No. 23-2020

In the

Supreme Court of the United States

October Term 2023

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

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

BRIEF FOR THE RESPONDENT

TEAM 15

Counsel for Respondent
September 26, 2023

QUESTIONS PRESENTED

I. Whether the Fourteenth Circuit Court of Appeals correctly concluded that the Uniform Disciplinary Act, which censors conversations between counselors and clients as "unprofessional conduct," does not violate the Free Speech Clause of the First Amendment of the United States Constitution.

II. Whether the Fourteenth Circuit Court of Appeals correctly concluded that the Uniform Disciplinary Act, a law that primarily burdens religious speech, is neutral and generally applicable, and the Court should not overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

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CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. I.

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

U.S. CONST. amend. X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATEMENT OF THE CASE

Howard Sprague ("Petitioner") is a licensed family therapist practicing in the State of North Greene ("North Greene"). For over twenty-five years, he has provided therapy for minors with various issues, including sexuality and gender identity. R. at 3. One such therapy Petitioner offers is religiously influenced conversion therapy that he conducts through "talk therapy." R. at 3. Notably, Petitioner does not utilize physical methods of counseling or treatment with his clients. R. at 3.

Petitioner does not work for a religious institution, yet his practice is defined by "God's design," and his work is influenced by his Christian beliefs and viewpoint. R. at 3. Petitioner believes that every person's sex at birth is a "gift from God" that should not be changed, and that

sexual relationships should only "occur between a man and a woman" once married. R. at 3. Many of Petitioner's clients evidently share his beliefs on gender and sexuality and seek his services because they are confident he will remain true to their beliefs. *Id*.

North Greene requires all health care providers to be licensed before practicing in North Greene. R. at 3. Acting under its authority to enact health and welfare laws, the State adopted the "Uniform Professional Disciplinary Act" (the "Act"). R. at 3-4. The Act lists prohibited actions considered "unprofessional conduct," and subjects licensed health care providers to discipline. R. at 4. Interestingly, the amendment does allow exceptions for therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization". R. at 4.

Section 106 of the Act expressly prohibits, "[p]erforming conversion therapy on a patient under the age of eighteen." R. at 4; N. Greene Stat. § 106(d). The statute defines "conversion therapy" as:

> "a regime that seeks to change an individual's sexual orientation or gender identity. The term includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. The term includes, but is not limited to, practices commonly referred to as 'reparative therapy.'" R. at 4.

Those who do not provide conversion therapy to minors are not bound by the Act. R. at 4. The statute specifies that ""[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization" will not be enforced by the Act. R. at 4.

Additionally, the Act does not apply to conversion therapy performed on those over the age of eighteen. R. at 4. Moreover, licensed professionals are still able to communicate to the

public about conversion therapy, express their personal views to patients about conversion therapy regardless of age, and refer minors that seek conversion therapy to counselors who practice "under the auspices of a religious organization" or in another state. R. at 4.

North Greene's General Assembly enacted the Act to regulate "the professional conduct of licensed health care providers" and protect "the physical and psychological well-being of minors . . . against exposure to serious harms caused by conversion therapy". R. at 4. The General Assembly made this decision in part by relying on the opinions of the American Psychological Association ("APA"). The APA opposes all types of conversion therapy while encouraging "affirming, multicultural" therapy that includes "acceptance, support…and identity exploration." R. at 4.

Petitioner brought suit against North Greene in August 2022, contending that prohibiting the practice of conversion therapy on minors violates his and his clients' First Amendment right to free speech and free exercise of religion. R. at 5. Petitioner filed for a preliminary injunction. North Greene opposed the preliminary injunction and filed a motion to dismiss Petitioner's complaint. R. at 5.

The District Court denied Petitioner's motion for a preliminary injunction and granted North Greene's motion to dismiss for failure to state a claim. R. at 5. The District Court concluded that Petitioner had standing to assert his claims but rejected his constitutional claims and dismissed the action. R. at 5. Petitioner appealed to the Court of Appeals for the Fourteenth Circuit and had proper jurisdiction under 28 U.S.C. § 1291. The Fourteenth Circuit reaffirmed the District Court's opinion ruling there is neither a free speech or free exercise of religion violation. R. at 11. Petitioner appealed the Fourteenth Circuit's ruling, and this Court granted certiorari to address "(1) Whether a law that censors conversations between counselors and clients as 'unprofessional conduct'

violates the Free Speech Clause of the First Amendment of the United States Constitution; and (2) Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990)."

SUMMARY OF THE ARGUMENT

I. Question Presented 1.

This Court should affirm the decision of the Fourteenth Circuit because North Greene's Uniform Disciplinary Act regulates the medical profession, not speech. The Act expressly prohibits *performing* conversion therapy on minors, and in no way attempts to regulate speech. The Act is only subject to rational basis review, which it undoubtedly satisfies because it serves a legitimate state interest that is grounded in a rational basis.

Even if the Act regulates speech, it is content and viewpoint-neutral. The Act does not "target speech for its communicative content," nor does it promote one point of view over another. Accordingly, the Act is subject to intermediate scrutiny. The Act survives intermediate scrutiny because North Greene has a substantial interest in protecting its youth, and the State achieves the interest directly through the implementation of the statute.

