which confuses both courts and religious groups on what protection the First Amendment presently affords. Specifically, the Supreme Court has upheld exceptions for religious groups in post-*Smith* jurisprudence while almost categorically upholding restrictions on individual religious conduct.

A. *Smith* Requires that Laws Burdening Religion Must be Neutral and Generally Applicable to Pass Constitutional Muster

In *Smith*, the Court considered whether the denial of unemployment benefits to the Respondents because of their religious beliefs violated their constitutional right to the free exercise of religion. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 874 (1990). The statute prohibited knowingly possessing a controlled substance. *Id.* The Respondents, Native American counselors at a private drug rehabilitation facility, were fired as a result of their religiously motivated ingestion of peyote in violation of a Georgia statute. *Id*. The Respondents argued that their use of peyote was part of a religious ceremony and therefore protected by the Free Exercise Clause of the First Amendment. *Id*. at 878. The Supreme Court held that the denial of unemployment benefits did not violate the First Amendment because the law was neutral and generally applicable. *Id*. at 879. The Free Exercise Clause does not excuse individuals with contradictory religious convictions from complying with neutral and generally applicable laws. *Id.*

The statute was religiously neutral on its face and generally applicable to both secular and religious actors because it did not unduly burden religious practices while simultaneously

exempting nonreligious use of controlled substances. *Id*. at 896 (O'Connor, J., concurring). While this Georgia statute incidentally burdened religious practice, the statute was still generally applicable and religiously neutral. *Id*. at 874. The Court reasoned that allowing individuals to claim exemptions from generally applicable laws would create a dangerous precedent that any law which incidentally burdens religion is presumptively invalid under the Free Exercise Clause. *Id*. at 888. The Court further clarified there was no requirement that Georgia have a compelling government interest in the statute or find a less restrictive means to enforce the statute. *Id*. at 883–84. In so holding, the Supreme Court overruled past precedent set in *Sherbert v. Verner*, requiring governmental action that burdens religious exercise be justified by a compelling government interest. 374 U.S. 398, 402–403 (1963). As a result of *Smith*, states may refuse to create religiously motivated exemptions to prohibited conduct as long as the law is neutral and generally applicable. *Id*. at 879, 890.

B. Determining When a Law is Neutral and Generally Applicable Post-*Smith*

Smith held that neutral and generally applicable laws are presumptively constitutional even if the free exercise of religion is incidentally burdened. *See Smith*, 494 U.S. 872 (1990). If a law is neutral and generally applicable, a rational basis standard of review applies, and the statute is presumptively constitutional. *Id*.

i. Applying Smith's *Neutrality Requirements*

The lower court erred in holding that the statute is neutral in application because healthcare providers are forced to engage in conduct inconsistent with their religious beliefs through a statute that substantially burdens the free exercise of religion. The statute is not neutral because it seeks to restrict the underlying religiously motivated conduct despite appearing facially neutral. *Parents for Priv. v. Barr,* 949 F.3d 1210, 1235 (9th Cir. 2020). A facially neutral

law with discriminatory application is not a neutral law under *Smith*. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. 508 U.S. 520, 534–38 (1993). The two-prong test for determining neutrality is delineated by the Supreme Court in *Lukumi*. *Id.* at 526.

In *Lukumi*, the Petitioners appealed a city ordinance in Hialeah, Florida, that targeted the religious practice of animal sacrifice by the Santeria religion. *Id.* at 526. The city ordinance prohibited unnecessary and cruel animal killings, specifically clarifying that killing an animal as a ritual sacrifice was unnecessary and unlawful. *Id*. at 526–27. However, the ordinance carved out exceptions for sport hunting, killing animals for food, pest control, and euthanasia. *Id*. at 537, 544. The Court held that the ordinance was not neutral and was specifically aimed at suppressing the Santeria religion. *Id*. at 545.

