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

SEPTEMBER 26, 2023

Team 17
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a law that disciplines state-licensed health care providers for practicing conversion therapy on minors by way of "unprofessional conduct" violates the Free Speech Clause of the First Amendment.

II. Whether a law that protects the physical and psychological well-being of minors is neutral and generally applicable when it incidentally burdens religious speech, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent, the State of North Greene, Defendant in the United States District Court and Appellee in the United States Court of Appeals for the Fourteenth Circuit, submits this brief in support of its request that the Supreme Court of the United States affirm the ruling of the Fourteenth Circuit and hold that the State of North Greene's regulation of conversion therapy is consistent with the First Amendment.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of North Greene is unpublished as *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The decision of the United States Court of Appeals for the Fourteenth Circuit is contained in the Record on Appeal at pages 2-16.

STATEMENT OF JURISDICTION

A formal Statement of Jurisdiction has been omitted in accordance with the rules of the 2023 Billings, Exum & Frye National Moot Court Competition at Elon University School of Law.

RELEVANT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Respondent, the State of North Greene ("the State"), maintains professional standards within health care services by requiring providers to be licensed and subjecting unprofessional conduct to disciplinary action. R. at 3-4. After the General Assembly heard the position of the American Psychological Association ("APA"), the State added the performance of conversion therapy on patients under the age of eighteen to the list of "unprofessional conduct" in the State's Uniform Disciplinary Act. R. at 4; N. Greene Stat. § 106(d). The APA opposes conversion therapy on minors because it has been linked to suicidal actions, depressive thoughts, harm, and substance abuse. R. at 7. According to the APA, conversion therapy has not been proven effective and should not be taught at "any stage in the education of psychologists." R. at 4; R. at 7. Psychologists should instead use an approach like that adopted by North Greene, which allows for counseling that provides acceptance, support, and identity understanding and exploration. R. at 4.

When it enacted the statute, the General Assembly intended to protect the physical and psychological well-being of minors, in accordance with the findings of the APA. R. at 4. N. Greene. Stat. § 106(d) defines "conversion therapy" as "a regime that seeks to change an individual's sexual orientation or gender identity" and includes numerous exemptions from its requirements. R. at 4. The statute exempts counselors acting under the auspices of a religious organization and excludes speech and religious practices that do not constitute conversion therapy. R. at 4. Importantly, health care providers may communicate their personal views on conversion therapy to the public and to all patients, including minors. R. at 4. The law's thrust is limited to minors; therapists may still practice conversation therapy on patients over the age of eighteen and

may refer minors seeking conversion therapy to religious counselors or to counselors in other states. R. at 4.

Petitioner, Howard Sprague ("Sprague"), is a Christian provider of therapy services who believes that sex assigned at birth should not be changed and that sexual relationships should only occur between a man and a woman within a marriage. R. at 3. Sprague asserts that many of his clients share these religious beliefs. R. at 3. Sprague engages in "talk therapy" with his clients, which is limited to verbal counseling. R. at 4. Sprague maintains that the North Greene law which deems conversion therapy on minors "unprofessional conduct" violates his and his clients' free speech and free exercise rights under the First Amendment. R. at 5. To support this claim, Sprague offers a weak showing of legislative history in the form of comments from individual legislators speaking on their own behalf. R. at 9. He also expresses concern that the statute's objectively defined practices excluded from the statute will result in a discretionary system of individual exemptions. R. at 10. Finally, he contends that harms such as regret from gender-affirming therapy are akin to suicide and depression, and thus undermine the object of the statute. R. at 10.

II. PROCEDURAL HISTORY

In August 2022, Sprague brought suit against North Greene seeking a preliminary injunction of enforcement of N. Greene Stat. § 106(d) alleging the statute violates his First Amendment rights. The District Court denied Sprague's motion for a preliminary injunction and granted the State's motion to dismiss. Sprague appealed to the United States Court of Appeals for the Fourteenth Circuit, which affirmed the District Court and held that North Greene's law banning conversion therapy does not violate Sprague's free speech or free exercise rights under the First Amendment. Accordingly, the Fourteenth Circuit held that dismissal of Sprague's claims was proper. Sprague filed a Writ of Certiorari to this Court, which granted review.

SUMMARY OF THE ARGUMENT

One of the most important functions of a state is the power to regulate its licensed professions. This Court has consistently acknowledged this authority by upholding restrictions that states have placed on professions. While no state may abridge the freedom guaranteed by the First Amendment to its licensed professionals, this Court's well-reasoned precedent gives states ample authority to regulate their conduct. Where regulations of licensed professionals target conduct, and not speech, the First Amendment steps aside to a state's authority to regulate its professions by analyzing the law under rational basis review. The two concepts are not in combat, and this Court's precedent is clear: when a state regulates professional conduct, even if incidentally burdening speech in the process, the law is presumptively constitutional under rational basis review. The Fourteenth Circuit was correct in holding that the North Greene law is a proper exercise of a state's power to regulate professions.

