NO. 23-2020

SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,
Petitioner.

v.

STATE OF NORTH GREENE,
Respondent.

Appeal From the United States Court of Appeals for the Fourteenth Circuit
Case No. 22-1023

BRIEF OF RESPONDENT, STATE OF NORTH GREENE

/s/ Team 18
Team 18

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JURISDICTIONAL STATEMENT

Appellee, State of North Greene, seeks affirmation of the United States Court of Appeals for the Fourteenth Circuit granting Appellee's Motion to Dismiss for failure to state a claim under the First Amendment. The United States Court of Appeals for the Fourteenth Circuit entered judgement on January 15, 2023. Appellant filed a timely Notice of Appeal. The Supreme Court of the United States granted Appellant's Writ of Certiorari, and the Court has jurisdiction under 28 U.S.C. §1254(1) and 28 U.S.C. §2106.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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.
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).

STATEMENT OF THE CASE

I. Statement of the Facts

Petitioner Howard Sprague is a Licensed Family Therapist in the State of North Greene, who provides conversion therapy to minors. R. at 3. In order to protect the physical and psychological well-being of LGBTQ+ youth, the State of North Greene sought to end this practice by enacting laws that prohibit therapists who are licensed by the state from practicing any form of conversion therapy in their capacity as a licensed medical professional. *Id.* The American Psychological Association opposes this practice. *Id.* at 4. To protect its citizens, the state requires that all health care providers be licensed by the State of North Greene before they provide care to patients. *Id.* at 3. The state considers all individuals who practice without a

license to be engaging in "Unprofessional Conduct." *Id.* at 4. Petitioner, who wishes to continue providing conversion therapy to minors, sued the State of North Greene in August 2022 to enjoin the enforcement of N. Greene Stat. §106(d), where he alleged that the prohibition of giving conversion therapy to minors violates his and his clients' Free Speech and Free Exercise rights under the First Amendment. *Id.* at 5.

II. Procedural History

The legislature made the practice of conversion therapy on children illegal in 2019. R. at 4. Sprague brought suit in August 2022, seeking a preliminary injunction. *Id.* at 5. The State filed a motion to dismiss. *Id.* The District Court for the State of North Greene denied Sprague's motion and granted the State's motion. *Id.* Sprague appealed to the United States Court of Appeals for the Fourteenth Circuit in 2022, and the court upheld the State of North Greene's motion. *Id.* He appealed their decision and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

This case is about the ability of a state government to regulate the conduct of professionals licensed in its jurisdiction to preserve the health and well-being of citizens. This Court has held that professional conduct is regulable by the state government, even when that regulation of conduct incidentally impinges upon freedom of speech rights. *Nat' Inst. Of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). The North Greene Statute was formulated to only regulate the conduct of licensed state therapists when they are conducting therapy on minor children. It is the opinion of the majority of circuit courts that have addressed this issue, including the Fourteenth Circuit Court of Appeals most recently, that conversion therapy is considered professional conduct when in the realm of state-licensed mental healthcare

providers. The regulation of professional conduct by way of a statutory restriction in the context of conversion therapy on minors is completely permissible and constitutional.

Because the restriction on speech is incidental, and the state has a compelling interest in protecting the well-being of minor children advanced by the statute, the appropriate level of scrutiny is rational basis review. *Casey v. Planned Parenthood*, 505 U.S. 833, 884, 967-68 (1992). This level of scrutiny would only require that this Court find that the statute be rationally related to a state interest. *Id.* This is summarily satisfied by the fact that the N. Greene § 106(d) came as a result of the ban of conversion therapy and the very real evidence of its harmful effects on minors. That basis, along with the exceptions for the expressive discussion of conversion therapy and its practice in all other auspices, would prove that any impingement on the free speech rights of Petitioner or other practitioners by the statute is a by-product of a state law that is rationally related to a state interest of protecting minors.

This Court should affirm that North Greene § 106(d) is in compliance with the Free Exercise Clause. Under the Free Exercise Clause, if a law is neutral and generally applicable it is analyzed under rational basis review and the government has the burden to show that the law is rationally related to a government interest. If the law is not neutral and generally applicable, then the law is subject to strict scrutiny. Here, North Greene § 106(d) is both neutral and generally applicable. Therefore, rational basis review applies.

North Greene § 106(d) passes rational basis review because a ban on conversion therapy for minors is rationally related to the government interest of protecting minors from harm to their physical and mental well-being. Therefore, North Greene § 106(d) is constitutional and does not violate any of Sprague's First Amendment rights.

Further, based on this reasoning the Court should affirm *Employment Division v. Smith*, 494 U.S. 872 (1990) to recognize the importance of the State's ability to make laws that protect the well-being of its citizens. Specifically, to protect minors from the harms of barbaric and scientifically unsound practices done by healthcare workers.

STANDARD OF REVIEW

On petition for Writ of Certiorari the issues addressed are the Free Speech and Free Exercise Clauses of the First Amendment. Appellant's claims of a First Amendment violation involve only issues of law and must be reviewed by this Court *de novo*. *Peel v. Att'y Registratioin & Disciplinary Comm'n of Illinois*, 496 U.S. 91, 108 (1990).

ARGUMENT

I. North Greene § 106(d) Is a Constitutional Regulation of Professional Medical Conduct.

A. The Practice of Conversion Therapy by a State-Licensed Mental Health Professional on a Minor Surmounts to Conduct That Is Regulable by State Laws.