II. Question Presented 2.

This Court should affirm the Fourteenth Circuit's decision because the Act is a neutral and generally applicable law that passes a rational basis analysis. Neither the text of the Act, nor its legislative history reveal an object of infringement upon or restriction of religious practices. The Act is not substantially under-inclusive and does not allow for any individualize exceptions that selectively enforce the Act. Finally, the Act passes the required rational basis analysis because North Greene has a rationally based legitimate governmental interest.

Further, this Court should reaffirm *Employment Division v. Smith* because the threshold to overrule precedent and go against *stare decisis* is not met here. *Employment Division v. Smith* is not grievously or egregiously wrong, has not caused significant negative jurisprudential or real-world consequences, and would unduly upset reliant interests if overruled.

ARGUMENT

I. THE UNIFORM PROFESSIONAL DISCIPLINARY ACT DOES NOT VIOLATE THE FIRST AMENDMENT BECAUSE THE LAW REGULATES THE MEDICAL PROFESSION, IS CONTENT AND VIEWPOINT-NEUTRAL, AND SURVIVES SCRUTINY.

This Court should affirm the Fourteenth Circuit's decision that the Act does not violate the First Amendment because the legislation regulates the conduct of medical professionals in a content-neutral manner that does not invoke a heightened level of scrutiny. Whether conversion therapy is an effective or constitutional treatment is not at issue in this case. The Petitioner only challenges the constitutionality of North Greene's law that prohibits licensed health care providers from practicing any form of conversion therapy on minors.

The Free Speech Clause of the First Amendment proscribes laws "abridging the freedom of speech." U.S. CONST. amend. I; *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It further provides that the government "may not regulate speech based on its substantive content or the message it conveys." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). However, this Court does "afford[] the government somewhat wider leeway to regulate features of speech unrelated to its content." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). In doing so, the Court makes a distinction between "speech" and "conduct." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

The distinction between speech versus conduct is essential because "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Thus, whether

written or spoken words are classified as speech or conduct determines the appropriate level of First Amendment scrutiny. *Id.*

A. The Uniform Professional Disciplinary Act Regulates The Medical Profession, Not Speech.

Simply because Petitioner employs speech while performing "talk therapy" does not per se invoke heightened First Amendment protection. This Court has long held that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). Accordingly, the First Amendment does not apply as rigorously when States enact laws that regulate conduct with an incidental effect on speech. *Id.*

1. The Act Regulates the Conduct of Medical Professionals.

The Act prohibits state-licensed health care providers from "*[p]erforming* conversion therapy on a patient under the age of eighteen." N. Greene Stat. § 106(d) (emphasis added). The word "performing" indicates control over what the Petitioner must *do* – not perform conversion therapy on minors, and not what the Petitioner can or cannot *say. Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006). Regulating what the Petitioner must do as a therapist is inherently a regulation of his conduct as a licensed professional, not speech. *Id.*

States "bear[] a special responsibility for maintaining standards among members of the licensed professions," and this Court has "regularly upheld" State regulation of professional conduct that "incidentally involves speech." *Ohralik*, 436 U.S. at 460; *See also Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (*"NAFTA"*); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Moreover, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part

initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 502. This is especially true in the practice of medicine.

Performing conversion therapy through "talk therapy," like many areas of medical practice, "transpires through the medium of speech." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950 (2007). Because states regulate the practice of medicine,[1] they "must necessarily also regulate" the associated speech. *Id.* In fact, "doctors are routinely held liable for malpractice for speaking or failing to speak," and "[l]ongstanding torts for professional malpractice . . . 'fall within the traditional purview of state regulation of professional conduct.'" *Id.*; *NAFTA*, 138 S. Ct. at 2373; (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). In this way, the practice of medicine and speech are so closely intertwined that the speech component cannot be afforded heightened First Amendment protection without improperly interfering with "other reasonable health and welfare laws." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct 2228, 2284 (2022).

The Ninth Circuit applied this principle in a factually analogous case addressing speech as a component of "sexual orientation change efforts," or "SOCE." *Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2010). In *Pickup*, the court rejected an argument that a California law banning state-licensed mental health providers from "engaging in 'sexual orientation change efforts' ('SOCE') with patients under 18 years of age," required heightened First Amendment scrutiny. *Id.* at 1225. The court concluded that the law "is a regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech." *Id*. at 1229. The

[1] Individual states have the authority to regulate the practice of medicine through the Tenth Amendment which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

court further opined that "[m]ost, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment." *Id.*; *See Nat'l Ass'n for the Advancement of Physchoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*") (concluding that "[t]hat psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection."). *See also Coggeshall v. Mass Bd. of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010) ("Simply because speech occurs does not exempt those who practice a profession from state regulation[.]"). Plainly, a state does not lose its right to regulate the medical profession simply because the regulation has an ancillary effect on speech.

