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
No. 22-1023

Brief for Respondents

Team 20
Attorneys for Respondents

Oral Argument Requested

QUESTIONS PRESENTED

I. Whether N. Greene Stat. § 106(d) is constitutional under the Free Speech Clause of the First Amendment when the statute regulates professional conduct by barring licensed therapists from performing conversion therapy and, in any event, passes heightened levels of scrutiny as a content-neutral regulation that is narrowly tailored and furthers a compelling governmental interest?

II. Whether N. Greene Stat. § 106(d) is constitutional under the Free Exercise Clause of the First Amendment as a neutral and generally applicable regulation when it applies evenhandedly and treats religious exercise more favorably than its secular counterpart, and if so, whether *Employment Division v. Smith*, a decision that is consistent with past precedent and adequately protects rights under the Free Exercise Clause, should be overturned?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

Constitutional Provisions

Secondary Authorities

STATEMENT OF JURISDICTION

A formal Statement of Jurisdiction has been omitted from this brief in compliance with the Rules of the Billings, Exum & Frye National Moot Court Competition at Elon University School of Law.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Respondent, North Greene, defendants in the United States District Court for the Eastern District of North Greene and appellants in the United States Court of Appeals for the Fourteenth Circuit, submits this brief in support of its request that this Court uphold the Fourteenth Circuit's ruling as to the constitutionality of the North Greene statute banning the performance of conversion therapy on minors.

OPINIONS BELOW

The United States District Court for the Eastern District of North Greene's unpublished memorandum opinion is available at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The United States Court of Appeals for the Fourteenth Circuit's unpublished opinion is available at *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023).

CONSTITUTIONAL PROVISIONS

The text of the First Amendment to the United States Constitution states in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Statement of Facts

Like many other states, North Greene requires health care providers to be licensed before they may practice in the state. R. at 3; N. Greene Stat. § 105(a). As licensed health care providers, these professionals are subject to disciplinary action for engaging in "unprofessional conduct" listed in Chapter 45 of Title 23 of the State's Uniform Professional Disciplinary Act. R. at 3; N. Greene Stat. §§ 106, 107, 110.

In response to the serious harms caused by performing conversion therapy on minors, in 2019, the State added "performing conversion therapy on a patient under age eighteen," to the unprofessional conduct list. R. at 4; N. Greene Stat. § 106(d). Of particular importance to this action, these requirements do not apply to any therapists, counselors, or social workers who "work under the auspices of a religious denomination, church, or religious organization." R. at 4; N. Greene Stat. § 111. Conversion therapy is further defined within the statute:

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

R. at 4; N. Greene Stat. § 106(e)(1). The end goal is to change a person's sexual orientation or gender identity, while the means used are therapeutic practices and psychological interventions. R. at 3 n.2. The legislature further explained what conversion therapy is *not*: "counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity." R. at 4; N. Greene Stat. § 106(e)(2).

The legislature enacted this additional provision with one primary goal in mind, protecting the physical and psychological well-being of minors with the intent of regulating licensed health care providers' conduct. R. at 4. Specifically, the General Assembly stated that it had "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." *Id.* Several legislators expressed their individual intent in supporting the passage of the statute. R. at 9. Senator Lawson stated his desire to eliminate "barbaric practices" inflicted with a desire to eliminate homosexuality. *Id.* Further, Senator Pyle, who has a daughter that is gay, denounced those who wish to "pray the gay away." *Id.* Yet, the driving force of legislation was to protect the health and welfare of minors. R. at 4. The legislature nonetheless provided explicit exceptions:

> (1) speech by licensed health care providers that 'does not constitute performing conversion therapy,' (2) '[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers,' and (3) [n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization.'

Id. See N. Greene Stat. § 106(f). The General Assembly also looked for guidance from the American Psychological Association ("APA"). R. at 4. The APA strongly opposes conversion therapy because it has proven to lack effectiveness, and instead produced anecdotal accounts of depression, suicidal thoughts or actions, and substance abuse. R. at 7. Instead, the APA "encourages psychologists to use an affirming, multicultural, and evidence-based approach" including "acceptance, support, . . . and identity exploration and development, within a culturally competent framework." R. at 4.

It is also important to explicitly define what the statute does *not* do. The statute does not prevent health care providers from: (1) speaking with the public about conversion therapy; (2)

sharing their personal views about conversion therapy, sexual orientation, or gender identity to patients (including minors); (3) performing conversion therapy on adult patients; or (4) referring minor patients to providers practicing under the auspices of a religious organization or practicing in a different state. *Id.* What the statute does do is subject licensed providers—that do not fall within the religious exception—to discipline for practicing conversion therapy on patients under the age of eighteen. R. at 3; N. Greene Stat. § 106(d).