In 2019, the North Greene Legislature added "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct in the Uniform Disciplinary Act for licensed health care providers. N. Greene § 106(d). It is a well-established tenet of the law that constitutional freedom of speech provided by the First Amendment is not an almighty sword that protects every form of speech at all times under all circumstances. *Chaplinsky v. N.H.*, 315 U.S. 568, 571 (1942). In fact, the study of free speech law would reveal the many times that the United States Government has deemed it permissible to regulate speech. (*See generally, Id.*, (exceptions regarding the utterance of fighting words), *Miller v. California*, 413 U.S. 15 (1973) (exception in the cases of obscenity), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (exceptions regarding defamation.)) The discussion of the nuances of speech regulation is not necessary, therefore the Court's attention regarding the First Amendment claim will be centered around the North Greene Statute and the reasons why it does not implicate Sprague's or any other practitioner's freedom of speech.

N. Greene § 106(d) is a piece of legislation that does not implicate the regulation of protected free speech, but instead is precisely aimed toward the regulation of professional conduct executed by a licensed therapist, who is governed by the rules and regulations of the state government. The United States Supreme Court has held that the regulation of professional conduct is permissible when the freedom of speech is abridged, but only in circumstances where

the infringement of speech rights is merely incidental. *Nat' Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("NIFLA").

B. "Talk-Therapy" Is Not Speech Protected by the First Amendment

First, it is important to draw lines so that the regulation of conduct is justified, both logically and legally. Sprague forms the foundation of his free speech claim around the notion that psychotherapy by way of conversion therapy consists solely of "talk therapy" which means that there is no physically intrusive procedure involved, only words being exchanged. This kind of bare bones argument is not convincing, and when looked at under the letter of the law, its foundation proves to be brittle. The Supreme Court of the United States already expelled this kind of failed reasoning, holding that "while it is possible to find some kernel of expression in almost every activity a person undertakes. . .such a kernel is not sufficient to bring the activity within the protection of the First Amendment. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Most of the Circuit Courts that have been faced with the instant issue have held that "talk therapy" falls outside of the realm of First Amendment protection. *See Natl' Ass'n for the Advancement of Psychoanalysis v. California bd. of Psychology,* 228 F.3d 1043, 1054 (9th Cir. 2000) ; *Brokamp v.* James, 66 F.4th 374 (2nd Cir. 2023); *King v. Governor of N.J.*, 767 F.3d 216 (3rd Cir. 2014). This Court should follow the Ninth Circuit's decision in *Nat'l Ass'n of Psychoanalysis v. Cal Bd of Psych*, 228 F.3d 1043, 1054 (9th Cir. 2000), which reasoned that "the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech." Sprague would like this Court to deduce the medical treatment of the mind as just a conversation between two people. This is a categorization that mental health professionals would likely find distasteful and untrue. It would be as though to deduce the practice of law to

speaking, reading, and writing, stripping it of all of the legally recognized complexities that lie therein.

Expressive speech receives special protection that lies at the very core of First Amendment guardrails. *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). This is the category in which Sprague hopes to equate his circumstances. However, North Greene § 106(d) very clearly does not prohibit the discussion of conversion therapy between provider and patient. Nor does it prohibit the expression of the provider's personal views about conversion therapy to the patient, even when a patient is a minor. This carve out that is recognized by the majority opinion of the Fourteenth Circuit is paramount to the discussion of protected speech, as the expressive content that surrounds conversion therapy is off-limits and the North Greene legislature made that very clear. R. at 4. In fact, the practice of conversion therapy under the North Greene law is completely lawful when conducted on a patient over the age of eighteen, or when it is done outside of the state-licensed medical profession. Sprague may even relinquish his license and practice conversion therapy on minors free from regulation of the state; however, because Petitioner insists on working under the *penumbra* of state-licensure, the government has a say in how a medical professional treats their patient. *NIFLA*, 1398 S. Ct. at 2373.

The Fourteen Circuit Court of Appeals, and the Eastern District Court of North Greene before it, correctly held that the conversion therapy Sprague practices fails to qualify as the expressive speech protected by the Federal Constitution. More clearly, the instant case's participants are not members of the general public, and the content involved is not expression. What Mr. Sprague, and fellow like-minded practitioners, find themselves with in the instant scenario are *patients* and *medical conduct*. It is this distinction that allows for regulation, because the regulation of professional conduct falls within the purview of the state and simply because

speech may be incidentally impacted does not mean that the treatment warrants First Amendment protection. *See United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); see also *Barnes v. Glen Theatre, Inc*., 501 U.S. 560, 567-72 (1991).

The Supreme Court of the United States takes no issue with the regulation and imposition upon the medical profession in the past. In fact, this Court has previously held that a state law that imposes the mandatory disclosure of risks posed by a medical treatment is not a violation of the First Amendment, specifically *because* the physicians in that case are subject to reasonable licensing regulation by the state. *Casey*, 505 U.S. at 884. his "mandated" speech, is arguably more invasive than the restriction imposed by North Greene § 106(d), and still it was found to be constitutional and permissible. In light of that precedent, it is difficult for one to imagine a world where the government in one instance is allowed to force licensed physicians to say things it deems to be important, but the regulation of conduct it deems destructive to minors performed by their health care providers is prohibited in another.

C. The Legislature Based the Statute upon Tried-and-True Legal Traditions, by Formulating It in Light of the Discussions and Opinions of Leading Reputable Medical Associations.

The State of North Greene enacted the statute based on the American Psychological Association's (APA) opposition to conversion therapy being conducted on minors. In fact, the statute makes distinct exceptions to the permissibility of practicing conversion therapy, like therapists, counselors, and social workers who are working under the auspices of a religious denomination, church, or religious organization. R. at 4.