North Greene does not lose its authority to regulate conversion therapy merely because it has a secondary effect on speech. Petitioner argues, like in *Pickup*, that "because his treatments consist entirely of speech," that he is entitled to First Amendment protection. Of course, Petitioner's First Amendment rights are somewhat implicated, "but only as part of the practice" of conversion therapy, which, like other health and welfare laws, "is licensed and regulate by the State." *Casey*, 505 U.S. at 884. Simply because Petitioner talks to his patients to treat them does not differentiate his conduct from other, physical medical practices. Therefore, because the Act only regulates Petitioner's conduct as a medical professional, the incidental speech cannot be afforded heightened First Amendment protection without usurping the State's authority to regulate the medical profession.

2. The Act is Subject to Rational Basis Review.

Because the Act regulates Petitioner's conduct as a medical professional, it is entitled to lesser protection under the First Amendment. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (applying a reasonableness standard where speech is incidental

to the regulation of medicine), *overruled on other grounds by Dobbs*, 142 S. Ct. 2228. This Court's precedents indicate that health and welfare laws "[are] entitled to a 'strong presumption of validity," and, as such, "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S. Ct. at 2284; (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). Accordingly, as a state-enacted health and welfare law, the Act is subject only to rational basis review and therefore must be upheld if it is "rationally related to a legitimate government interest. *Casey*, 505 U.S. at 884.

The Act must be sustained "if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S. Ct. at 2284. Thus, whether the Act is upheld under rational basis review hinges upon whether (1) there is a legitimate state interest in adopting the law, (2) supported by a rational basis. *Id*. In this context, "rational basis" refers to "any reasonably conceivable state of facts" that provide "plausible reasons" for the legislature's actions. *Fcc v. Beach Commc'ns*, 508 U.S. 307, 313 (1993).

First, as the Fourteenth Circuit noted, the Act was enacted "to protect minors, including lesbian, gay, bisexual, and transgender youth . . . against exposure to serious harms caused by sexual orientation change efforts." R. at 4; *Sprague v. State of North Greene*, 2023 WL 12345 (14th Cir. 2023). Certainly, North Greene has a legitimate interest in adopting a law to protect its children from potentially harmful medical treatments.

Second, in making the determination that conversion therapy could be harmful to minors, the legislature relied on the opinions of the APA. The APAs findings reveal, among other things, that conversion therapy can "lead to mental health problems such as depression, sexual problems, low self-esteem, and suicide." Banning Sexual Orientation and Gender Identity Change Efforts: Suggested Discussion Points With Resources to Oppose Transgender Exclusion Bills, American

Psychological Association, https://www.apa.org/topics/lgbtq/sexual-orientation-change. Thus, there are "plausible reasons" for the State's actions, and the legislature acted "rationally" in concluding that children could be harmed by the effects of conversion therapy. North Greene's adoption of the act is, therefore, "rationally related" to the State's interest in protecting its children and must be upheld under rational basis review.

B. The Uniform Professional Disciplinary Act is A Content and Viewpoint-Neutral Regulation of Conduct and Survives First Amendment Scrutiny.

Even if the Act does not regulate Petitioner's speech as a medical professional, it is still not subject to First Amendment strict scrutiny because the law is content and viewpoint-neutral. *Reed*, 576 U.S. at 165. North Greene adopted the Act to "protect[] the physical and psychological well-being of minors," and to shield minors from "exposure to serious harms caused by conversion therapy." R. at 4. Accordingly, the Act was enacted for a purpose "unrelated to the content" of the regulated speech and not "because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Historically, the purpose behind enacting a law was the "controlling consideration" in determining whether a regulation is content-based or content-neutral. *Id.* Under this precedent, an "innocuous justification" could re-characterize a "facially content-based law into one that is content-neutral." *Reed*, 576 U.S. at 163. In *Reed v. Town of Gilbert*, however, the Court moved away from considering the justifications for a law and clarified that "content-based distinctions 'on the face' of a law warrant heightened scrutiny even if the government advances a content-neutral justification for that law." Overview of Content-Based and Content-Neutral Regulation of Speech, Constitution Annotated, https://constitution.congress.gov/browse/essay/amdt1-7-3-

1/ALDE_00013695/. Thus, the Act must be wholly content-neutral to permit a lower standard of scrutiny.

1. The Act is Neutral Because it Does Not Target Petitioner's Speech Based On Its Content.

The Court "consider[s] whether a law is content-neutral on its face *before* turning to the law's justification or purpose." *Reed*, 576 U.S. at 165. This is the preliminary question because, after *Reed*, "a law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 166; see also *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). In other words, the government's justification for enacting a law, or whether the law is content-neutral "as-applied," is immaterial if the law targets content on its face. *Id.*

Determining whether a law is content-neutral or content-based "is not always a simple task." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). In the most basic form, a law is content-neutral if the speech regulation "[is] *justified* without reference to the content of the regulated speech." *Renton v. Playtime Theaters*, 475 U.S. 41, 48 (1986). By contrast, a law is facially content-based if it "'target[s] speech based on its communicative content,'" or it "'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (quoting *Reed*, 576 U.S. at 163)). Accordingly, content-based versus content-neutrality hinges on regulated *discussion* of a topic and *communication* of a specific message.