Petitioner, Howard Sprague, is a deeply devout Christian. R. at 3. Petitioner proffers himself to his clientele as a Christian provider of family therapy services. *Id.* Yet, Petitioner does not practice under the auspices of a religious denomination—he is a state licensed family therapist and has been for twenty-five years. *Id.* Nonetheless, his clients largely share his religious viewpoints and are drawn to him because of them. *Id.*

His work includes, but is not limited to, assisting patients with sexuality and gender identity issues. *Id.* Petitioner believes that his personal Christian beliefs and viewpoints influence and inform his work as a therapist. *Id.* Some of these views include that human identity is God's design, and further, each person's sex assigned at birth is "a gift from God." *Id.* This gift, from God, preempts an individual's wishes or beliefs and should not be changed. *Id.* Relatedly, Petitioner believes that sexual relationships should only take place between a married man and a woman. *Id.*

B. Procedural History

In August 2022, Petitioner filed suit against North Greene in the United States District Court for the Eastern District of North Greene. R. at 2, 5. Petitioner sought to enjoin enforcement of N. Greene Stat. § 106(d) under the First Amendment's Free Speech and Free Exercise Clauses. R. at 5. Petitioner filed a motion for preliminary injunction, which was met with North Greene's opposition and motion to dismiss the complaint. *Id.* The District Court denied Sprague's motion

for preliminary injunction. *Id.* While finding that Petitioner had standing to sue, the District Court was not persuaded by Petitioner's constitutional claims and consequently granted the State's motion to dismiss. *Id.* Petitioner appealed the District Court's decision, and the United States Court of Appeals for the Fourteenth Circuit exercised its jurisdiction under 28 U.S.C. § 1291. R. at 2, 5. On January 15, 2023, the Fourteenth Circuit affirmed, denying Petitioner's motion for preliminary injunction and granting the State's motion to dismiss, and therefore, upheld North Greene's statute. R. at 2, 11. Petitioner appealed the Fourteenth Circuit's decision, and this Court granted certiorari on both claims. R. at 17.

SUMMARY OF THE ARGUMENT

It is paramount that the State is able to exercise its police power to protect the health and welfare of its citizenry. This is especially true in relation to minors, who represent the most vulnerable population. This Court should, respectfully, uphold the constitutionality of N. Greene Stat. § 106(d) in order to ensure that the State remains empowered to protect minors from known harms caused by conversion therapy.

Free Speech Claim. N. Greene Stat. § 106(d) does not violate the First Amendment's Free Speech Clause. Firstly, the First Amendment does not apply to N. Greene Stat. § 106(d) because the statute targets unprofessional conduct. It bars licensed therapists not working under the auspices of religion from *performing* conversion therapy on minors, while allowing therapists to express their opinions on conversion therapy, discuss the treatment, and recommend that the treatment be performed by a religious organization. The First Amendment is not implicated merely because the conduct – conversion therapy – is carried out through speech.

In addition, even if N. Greene Stat. § 106(d) is found to target some speech, it does not violate the First Amendment because it is a content-neutral regulation that survives intermediate

scrutiny. The statute applies evenhandedly to all therapists performing conversion therapy, whether for religious or secular reasons. Furthermore, the statute serves purposes unrelated to the suppression of speech. The goal of N. Greene Stat. § 106(d) is to protect minors from harm, not to suppress the speech of licensed therapists. The statute survives intermediate scrutiny because the State has an important interest in protecting minors from harm, and the conversion therapy ban serves this interest, as there is empirical evidence that minors who receive conversion therapy may suffer from depression, suicidal ideation, and substance abuse.

Finally, even if N. Greene Stat. § 106(d) is determined to be a content-based regulation on speech, the statute should still be upheld because it survives strict scrutiny. Protecting minors from harm is not only an important, but a compelling governmental interest. The statute is narrowly tailored because it allows licensed therapists to express their views on conversion therapy with minors. In addition, minors are incapable of giving informed consent, so modifying the provision to allow licensed therapists to perform conversion therapy on a minor with their informed consent would not adequately serve the State's interest. Therefore, this Court should affirm the Fourteenth Circuit's decision that N. Greene Stat. § 106(d) does not violate the First Amendment's Free Speech Clause.

Free Exercise Claim. N. Greene Stat. § 106(d) does not violate the First Amendment's Free Exercise Clause. *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) provides that a law does not violate the Free Exercise Clause if it is neutral and generally applicable. N. Greene Stat. § 106(d) is neutral because it applies evenhandedly to all licensed therapists not working under the auspices of religion, no matter their justification for performing conversion therapy. The central object of the statute is to regulate the professional conduct of licensed therapists. It is not intended to target religion. Furthermore, N. Greene Stat. § 106(d) is generally applicable because it does

not provide a formal and discretionary mechanism for individual exceptions or treat any comparable secular activity more favorably than religious exercise. In fact, by providing an exception to therapists working under the auspices of religion, the statute treats religious practice more favorably than its secular counterpart.

Employment Division v. Smith and its neutral and generally applicable test should not be overturned in accordance with the principle of *stare decisis*. Firstly, the decision is consistent with past precedent. As early as 1905, this Court recognized the neutral and generally applicable framework and applied it to Free Exercise claims. In addition, the decision is not egregiously wrong because it adequately protects the right to free exercise by barring laws that fail not only to be facially neutral, but also operationally neutral. When this Court was confronted with *Employment Division* v. *Smith* less than two years ago, it declined to overrule the precedent, further supporting that it is valid and sound law. Finally, overturning *Employment Division v. Smith* would have harmful real-world consequences by barring the State from reasonably protecting the health and welfare of its citizenry. Therefore, this Court should affirm the Fourteenth Circuit's decision that N. Greene Stat. § 106(d) does not violate the First Amendment's Free Exercise Clause and decline to overturn *Employment Division v. Smith.*

ARGUMENT

Standard of Review

The two issues before this Court are (1) whether a statute that bans the performance of conversion therapy on minors violates the Free Speech Clause of the First Amendment and (2) whether such a statute, which primarily burdens religion, is neutral and generally applicable, and if so, if *Employment Division v. Smith* should be overturned. This Court reviews challenges to the constitutionality of a statute de novo. *See Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S.