There is widespread consensus among professional organizations like The American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, that conversion therapy on minors conducted by medical professionals should be

outlawed due to its harmful effects. These organizations support ongoing efforts to encourage the US Congress and State Legislatures the like to outlaw the practice of conversion therapy on minor children as the State of North Greene did. Andrew Arriaga et al., *Banning Sexual Orientation and Gender Identity Change Efforts Orientation and Gender*, Am. Psychology Assoc. (last visited Sep. 23, 2023), https://www.apa.org/topics/lgbtq/sexual-orientation-change.

The Supreme Court has upheld the legislative prohibition of a medical treatment that was inspired by prevailing opinion among organizations in the medical community. *Lambert v. Yellowley*, 272 U.S. 581, 590-91 (1926). In this case, Congress enumerated the limitations to be placed on prescribing physicians when it came to prescribing alcohol to their patients. These limitations came to Congress as a result of gauging the opinion of the medical community through testimony heard by the relevant committees. *Id*. In turn, this means that it is entirely appropriate for North Greene's legislative body to base their determinations on a consensus in the specific medical field.

Because of the plethora of evidence that conversion therapy poses serious risks to the well-being of minor children in the mental health professional landscape, any information proffered by Sprague or that exists in the mental health world at large depicting the practice as safe or non-threatening to minors, would fail to give this court a reason to strike the rational basis used by the North Greene Legislature to enact this statute. It is because of this firm foundational basis in making the decision to regulate the therapists' conduct that this Court should affirm the lower courts' decisions regarding the permissibility of regulation like the North Greene Statute.

Given that the speech factor of conversion therapy that Sprague is relying upon would only be a contributing factor to his conduct as a professional, it would make any infringement on the speech incidental as the statute is geared toward a government interest. *Pickup v. Brown*, 740

F.3d 1208, 1230-32 (9th Cir. 2014). In *Pickup*, the Ninth Circuit court held, in a situation strikingly similar to the one at hand, that a Washington state statute that outlawed the practice of conversion therapy on minors was not violative of the First Amendment. *Id*. A psychologist sued to enjoin the statute based on, *inter alia*, the statute's alleged infringement on his freedom of speech. In the end, what carried the day in that decision was (1) that the practice of conducting conversion therapy on minor children is professional conduct (2) that any kind of speech restriction was simply incidental to the regulation of the professional conduct, and (3) that there was a compelling government interest in protecting minor children. *Id.*

In reaching the determination that the practice of conversion therapy on minor children is professional conduct, the court below got it right by granting this case a lower level of scrutiny that, as expressed by the Ninth Circuit in *Pickup*, requires only the presentation of a state interest to justify any *de facto* inhibitions to free speech brought about by the statute in question. *Id*.

The case, *Otto v. City of Boca Raton*, 41 F.4th 1271 (11th Cir. 2022) is distinguishable from this case. The opinion centers on the distinction that talk-therapy is speech, and its regulation would be equated to the regulation of a debate team or a book club's discussions. *Id*. At 865. This entire opinion rests on the misclassification of mental health therapy as speech, which is a falsity that this Court cannot adopt. The dissent in *Otto*, is the quintessence of reason that this Court, along with the majority opinions coming from the Second, Third, and Ninth Circuit Courts of Appeal cases, should base the framework of its decisions in this case on. The Dissent denies the application of strict scrutiny, as the exception to the incidental infirmity on free speech rights by regulating professional conduct that is articulated in *NIFLA* calls for a lesser standard of scrutiny. *NIFLA* at 2375.

The level of scrutiny that is required should mirror the one that this Court used in its decision in *Planned Parenthood v. Casey*, 505 U.S. 833, 884, 967-68 (1992) where a reasonableness standard was applied to the regulation of medicine where speech may be implicated incidentally. The North Greene statute more than satisfies the reasonableness standard articulated in *Casey* because the state legislature (1) has a compelling interest in protecting the well-being of minor children (2) forged the statute from the consensus among professional medical associations regarding the harmful effects of conversion therapy, and (3) formulated it in a way that would only restrict the speech of licensed mental health professionals, purposefully allowing expressive discussion of conversion therapy and allowing it in every other context outside of medical treatment.

D. The Government Holds a Compelling Interest in Protecting the Safety and Well-Being of Minor Children Who Can Be Potentially Afflicted by the Adverse Effects of Conversion Therapy.

The Supreme Court held that when a non-speech and speech element are combined in the same course of conduct, a government interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). This would mean that even assuming *arguendo* that Sprague could present to the Court some kind of extensive expressive speech that is paired with the practice of conversion therapy on minors, the statute would remain constitutionally applicable because the government has a special interest in protecting the well-being of minor children. This special interest is perfectly depicted in the Supreme Court's decision in *New York v. Ferber* 458 U.S. 747, 751 (1982) where the Court was faced with a state law that was applied to prosecute someone for the distribution of child pornography. The Court granted certiorari to enumerate a new test that is specifically tailored to address the obscenity of *child* pornography, even though a test for

obscenity already existed under *United States v. Miller*, 425 U.S. 435 (1976). In the opinion Justice White lays out five factors to explain why child pornography resides outside of First Amendment free speech protection, the first of which reads "It is evident, **beyond the need for elaboration**, that a state's interest in safeguarding the physical and **psychological** well-being of a minor is compelling." *New York v. Ferber* 458 U.S. 747, 756-57 (1982). The opinion lists other factors like the fact that the abuse of children involved in the production of child pornography is lifelong and another that states any kind of artistic value brought forth from this horrible imagery is *de minimis* and therefore does not afford First Amendment protection. *Id*. at 762. Although *Ferber* deals with child pornography and North Greene § 106(d) protects children against the harm of conversion therapy, the analysis of the *Ferber* court is valuable guidance. First, the legislature of North Greene made it clear that they based this amendment on studies conducted by the APA, which showed that it is the APA's preference that identity affirming methods be used when conducting therapy on children. R. at 4. And second, the statute in question purports to do nothing more than protect the well-being of minor children while they are under the care of a state-licensed medical professional. This court also need not determine the likelihood of the harms presented by conversion therapy to minors, only that the harms could reasonably be conceived to be true by the legislature. *Pickup*, 728 F.3d at 1231.