Initially, it seems as though the Act is facially content-based. After all, it does target a specific topic—conversion therapy. However, making a distinction between discussion/expression and "performing" in crucial for this analysis. *Id*. Nothing in the Act specifies what Petitioner can

or cannot *say* during an appointment, nor does it prevent Petitioner from talking about conversion therapy with a patient. R. at 4. In fact, Petitioner is pointedly allowed to "express[] [his] personal views to patients (including minors) about conversion therapy, sexual orientation, or gender identity." *Id.* The Act only regulates the *performing* of conversion therapy, not the discussion of the topic altogether. Consequently, the Act is facially content-neutral and "not subject to First Amendment strict scrutiny absent a content-based purpose or justification." *City of Austin*, 142 S. Ct. at 1471.

However, if there is "evidence that an impermissible purpose or justification underpins a facially content neutral restriction [it] may mean that the restriction is nevertheless content based." *City of Austin*, 142 S. Ct. at 1468; *See also Reed*, 576 U.S. at 164. Laws that were adopted "because of disagreement with the message [the speech] conveys," are content-based as-applied and thus still subject to strict scrutiny. *Reed*, 576 U.S. at 164; (quoting *Ward*, 491 U.S. at 791). Conversely, "a regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others." *Ward*, 491 U.S. at 791.

North Greene's "principal justification" for the Act is to "protect the physical and psychological well-being of minors," and shield said minors "against exposure to serious harms caused by conversion therapy." R. at 4. In this way, the Act is "aimed not at the *content*" of what is said during conversion therapy, but "rather at the *secondary effects*" that conversion therapy has on the State's youth. *Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986). This is not a case in which the state is trying to silence health care providers who believe in the benefits of a controversial treatment; it is a case in which the state is trying to prevent said providers from harming children. Therefore, the Act was not adopted because of the State's "disagreement with

the message" being conveyed, nor was it adopted for "impermissible reasons," and is content-neutral both on its face and as-applied.

2. The Act is Neutral Because It Does Not Suppress Petitioner's Viewpoint.

Like content-based regulations, regulations based on viewpoint are also prohibited. *Pleasant Grove City v. Summum*, 555 U.S. 460, 461 (2009); *See also Carey v. Brown*, 447 U.S. 455 (1980). This Court has noted that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). States therefore must "abstain from regulating speech where the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

A law can be facially viewpoint-neutral, yet still discriminate on the basis of viewpoint. In determining whether a law is viewpoint-neutral, the Court asks whether the law favors or disfavors a point of view in its "design" or "operation." *Turner*, 512 U.S. at 647. The first focuses on whether the State's purpose in enacting the law was to promote one viewpoint over another, and the second on whether the law promotes a particular viewpoint in practice. *Id*. at 658. In this case, it is undoubtedly neither.

It is evident from North Greene's stated purpose for enacting the law that the Act is not designed "to favor or disadvantage speech of any particular content." *Turner*, 512 U.S. at 652. The legislature's intent for adopting the statute was to "regulate the professional conduct of licensed health care providers," and by doing so, protecting North Greene's children from the harms of conversion therapy. R. at 4. The Act expressly does *not* prevent Petitioner from expressing his personal views on conversion therapy to patients. Rather, the Act only sanctions the actual practice of conversion therapy. Accordingly, the Act is viewpoint-neutral in its design because it does not

prohibit Petitioner from advocating for or expressing his opinions on conversion therapy, thus meaning one point of view is not favored over another.

The operation of the Act further confirms that the legislature's intent in adopting the law was not to suppress a particular viewpoint. The Act prohibits *all* state-licensed health care providers from performing conversion therapy on minors—irrespective of their opinion on the treatment. In fact, under the Act, said providers are still allowed to speak to the public and individual patients about their stance on conversion therapy, perform conversion therapy on adults, and refer minor patients to counselors practicing "under the auspices of a religious organization," or health providers located in other states. R. at 4. Any person can express any view on conversion therapy at any time. Such ability to speak freely cements the conclusion that the Act does not promote one viewpoint over another, but only exists to shield minors from harm through the regulation of health providers' conduct.

3. The Act Survives Intermediate Scrutiny.

The Act is content and viewpoint-neutral and is therefore subject to an intermediate level of scrutiny under the First Amendment. *Turner*, 512 U.S. at 642. Intermediate scrutiny applies when a law does not target speech based on its content, yet nonetheless "impose[s] an incidental burden on speech." *Id.*

Under intermediate scrutiny, states "must assert a substantial interest to be achieved by restrictions on…speech." *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The limitations on the speech, then, must "be designed carefully to achieve the State's goal." *Id*. That is, the law must be "narrowly drawn" to advance a "substantial" state interest. *Id.* at 565. Under *Hudson*, whether a law passes intermediate scrutiny is "measured by two criteria." *Id.* at 564. "First, the restriction must directly advance the state interest involved; [it] may not be

sustained if it provides only ineffective or remote support for the [state's] purpose." *Id.* Second, the restrictions cannot survive "if the [state] interest could be served as well by a more limited restriction on…speech." *Id.*

Beginning with the first criterion, the Act directly advances North Greene's "substantial" interest in protecting its youth. North Greene unquestionably has a considerable interest in protecting children from potential harm resulting from a controversial treatment. The Act advances this interest directly, as it pointedly sanctions any state-licensed health care provider from practicing conversion therapy on minors. R. at 4. Consequently, the Act satisfies the first criterion.