North Greene has placed restrictions on its licensed health care providers to protect the State's youth. It does this by regulating which forms of mental health treatment are available to minors. Regulating forms of permissible medical treatment is consistent with this Court's precedent which allows for states to regulate the practices of licensed professionals. The analysis does not change when a treatment is available by speech only. North Greene, in banning licensed providers from practicing conversion therapy, has shielded the State's youth from receiving a form of treatment which is harmful to them. Because it regulates conduct, the State does not run afoul of the First Amendment on free speech grounds. Any argument that the conversion therapy ban does regulate speech is defeated by the State's careful tailoring of the law.

While the law is constitutional under the First Amendment on free speech grounds, it is also valid under the Free Exercise Clause. The Fourteenth Circuit properly found that N. Greene

Stat. § 106(d) is neutral and generally applicable, in accordance with *Employment Division v. Smith* and its jurisprudence. Because the law is neutral and generally applicable, it warrants rational basis review.

North Greene's law restricting conversion therapy practices is not only neutral in its object of protecting minors from serious harms, but also neutral beyond its face. The legislative history is insufficient to show hostility toward religion because stray remarks from legislators grounded in their own personal experiences do not reflect the opinion of the entire legislative body.

North Greene's law is also generally applicable because it is not substantially underinclusive nor does it contain individualized exemptions. The law does not prohibit religious conduct while permitting secular conduct that undermines the goal of protecting minors. The risks of gender-affirming therapy—regret—are so remote from those of conversion therapy—suicide and depression—that they cannot be regarded as comparable. Nor does the law provide a discretionary mechanism for individual exemptions. Instead, it creates an express exemption for an objectively defined group.

This Court should not overrule *Employment Division v. Smith*. Overruling *Smith* would create an avenue for religion to become the law of the land. It also would neglect a long history of jurisprudence before *Smith* and subsequent precedent built upon Smith's holding. The Court should refrain from judicial overreach and allow states to continue to issue neutral and generally applicable in line with state interests. To do so would result in courts needing to engage in an unnecessary, constant inquiry into religious interests.

ARGUMENT

I. N. GREENE STAT. § 106(D) REGULATES ONLY THE CONDUCT OF HEALTH CARE PROVIDERS BY GOVERNING PERMISSIBLE MEDICAL TREATMENTS AND THUS IS A PERMISSIBLE REGULATION OF PROFESSIONAL CONDUCT UNDER THE FIRST AMENDMENT.

North Greene's law which disciplines health care professionals for engaging in conversion therapy is consistent with the First Amendment. North Greene maintains health care standards amongst its licensed professionals by subjecting them to discipline for engaging in "unprofessional conduct." When a state regulates professional conduct, the law is presumed constitutional under rational basis review. Because N. Greene Stat. § 106(d) regulates a form of conduct, it meets its burden under rational basis review because the State has a legitimate interest in protecting the psychological well-being of its youth, and a law outlawing conversion therapy, which has been linked to depression and suicide, is rationally related to that interest. Under this analysis, N. Greene Stat. § 106(d) does not abridge Sprague's free speech rights under the First Amendment.

Even if this Court finds that N. Greene Stat. § 106(d) regulates speech, there are many hurdles to cross before invalidating the law. If this Court determines the law is a content and viewpoint neutral regulation of speech, it must only satisfy intermediate scrutiny. If it determines the law is a content-based restriction of speech, N. Greene Stat. § 106(d) withstands strict scrutiny because its many exceptions narrowly tailor the statute to the State's interest in protecting its youth from psychological and physical harm. N. Greene Stat. § 106(d) is formidable against any level of scrutiny, and because of this, does not abridge Sprague's free speech rights under the First Amendment.

A. N. Greene Stat. § 106(d) regulates professional conduct and must only satisfy rational basis review.

N. Greene Stat. § 106(d) regulates the conduct of licensed professionals because it governs which medical treatments licensed healthcare professionals may practice, which is a critical function of the State. Because N. Greene Stat. § 106(d) regulates conduct, rational basis review is the correct level of scrutiny to guide this Court's analysis. Under the Supreme Court's precedent, states are empowered to regulate the conduct of professionals. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978). In fact, states bear "a special responsibility for maintaining standards among members of licensed professions." *Id*. States regulate professionals by imposing requirements upon members of a profession to ensure that the profession is operating safely and in the best interests of those seeking professional services. Examples of regulating professional conduct include requirements that doctors obtain informed consent from patients prior to medical procedures, lawyers refrain from soliciting victims of accidents, and psychoanalysts obtain certain educational credentials. *Ohralik*, 436 U.S. at 460 (1978); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Calif. Bd. of Pysch.*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"). Regulating the conduct of licensed professionals is well-within a state's police power. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