The harms to children who undergo conversion therapy are many, one of the most chilling being suicidality.[1] Given the gravamen of the North Greene Legislative body's quarrel with conversion therapy it is evident that the statute was ratified to protect the well-being and

[1] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf ; Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, J. Homosexuality (Nov. 7, 2018), https://www.tandfonline.com/doi/abs/101080/00918369.2018. 1538407.

safety of minor children who receive therapy in the State, and that the statute's enforcement directly serves that purpose and tremendously advances this interest.

II. North Greene § 106(d) is Neutral and Generally Applicable and Passes Rational Basis Review Because It is Applied Equally to Secular and Religious Groups and Any Incidental Burden on Religion is Justified by the Compelling Governmental Interests of Preventing Harm to Youths.

The Free Exercise Clause of the First Amendment has strong roots in the American legal system in preventing the government from unduly burdening an individual's free practice of religion. *Cantwell v. State of Connecticut,* 310 U.S. 296, 303 (1940). Under the Free Exercise Clause, a law must be neutral and generally applicable. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546 (1993). These two concepts overlap and share similarities; however, courts evaluate each as a separate requirement. *Id.* The nuances of neutrality and general applicability are so intertwined that one often triggers the other, but the Court has found that failure of one is sufficient to require strict scrutiny review. *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2422 (2022).

If a law is neutral and generally applicable, rational basis review is applied. *Stormans, Inc. v. Wiesman,* 794 F.3d 1064, 1075-76 (9th Cir. 2015). Under rational basis review, a law is upheld if it is rationally related to a legitimate government purpose. *Id.* If a law is not neutral or generally applicable, strict scrutiny is applied and the law must be justified by a "compelling interest and [be] narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye, Inc*., 508 U.S. at 533.

This Court should affirm the District Court's holding that North Greene § 106(d) does not violate the Free Exercise clause because it is neutral and generally applicable. The law is rationally related to the legitimate government purpose of protecting youth and therefore survives rational review. The text of the law is neutral because it does not explicitly reference

religious beliefs or conduct. It is neutral in practice because it does not make religious groups the object of its enforcement and includes specific exemptions for religious institutions. North Greene § 106(d) is generally applicable because it imposes a burden on all conversion therapy, not just that motivated by religious beliefs, and it does not grant secular exemptions. Lastly, North Greene § 106(d) passes rational basis review because it supports the government interest of protecting youths by shielding them from the trauma and harm of conversion therapy.

A. North Greene § 106(d) is Neutral in Construction and Application Because It is Not Facially Discriminatory and Based on Circumstantial Evidence It is Applied Without Consideration of Religion.

In determining whether a law violates the Free Exercise clause, courts must first decide whether the plaintiff met its burden of challenging the neutrality of the law. *Kennedy,* 142 S.Ct. at 2421. To determine whether a law is neutral, the Court uses a two-step approach. *See Church of Lukumi Babalu Aye, Inc.,* 508 U.S. at 540. The first step is to analyze direct evidence and the face of the statute. *Id.* Second, the court looks at circumstantial evidence and the application of the statute to determine if the law makes religious exercise its "object". *Id.* at 533.

The relevant factors in this analysis are "historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the [sic] decisionmaking body." *Id.* at 540. Neither facial nor covert suppression of religious activity is sufficient on its own; it is only when the Court finds both steps to fail neutrality that it can make a determination that a statute is not neutral. *Id.* at 534.

1. North Greene § 106(d) is Facially Neutral Because Its Text Does Not Mention Religious Exclusion and It Provides a Specific, Formal Religious Exemption.

To analyze the facial neutrality of a law, the first step is to read the text of the statute as it is printed. *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 525 (1993) involves the religious group, the Santeria, and a congregation they established in Florida. Part of the Santeria's religious practice is to perform animal sacrifice for special occasions such as birth, marriage, and during an annual religious celebration. *Id.* To conduct the ritual, members of the congregation kill an animal, such as poultry, goats, and turtles, and eat the animal to complete the ceremony. *Id.*

A Santeria congregation leased a plot of land in Hialeah, Florida; the town responded by passing new ordinances that prohibited killing of animals. *Id.* at 526-27. Later the city passed subsequent ordinances that announced a city policy against ritual sacrifice of animals, defining sacrifice as an unnecessary killing of an animal in public or private ritual or ceremony not for the primary purpose of food consumption. *Id.* The ordinance included an exception for persons with licenses to raise animals for food. *Id.* The city defended its statute by claiming it was promoting the public policy goals of health, safety, welfare, and morals. *Id.* at 528. In striking down the city ordinance, this Court pointed out that the law was not neutral because it uses words such as "sacrifice" and "ritual." *Id.* at 535. Although this did not end the Court's inquiry, these words describing the exact religious practice of the Santeria that the residents of Hialeah opposed, supported the reasoning that the law was not facially neutral. *See id.*

On the other hand, a law that makes no mention of religion or distinguishing religious conduct from secular, points to a finding of facial neutrality. *Tingley v. Ferguson*, 47 F.4th 1055, 1087 (9th Cir. 2022). In *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022), the

Washington State legislature responded to the evolution of psychiatric research on gender and sexual identity by passing a law that disciplined licensed health care providers if they gave conversion therapy to minors. The statute exempts counselors who "work under the auspices of a religious denomination, church, or religious organization." *Id*. Further, it does not place any limits on counselor's ability to speak publicly, express personal views to patients about conversion therapies, and refer patients. *Id.* In its holding that the law did not violate the Free Exercise Clause, the Ninth Circuit reasoned that the law was facially neutral because it made no reference to religion or belief system, except in providing an exemption from the law to counselors practicing under religious organizations. *Id.* at 1087.