Turning to the second criterion, North Greene's speech restrictions are "narrowly drawn," and its interest could not be served by "a more limited restriction on speech." North Greene enacted a singular law that prohibits state-licensed health care providers from performing one treatment of concern—conversion therapy, on one group of people of concern—minors. The Act does not extend to any other treatments performed on any other groups of people. Accordingly, the Act is "narrowly tailored" to the State's interests and thus satisfies the second criterion.

North Greene's Act therefore survives intermediate scrutiny because it is "narrowly drawn," to serve the State's "substantial interest" in shielding minors from the harmful effects of conversion therapy. The Act is thus constitutional and does not violate the First Amendment.

II. THE ACT DOES NOT VIOLATE THE FREE EXERCISE CLAUSE BECAUSE THE LAW IS NEUTRAL, GENERALLY APPLICABLE, AND DOES NOT GIVE REASON TO OVERRULE *EMPLOYMENT DIVISION V. SMITH*.

The Court should affirm the Fourteenth Circuit's decision to uphold the Act which bans conversion therapy for minors from licensed health care providers in a neutral and generally applicable manner. The Free Exercise Clause of the First Amendment requires that "Congress shall

make no law . . . prohibiting the free exercise" of religion. U.S. CONST. amend. I. The Free Exercise Clause governs the freedom to believe and the freedom to act. This Court has repeatedly held that the freedom to believe any religion or ideology is absolute while the freedom to act is not. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940)

Employment Division v. Smith set a firm precedent in determining if prohibiting or limiting an act that coincides with religious acts and practices is constitutional. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990). If the law in question is neutral and generally applicable towards the action the law is attempting to prohibit or limit, a compelling interest is not required for the law to be constitutional. *Id.* at 884-85 ("We conclude…that the sounder approach…is to hold the [*Sherbert*] test inapplicable to such challenges.") (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)). All that is required is a rational basis review for neutral and generally applicable laws. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) ("*Stormans II*"). However, if the law is *not* neutral or generally applicable, a strict scrutiny analysis must be applied. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

This Court has never permitted legislation that limits religious beliefs. In fact, "religious beliefs need not be acceptable…or comprehensible to others in order to merit First Amendment protection". *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). However, state and federal laws that incidentally limit religious actions have been permitted since 1878. *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) ("To permit… [religious exemptions for polygamy] would be to make the professed doctrines of religious belief superior to the law of the land.").

The instant case demonstrates another instance of the necessity to limit professional conduct for the compelling reason of protecting minors from the physical and psychological damages of conversion therapy. *See Stormans II*, 794 F.3d at 1077 ("By prohibiting all refusals

that are not specifically exempted, the rules establish a practical means to ensure the safe and timely delivery of all unlawful and lawfully prescribed medications to the patients who need them."). After *Reynolds*, the opinions of *Sherbert* and *Yoder* restricted the free reign of legislation enactment by ruling that if a neutral law of general applicability burdens religiously motivated conduct, the law is required to serve a compelling state interest. *Sherbert*, 374 U.S. at 406; *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The *Sherbert-Yoder* standard was endorsed until the ruling of *Employment Division v. Smith*, 494 U.S. at 883-84. After *Employment Division v. Smith* became precedent, a more tangible test was created by the Court to determine whether the Free Exercise Clause from the First Amendment was violated. *Id*.

The Act undoubtedly passes the *Employment Division v. Smith* test because it is neutral and generally applicable to any party affected and passes a rational basis analysis. Although Justice Knott's dissent urges this Court to overrule *Employment Division v. Smith*, state and federal laws across the United States heavily rely on the test to effectively enforce the nation's laws. *Sprague*, 2023 WL at 15; *Parents for Privacy v. Barr*, 949 F. 3d 1210, 1233 (9th Cir. 2020) (" . . . does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'") (quoting *Employment Division v. Smith*, 494 U.S. at 879).

A. The Act is Neutral Because the Text and Legislative History of the Statute Do Not Indicate the Object of the Law is to Infringe on Religious Activities.

The first prong in the *Employment Division v. Smith* test requires a law to be neutral toward restricted acts whether religiously or secularly motivated. *Employment Division v. Smith*, 494 U.S. at 879 (citing *United States v. Lee*, 445 U.S. 252, 263 (1982)). Under *Employment Division v. Smith*, a law is not neutral "if the object of a law is to infringe upon or restrict practices because of . . . religious motivation." *Id.* at 878–79. One avenue to determine whether a law is neutral includes

looking at the actual text of the statute and legislative history. *Lukumi*, 508 U.S. at 533-34 (citing *Waltz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

1. The Text of the Act Does Not Indicate The Objective Of Infringing Upon Or Restricting Religious Practices.

The actual text of a law may provide an explicit indication of a Free Exercise Clause violation. Words or phrases within the text of a statute can point to clear indicators of a legislature suppressing religious activity. *Lukumi*, 508 U.S. at 534. For instance, in *Lukumi*, the City of Hialeah ("Hialeah") enacted "Resolution 87-90" which banned "ritualist animal sacrifices" in accords with Fla. Stat. § 828.12. *Lukumi*, 508 U.S. at 526-27. The words in Hialeah's enactments, such as "sacrifice" and "ritual", although not explicit, supported the argument of improper targeting. *Id*. at 534. The words heavily alluded to the religious practice of animal sacrifice from the Santeria religion. *Id.* at 524-25.