When a state regulates professional conduct, but incidentally burdens speech, the Supreme Court has afforded less protection to the speech of professionals. *Nat'l Inst. of Fam. and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). This is precisely why the Ninth Circuit found a law nearly identical to N. Greene Stat. § 106(d) a permissible regulation of professional conduct, even though it targeted a speech-based profession. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). The court in *Pickup* found constitutional a law which disciplined mental health

providers for engaging in "Sexual Orientation Change Efforts" ("SOCE"). *Id.* The law there, much like N. Greene Stat. § 106(d), subjected mental health providers to discipline for practicing conversion therapy on minors. *Id.* at 1215. To determine whether the law regulated speech or conduct, the court focused on the fact that the law regulated a form of treatment. *Id.* at 1229. The court explicitly rejected the notion that just because it is *speech* that is used to treat a client, the law regulates speech instead of conduct. *Id.* at 1226 ("That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection."). The Ninth Circuit held that "the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone." *Id.* at 1230. If talk therapy were entitled to heightened First Amendment protection, it would be "virtually 'immune from regulation.'" *Id.* at 1231 (quoting *NAAP*, 228 F.3d at 1054). The Ninth Circuit in *Pickup* also rejected the argument that *Holder v. Humanitarian Law Project* was controlling, which held a ban on citizens from communicating information about international law to a terrorist organization was a regulation of speech, not conduct. 561 U.S 1 (2010); *Pickup*, 740 F.3d at 1230. It reasoned that under the SOCE ban, professionals were free to express their view to anyone as *citizens*, as opposed to the law in *Holder* which prohibited this. *Pickup*, 740 F.3d at 1230. The North Greene law at issue here operates in the same manner.

Much like the SOCE ban in *Pickup*, N. Greene Stat. § 106(d) regulates a form of treatment. As the Fourteenth Circuit noted, practicing "psychotherapy is not different simply because it uses words to treat ailments." R. at 7. Specifically, N. Greene Stat. § 106(d) disciplines health care providers for using "a regime that seeks to change an individual's sexual orientation or gender identity." R. at 4. The statute is targeted at a particular form of treatment that might be used by therapists. Because health care providers like Sprague engage in talk therapy, which is limited to

verbal counseling, N. Greene Stat. § 106(d) necessarily implicates some speech. R. at 3. Even so, the Supreme Court in *NIFLA v. Becerra* explicitly held that states may regulate professional conduct even if that conduct "incidentally involves some speech." 138 S. Ct. at 2372. When a law regulates speech only "as part of as part of the *practice* of medicine," it is "subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. Such is the case here. N. Greene Stat. § 106(d) regulates the practice of talk therapy, and in turn necessarily implicates *some* speech. But the law is targeted at regulating the practice of medicine, a form of conduct. Because of this, N. Greene Stat. § 106(d) is subject only to rational basis review.

B. Even if N. Greene Stat. § 106(d) does regulate speech, the statute is content and viewpoint neutral.

Should this Court find that N. Greene Stat. § 106(d) regulates speech, as opposed to conduct, the law is viewpoint and content-neutral and does not trigger strict scrutiny. The applicable level of scrutiny turns on "whether the statute distinguishes between prohibited and permitted speech on the basis of its content." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (citing *Frisby v. Schultz*, 487 U.S. 474 (1988)). This inquiry turns on "whether the government has adopted a regulation … because of [agreement or] disagreement with the message it conveys." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)). A law is a valid content-neutral regulation of speech if it advances an important government interest and does not burden substantially more speech than necessary. *Turner*, 512 U.S. at 662.

In *King v. Governor of the State of New Jersey*, the Third Circuit analyzed a statute similar to North Greene's which exposed professionals who engage in sexual orientation change efforts to discipline. 767 F.3d 216, 221 (3d Cir. 2014). While the Third Circuit held that the statute regulated speech, as opposed to conduct, it found that the law did not trigger strict scrutiny because

it was viewpoint neutral. *Id.* at 237. The plaintiffs in *King* argued that the anti-SOCE law prohibited them, as licensed counselors, from expressing their viewpoint that same-sex attractions can be reduced. *Id.* The Third Circuit rejected this argument because the statute allowed licensed professionals to express their personal viewpoints on this matter. *Id.* The court noted that any time a professional engages in a practice they are "implicitly communicating the viewpoint that such practice is effective and beneficial." *Id.* A rule prohibiting that method of communicating would "undermine the State's authority to regulate the practice of licensed professions" because "[s]tate legislatures could never ban a particular professional practice without triggering strict scrutiny." *Id.* Similarly, in *NAAP*, the Ninth Circuit found a law which required its psychoanalysts to take educational courses that taught certain psychological theories to be content-neutral because the law was adopted to serve a public safety purpose, not to endorse a psychological theory. 228 F.3d at 1055-56. Alternatively, in *Otto v. City of Boca Raton*, the Eleventh Circuit held that an anti-SOCE ordinance was viewpoint discriminatory. 981 F.3d 854 (11th Cir. 2020). It reasoned that the statute allowed for health professionals to provide "support and assistance to a person undergoing a gender transition," but allowed no such exception for sexual orientation. *Id.* at 864. This, according to the court, "codif[ied] a particular viewpoint—sexual orientation is immutable, but gender is not . . ." *Id.*

Unlike the law in *Otto*, N. Greene Stat. § 106(d) allows mental health professionals to provide acceptance, support, and understanding of a patient's identity exploration regardless of whether this refers to gender identity or sexual orientation. R. at 4. This exception, in turn, does not advance the same prerogatives as the Florida statute in *Otto*, which promoted the viewpoint that sexual orientation is immutable, but gender is not. N. Greene Stat. § 106(d) defines conversion therapy as "a regime that seeks to change an individual's sexual orientation or gender identity." R.

at 4. The law applies equally regardless of viewpoint; it would equally discipline a counselor who sought to assist her client in undergoing a gender transition and one that sought to suppress a client's same-sex tendencies. N. Greene Stat. § 106(d) is more closely aligned with the law in *King*, since it allows counselors to communicate with the public about conversion therapy, express their personal views regarding conversion therapy, and practice conversion therapy under a religious auspice. R. at 4.