North Greene § 106(d) exactly mirrors the Washington State statute in *Tingley*. It simply states that it is unprofessional conduct for a licensed health care provider to perform conversion therapy on a patient under the age of eighteen. R at 4. Similar to the statute in *Tingley*, North Greene § 106(d) also contains exceptions for counselors performing conversion therapy "under the auspices of a religious denomination, church, or organization." *Id.* The statute also does not apply to therapists giving their personal opinion about conversion therapy, practicing conversion therapy on adults, and referring minor patients to other healthcare providers. *Id.*

Given that the only mention of religion in the statute is to provide distinct exceptions from discipline, it follows that like in *Tingley*, the statue is facially neutral. Additionally, the statute does not reference any terms that are clearly associated with a religious group, as in *Church of Lukumi Babalu Aye, Inc*.

While North Greene § 106(d) is facially neutral, this is not enough on its own to deem the statute neutral. Next, the Court must look at the circumstances of the law's construction and application to ensure there is no covert suppression of religious activity that would make

oppression of free religious activity the "object" of the law. *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 534.

2. The Law is Neutral in Its Operation Because It Does Not Make Religious Exercise Its Object as It Is Broadly Enforced as Supporting by Its Historical Context.

Next the Court must consider whether the statute is operationally neutral. *Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 535. Courts can ask whether a statue was passed in spite of its effect on religious groups, rather than because of it. *Id.* at 540. To analyze the operation of a law, courts must look to the context in which the law is applied. *Id.* This includes, "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the [sic] decisionmaking body." *Id.* This gives objective evidence by which to measure neutrality in application. *Id.*

A law is operationally neutral if in its application it prohibits conduct by both non-religious and religious persons, rather than "religious[ly] gerrymander[ing]". *See Stormans*, 794 F.3d at 1076. In *Stormans II*, a pharmacy owner refused to stock their store with contraceptive drugs. *Id.* at 1073. The Pharmacist Responsibility Rule required that pharmacists deliver medications to patients, with a few exceptions, none of which were religious objections to the medication. *Id.* at 1072. Members of the community intervened to defend the rule because their health and safety required receipt of contraceptive medication. *Id.* at 1073. The 9th Circuit found that the rule was neutral in operation because the rule applied equally to all objections to dispensing of medications. *Id.* at 1076-77. Further, the court stated that the rule may burden religious pharmacists, but this did not undercut the rule's neutrality. *Id*. at 1077.

This reasoning applies precisely to North Greene § 106(d). The Uniform Disciplinary Act applies equally to all licensed health care providers, regardless of the methodology and philosophies that motivate their practice. R. at 4. Sprague's beliefs stem from his Christian faith but, the Act applies equally to a therapist who has Atheist beliefs. R. at 3. Although it may be true that § 106(d) has an impact on Christian therapists, the Act itself makes no reference to the violator's viewpoint or motivation, which confirms its operational neutrality. This is further confirmed by analyzing the historical background and context of North Greene § 106(d).

i. The Circumstantial Evidence Supports a Finding of Neutrality.

In looking at the history and context leading up to the enactment of a statute, statements of hostility will point towards a lack of neutrality and statements of support and respect suggest neutrality. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719, 1729 (2018). Statements made by decisionmakers are considered evidence of the intended "object" of the statute. *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2422 (2022) (finding a lack of operational neutrality when a school district made a statement that they could not allow an employee to engage in religious conduct while on duty).

In *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719, 1725 (2018) the Court examined statements made by lawmakers to determine the "object" of a Colorado statute that makes it unlawful to deny a person service based on their sexual orientation. A bakeshop owner turned away customers who requested a cake for a same-sex wedding. *Id*. The Colorado Civil Rights Commission held public hearings to discuss the shop owner's case. *Id.* at 1729. During the hearing the commissioners made statements that implied that the owner was not free to express his religion in his business practice. *Id.* The Court considered these statements as hostility towards the shop owner and his religious beliefs. *Id.* at

1730. In considering the historical background and events leading up to the decision, the Court reasoned that the shop owner's religious beliefs were treated with hostility, and the law was therefore not applied neutrally. *Id.* at 1731-32.

The statements made by North Greene Senators do not come close to the threshold of hostility. The commissioners in *Masterpiece Cakeshop* compared the shop owner's beliefs to defenses of the Holocaust and slavery. 138 S.Ct. at 1729. This is a grave accusation of the most serious degree that does not belong in the same category as the North Greene Senators' statements. Senator Lawson called for the elimination of "barbaric practices" that included electroshock therapy and induced vomiting.[2] R. at 9. Further, Senator Pyle spoke about his own religion and the experience of being a parent to a gay daughter. *Id.* These statements do not make any value judgments about religious practices and how they affect others.

Overall, the fact that statistically most conversion therapy is performed by therapists of Christian faith does not detract from the neutrality of North Greene § 104(d). Just because one religious group is *more likely* to engage in certain conduct, does not mean the Free Exercise Clause is violated if the law is written and applied neutrally. *Stormans, Inc.*, 794 F.3d at 1077. In North Greene, giving conversion therapy to minors is considered unprofessional conduct for all licensed therapists, regardless of the motivation for providing conversion therapy. North Greene § 106(d) is neutral, which leads into discussion of its general applicability.