The Court created a two-prong test to determine whether a law was neutral both facially and in application. *See id.* at 533–535, 558–59. First, the Court looked at the ordinance on its face to determine whether it was religiously neutral. *Id.* at 533. Specifically, the Court had to determine whether the ordinance referred to religious conduct exclusively, with no secular counterpart. *Id*. In *Lukumi*, although the ordinance included religiously laden words such as "ritual" and "sacrifice," those words have secular definitions as well and survive facial neutrality requirements. *Id*. at 533–34. The Court determined that the ordinance was religiously neutral on its face and moved to the second prong of the analysis. *Id*. at 534. Second, the Court considered whether the ordinance was enacted for a religiously motivated purpose. *Id.* While not dispositive, determining the intent of the legislators in passing a law is an important consideration in the neutrality analysis. *Id.* at 535. Considering the context of the ordinance's enactment, specifically the city council meeting in which the council committed to prohibiting acts by *religious groups*

that go against the city's "'… public morals, peace or safety,'" the ordinance seemingly targeted the Santeria religion specifically. *Id*. at 535 (emphasis added).

This Court must first analyze the neutrality of North Greene's statute on its face. The suspect statute prohibited conversion therapy performed on minors and defined conversion therapy as a "regime that seeks to change an individual's sexual orientation or gender identity." N. Greene Stat. § 106(d)(1). The statute also expressly exempts "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed healthcare providers." N. Greene Stat. § 106(f)(2). On its face, the statute does not specifically burden religious groups. The statute appears to apply equally to religious and secular healthcare providers. Because of the facially neutral language of the statute and the religious exemption, the Statute indisputably survives the first prong of a neutrality analysis.

Next, this Court must analyze the underlying policy rationale behind the statute. *Lukumi*, 508 U.S. at 534. Courts may look to the legislative intent behind the statute in making this determination. *Id*. The North Greene Statute was informed by the APA and their determination that conversion therapy is pejorative to minors struggling with gender and sexual identity. R. at 4. The official stated intent for the statute, as proffered by the State of North Greene, was that the statute was intended to regulate healthcare providers' professional conduct. R. at 4. However, it must also be noted that a statute banning conversion therapy is largely directed at those with strong religious convictions that contrast with the legislator's goal of promoting gender and sexuality-affirming counseling. R. at 15. While the statute does exempt "[t]herapists, counselors, and social workers who 'work under the auspices of a religious denomination, church, or religious organization,'" the statute still undermines the free expression of religion for counselors

who do not fit into those exemptions. R. at 4. While Sprague is not working under the auspices of any organized religion, many of his clients came to him throughout the past twenty-five because his strong religious convictions align with their own. R. at 3.

Although the stated intent of the statute was to protect minors from undergoing conversion therapy by their healthcare providers in the interest of fostering acceptance and encouragement, the underlying policy was to restrict those with differing religious views from exercising their beliefs. As such, the intent of the legislation was not neutral in application because it substantially burdens the free exercise of religion under the guise of professionalism and acceptance.

ii. Applying Smith's *General Applicability Requirements*

The Fourteenth Circuit erred in affirming the District Court because the law is not generally applicable to both secular and religious groups. Generally applicable laws may be neutral on their face but discriminatory in practice. Because the statute prohibits healthcare providers from counseling in a manner consistent with their religious convictions, North Greene's statute is discriminatory in practice despite seemingly applying to all healthcare providers equally.

The Court determined in *Lukumi* that because the law restricted only religious killing of animals while exempting secular animal killing, the law was discriminatory in application despite being facially neutral. *Lukumi*, 508 U.S. at 536. The Court held that a law is not generally applicable if it has discriminatory effects in practice. *Id*. at 558–59. The Court looked to the enforcement of the statute to determine discriminatory impacts in practice that are concealed by facial neutrality. *See Id.* at 557 (Scalia, J., concurring in part and concurring in judgment).

Lukumi crafted a second two-prong test to determine whether a statute is generally applicable. *See* i*d*. at 542–43. Courts should begin their analysis of general applicability by

determining whether the law is designed to achieve specific or general goals. *Id*. at 143. The ordinance in *Lukumi* purported to address two general public interest goals, namely promoting public health, and preventing cruelty to animals. *Id*. While the ordinance was general, the statute carved out so many exceptions for secular killings that the general purposes for which the ordinance was enacted were undermined. *Id*. at 544. Second, courts should consider whether the law unconstitutionally targets religious groups in practice. In this case, the many exceptions allowed for the ordinance to regulate only religious conduct while exempting secular animal killings. The Court noted that "[t]he health risks posed by the improper disposal of animal carcasses are the same whether Santeria sacrifice or some nonreligious killing preceded it." *Id.* Because the ordinance claimed to be a blanket prohibition against unnecessary animal killings, the law in practice only burdened those engaging in the practice for religious reasons. *Id*. Therefore, the ordinance was not generally applicable to both religious and secular groups because it almost exclusively prohibited religious conduct. *Id.* at 535.