Because the statute explicitly permits counselors to express their viewpoint on conversion therapy, it is viewpoint neutral. The law only prohibits licensed counselors from engaging in the medical practice of conversion therapy and does not punish professionals for expressing a particular viewpoint. N. Greene Stat. § 106(d) does not target or censor certain views and would allow Sprague to express his views that sexual relationships should occur between a man and a woman, free of discipline. Much like the Ninth Circuit found in *NAAP*, the North Greene law does "not 'dictate what can be said between psychologists and patients during treatment.'" 228 F.3d at 1055. It is indifferent as to the content of the speech; it targets only the method by which such ends are achieved. Because of this, N. Greene Stat. § 106(d) is viewpoint and content-neutral and should be analyzed under intermediate scrutiny, should this Court find that it regulates speech at all.

C. N. Greene Stat. § 106(d) satisfies any level of judicial scrutiny and should be upheld.

N. Greene Stat. § 106(d) regulates conduct and should be analyzed under rational basis review, meaning it will be upheld if it bears a rational relationship to a legitimate state interest. *See Casey*, 505 U.S. at 884. However, even if this Court finds that N. Greene Stat. § 106(d) regulates speech, it withstands any heightened level of judicial scrutiny. If it is a content-neutral regulation of speech, the law must satisfy intermediate scrutiny and will be upheld if it advances an important government interest and does not burden substantially more speech than necessary.

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994). If this Court does find that N. Greene Stat. § 106(d) is a content-based regulation of speech, it must satisfy strict scrutiny by being narrowly tailored to serve a compelling government interest. *NIFLA v. Becerra*, 138 S. Ct. at 2371. N. Greene Stat. § 106(d) is analyzed below under strict scrutiny because if it meets this demand, it survives any level of judicial scrutiny and does not violate the First Amendment's guarantee of free speech.

Under strict scrutiny, N. Greene Stat. § 106(d) will be upheld if it is narrowly tailored to serve a compelling government interest. *NIFLA v. Becerra*, 138 S. Ct. at 2371. Even a content-based restriction of speech may be upheld under this framework. *See Williams-Yulee v. Florida Bar*, 575 U.S. 433 (2015). The North Greene legislature enacted the law to protect the psychological well-being of minors by safeguarding them against the harms caused by conversion therapy. R. at 4. The Supreme Court has held that the government's interest in protecting minors from psychological harm is "evident beyond the need for elaboration." *New York v. Ferber*, 458 U.S. 747, 756 (1982); *Globe Newspaper Co. v. Sup. Ct. for Norfolk Cnty.*, 457 U.S. 596, 608 (1982). North Greene's interest in protecting its minors from harm is not only compelling; it is "indisputable." *Otto*, 981 F.3d at 868. It is also a "weighty" state interest to affirm the equal "dignity and worth" of lesbian, gay, bisexual, and transgender individuals. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). Because of the particularly compelling nature of the government's interest in protecting the well-being of children, the Supreme Court has sustained legislation aimed at this end "even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 757.

If N. Greene Stat. § 106(d) is narrowly tailored to serve its compelling interest in protecting the psychological well-being of its youth, it will withstand even the highest form of judicial

scrutiny. For a law to be narrowly tailored, it does not have to be a perfect "fit" to achieve its ends, merely a tight "fit." *See United States v. Alvarez*, 567 U.S. 709, 730-31 (2012). Here, N. Greene Stat. § 106(d) is "actually necessary" to achieve the government's interest. *Id.* at 725. The Generally Assembly did not adopt N. Greene Stat. § 106(d) based on its own inclinations; it relied on reports by the American Psychological Association which have linked conversion therapy to harm, depression, suicide, and substance abuse. R. at 7. According to the APA, conversion therapy has not been found effective and should be avoided "in any stage of the education of psychologists." R. at 7. Rather than conversion therapy, the APA recommends psychologists use the approach adopted by North Greene: acceptance, support, and identity exploration. R. at 4. N. Greene Stat. § 106(d) was carefully constructed to accommodate the position of the APA.

Important to its narrow tailoring are the many exceptions within N. Greene Stat. § 106(d) which prevent the statute from burdening more speech than necessary. N. Greene Stat. § 106(d) does not apply to counseling that provides acceptance and support of a minor's identity exploration. R. at 4. It allows counselors to discuss their personal views regarding conversion therapy, allowing ample means for other speech. R. at 4. The law is limited to restricting conversion therapy on minors, the very object of the State's interest. R. at 4. It leaves open the alternatives to practice conversion therapy on patients over eighteen, to refer patients to counselors who may practice conversion therapy, and to express personal views, even to minors, on conversion therapy. R. at 4. Thus, the law targets exactly what it intends to and no more: therapy efforts aimed at changing a minor's identity. For these reasons, N. Greene Stat. § 106(d) is narrowly tailored to serve a compelling government interest and withstands heightened scrutiny.