[2] The American Psychological Association has declared that the use of electroshock and other conversion therapy techniques to "treat" LGBTQ+ individuals is not supported by science or medicine. These practices are outdated, discredited, and medically unsound. *APA Resolution on Sexual Orientation Change Efforts*, Am. Psychology Assoc. (Feb. 2021), https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf.

B. As Enforced and in Its Effects, North Greene § 106(d) Is Generally Applicable Because It Does Not Single Out Religious Conduct or Grant Exceptions to Secular Conduct.

A law is generally applicable if it is universal in its application and does not favor secular conduct over religious conduct. *Church of Lukumi Babalu Aye, Inc.,* 508 U.S. at 542. General applicability means that the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* at 543. There are two main mechanisms for analyzing whether a law is generally applicable. *See id*. First, whether the law is underinclusive in its prohibitions to permit one secular activity but ban a similar religious activity. *Id*. at 544. Second, whether the statute has an enforcement mechanism to provide individualized exceptions for secular activity and to deter religious activity. *Kennedy*, 142 S.Ct. at 2422; *Thomas v. Review Bd. of Indiana Employment Sec. Division,* 450 U.S. 707, 717-18 (1981).

The Court should only find a lack of general applicability if the law prohibits religious conduct but allows secular conduct when both the types of conduct cut against a government interest, and grants exceptions to the law on an individual basis. *Fulton v. City of Philadelphia,* 141 S.Ct. 1868, 1877 (2021). The exceptions to North Greene § 106(d) guard from exactly the type of harm that would not be tolerated under the Free Exercise clause. Religious organizations that employ mental health therapists that have a dual purpose of giving services and promoting a religious agenda are exempt from the law. R. at 4. However, the fact is simply that Sprague does not work for such an institution. R. at 3. As such, the exemptions to North Greene § 106(d) make the law fall squarely in line with the Court's precedent and the Court can turn to analysis of whether the law is generally applicable.

1. North Greene § 106(d) Does Not Substantially Under Include Secular Conduct in Its Prohibitions.

When two acts, one secular and one religious, similarly undercut government interest and both are prohibited, the law is generally applicable. *Fulton,* 141 S.Ct. at 1877. If a law is generally applicable it will not under include repression of secularly motivated conduct while banning similar religiously motivated conduct. *Stormans II*, 794 F.3d at 1079 (finding that the enumerated exceptions designed to promote public safety did not over include secular conduct).

In *Tingley*, the court found that the law was generally applicable because the therapist could not point to any permitted comparable secular conduct that undermines the government interest of protecting youths in the same way as religiously motivated conversion therapy he performed. 47 F.4th at 1088. This illustrates that there will not be an overinclusion of religious conduct that is prohibited when no such comparable secular conduct that is allowed by law is evidenced. *See id.*

Here, Sprague's argument is deficient in the same ways as the therapist in *Tingley*. The Court need not consider that religiously motivated conversion therapy was treated adversely because there is no secular equivalent on the record for the Court to consider. *See* R. at 3. In fact, "adverse impact will not always lead to a finding of impermissible targeting…a social harm may have been a legitimate concern of government for reasons quite apart from discrimination." *Church of Lukumi Babalu Aye, Inc.,* at 535. This was exactly the situation in *Tingley* and is the case in Sprague's situation. As the rule in *Tingley,* North Greene § 106(d) passes general applicability because it flatly prohibits conversion therapy and strictly adheres to detailed exceptions. *See* R. at 3.

2. The North Greene Law Contains No Mechanism for Individualized Exemptions in Which Officials Could Discriminate Based on Religion.

A law is generally applicable if it does not contain a mechanism that grants the decision maker discretion to consider the particular motivations behind the conduct and grant individualized exceptions. *Fulton*, 141 S.Ct. at 1878; *Employment Division v. Smith*, 494 U.S. 872, 884 (1990). Passing general applicability requires that the law view conduct flatly, rather than inquiring into the motivation and reasons for conduct to provide individualized exceptions. *Fulton,* 141 S.Ct. at 1877. A law must create one standard for all persons to follow, rather than a double standard that singles out and disfavors religious conduct. *Kennedy*, 142 S.Ct. at 2416; *See Church of Lukumi Babalu Aye, Inc.*, 508 U.S. at 543 (finding that the ordinance prohibiting animal sacrifice was not generally applicable because it targeted the religious motivation of the conduct).

In *Tingley*, the therapist argued that the law prohibiting licensed health care professionals from giving conversion therapy to minors gave officials discretion to grant individual exceptions. *Tingley*, 47 F.4th at 1088. The court rejected this argument because the rule gave no room for discretion to decide whether to revoke a license. *Id.* Ultimately the court found that the law contained no "formal and discretionary mechanism" to grant individualized exceptions. *Id*.

Here, the text of the statute and its method of enforcement leave no room for exercise of discretion to consider motivation or purpose for conduct. *See* R. at 4. North Greene 106(d) is objective in that giving conversion therapy is unprofessional conduct, regardless of the motivation or purpose. *Id.* There is no room for discretion for revoking a therapist's license; the statute is objective. If a therapist does not fall into an exception and they conduct conversion therapy with a minor, their license will be revoked. As defined by North Greene § 106(d),

conversion therapy is a regime of therapy targeted at changing a person's sexual orientation. R at 4. This is an objective definition that leads officials to easily make a decision of whether or not a therapist was conduct conversion therapy. Additionally, the exceptions to North Greene § 106(d) explicitly allows conversion therapy conducted under the guise of a religious organization. *Id*. As such, there is no mechanisms for individualized exceptions based on official discretion that would exclude religious conduct.

In sum, North Greene § 106(d) is generally applicable because it does not under include religious conduct in its exclusions and does not contain any mechanism for individualized exceptions. The law also meets the standards of neutrality based on the facial text and the operation of the rule. Based on the neutrality and general applicability of North Greene § 106(d) it must be analyzed under rational basis review.