424, 435 (2001). De novo review requires an independent determination of the issues to be made by this Court, with no deference given to the lower courts. *United States v. First City Nat'l Bank*, 386 U.S. 361, 368 (1967).

I. N. GREENE STAT. § 106(d) DOES NOT VIOLATE PETITIONER'S RIGHT TO FREE SPEECH BECAUSE THE STATUTE REGULATES CONDUCT, AND EVEN IF THE STATUTE TARGETS SPEECH, IT SURVIVES HEIGHTENED SCRUTINY.

The First Amendment prohibits Congress from enacting laws that interfere with the public's right to free speech. U.S. Const. amend. I. First Amendment protections do not extend to conduct and laws that target conduct are only subject to rational basis review. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). First Amendment protection is at its height only when it targets laws that distinguish "favored speech from disfavored speech on the basis of the ideas or views expressed." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). Content-neutral laws serve purposes unrelated to the content of the speech, even if they have an incidental impact on speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Laws that target content-neutral speech are subject to the lower standard of intermediate scrutiny. *See Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 189 (1997). On the other hand, laws that are deemed content-based are subject to strict scrutiny and are upheld only if the government can prove the law is narrowly tailored to serve a "compelling" governmental interest. *Republican Party v. White*, 536 U.S. 765, 774–75 (2002).

In the present case, the First Amendment does not apply to N. Greene Stat. § 106(d) because it places a restriction on professional conduct. In the event N. Greene Stat. § 106(d) targets some speech, it avoids strict scrutiny because it applies evenhandedly to all therapists no matter their reasoning for performing conversion therapy and serves purposes unrelated to the suppression of speech. However, even if N. Greene Stat. § 106(d) is determined to be a content-based restriction

on speech, it should still be upheld because it survives strict scrutiny review. The State has a compelling interest in protecting the health and welfare of minors, and the statute is narrowly tailored to serve this interest. Therefore, this Court should affirm the Fourteenth Circuit's holding that N. Greene Stat. § 106(d) meets the applicable level of constitutional scrutiny.

A. N. Greene Stat. § 106(d) Is Not Subject to First Amendment Scrutiny Because It Principally Regulates Conduct and Survives Rational Basis Review.

This Court has made clear that First Amendment protection does not apply to conduct that is not inherently expressive, even if that conduct is carried out through speech. *Rumsfield v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 66 (1999). "[W]ords can in circumstances violate laws directed not against speech but against conduct . . ." *R.A.V.,* 505 U.S. at 389. N. Greene Stat. § 106(d) regulates conduct because it bans the *practice* of conversion therapy on minors, which is merely accomplished through speech, while leaving untouched the ability of therapists to discuss and express their views on the treatment.

1. N. Greene Stat. § 106(d) Regulates Conduct Because It Prohibits Licensed Therapists from Performing Conversion Therapy on Minors but Permits the Discussion or Recommendation of the Treatment.

"A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Accountant's Soc. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). The fact that speech may be used to carry out a therapeutic treatment does not turn a regulation on a therapist's professional conduct into a regulation on the therapist's speech. *See Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Like any other licensed profession, the practice of therapy is "subject to reasonable licensing and regulation by the State . . . ." *See Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Thus, this Court should find that N. Greene Stat. § 106(d) is a reasonable licensing regulation of a therapist's professional conduct.

This Court has a long history of holding that laws that regulate professional conduct, while having an incidental impact on speech, do not violate the First Amendment. In previous years, this Court has upheld laws that limit a lawyer's communication with potential clients, regulate malpractice by professionals, and compel doctors performing abortions to provide information "in a manner mandated by the State" about the risks of the medical treatment. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Casey*, 505 U.S. at 884 (1992). While these professional practices are certainly carried out through speech, this Court determined that these laws were constitutional regulations on professional conduct. *See, e.g., Ohralik*, 436 U.S. at 457 ("[A]ppellant's *conduct* is subject to regulation in furtherance of important state interests.") (emphasis added).

While undeniably a regulation of licensed professionals, the circuits are split as to whether identical laws barring therapists from performing conversion therapy on minors target conduct or speech. In *Otto v. City of Boca Raton*, 981 F.3d 854, 868, 871 (11th Cir. 2020), the Eleventh Circuit determined that such a regulation targeted speech and could not survive strict scrutiny. The court reasoned that the "procedure" consists entirely of words and "limits a category of people – therapists – from communicating a particular message." *Id.* at 863. The Ninth Circuit, however, reached the opposite conclusion in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). The court reasoned that a regulation of conversion therapy did not prevent a therapist from "engag[ing] in public dialogue" on the treatment, which would subject the law to the greatest First Amendment scrutiny. *Id.* at 1227. Rather, the law regulated the performance of a mental health treatment, a type of conduct, while allowing therapists to discuss or recommend the treatment and to express

their views on the topic. *Id.* at 1223. Since the state's power is at its greatest when it regulates professional conduct, which merely has an incidental impact on speech, the Ninth Circuit determined that the conversion therapy ban was constitutional.[1] *Id.* at 1229.

On the face of the statute, N. Greene Stat. § 106(d) regulates conduct. Any restriction on speech occurring as a result of N. Greene Stat. § 106(d) is incidental at most. This Court should adopt the Ninth Circuit's reasoning in *Pickup* and overrule *Otto* for several reasons. First, the *Otto* court was simply incorrect that Boca Raton's conversion therapy ban, identical to the one at issue here, bars therapists from "communicating a particularized message." *See Otto*, 981 F.3d at 863. Both regulations explicitly allow for therapists to recommend conversion therapy to a minor, to discuss and express their opinions on conversion therapy with a minor, and to perform the practice on patients over eighteen. *See id.* at 872; *see also* R. at 4. Under N. Greene Stat. § 106(d), it is permissible for therapists to communicate any message they may have relating to conversion therapy to the public and to their clients. The statute simply bars therapists from *performing* conversion therapy on minors.