Because N. Greene Stat. § 106(d) satisfies even the highest form of judicial scrutiny, it will satisfy less-demanding forms of scrutiny. However, the Court need not touch heightened scrutiny

at all; rational basis review governs statutes aimed at regulating professional conduct. Under rational basis review, the State's interest remains the same, and just as compelling. Certainly, a law which bans conversion therapy due to reports of harm to minors is rationally related to the government's interest in protecting its minors from psychological harm. By relying on the opinion of the APA regarding the harms of conversion therapy, North Greene acted rationally when it enacted a law shielding minors from this form of treatment. Under any level of judicial scrutiny, N. Greene Stat. § 106(d) does not infringe on the free speech rights guaranteed by the First Amendment and should be upheld as a proper exercise of the State's power to regulate professions.

II. NORTH GREENE'S LAW PROHIBITING LICENSED HEALTH CARE PROVIDERS FROM PRACTICING CONVERSION THERAPY ON CHILDREN IS NEUTRAL AND GENERALLY APPLICABLE DESPITE INCIDENTALLY BURDENING RELIGIOUS SPEECH, AND THE COURT SHOULD NOT OVERRULE *SMITH*.

The State of North Greene did not violate Sprague's constitutional right to free exercise when it sought to protect minors from the well-founded harms of conversion therapy by state-licensed health care providers. The First Amendment of the United States Constitution contains two clauses concerning religion, providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I (incorporated as to the states in *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940)). Yet, this Court has long held that a "conscientious scruple" does not discharge an individual's duty to follow a law "not aimed at the promotion or restriction of religious beliefs." *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 594-95 (1940). Thus, a government may still implement neutral and generally applicable laws that incidentally burden religion if they are rationally related to a

legitimate government interest. *Emp. Div. v. Smith*, 494 U.S. 872, 879 (1990); *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) ("*Stormans II*").

Here, Sprague seeks to evade his obligations to protect minors as a licensed health care provider by employing the shield of personal religious beliefs. The State has not violated Sprague's free exercise rights by holding him to a general standard of care applied to all state licensed health care providers for the well-being of patients in their care. Rather, the law is both neutral and generally applicable such that rational basis is the proper standard of scrutiny for this constitutional question. *Stormans II*, 794 F.3d at 1076. Because North Greene's law is rationally related to a legitimate government interest of protecting the safety of minors by prohibiting mental health providers from using conversion therapy, the law is constitutional. See R. at 7, 10. Moreover, even if this Court should find that the law was not neutral or generally applicable, the law still would survive strict scrutiny because it is narrowly tailored to serve the compelling government interest of protecting minors against a known harm.

A. North Greene's statute prohibiting licensed health care providers from practicing conversion therapy on minors is neutral and generally applicable, and thus subject to rational basis review.

A law that incidentally burdens free exercise is constitutional when it is neutral and generally applicable and satisfies rational basis review. *Smith*, 494 U.S. at 879; *Stormans II*, 794 F.3d at 1076. Only if the law is found not to be neutral or generally applicable is the law subject to strict scrutiny, shifting the burden to the government to establish that the law is "narrowly tailored to advance a compelling government interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). When practitioners of a particular sect of religion choose to participate in commercial activity, "the limits they accept on their own conduct as a

matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982).

i. North Greene's law is neutral.

North Greene's law satisfies the neutrality prong of the *Smith* test. The claimant carries the burden of proving a free exercise violation, and Sprague has failed to "discharge[] his burdens" at this step of the constitutional inquiry. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). A law is not neutral when the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). In doing so, "[t]he law or the process of its enactment must demonstrate 'hostility' to religion." *We the Patriots United States v. Conn. Off. of Early Childhood Dev.*, 76 F.4th 130, 145 (2d Cir. 2023) (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 138 S. Ct. 1719, 1729 (2018)).

While the Free Exercise Clause "forbids subtle departures from neutrality," the claimant alleging a religious "gerrymander" bears the burden of proving the absence of a neutral, secular basis for the government's actions to succeed. *Gillette v. United States*, 401 U.S. 437, 452 (1971). To fail the neutrality prong, a law must do more than merely affect religious practice; the very object of the law must be to target religion. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020), *cert. denied*, —— U.S. ——, 141 S. Ct. 894. The Ninth and Third Circuits have found that laws prohibiting the practice of conversion therapy on minors by licensed counselors do not violate free exercise because the laws did not target religious character, but rather sought to protect minors from harm. *See King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016). *Contra*

Kennedy, 142 S. Ct. at 2422 (where the school district "sought to restrict [the coach's] actions at least in part because of their religious character").

Here, the object of North Greene's law prohibiting health care providers operating under a state license from practicing any form of conversion therapy on patients under the age of eighteen is not to target religion. *See* R. at 3. The State has not proceeded in a manner that restricts the practice of conversion therapy *because of* a possible religious intersection. *See Fulton*, 141 S. Ct. at 1877. Instead, the stated object of the law is to "protect[] its minors against exposure to serious harms caused by conversion therapy" identified by scientific research from the APA, including suicide and depression. R. at 4. In fact, the law is appropriately limited to its stated purpose by only regulating the practice of conversion therapy by state-licensed mental health providers. *See* R. at 4.