The State of North Greene statute was not generally applicable because it disproportionately burdened religious groups. While the statute does exempt healthcare workers operating under a religious institution from the statute, all other healthcare workers are subject to the restrictions of the Statute. R. at 4. The Statute has a general public policy goal to prohibit all conversion therapy on minors to reduce the levels of juvenile depression, suicidal ideations, and substance abuse. R. at 4, 7. However, many of Sprague's clients come to him because of—not in spite of—his religious convictions. R. at 3. Some clients may come to Sprague struggling with their gender identity or sexuality and seeking to change their behavior to conform to their Christian religious beliefs. *See* R. at 3. The statute prevents Sprague's clients from receiving the counseling they have sought for over twenty-five years from Sprague. R. at 3. The statute

burdens religious groups who seek to conform their internal sexuality and gender identity with their religious convictions and does so by preventing Christian counselors from providing conversion counseling. R. at 3–4.

II. Applying Heightened Scrutiny and the Sherbert Rule

This Court should reverse and apply strict scrutiny because the statute is not religiously neutral or generally applicable. Therefore, the statute must use the least restrictive means of achieving a compelling state interest. *Korematsu v. United States*, 323 U.S. 214 (2018). While the government does have a compelling interest in protecting the rights of minors to explore their sexual and gender identities, prohibiting all state-licensed therapists from counseling their clients in a manner consistent with their religion is not the most narrowly tailored means to achieving that goal. Therefore, this Court must reverse the lower courts and rule this statute as an unconstitutional constraint on the free exercise of religion pursuant to the First Amendment.

A. Lukumi Demonstrates the Heightened Scrutiny Requirement

It is undisputed that the standard established under *Smith* does not require the states to have a compelling government interest to justify neutral and generally applicable laws even if they incidentally burden the free exercise of religion. *Smith*, 494 U.S. at 890. However, when the law is not neutral and generally applicable a heightened level of scrutiny is required. *See, e.g., Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006).

This Court held that the ordinance in *Lukumi* was not a neutral law of general applicability. 508 U.S. at 546. The Court emphasized that the government cannot target religious practices for regulation or prohibition without a legitimate government interest and narrow tailoring. *Id*. For a government interest to be compelling, the law should restrict all other conduct resulting in the same kind of harm sought to be avoided by burdening religious practices. *Id.* at

546–47. In this case, the end goal of avoiding animal cruelty and protecting public health was achieved only by burdening religious animal sacrifices without burdening secular forms of animal cruelty. *Id.* at 547. As a result, the ordinance resulted in religious gerrymandering which impermissibly burdened the Santeria religion. *Id*. at 535. The only conduct subject to the ordinance was religious conduct despite the seemingly broad and neutral statutory text. *Id*. at 535, 537.

Moreover, the ordinance was not narrowly tailored and prohibited more religious conduct than necessary. *Id*. at 538. While there is a legitimate government interest in preventing animal cruelty and promoting public health, the government did so by broadly proscribing all animal sacrifices. *Id*. The city could have prohibited improper disposal to ameliorate public safety concerns, but instead broadly prohibited all animal sacrifice. *Id*. Additionally, the city could have broadly regulated the conditions of animal treatment for *all* animals regardless of whether they are being used for sacrifices or rituals. *Id*. at 539 (emphasis added). Because suppression of the Santeria religion was the goal of the ordinances rather than incidental to the ordinance's enactment, the ordinance imposed a substantial burden on the Church's ability to freely exercise its religion and violated the First Amendment rights of those practicing the Santeria religion. *Id*. at 540–41.

B. Analyzing and Applying the Sherbert Rule in a Strict Scrutiny Analysis

Sherbert strikes an appropriate balance between protecting religious freedom and furthering legitimate government interests. By requiring the government to demonstrate a compelling interest, courts can ensure that any burden on religious exercise is justified by a significant societal need. Additionally, the requirement to use the least restrictive means ensures that the government explores alternative options that have a lesser impact on religious freedom.