In addition, the *Otto* court's holding is inconsistent with this Court's jurisprudence relating to laws regulating licensed professionals. As stated above, this Court has upheld laws regulating the legal and medical professions – many of which were aimed at conduct carried out through speech. *See Ohralik*, 436 U.S. at 449; *see also Casey*, 505 U.S. at 884. Adopting the *Otto* court's reasoning would threaten this longstanding jurisprudence and would preclude other "reasonable

[1] There was concern that this Court's decision in *NIFLA v. Becerra,* 138 S. Ct. 2361 (2018), overruled *Pickup*. However, in *Tingley v. Ferguson,* 47 F.4th 1055, 1080 (9th Cir. 2022), the Ninth Circuit explained it did not. *NIFLA* only abrogated the idea that professional speech receives less protection per se. *Id.* Yet, it did not abrogate the central holding that a conversion therapy law is a regulation on conduct.

health and welfare laws" that apply to healthcare professionals and impact their speech. *Dobbs*, 142 S. Ct. at 2284.

N. Greene Stat. § 106(d) is a reasonable professional licensing provision applicable to conduct, and it is not a check on the speech involved. "Most . . . mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment." *Pickup*, 740 F.3d at 1229. It follows logically that therapy effectuated by speech should be given the same protection as therapy effectuated through physical touch. If not, therapy as a profession could go wholly unchecked. It cannot be disputed that therapy, if conducted inappropriately, can worsen the mental health of those it is designed to treat. This very conclusion was reached by the APA in relation to conversion therapy performed on minors. R. at 4. It cannot be said that licensed therapists should be free from reasonable government regulations merely because they treat other humans partially through speech. Therefore, this Court should find that N. Greene Stat. § 106(d) regulates a therapist's professional conduct.

2. N. Greene Stat. § 106(d) Survives Rational Basis Review Because It Is Rationally Related to the Legitimate Government Interest of Preventing Harm to Minors.

Statutes which regulate conduct are subject to only rational basis review. *See Casey*, 505 U.S. at 884. These statutes are presumptively constitutional and are upheld if they bear "a rational relationship to a legitimate state interest." *Id.* N. Greene Stat. § 106(d) survives rational basis review.

The interest cited by the State in enacting N. Greene Stat. § 106(d) is to protect the physical and psychological well-being of minors from exposure to serious harms caused by sexual orientation change efforts. R. at 4. This interest is rational given the APA's conclusion that conversion therapy can lead to depression, suicidal ideation, and substance abuse. R. at 7. It follows

logically that banning therapists from performing conversion therapy on minors is rationally related to the goal of protecting minors from the harm empirically shown to be caused by conversion therapy.

B. In the Event N. Greene Stat. § 106(d) Targets Speech, It Is a Content-Neutral Regulation That Survives Intermediate Scrutiny Review.

Statutes that "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or viewpoint expressed are content-based." *Turner Broad. Sys.*, 512 U.S. at 643. On the other hand, statutes that "confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content-neutral." *Id.* Content-based restrictions on speech are subject to strict scrutiny, whereas content-neutral restrictions are subject to a lesser intermediate scrutiny. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020). In the event that N. Greene Stat. § 106(d) targets some speech, this Court should recognize it as a content-neutral regulation because it applies evenhandedly and serves purposes unrelated to a therapist's speech.

The quintessential example of a content-based restriction can be found in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). There, this Court held that a regulation that differentiated the requirements for displaying outdoor signs based on their message was content-based. *Id.* at 162. In its majority opinion, this Court opined that there would be ways to make such a regulation content-neutral, such as "entirely forbidding the posting of signs, so long as [the town] does so in an evenhanded content-neutral manner." *Id.* at 173.

In addition to considering the "evenhandedness" of a law, this Court also considers whether the law "serves purposes unrelated to the content of the expression . . . ." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014). For example, in *McCullen*, Massachusetts passed a statute that excluded all individuals from standing within thirty-five feet around the entrance to abortion clinics, with

an exception for individuals who had clinic-related business. *Id.* at 469. The petitioners argued the law violated their right to free speech by effectively thwarting their efforts to counsel women entering abortion clinics. *Id.* at 474. This Court determined that the law was a content-neutral restriction on speech and thus avoided strict scrutiny. *Id.* at 482. The purpose of Massachusetts's law was to ensure public safety and limit congestion at abortion clinics. *Id.* at 480. It was not intended to suppress the speech of those seeking to deter women from receiving an abortion. *Id.* Therefore, there were no grounds for determining that the law as content-based "simply because the legislature acted with respect to abortion facilities generally rather than proceeding on a facility-by-facility basis." *Id.* at 482.

In *Otto*, in addition to finding that a law banning conversion therapy on minors targeted speech, the Eleventh Circuit also determined that the law was content-based. 981 F.3d at 863. The court reasoned that "[w]hether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on the content is because the government disagrees with it." *Id.* While the court recognized that therapists have other avenues of expression under the regulation, "the ordinance plainly prohibits the therapists from having certain conversations with clients." *Id.*

In the event that N. Greene Stat. § 106(d) is determined to target speech, it should be construed as content-neutral. First, the statute is distinguishable from *Reed* because it applies evenhandedly. N. Greene Stat. § 106(d) applies to all licensed therapists, not working under the auspices of a religious organization. R. at 4. It bars the performance of conversion therapy on minors, whether it is conducted through aversive or non-aversive treatments or for religious or secular reasons. *Id.* Just as this Court in *Reed* suggested that the town "entirely forbid[] the posting of signs," 576 U.S. at 173, the State here has chosen to entirely ban licensed therapists from performing conversion therapy on minors through N. Greene Stat. § 106(d).