Next, courts consider whether the law is neutral on its face. *See Lukumi*, 508 U.S. at 533. A law is facially neutral if it does not "refer[] to a religious practice without a secular meaning discernible from the language or context." *Id.*; *see also Parents for Priv.*, 949 F.3d at 1235. North Greene's law is facially neutral because it expressly prohibits all state-licensed therapists from practicing conversion therapy on minors, placing no explicit restrictions on religion. *See* R. at 4. It does not limit the mere discussion of conversion therapy in the context of personal and religious beliefs, nor does it limit conversion therapy under the auspices of a religious denomination, church, or organization, if it is conducted outside the realm of licensed health care. R. at 4, 8. In fact, this clarification is the opposite of hostility—it demonstrates the very concept of "benevolent neutrality" toward religious institutions envisioned by the First Amendment. *See Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 669 (1970).

To determine whether a law is neutral beyond its face, courts consider an array of both direct and circumstantial factors, such as the background of the challenged action, the sequence of events leading to its enactment, and the legislative or administrative history. *Masterpiece Cakeshop,* 138 S. Ct. at 1731; *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020); *Swartz v. Sylvester*, 53 F.4th 693, 701 (1st Cir. 2022). Stray remarks of individual legislators are one of the weakest showings legislative intent. *Tingley*, 47 F.4th at 1087. Even statements that suggest some level of hostility from individual legislators are not sufficient to show that the law itself is hostile to religion. *Slattery v. Hochul*, 61 F.4th 278, 293 (2d Cir. 2023). The Court in *Masterpiece Cakeshop* acknowledged that hostile comments made by an adjudicatory body is a "very different context" than comments made by lawmakers. 138 S. Ct. at 1730; *Stormans II*, 579 U.S. at 948 n.3 (Alito, J., dissenting) ("It is an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers' personal intentions, as is done in the equal protection context."). Moreover, comments made by individual lawmakers do not reflect the object of the law nor the views of the entire enacting legislative body. *Lukumi*, 508 U.S. at 558 (Scalia, J., concurring) (noting that determining object of the *laws* is a separate inquiry than the subjective motivation of the *lawmaker*, an inquiry from which the Court refrains because it is virtually impossible to determine the singular "motive" of a collective legislative body). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it," and the court should not engage in guesswork. *United States v. O'Brien*, 391 U.S. 367, 384 (1968).

Circuit courts have also found that laws incidentally burdening religion were neutral despite individual lawmakers' comments related to religion. In *Tingley*, the court concluded that a lawmaker was merely speaking from their personal experience—rather than on behalf of the entire

legislature—when the lawmaker "denounced those who try to 'pray the gay away'" in connection with a bill prohibiting conversion therapy by state-licensed therapists. 47 F.4th at 1086. Similarly, another lawmaker's statements against the "barbaric practices" of conversion therapy were directed at the mode of treatment, not the religious belief. *Id.* In *Slattery*, the court considered the constitutionality of a law prohibiting employers from taking adverse employment actions against employees for their reproductive health decisions. 61 F.4th at 278. Comments from the bill's sponsors, including that "[e]mployers should not be allowed to use their personal beliefs to discriminate against their employees," did not violate neutrality because they did not establish that the purpose of the legislature was to target religion. *Id.* These circuit court cases are distinguished from the facts of *Lukumi*, where lawmakers made specific and hostile comments degrading the beliefs of a particular religious sect. 508 U.S. at 541. The Second Circuit has also found that lawmakers are less likely to be considered hostile to religion if they "accommodated religious objectors to an extent the legislators believed would not seriously undermine the Act's goals." *We the Patriots*, 76 F.4th at 148.

The circumstances of enactment of North Greene's law, namely the legislative history, do not weaken the neutrality of the statute. Senator Lawson's concerns about "barbaric practices" refer to the harshness of the practice of conversion therapy—harmful methods such as inducing vomiting and electroshock therapy—which are not specific to religious belief. *See* R. at 8-9. Moreover, Senator Pyle's denouncement of "praying the gay away" is not directed at inhibiting religion, but rather speaking to his personal opinion about the ineffectiveness of the method. *See* R. at 9. These comments are distinct from those made in *Masterpiece Cakeshop* in two ways: they do not rise to the level of animus necessary to depart from neutrality, and the comments were made by individual lawmakers rather than an adjudicatory body. *See* R. at 8-9; 138 S. Ct. at 1730. Here,

Sprague offers a weak showing of legislative intent that does not disturb the neutral intent of the North Greene legislature to protect minors from harmful practices associated with conversion therapy. *See* R. at 4, 9. The legislators also accommodated religious objectors without undermining the object of the law by seeking only to limit state-licensed therapists. *See* R. at 4, 10.