Conversely, nothing in the Act's text gives an indicium of evidence that religious suppression was the object behind the Act's enactment. The concepts and terminologies of sexual identity can be used in either a religious or secular context. Contrasting the Act's wording from the terms "ritual" or "sacrifice" used in *Lukumi*, which have little use in a secular world, from terms like "sexual", "support", "identity exploration" are used in both a secular and religious context. *Id.* at 533. There isn't any room given in the Act to misconstrue or point to religious concealment.

2. The Legislative History of the Act Does Not Have an Objective Of Infringing Upon Religious Beliefs.

Because the text of the Act proves to be neutral, the remaining question is whether the Act's legislative history proves to be neutral as well. Legislative history neutrality can shed light

on the intention of a statute. *Id.* at 541. For example, in *Masterpiece Cakeshop,* there are several instances of the Colorado Civil Rights Commission announcing derogatory statements towards a cakeshop owner's beliefs during their hearings. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018).

When reviewing the legislative history of the Act, there aren't any indicators of derogatory statements or hostility towards the religious beliefs against same-sex attraction as there were in *Masterpiece Cakeshop.* The comments Petitioner claims are one-sided and biased do not bear any weight on the current issue. *Sprague*, 2023 WL at 8-9. The "barbaric practices" mentioned by North Greene State Senator Floyd include the physical and mental tactics used in conversion therapy that has traumatized many youthful minds. Molly Williams, *Conversion Therapy on LGBTQ+ Children As a Form of Torture and the Rights of the Child in the Face of the United States Constitution's Free Speech and Religious Free Exercise Clauses*, 26 JGRJ 393, 417-18 (2023) (Discussing methods of conversion therapy such as "electric shock, beatings, and starvation"). The comment from Senator Floyd referred to anytime a licensed therapist uses these kinds of tactics without any consideration regarding the motive for the tactic; whether that motive is backed by religious or secular reasoning.

The other instance the Petitioner mentions legislative history that disfavors religious freedom is regarding Senator Golmer Pyle's anecdote about his journey concerning his lesbian daughter, his Christian beliefs, and the negative outcomes he personally witnessed with conversion therapy. *Sprague*, 2023 WL at 9. These statements within the given context do not lean towards anti-religious intentions from the North Greene legislature. Rather, the story provides support to the fact that the Act provides a legitimate governmental interest in protecting minors negatively affected by conversion therapy.

As demonstrated through the Act's text and legislative history, the Act is neutral in punishing *any* licensed therapist who provides conversion therapy to minors. Both facially and through legislative proceedings, the object of the Act was not to limit religious actions, although the law may incidentally do so. This will prove to be a moot point, however, as the law is neutral and generally applicable. *Stormans II*, 794 F.3d at 1077.

B. The Act is a Generally Applicable Law Since the Law is Not Substantially Underinclusive, Does Not Allow for Individualized Exceptions, and Does Not Have Selective Enforcement.

The opinion in *Stormans II* lays out two ways of determining whether a statute is generally applicable across both secular and religious uses: (1) If a statute proves to be substantially underinclusive by failing "to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest," and (2) if the statue allows individualized exceptions that selectively enforces the law, then the statute is not generally applicable. The statute presented before the Court does not fall under any of the listed categories. *Id.* at 1079.

1. The Act is Not Substantially Under-Inclusive Because All Conversion Therapy for Minors is Banned.

The Act is not substantially under-inclusive. When discussing substantial under-inclusivity, *Stormans II* is referring to the law being implemented towards religious motives while not including several secular motives. *Id*. For instance, in the *Tandon v. Newsom* opinion, although groups were not allowed to gather for religious activities while COVID-19 regulations were at their height, the law did allow several exemptions where non-religious activities could meet. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). In *Tandon*, the government's interest was to limit the spread of COVID-19. However, the fact that certain meetings were religious in nature did

not make the spread of COVID-19 more likely than the spread of the disease at non-religious activities. *Id.* Therefore, the law was under-inclusive when forcing religious meetings to subside and while still allowing non-religious meetings that could spread COVID-19.

By contrast, the Act does not prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *Sprague*, 2023 WL at 10. The statute is a blanket regulation that affects all conversion therapy whether secular or religiously driven.

2. The Act Does Not Allow Any Individualized Exceptions that Selectively Enforce.

The text of the Act does not permit any room for individualized exceptions to be made no matter the intention behind the conversion therapy. *Id*. A statute is not generally applicable "if it invites the government to consider particular reasons for a person's conduct by creating individualized exemptions". *Fulton*, 141 S. Ct. at 1871. In *Fulton*, the City of Philadelphia ("Philadelphia") was not permitted to pick and choose which adoption agencies are permitted to continue in the city's foster care system. *Id.* at 1878. When comparing the outcome of *Fulton* with the Act, *any* therapist in North Green is subject to discipline for practicing conversion therapy. *Sprague*, 2023 WL at 10. North Greene does not provide any kind of mechanism that allows exceptions to the law to be determined.