Instead, N. Greene Stat. § 106(d) is synonymous with *McCullen*, 573 U.S. at 480. The statute serves purposes unrelated to the content of the expression – it was enacted to prevent minors from physical and psychological harm, r. at 4, and is not a reflection of the State's stance on conversion therapy. It cannot be said that N. Greene Stat. § 106(d) distinguishes speech relating to conversion therapy as "disfavored" because under the statute, therapists remain able to discuss conversion therapy with minor clients and express their views on the practice to minor clients. R. at 4. Therapists are also able to recommend that the minor receive conversion therapy from anyone working under the auspices of religion. *Id.* The court in *Otto* incorrectly deemed such a regulation to be content-based. 981 F.3d at 863. N. Greene Stat. § 106(d), and the conversion therapy ban at issue in *Otto*, particularly allow therapists to communicate, both to the public and to minors, their position on conversion therapy. R. at 4; *Otto*, 981 F.3d at 872.

If N. Greene Stat. § 106(d) is determined to be a content-neutral restriction on speech, it is subject to intermediate scrutiny. For a law to pass intermediate scrutiny, it "must be narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534. The law must not "burden substantially more speech than is necessary to further the government's legitimate interests" *Id.* at 2535. This does not require that the law "be the least restrictive or least intrusive means of" serving the government's interests, but the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.* The State asserts that N. Greene Stat. § 106(d) satisfies intermediate scrutiny because the government has a not only substantial, but compelling interest in protecting the well-being of minors, and as more fully explained below, the statute survives the more demanding test of strict scrutiny.

C. Even If N. Greene Stat. § 106(d) Is Subject to Strict Scrutiny, It Still Survives.

Content-based regulations on speech must satisfy strict scrutiny. *Reed*, 576 U.S. at 155. Such regulations will only survive if they are "narrowly tailored to serve compelling state interests." *Id.* at 163. While regulations subject to strict scrutiny are "presumptively invalid," *R.A.V.,* 505 U.S. at 382, this Court has previously upheld laws subject to this demanding test. *See Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015). In the event this Court finds that N. Greene Stat. § 106(d) is a content-based restriction on speech, it should still uphold the regulation as narrowly tailored to serve a compelling state interest.

1. Preventing Harm to Minors, Especially Those that Identify as LGBTQ+, Is a Compelling State Interest.

When a regulation is subject to strict scrutiny, the Government must "prove that the restriction furthers a compelling state interest . . . ." *Reed*, 576 U.S. at 171 (internal citations omitted). Among the interests this Court has considered to be compelling include the "interest in safeguarding the physical and psychological well-being of a minor . . . ." *New York v. Ferber*, 458 U.S. 747, 756–57 (1982). Therefore, this Court should find that N. Greene Stat. § 106(d) satisfies the first prong of the strict scrutiny test.

The lower court's dissenting opinion and the majority opinion in cases that have struck down similar laws banning conversion therapy for minors have conceded that protecting the welfare of minors is a compelling state interest. *See* R. at 14; *see also Otto*, 981 F.3d at 868 ("We have no doubt that the local governments here have a strong interest in protecting children."). For this reason, the State does not intend to belabor the point that the interests underlying N. Greene Stat. § 106(d) are compelling and presumes that it has satisfied the first requirement set forth under strict scrutiny.

2. N. Greene Stat. § 106(d) Is Narrowly Tailored Because It Permits Discussion of Conversion Therapy and Minors Cannot Provide Informed Consent.

In order to survive strict scrutiny, the Government must also show that the regulation is "specifically and narrowly framed to accomplish [the compelling governmental] purpose." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996). In other words, there must not be an alternative to a regulation that is "at least as effective in achieving the legitimate purpose that the [regulation] was enacted to serve." *See, e.g., Reno v. ACLU*, 521 U.S. 844, 874 (1997). Because N. Greene Stat. § 106(d) is narrowly drawn to address the Government's compelling interest in protecting children from the harms of conversion therapy, this Court should find that the regulation survives strict scrutiny.

Courts that have struck down similar bans on conversion therapy for minors have argued that such a regulation is not narrowly tailored to serve the Government's stated interest. For example, in *Otto*, the Eleventh Circuit held that Boca Raton's ordinance barring sexual orientation change efforts (SOCE) was not narrowly tailored because it barred therapists from exposing minors to particular ideas or information regarding "sex, gender [identity], or sexual ethics." 981 F.3d at 864. Other opponents of the conversion therapy ban argue that outright bans on conversion therapy are not narrowly tailored because the Government's objectives "could be accomplished in a less restrictive manner via a requirement that minor clients give their informed consent" to conversion therapy. *King v. Governor of the State of N. J.*, 767 F.3d 216, 239–40 (3d Cir. 2014), *abrogated on other grounds by NIFLA,* 138 S. Ct. at 2371. It is also asserted that the ordinance does not further the Government's interest in protecting minors from harm because there is a "'complete' lack of rigorous research" relating to the harmful outcomes among minors who have undergone conversion therapy. *Otto*, 981 F.3d at 869.