C. North Greene § 106(d) Passes Rational Basis Review Because It Is Rationally Related to the Governmental Purpose of Preventing Harm to Vulnerable LGBTQIA+ Youth.

When a law meets both the requirements of being neutral and generally applicable, rational basis review is applied. *Stormans II*, 794 F.3d at 1076. Under rational basis review, a law is valid if it is rationally related to a government interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.,* 473 U.S. 432, 440 (1985). This allows the government to promote important health and social policy goals even if the law has incidental effects on religious conduct. *Emp. Div.,* 494 U.S. at 890. In conducting rational basis review, activities are judged against the government interest based on the risk they pose to undermining that interest rather than the specific motivation for the conduct. *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021). Strict scrutiny review is not applicable in this situation because the higher threshold of promoting a compelling government interest is only imposed when a law fails to be neutral and generally applicable and

thus requires greater justification. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987).

There are two steps to determine whether a law passes rational basis review. *W. & S. Life Ins. Co. v. State Bd. of Equalization of* California, 451 U.S. 648, 668 (1981). First, whether the law has a legitimate purpose. *Id.* Second, if lawmakers can reasonably believe that the law promotes that governmental purpose. *Id.* North Greene § 106(d) passes both of these steps of review.

1. Protecting LGBTQ+ Youth from Detrimental Harm Is the Legitimate Governmental Interest of North Greene § 106(d).

It is well-established through precedent that health and welfare, especially that of children is a legitimate state interest; laws that support these interests are given a "strong presumption of validity." *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2284 (*quoting Heller v. Doe,* 509 U.S. 312, 319 (1993)). Additionally, the state has a legitimate interest in regulating the conduct of health care professionals to ensure the health and welfare of citizens is protected. *Tingley*, 47 F.4th at 1078; *Dobbs*, 142 S.Ct. at 2284 (finding there was a legitimate state interest to prevent "gruesome or barbaric medical procedures").

In *Tingley*, the 9th Circuit found that banning conversion therapy on minors supported the legitimate state interest of protecting physical and psychological health of minors from the harms that conversion therapy. *Id*. at 1078. The court used evidence from the American Psychological Association ("APA") task force on conversion therapy that presented clinical evidence that conversion therapy produced negative health outcomes in youth including depression, self-stigma, cognitive and emotion dissonance, and emotional distress. *Id*. This led to the conclusion that banning conversion therapy on minors was a legitimate legislative purpose. *Id*.

The North Greene General Assembly stated its intent in passing § 106(d) as "protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." R. at 4. As in *Tingley*, the North Greene General Assembly acknowledged the APA's opposition of conversion therapy. *Id*. The American Academy of Child & Adolescent Psychiatry states there is no pathological or scientific support for conversion therapy.[3] In fact, conversion therapy exacerbates, rather than improves, mental health outcomes for children.[4] Protecting the health and well-being of children in North Greene is a serious government interest that can legitimately be addressed by the State legislature.

2. A Lawmaker Would Reasonably Believe That North Greene § 106(d) Promotes the Governmental Purpose of Preventing Harm to LGBTQ+ Youth.

In determining if a law is rationally related to a government interest, a legislative body can rely on evidence from expert organizations that shows that an issue is of public importance. *Tingley*, 47 F.4th at 1078-79. In *Tingley*, the Washington state legislators drafted the law prohibiting conversion therapy on minors by looking at conclusions by "every major medical and mental health organization," which each found that conversion therapy had negative mental health effects on those to whom it was given. *Id*. Relying on medical experts is a valid method for reasonably believing that a law reaches its stated purpose. *Id*. Lawmakers are not subject matter experts on health and welfare and defer to experts in making decisions that affect these

[3] Gender and sexual orientation are not included in the DSM and therefore are not accepted as a mental disorder that can be addressed by therapeutic practices. *Conversion Therapy*, Am. Acad. of Child & Adolescent Psychiatry (Feb. 2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx.

[4] Meanley et al., *Lifetime Exposure to Conversion Therapy and Psychosocial Health Among Midlife and Older Adult Men Who Have Sex With Men*, Gerontologist (Sep. 2020), https://www.ncbi.nlm.nih.gov/ pmc/articles/PMC8189 432/. "Men exposed to conversion therapy had 2-2.5 times the odds of reporting 1 and ≥2 psychosocial conditions."

issues. *See id*. As such, if a lawmaking uses opinions and reports of expert organizations, the law should be regarded as reasonably promoting a governmental interest.

Laws that promote the health and safety of youth with limited religious exceptions existed long before North Greene § 106(d) and will continue to be passed after it. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (holding that protecting child welfare by a law banning child labor overrides a freedom of religion claim). *Doe v. San Diego Unified School District*, 19 F.4th 1173, 1181 (2021) (requiring students to be vaccinated promoted public health interests). Based on the information and research provided to the North Greene General Assembly by the APA a reasonable lawmaker could find that the law addresses the government interest of protecting the State's youth. *See* R. at 4.

Additionally, North Greene legislators spoke from personal experience of the harms of conversion therapy and for the need to eliminate "barbaric practices." R. at 8-9. As stated in *Dobbs*, there is a government interest in eliminating barbaric medical procedures that threaten the integrity of the medical profession. The practices of conversion therapy described by Senator Lawson, including electroshock therapy and induced vomiting constitute barbaric practices without any scientific basis. R. at 9. Considering that sexual orientation and gender identity are not listed in the DSM, it would follow that extreme, disturbing therapy practices should not be used to attempt to change a person's identity. Therefore, a reasonable lawmaker would find that North Greene § 106(d) promotes the governmental purpose of preventing harm to youth.