Petitioner contends that the Act is not generally applicable since equal treatment is not given to preventing the "regret" from "sex reassignment surgery". *Id*. However, this argument shows that Petitioner does not fully understand the ruling in *Employment Division v. Smith*. When looking at any action prohibited by law, it must be that the action is banned regardless of the intention behind the act apart from certain circumstances. *Stormans II*, 794 F.3d at 1080. An argument regarding a different act that may bring about a similar effect would be irrelevant. *Id.* at

1084. The fact that Petitioner does not agree with a law that prohibits certain practices does not indicate that a comparable, secular activity needs to be prohibited too. *Employment Division v. Smith* only ascertains that the *same* act must be generally applicable, not *comparable* acts. *Tandon*, 141 S. Ct. at 1296. Therefore, the Petitioner referencing the harms of sex reassignment surgery is not appropriate because it is plainly not the prohibited act at issue in front of the Court today.

In accord with the analysis provided in *Fulton*, the Act is generally applicable among all motivations behind conversion therapy since the law is not under-inclusive and does not provide any means of individual exemptions. *Fulton*, 141 S. Ct. at 1877.

C. The Act Passes a Rational Basis Analysis

Once a law that is in question of violating the Free Exercise Clause is determined to be neutral and generally applicable, the law must further prove to be derived from a rational basis. *Stormans II*, 794 F.3d at 1076. The Act passes a rational basis analysis because North Greene legislatures can point to the dangerous effects of providing conversion therapy to minors. To pass a rational basis analysis, the party must demonstrate that there is a legitimate state interest. *See Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (clarifies that all that is required of a neutral and generally applicable law that coincidentally burdens the exercise of religion is a rational basis analysis); *Heller*, 509 U.S. at 320 (1993) (although discussing the Equal Protection Clause, the case demonstrates the meaning of rational basis analysis).

The legitimate government interest involves protecting "the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth". R. at 4. Statistics point to an increase in suicide rates among minors who attend conversion therapy. *National Survey on LGBTQ Youth Mental Health 2020*, Trevor Project (2020) (showing that 8% of LGBTQ youth

who attempted suicide did not experience attempts in changing their sexuality while 19% of LGBTQ youth who attempted suicide did experience attempts in changing their sexuality).

Furthermore, talk therapy still causes psychological harm to minors and continues brings about the consequences North Greene's legislature is looking to prevent. Molly Williams, *Conversion Therapy on LGBTQ+ Children As a Form of Torture and the Rights of the Child in the Face of the United States Constitution's Free Speech and Religious Free Exercise Clauses*, 26 JGRJ at 419. The safety concerns for the State's children should never be swept under the rug and the North Greene legislature acknowledged the concern by passing the Act. Therefore, the Act passes the rational basis analysis required for neutral and generally applicable laws. *Employment Division v. Smith*, 494 U.S. at 884-85.

D. *Employment Division v. Smith* Should Not Be Overruled Because Doing So Would Prove to Undermine the Meaning of *Stare Decisis*. Furthermore, the Ruling in *Employment Division v. Smith* is not Egregiously Wrong, Does Not Cause Significant and Jurisprudential Consequences, and Does Not Unduly Upset Reliant Interests.

The Court should not overrule *Employment Division v. Smith* but instead affirm the Fourteenth Circuit's prior decision. *Sprague*, 2023 WL at 11. The act of overruling any Supreme Court precedent must be taken with the utmost seriousness. Overruling precedent demonstrates that the meaning of the Constitution itself is being changed. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Furthermore, the nation's case law is stable because of the court systems' practice of *stare decisis*. The reasons that go toward overruling precedent should "go beyond mere demonstration that the overturned opinion was wrong." *Hubbard v. United States*, 514 U.S. 695, 716 (1995)

(opinion concurring in part and concurring in judgment). Therefore, overruling a Supreme Court decision should be held with high regard and done in circumstances that require a change because *stare decisis* "contributes to the integrity of our constitutional system of government". *Dobbs*, 142 S.Ct. at 23333 (2022) (Breyer J., dissenting) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)).

This Court has not provided a static test for determining when overruling precedent is appropriate. However, Justice Kavanaugh presents three questions to analyze when overruling precedent is appropriate in his concurrence in part in *Ramos v. Louisiana*, (1) Is the prior decision grievously or egregiously wrong? (2) Has the prior decision caused significant negative jurisprudential or real-world consequences? (3) Would overruling the prior decision unduly upset reliance interests? *Ramos v. Louisiana*, 140 S.Ct. 1390, 1414-15 (2020) (Kavanaugh J., concurring in part). The precedent of the Supreme Court makes it clear that *Employment Division v. Smith* is not grievously or egregiously wrong, has not caused significant negative jurisprudential or real-world consequences, and if overruled, would unduly upset reliant interests.