These arguments are misplaced and should not persuade this Court's opinion for several reasons. First, N. Greene Stat. § 106(d), like the SOCE ordinance in *Otto*, is narrowly tailored because, as stated above, it does not prevent licensed therapists from exposing minors to the idea of conversion therapy or expressing their personal views about conversion therapy and sexual and gender identity. R. at 4. Therapists may also refer minors seeking conversion therapy to counselors practicing under the auspices of a religious organization. *Id.* N. Greene Stat. § 106(d) is carefully crafted to allow minors interested in conversion therapy to obtain knowledge about the practice and even participate in the practice via a religious organization. Second, an informed consent requirement would not adequately serve the interests of the Government. Minors, especially those that identify as LGBTQ+, constitute an "especially vulnerable population, and their parents or therapists could easily pressure them into undergoing conversion therapy." *See King*, 767 F.3d at 240; *see also* Samuel G. Bernstein, *The Not-So-Straight First Amendment: Why Prohibitions on Conversion Therapy for Children Survive Strict Scrutiny*, Boston Col. L. Rev. Vol. 63, 1861, 1910 (2022).

Finally, N. Greene Stat. § 106(d) furthers the State's interest, and the *Otto* court is incorrect to assert that there is a lack of rigorous research surrounding conversion therapy. For decades "a number of well-known, reputable professional and scientific organizations, like the APA, have publicly condemned the practice of [conversion therapy] and warned of great or serious health risks associated with it." *King*, 767 F.3d at 238. Professional organizations, including the APA, "possess specialized knowledge and experience" concerning conversion therapy. *Id.* "Legislatures are entitled to rely on the empirical judgments" of these organizations, especially when "[the] community has spoken with such urgency and solidarity on the subject." *Id.* More than twenty states and the District of Columbia have laws prohibiting or restricting conversion therapy.

Tingley, 47 F.4th at 1063. This widespread stance evidences the veracity with which the nation has recognized the harm caused by conversion therapy. An outright ban on the practice on minors is the *only* way the Government can further its compelling interest of protecting this unquestionably vulnerable population. For this reason, this Court should find that N. Greene Stat. § 106(d) satisfies strict scrutiny.

II. DESPITE ITS IMPACT ON RELIGION, N. GREENE STAT. § 106(d) IS NEUTRAL AND GENERALLY APPLICABLE, A STANDARD SET FORTH IN *EMPLOYMENT DIVISION V. SMITH* WHICH SHOULD NOT BE OVERTURNED BECAUSE IT IS CONSISTENT WITH PRIOR PRECEDENT AND ADEQUATELY PROTECTS THE RIGHT TO FREE EXERCISE.

"The Free Exercise Clause of the First Amendment prevents Congress from making a law 'prohibiting the free exercise' of religion and applies to the States through the Fourteenth Amendment." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). The Free Exercise Clause bars laws that "discriminate[] against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Id.* at 532. *Employment Div., Dept. of Human Resources of Or. v. Smith*, 494 U.S. 872, 879 (1990) [hereinafter *Employment Division v. Smith*] sets forth the current test for determining the validity of laws alleged to burden religion in violation of the Free Exercise Clause. Under this test, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. *Id.* In the present case, N. Greene Stat. § 106(d) is neutral and generally applicable because it applies to conversion therapy performed on minors for both secular and religious reasons and was enacted for the sole purpose of preventing harm to minors. R. at 4.

The principle of *stare decisis* mandates that the neutral and generally applicable test set forth in *Employment Division v. Smith* should not be overturned. This principle provides that this

Court "may not overrule a decision, even a constitutional one, without a special justification." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). This Court lacks such a justification to overrule *Employment Division v. Smith* because it is consistent with prior precedent, it adequately protects the right to free exercise, and it ensures that the State can exercise its power to protect the public health and welfare of its citizenry. Therefore, this Court should affirm the Fourteenth Circuit's holding that N. Greene Stat. § 106(d) is neutral and generally applicable and decline to overturn *Employment Division v. Smith.*

A. N. Greene Stat. § 106(d) Is a Neutral and Generally Applicable Law That Survives Rational Basis Review Because It Does Not Target Religion, But Rather, Is Intended to Prevent Harm to Minors and Applies to Therapists Performing Conversion Therapy for Both Secular and Religious Reasons.

The requirements of neutrality and general applicability "are interrelated, and failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. Where the purpose of a law is to restrict practices due to the religious motivations of those performing the practices, the law is not neutral. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). In conjunction, a law is not generally applicable if there is a "formal mechanism for granting exceptions that invites the government to consider the particular reasons for a person's conduct" or if the law "prohibits religious conduct while permitting secular conduct that works against the government's interest in enacting the law." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877, 1879 (2021) (internal citations and quotations omitted). In the present case, N. Greene Stat. § 106(d) is both neutral and generally applicable because it was not enacted to target religion, but rather to protect minors from the harms associated with conversion therapy. R. at 4. Furthermore, the statute applies evenhandedly to therapists performing conversion therapy for both secular and religious reasons and even allows for an exception for therapists performing the practice *under the auspices of religion. Id.*

In *Lukumi*, this Court examined a city ordinance that prohibited animal sacrifice, which was deemed neither neutral nor generally applicable. 508 U.S. at 535, 543. It was determined that while the ordinance was facially neutral, it was not "operationally neutral" because its sole objective was "to suppress an essential element of [a religious] worship service." *Id.* The ordinance was enacted "'because of'" and not merely "'in spite of'" the city's desire to the religious practice of animal sacrifice. *Id.* Further, the ordinance was not generally applicable because it was entirely underinclusive for the city's stated interest – "protecting the public health and preventing cruelty to animals" as it did not prohibit or expressly permitted many types of animal kills for non-religious purposes that endangered these interests in a similar or greater degree than animal sacrifice. *Id.*