Courts also consider the real-world operation of a law to determine if a law is neutral. *Lukumi*, 508 U.S. at 535. In *Lukumi*, the restrictions on animal sacrifice were so operationally narrow that the restricted conduct excluded nearly all animal slaughter except for religious sacrifice, resulting in a "religious gerrymander." *Id.* at 535. However, a social harm may be a legitimate concern of government for reasons quite apart from discrimination. *Id.* In *Reynolds v. United States*, this Court upheld a law banning polygamy as a legitimate concern, even though polygamy was disproportionately practiced within the Mormon religion. 98 U.S. 145, 166-67, (1878). Comparably, in *Lee*, the Court upheld mandatory participation in the social security system because it was essential to accomplish an overriding governmental interest in the integrity of social welfare, even though it interfered with an employer's free exercise rights. 455 U.S. at 257; *see also O'Brien*, 391 U.S. at 388 (upholding a statutory prohibition of burning draft cards, even though violators were more likely to be opponents of war); *Gillette*, 401 U.S. at 461 (upholding a selective service law because state interest in the military justified conscripting people who opposed a particular war on religious grounds). There is no free exercise violation merely when a religious group is more likely to engage in the proscribed conduct. *Stormans II*, 794 F.3d at 1077.

North Greene's law is operationally neutral and has not resulted in a religious gerrymander. People consider conversion therapy for both religious and secular reasons, including "social stigma, family rejection, and societal intolerance for sexual minorities." *See Welch*, 834 F.3d at 1046. Even if more people seek conversion therapy for religious reasons than secular reasons, the

statute aims to protect all people who may seek conversion therapy from state-licensed therapists, including for secular reasons. R. at 9-10. Sprague, by operating a state-licensed healthcare facility, has entered into "commercial activity as a matter of choice," thus accepting that their faith will not be "superimposed on the statutory schemes which are binding on others in that activity." *See Lee*, 455 U.S. at 261; *see also Locke v. Davey*, 540 U.S. 712 (2004); *Ill. Bible Colleges Ass'n v. Anderson*, 870 F.3d 631, 640 (7th Cir. 2017) (only when the colleges venture into the secular sphere is regulatory oversight required). The mere fact that the statute may disproportionately impact religion is insufficient to upend neutrality.

ii. North Greene's law is generally applicable.

This Court has held that general applicability fails under two circumstances: (1) when there is a "formal mechanism for granting exceptions" that "invite[s] the government to consider the particular reasons for a person's conduct," or (2) when the law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877-79. Put more simply, courts consider whether the law includes individualized exemptions and whether it is substantially underinclusive. *See Lukumi*, 508 U.S. at 537, 547.

First, a law is substantially underinclusive when it seeks to regulate religious conduct while failing to regulate secular conduct "that 'endangers' the State's professed interest in ensuring timely access to medication 'in a similar or greater degree than' religiously motivated facilitated referrals do." *Lukumi*, 508 U.S. at 543. Courts must ask "whether two activities are comparable for purposes of the Free Exercise Clause must be judged against the asserted government interest that justifies the regulation at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). As part of

this inquiry, this Court only considers the government's *actually asserted* interests—not "*post-hoc* reimaginings of those interests." *Doe v. Mills*, 142 S. Ct. 17, 20 (2021).

Recent circuit court cases addressing the interaction between free exercise and COVID-19 restrictions are instructive. Each of these cases upheld a vaccination mandate that exempted individuals whose health would be endangered by vaccination but rejected religious exemptions. *See We the Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021); *Doe v. San Diego Unified Sch. Dist.*, 19 F.4th 1173 (9th Cir. 2021); *Doe v. Mills*, 16 F.4th 20 (1st Cir. 2021). The laws were not substantially underinclusive because applying the mandate to religious opponents furthered the government's asserted interest in protecting the public health, whereas requiring vaccination for individuals with medical contraindications or pre-existing conditions would undermine those interests. *We the Patriots USA*, 17 F.4th at 286; *San Diego Unified Sch. Dist.*, 19 F.4th at 1180-81; *Mills*, 16 F.4th at 30-31. In doing so, the government showed that the exemptions are not comparable in terms of the "risk" that they pose. *See Tandon*, 141 S. Ct. at 1296.

The cases above are distinguished from COVID-19 cases that found a free exercise violation, such as *Tandon* and *Roman Catholic Diocese v. Cuomo*, because those cases found that the risk transmissions between regulated religious institutions and unregulated secular businesses were equal. *See* 141 S. Ct. at 1297; 141 S. Ct. 63, 67 (2020). Both cases involved challenges to occupancy limitations on religious services to reduce the spread of COVID-19, but these same restrictions did not apply to secular businesses with similarly high capacities, such as grocery stores. *Tandon*, 141 S. Ct. at 1297; *Roman Catholic Diocese*, 141 S. Ct. at 67. Therefore, the regulations failed for being substantially underinclusive because they targeted religious conduct while failing to regular comparable secular conduct.

North Greene's law is distinguishable from the facts of *Tandon* and *Roman Catholic Diocese* because it does not restrict a religious practice while allowing comparable secular activity that undermines state interests. Moreover, conversion therapy is not necessarily a religious-exclusive practice. *See Welch*, 834 F.3d at 1046. North Greene's rationale is far from a post-hoc reimagining; rather, the legislature stated that it intended to regulate the professional conduct of licensed health care providers to protect minors from serious harms—scientifically documented increased risk of suicide and depression. *See* R. at 4. Sprague fails to satisfy his burden of showing a comparable secular practice that is permitted by North Greene but causes the same harm as conversion therapy. *See* R at 10. Sprague offers gender-affirming therapy as a comparable secular practice but presents no evidence that the risk of "regret" associated with gender-affirming therapy rises to the same level of detrimental harms the statute intends to prevent. R. at 10. Conversion therapy practices and gender-affirming therapy are simply not comparable in terms of the risk that they pose. *See Tandon*, 141 S. Ct. at 1296.