This approach prevents unnecessary infringements on individuals' religious beliefs and practices while still allowing for the pursuit of important government objectives. By providing a clear framework for analysis, the *Sherbert* test ensures that courts can assess the constitutionality of government actions consistently and predictably, while still upholding the fundamental right to religious freedom. This standard ensures that individuals' religious freedoms are given the utmost protection while still allowing for legitimate government interests to be pursued. This Court must apply the *Sherbert* strict scrutiny test to Sprague's claims because the statute substantially burdens religious beliefs and practices without a compelling government interest. *See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 565 (1993) (Souter, J., concurring). The rule in *Sherbert*, as established by the Supreme Court in *Sherbert* provides a clearer and more precise test when evaluating government actions that burden an individual's free exercise of religion. 374 U.S. 398. Specifically, *Sherbert* requires the application of the well-defined standard of strict scrutiny, which requires the government to demonstrate a compelling interest and use the least restrictive means to achieve that interest. *Id.* at 403.

Courts must determine whether there was a compelling government interest in the statute. *Sherbert*, 374 U.S. at 406–07. Beyond a showing of a mere rational correlation between the statute and the government interest, the statute must address "(o)nly the gravest abuses, endangering paramount interest," to justify the restriction of constitutional rights. *Thomas v. Collins*, 323 U.S. 516, 530 (2005). In *Sherbert*, the mere possibility that some individuals may fraudulently claim religious objections to working on Saturday was insufficient to support a statute requiring Saturday work to receive unemployment compensation benefits. *Id*. at 400, 408. Second, the Court must determine whether a law restricts the free exercise of religion in *any* way. *Id*. at 403 (emphasis added). In *Sherbert*, the statute disqualified welfare recipients on

religious grounds, which the Court held to be burdensome on religion. *Id*. Laws that "impede the observance of one or all religions or… discriminate invidiously between religions" violate the First Amendment whether the burden is direct or merely incidental. *Id*; *see also Braunfeld v. Brown*, 366 U.S. 599, 607.

The State of North Greene indisputably had a compelling government interest in protecting the dignity and mental health of minors experiencing sexuality or gender dysphoria. Minors suffering from sexuality or gender discomfort are more likely to experience depression, suicidal thoughts and behaviors, and other mental health issues. R. at 7. However, Sprague and other counselors provide conversion counseling to religious clients who desire to conform their behavior to their religious beliefs, even if that requires the practice of conversion therapy. *See* R. at 3. For these clients, and Sprague himself, the statute unjustifiably restricts their ability to seek and offer counseling consistent with their religious convictions. Narrow tailoring would allow this Statute to protect the indisputably important goal of protecting minors from abusive counseling practices while allowing clients and counselors who do desire to undergo conversion therapy. A narrowly tailored statute could prevent nonconsensual conversion therapy except for minors who willingly desire to undergo conversion therapy.

Conclusion

This Court should reverse the Fourteenth Circuit's motion to dismiss. The North Greene statute requires strict scrutiny because it is a content-based restriction on speech and is neither generally applicable nor neutral. The North Greene statute did not regulate conduct but the viewpoints and speech content of people who held deeply religious beliefs. The statute, while facially neutral, imposed a substantial burden on the free exercise of religion that disproportionately restricted counseling in line with Christian beliefs in practice. The law's prohibition of conversion therapy, a practice largely associated with religious beliefs, disproportionately affects religious practitioners. This is not in line with this Court's content-based ruling in *Reed v. Town of Gilbert, Ariz*., 576 U.S. 155, 164, 192 L. Ed. 2d 236 (2015) and the requirements of general applicability as established in *Employment Division v. Smith*, 494 U.S. 872 (1990). Because the law was content-based and not generally applicable to religious and secular groups alike, the statute requires strict scrutiny and may be analyzed under the *Sherbert* rule. *Sherbert*, 374 U.S. at 403–04. Applying strict scrutiny, the statute fails to achieve the compelling state interest in protecting minors through the least restrictive means. Therefore, N. Greene Stat. § 106 unconstitutionally restricts free speech and free exercise of religion in violation of the First Amendment. For these reasons, this Court must reverse the Fourteenth Circuit and grant Sprague's preliminary injunction.

Respectfully submitted,

Team 14