Similarly, in *Kennedy*, disciplinary action taken by Bremerton School District against a high school football coach for engaging in "'thanks through prayer' briefly and by himself 'on the playing field'" was found to violate the Free Exercise Clause because the action lacked neutrality and general applicability. 142 S. Ct. at 2416. The district prohibited "any overt actions on [the coach's] part, appearing to a reasonable observer to endorse even voluntarily, student-initiated prayer." *Id.* at 2422 (internal quotations omitted). This Court determined that the policy was not neutral because, by its own admission, "the [d]istrict sought to restrict [the coach's] actions at least in part because of their religious character." *Id.* Like *Lukumi*, the sole objective of the district's policy was to prohibit a religious practice. *Id.* This Court similarly found that the policy was not generally applicable because, while the district alleged that the policy ensured supervision of student athletes after games, the district "permitted other members of the coaching staff to forgo supervising students briefly after the game to do things like visit friends or take personal phone calls." *Id.* at 2423. Therefore, any sort of postgame supervisory requirement "was not applied in an evenhanded, across-the-board way." *Id.*

In contrast to this Court's holdings in *Lukumi* and *Kennedy*, several lower courts have determined that laws banning the performance of conversion therapy on minors are both neutral and generally applicable. *See Tingley*, 47 F.4th at 1085; *see also King*, 767 F.3d at 241. In *Tingley*, the Ninth Circuit examined the text, historical background, and implications of a California law nearly identical to the one at issue in the present case to determine its neutrality and general applicability. *Id.* at 1085–88. The *Tingley* court found the law to be neutral on its face because it made "no reference to religion, except to clarify that the law [did] not apply to religious counselors." *Id.* at 1085. The neutrality of the law was also evidenced by the statute's historical background. *Id.* The court reasoned that legislative comments including that the practice of conversion therapy was "barbaric" and sought to "pray the gay away" did not reflect an anti-religious attitude but were spoken from experience and related to the country's history of performing harmful practices to overcome homosexuality, like electroshock therapy and induced vomiting. *Id.* at 1085-86. The court also found the law to be operationally neutral because "it evenhandedly prohibit[ed] health care providers from performing conversion therapy on minors, whether those minors [sought] it for religious or non-religious reasons." *Id.* at 1086. Finally, the Ninth Circuit determined the law to be generally applicable because the ban did not provide a formal and discretionary mechanism for individual exceptions, nor did it treat any comparable secular activity more favorably than religious exercise. *Id.* at 1088.

In the present case, N. Greene Stat. § 106(d) is neutral and generally applicable. Unlike in *Lukumi* and *Kennedy*, the central object of the statute is not to suppress an essential element of a religious belief. *See Kennedy,* 142 S. Ct. at 2422; *Lukumi*, 508 U.S. at 543. Firstly, one cannot say that conversion therapy is an essential element of any religion. The practice is not synonymous with prayer or a religious ritual – it is a mental health treatment. Furthermore, the object of N.

Greene Stat. § 106(d) is completely distinct from any desire to suppress religious practice. It was enacted to prevent harm to minors caused by conversion therapy, a conclusion which is backed by empirical evidence from leaders in the mental health field. R. at 4. If the statute was intended to target religion, the State would not have provided an exception to the ban on conversion therapy for health care providers working under the auspices of religion. *Id.* It is nonsensical to assert that a law allowing for religious exceptions was *intended* to target religion.

This case can be further distinguished from *Lukumi* because, while the City of Hialeah's ordinance was enacted to bar a group of religious individuals from acting in a religious capacity, N. Greene Stat. § 106(d) was enacted to bar a group of professionals from acting in a professional capacity. This fact also points to the statute's operational neutrality and general applicability – it prohibits health care providers from performing conversion therapy on minors, whether those minors seek it for religious or non-religious reasons: "the same conduct is outlawed for all." *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995).

The Ninth Circuit decision in *Tingley* provides further support that the legislative history presented in the record does not evidence that N. Greene Stat. § 106(d) was intended to target religion. Comments from North Green's legislators are *identical* to those made by California's legislators in *Tingley*. Like the lower court, the Ninth Circuit determined that such comments did not evidence hostility toward religion. 47 F.4th at 1085–86. In any event, this Court has "long disfavored arguments based on alleged legislative motives because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 560 U.S. 218, 383, 384 (2010). While Senators Lawson and Pyle may have spoken about the religious implications of N. Greene Stat. § 106(d), it does not negate the fact that the legislature as a whole enacted the law in order to protect the health and

welfare of minors. R. at 4, 8–9. *Tingley* also supports N. Greene Stat. § 106(d)'s general applicability. It cannot be denied that the statute, like the one at issue in *Tingley*, does not provide a formal and discretionary mechanism for individual exceptions or treat any comparable secular activity more favorably than religious exercise. 47 F.4th at 1086; R. at 4. In fact, the exact opposite can be argued. N. Greene Stat. § 106(d) provides an express and non-discretionary exception for conversion therapy performed under the auspices of religion. R. at 4. The statute treats religious exercise *more favorably* than its secular counterpart. Therefore, this Court should find that N. Greene Stat. § 106(d) is neutral and generally applicable.