Second, courts consider whether there is a formal and discretionary mechanism for individual exceptions. *Fulton*, 141 S. Ct. at 1879. When the government offers individualized exemptions from a general requirement, it cannot "refuse to extend those exemptions to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). This concern applies to exemptions decided by subjective case-by-case determinations, inviting "considerations of the particular circumstances." *Id.*; *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004). The exception does not apply to statutes that, although otherwise generally applicable, contain express exceptions for objectively defined categories of persons. *Axson-Flynn*, 356 F.3d at 1298; *see also Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 701 (10th Cir. 1998) (finding that a school district's policy that all

students must be enrolled full-time did not "establish a system of individualized exceptions that give rise to the application of a subjective test" because any exceptions were limited to "strict categories of students"). By contrast, exemptions made with "sole discretion" of a government employee trigger strict scrutiny. *Fulton*, 141 S. Ct. at 1878.

North Greene's law does not provide for individualized exemptions, but rather creates an exemption for objectively defined categories of persons. *See* R. at 4, 10. There is no indication in the record that North Greene makes "case-by-case determinations" about who may be exempted from the law. Because the law applies equally to state-licensed therapists, there is no avenue for individual exceptions that would permit a secular exemption while rejecting religious exemptions. *See* R. at 4. Instead, the law creates an express exemption for an objectively defined group, those practicing outside of state-licensed therapy and "under the auspices of religion." *See* R. at 4, *Axson-Flynn*, 356 F.3d at 1298.

B. <u>This Court should not overrule Smith.</u>

This Court would be remiss to overrule *Smith*. To eradicate the standard in *Smith* would be to create a danger whereby religion would become the law of the land. *Reynolds*, 98 U.S. at 167. In *Smith*, Justice Scalia wrote for the majority, stating that exempting persons from every law that conflicts with their religion "would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind." 494 U.S. at 888. Sprague, and all health professionals, owe their patients the highest quality care they can provide. Should a state licensed health professional seek an exemption, those patients risk not receiving the necessary care for their well-being. An increase in religious exemptions risks the loss of the very integrity of essential services. Moreover, a strict scrutiny standard would govern all laws burdening free

exercise, even if Congress and state legislatures decided that strict scrutiny was not appropriate for certain government actions.

The decision in *Smith* was a culmination of a long history of jurisprudence. Smith harkens back to this Court's decision in *Reynolds* in 1878, finding that religion could not exempt a person from generally applicable laws. 98 U.S. at 166-67. *Minersville* further laid the groundwork by articulating that one's religion does not relieve them from following a general law not aimed at the promotion or restriction of religious beliefs. 310 U.S. at 594-95. Leading up to *Smith*, the court consistently declined to implement the standard of strict scrutiny established in *Sherbert v. Verner* for generally applicable laws. *See* 374 U.S. 398 (1963). Thus, *Smith* does a superior job capturing and synthesizing free exercise precedent.

Overruling *Smith* would upset over three decades of subsequent precedent building upon Smith. *See City of Boerne*, 521 U.S. 507, 512-14 (1997); *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2020-21 (2017). This would cut directly against the principles of stare decisis, and instead would result in the Court's dramatic usurpation power from the states. Moreover, the rulings in *Masterpiece Cakeshop*, *Lukumi*, and *Roman Catholic Diocese* demonstrate that *Smith* provides adequate safeguards for free exercise: this standard has halted several egregious burdens on free exercise by applying strict scrutiny to laws that are not neutral and generally applicable.

If this Court chose to overrule Smith, a panoply of Free Exercise exemptions would "force[] courts to engage in a balancing process that systematically underestimates the state interest, and threatens other constitutional values." William P. Marshal, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. Chi. L. Rev. 308, 310 (1991). Courts would have to engage in a continual analysis of whether the belief at issue is "religious" and sincerely held. *Id.* Moreover, a

scheme where exemptions are granted only to religious persons "promotes its own form of inequality: a constitutional preference for religious over non-religious belief systems." *Id.* at 319.

CONCLUSION

The ability to regulate licensed professions is one of the most crucial functions of the State. Where a regulation of professional conduct is in tension with the First Amendment, the statute is presumed constitutional as a proper function of the State's police power. North Greene enacted a law to protect the well-being of its youth. Of course, a regulation of a speech-based profession will incidentally burden speech. But these professions are not immune from regulation. The Fourteenth Circuit correctly held that N. Greene Stat. § 106(d) was a proper exercise of North Greene's ability to regulate the medical profession.

Sprague's privately held religious contentions do not relieve him of the obligations associated with a neutral and generally applicable law. North Greene neither targets religious practice nor fails to regulate comparable secular conduct. Regardless of whether N. Greene Stat. § 106(d) falls disproportionately on religious individuals, Sprague has chosen to operate in the commercial sphere of state-licensed counseling, and therefore must abide by the statutes that protect vulnerable patients from harm. To overrule *Smith* would be to create a slippery slope where religious exemptions govern with a heavier hand than legitimate state interests.

Respectfully Submitted,

Team 17

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