1. Employment Division v. Smith is Not Grievously or Egregiously Wrong.

Employment Division v. Smith is not egregiously wrong. Justice Knott's dissent argues that the ruling in *Employment Division v. Smith* "relied on policy concerns" rather than a constitutional analysis to reach its ruling. *Sprague*, 2023 WL at 16. However, that would be a false statement. *Employment Division v. Smith* analyzes the meaning of the Free Exercise Clause head-on and starts off with a textual analysis. *Employment Division v. Smith*, 494 U.S. at 878. Past opinions in case law have always permitted the limitation of actions that incidentally limited religious practices to an extent. *See United States v. Lee*, 455 U.S. 252 (1982). Religious beliefs cannot be an excuse for an individual to ignore a valid law. *Id.* at 878-79. There are social obligations and duties that the

government is required to uphold. Fulfilling these duties would be nearly impossible if an individual may reject a neutral and generally applicable law. *Reynolds*, 98 U.S. at 165.

For instance, the North Greene legislature is aiming to protect the mental and physical well-being of minors who experience same-sex attraction from conversion therapy that commonly conducts abusive tactics to achieve its end goal. *First Study Shows Pivotal Role of Parents in Conversion Efforts to Change LGBT Adolescents' Sexual Orientation*, San Francisco State University Family Acceptance Project (2018) ("Suicide attempts nearly tripled for LGBT young people who reported both home-based efforts to change their sexual orientation by parents and intervention efforts by therapists and religious leaders"), https://familyproject.sfsu.edu/first-study-shows-pivotal-role-parents-conversion-efforts-change-lgbt-adolescents-sexual. When comparing the practices of conversion therapy with other legislation that has been upheld by this Court, conversion therapy has a more destructive impact to society than similarly situated and permissibly outlawed acts. *Cf*. *Stormans II*, 794 F.3d at 1078-79 (comparing the consequences of not being able to attain emergency contraceptives to the consequence of minors suffering suicidal thoughts with conversion therapy).

2. Employment Division v. Smith Has Not Caused Significant Negative Jurisprudential or Real-World Consequences.

Further, *Employment Division v. Smith* has not created significant and negative jurisprudential or real-world consequences. *Employment Division v. Smith* provided a means to solidify many individuals' rights to continue their religious practices by finding for oppressed Petitioners that may not have been possible without *Employment Division v. Smith*. *See Lukumi*, 508 U.S. at 521-22 (found for the Petitioner and ruled that the city ordinance prohibiting animal sacrifice violated the Free Exercise Clause); *Fulton*, 141 S. Ct. at 1871 (found for the Petitioner

and ruled that Philadelphia cannot force Catholic Social Services go against their religious beliefs and allow same-sex couples to adopt children in their adoption system). The just rulings that have come out of *Employment Division v. Smith* heavily outweighs any potential significant and negative jurisprudential or real-world consequences.

Additionally, the rulings from *Reynolds* and *Yoder*, which were the main rulings used to govern Free Exercise Clause violations before *Employment Division v. Smith*, present inconsistent holdings due to the lack of direction that *Employment Division v. Smith* would provide approximately 20 years later. In *Yoder*, Chief Justice Burger notes that

> "to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability". *Yoder*, 406 U.S. at 220.

Meanwhile, *Reynolds* denounced the individual "mak[ing] the professed doctrines of religious belief superior to the law of the land". *Reynolds*, 98 U.S. at 167. The inconsistent reasonings from the two holdings demonstrates the need for *Employment Division v. Smith*.

3. If Employment Division v. Smith is Overruled, the Decision Would Unduly Upset Reliant Interests.

Finally, overruling *Employment Division v. Smith* would unduly upset reliant interests. *Ramos*, 140 S. Ct. at 1414-15. *Employment Division v. Smith* affirmed several rulings that uphold legislation that helps the nation function, such as requiring every citizen to pay Social Security taxes despite their religiously held beliefs against payment of such kinds of taxes. *United States v. Lee*, 455 U.S. 252 (1982). The ruling protected the religious acts of numerous groups and individuals while finding the fine line of satisfying government interests. *Compare Tandon*, 141 S. Ct. at 1296 (determining that comparable secular activity was treated more favorably than

religious activity and found for Petitioner), *and Fulton*, 141 S. Ct. at 1871 (finding that Philadelphia had violated the Free Exercise Clause by forcing Catholic Social Services to choose between continuing their adoption services and go against their religiously held beliefs against same-sex marriage or not continuing the service), *with Parents for Privacy v. Barr*, 949 U.S. at 1217 (finding that the "Student Safety Plan" was neutral and generally applicable while passing a rational basis standard by seeking to protect transgender children).

Therefore, since *Employment Division v. Smith* is not grievously or egregiously wrong, hasn't caused significant jurisprudential or real-world consequences, and would unduly upset reliant interests if overruled, the Court's precedent should not be overruled.

CONCLUSION

For the foregoing reasons, the Uniform Disciplinary Act is constitutional and does not violate Petitioner's rights under the Free Speech Clause of the First Amendment. Further, the Act is neutral and generally applicable, and does not violate the Free Exercise Clause of the First Amendment. Finally, this Court should adhere to *stare decisis* by upholding *Employment Division v. Smith.* Petitioner's challenge should therefore be denied, and the decision of the Fourteenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

Team 15

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