B. The Principle of *Stare Decisis* Mandates that *Employment Division v. Smith* Should Not Be Overturned Because the Decision is Consistent with Prior Precedent and Is Not Egregiously Wrong.

"*Stare decisis* is rooted in Article III of the Constitution and is fundamental to the American judicial system and to the stability of American law." *Dobbs*, 142 S. Ct. at 2306 (Kavanaugh, J, concurring). "Adherence to precedent is the norm, and *stare decisis* imposes a high bar before this Court may overrule a precedent." *Id.* at 2306–07. This Court must have a good reason to overturn a prior decision above the belief "that the precedent was wrongly decided." *Haliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014). "[I]t is not alone sufficient that [this Court] would decide a case differently now than [it] did then." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). This Court should, respectfully, decline to overturn *Employment Division v. Smith* because the decision is consistent with prior precedent and adequately protects the right to religious freedom, while also ensuring that the State retains its power to protect the health and welfare of its citizenry.

In *Employment Division v. Smith*, employees of a private drug rehabilitation organization were fired from their jobs and denied unemployment compensation after they "ingested peyote for

sacramental purposes at a ceremony of the Native American Church." 494 U.S. at 874. Consumption of the substance violated Oregon law. *Id.* This Court was tasked with deciding "whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on the use of that drug . . . ." *Id.* Ultimately, the Oregon law was upheld, and it was determined that a neutral, generally applicable law that has the effect of burdening a particular religious practice need not be justified, under the Free Exercise Clause, by a compelling governmental interest. *Id.* at 879. This Court reasoned that "[it] has never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878–79.

More than thirty years later, this Court is now tasked with determining whether the neutral and generally applicable test set forth in *Smith* should be overturned. A prior decision should be overturned "when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). This Court also considers whether the decision was "egregiously wrong" and the "jurisprudential or real-world consequences" of overturning the decision. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020).

Employment Division v. Smith should not be overturned because it is consistent with past precedent. In 1905, in *Jacobsen v. Massachusetts,* 197 U.S. 11, 38 (1905), this Court held that an individual may be required to receive a vaccination against disease, even if his or her religion prohibits such procedures. This holding is analogous with the test set forth in *Employment Division v. Smith* since vaccine mandates are a classic example of a neutral, generally applicable law that may interfere with one's religious beliefs but remains constitutional due to its neutral framing and

ultimate goal of protecting public health. Similarly, in 1940, this Court in *Minnersville Sch. Dist. Bd. of Ed v. Gobitis*, 310 U.S. 586, 594–95, held that "[c]onscientious scruples have not, in the course of a long struggle for religious toleration, relieved the individual from obedience to a *general law* not aimed at the promotion or restriction of religious beliefs." (emphasis added). This Court went on to state that the "mere possession of religious convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibilities." *Id.* at 595. *Minnersville* evidences that the neutral and generally applicable framework has been in the mind of this Court and has been applied to Free Exercise claims for more than sixty years. The test set forth in *Employment Division v. Smith* does not "collide with past precedent." It merely reinforces it. *See Helvering*, 309 U.S. at 119.

In addition, *Employment Division v. Smith* is not "egregiously wrong." *Employment Division v. Smith* adequately protects religious freedom under the Free Exercise clause. Its test bars laws that fail to be facially neutral, but also those that are not operationally neutral, thus offering greater protection under the Free Exercise Clause. *See Lukumi*, 508 U.S. at 534. This Court's holding in *Lukumi* evidences that when a law is entirely neutral on its face, it will still be struck down if the essential objective of the law is to target religion. *Id.* Any law or regulation that is intended to target religion will be struck down under *Employment Division v. Smith*'s test. *See Kennedy*, 142 S. Ct. at 2407 (striking down a policy which had the object of prohibiting a religious practice). The test, thus, operates to protect the freedoms guaranteed under the Free Exercise Clause.

Furthermore, less than two years ago, this Court was asked in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) to reconsider *Employment Division v. Smith.* An issue was presented of whether an anti-discrimination policy that barred an agency from rejecting a

prospective foster family based on sexual orientation, unless approved by the city commissioner, violated the Free Exercise Clause. *Id.* at 1875–76. Although petitioners asked this Court to overturn *Employment Division v. Smith*, it instead found a way to dispose of the case outside of *Employment Division v. Smith.* When confronted with *Employment Division v. Smith* and having the opportunity to overturn the precedent, this Court declined to, a decision which demonstrates that the precedent is not egregiously wrong.

Finally, overturning *Employment Division v. Smith* would have the detrimental consequences of barring the State from exercising its power to protect the health and welfare of its citizenry. A person's religious beliefs may encourage or compel them not to receive a vaccine, to ingest illegal substances, or, relevant to this case, to receive conversion therapy. When the State is presented with empirical evidence that these practices are detrimental to public health and safety, it must be able to act by enacting a neutral and generally applicable law that regulates or bars them. Overturning *Employment Division v. Smith* would "strip the legislative department of its function to care for the public health and safety. . . ." *See Jacobsen*, 197 U.S. at 37. A minority of the population must not be able to defy the will of the State, acting in good faith for all of its citizenry. *See id. Employment Division v. Smith*'s neutral and generally applicable test ensures that this longstanding principle remains in full force and effect. For these reasons, this Court should, respectfully, decline to overturn *Employment Division v. Smith.*

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the decision of the of the Fourteenth Circuit Court of Appeals.

Dated: September 26, 2023

Respectfully submitted,

Team 20
Attorneys for Respondent