III. The Court Should Uphold *Employment Division v. Smith* with the Goal of Preserving State Regulation of Conduct in the Interest of Public Health and Welfare.

Employment Division v. Smith was a landmark case in the interpretation of the Free Exercise Clause and setting the proper standard of review. The case gives the important proposition that, "[the Court] never held than individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Emp. Div*., 494 U.S. at 878-79. At the center of the case is an issue of whether a denial of unemployment benefits after complainants were terminated from their job for use of peyote during a religious ceremony violates the First Amendment. *Id*. at 875. The Court held that it was not a violation of the Free Exercise Clause for the state to prohibit ceremonial ingestion of peyote. *Id*. at 890.

The Court carved out the exception that when cases involve a Free Exercise Clause claim with another constitutional claim, a neutral and generally applicable law may not always be enforced against religious conduct. Id. at 881. However, the facts of *Smith* did not present this hybrid situation. *Id*. Further, the case declined to breathe new life into the *Sherbert* test, which requires that laws that substantially infringe on religious practice be supported by a compelling government interest. *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). *Smith* critiqued the application of the compelling government interest as too high a burden for the government to meet based on religion. *Emp. Div.*, 494 U.S. at 885. The Court concludes by stating that States are free to allow the use of peyote in religious ceremonies, but it is up to the State to incorporate that exception into the criminal code. *Id*. at 890.

There are two reasons that *Employment Division v. Smith* should be upheld. First, a return to the *Sherbert* compelling government interest test would prevent the State from promoting

public health and welfare. Second, following *Employment Division v. Smith* there was much back and forth between Congress and the Court, which would create even more confusion to the law.

A. A Return to the *Sherbert* Compelling Government Interest Test Would Create Too High of a Standard for the State to Meaningfully Prevent Harm to Its Citizens.

Smith represents the important proposition that the compelling interest standard is too high for religious objections to law. *Emp. Div. v. Smith*, 494 U.S. at 888. It would allow individuals to disobey many of the laws required to preserve a functioning society. *Id*. A return to the *Sherbert* compelling interest test would allow the State to make individualized exemptions when a person can present a good cause argument that they should be exempted from a law based on their religion. *Fulton*, 141 S.Ct. at 1878.

Requiring the State to present a rational basis for the government interest that the neutral and generally applicable law supports is enough of a barrier to prevent anything more than incidental burden on religious conduct. *Smith* works in tandem with *Church of Lukumi Babalu Aye* to give the extra layer of support that if a law is not neutral and generally applicable, it must undergo strict scrutiny review. 508 U.S. at 546. This system allows laws that target religious conduct to be struck down as unconstitutional because after the law fails the neutrality and general applicability test, it will have to undergo, and likely fail, strict scrutiny.

North Greene § 106(d) illustrates that through facially neutral conduct, religious exemptions, and no room for discretion by officers, a law can tailor itself to pass neutrality and general applicability, and then rational basis, to support a public interest without overly infringing on religious conduct. R. at 4. Lawmakers can yield to the *Smith*, *Lukumi*, and *Fulton* decisions and can be mindful to ensure their laws are not excluding religious conduct or granting individualized exceptions to secular conduct. Therefore, the *Smith* rule allows lawmakers to

combat social issues plaguing their constituents while following safeguards to ensure that those laws do not trample the free exercise of religion.

B. Upholding *Employment Division v. Smith* Will Promote Stability in an Area of Law That Has Been Unstable and Varied.

The *Smith* decision was a catalyst for a back-and-forth between the Supreme Court and Congress in protective measures for religious conduct. In response to *Smith*, Congress passed the Religious Freedom Act (RFRA) of 1993. 42 U.S.C.A. § 2000bb-1. The RFRA stated that the Government can't substantially burden the right of religious exercise, even if a rule is generally applicable. *Id*. It also provided exceptions that allows for substantial burden of religious exercise if it furthers a compelling governmental interest by the least restrictive means necessary. *Id*. This is a codification of *Sherbert* and an attempt by Congress to render meaningless the *Smith* decision.

In response, *City of Boerne v. Flores*, 521 U.S. 507, 534-536 (1997) held that the RFRA was unconstitutional because in passing the law Congress violated the separation of powers and infringed on States' ability to regulate health and welfare of its citizens. Congress amended the RFRA so that it is currently limited to application to federal laws and through the Religious Land Use and Institutionalized Persons Act (RLUIPA) it extends to persons in State institutions. 42 U.S.C.A. § 2000cc-1. This back-and-forth policy making creates confusion for lower courts and a lack of predictability that is not a realistic environment in which lawmakers can successfully work. Precent shows that the *Smith* standard works because a law that unconstitutionally impedes a person's ability to practice their religion will not pass neutrality and general applicability will be subject to strict scrutiny anyways. Under *Smith*, as demonstrated by North Greene § 106(d), the rational basis test allows for the government to regulate important health and safety issues for the well-being of its citizens.

To conclude, North Greene § 106(d), which bans state licensed therapists who do not practice at a religious institution from giving conversion therapy to minors, is neutral and generally applicable. It is also rationally related to the government interest of protecting the safety and mental health of the State's youth. This law is an example of why the *Smith* decision should be upheld because it properly protects First Amendment rights while allowing the government to regulate public health.

CONCLUSION

For the foregoing reasons, this Court should find that North Greene § 106(d) is a constitutionally permissible regulation of professional conduct related to a state interest, and any impingement it may have on the freedom of speech is merely incidental. This Court should also find that North Greene § 106(d) is neutral and generally applicable and passes rational basis review. The Respondent asks that the decision in *Employment Division v. Smith* be upheld by this Court.

Respectfully submitted,

State of North Greene
Respondent