ELON UNIVERSITY SCHOOL OF LAW

BILLINGS, EXUM & FRYE NATIONAL MOOT COURT COMPETITION

FALL 2023 PROBLEM

No. 23-2020

IN THE SUMPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREEN,

Respondent.

RECORD ON APPEAL

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QUESTION PRESENTED

I. Under the First Amendment of the United States Constitution, does North Green Statute 106(d) discriminate against licensed health care providers freedom of speech and freedom to exercise religion when North Green state:
    a. suppresses the content of state licensed health care providers speech and discriminates their viewpoint;
    b. the statute is vague and overbroad;
    c. and the statute is not a neutral law of general applicability?

II. Should the Court Overrule Employment of Division v. Smith?

STATEMENT OF THE FACTS

Petitioner, Mr. Sprague, has worked as a licensed family therapist for more than twenty-five years, helping clients with various issues, including sexuality and gender identity. He firmly and sincerely believes that human identity is a design of God, and sex of each person is assigned at birth as a “gift from God. "According to Mr. Sprague’s honest belief, sex should not be changed as it supersedes an individual’s feelings, decisions or wishes. The Petitioner also believes that sexual relationships are beautiful and healthy, only if they occur between a man and a woman committed to one another through marriage. Although the petitioner does not work for a religious institution, his work of twenty-five years is deeply influenced and informed by his sincere Christian belief and viewpoint.

The North Green State enacted the law prohibiting licensed health care providers from practicing any form of conversion therapy on children.

The law contains the following provisions:

1. North Green Statute Section 105 (a): requires all health care providers to be licensed before they can practice in North Greene.

2. North Green Statute Section 106 (d): performing conversion therapy on a patient under the age of eighteen is added to the list of unprofessional conduct for licensed health care providers.
    3. The statute further defines "conversion therapy" as
        a. 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 feeling toward individuals of the same sex.
        b. "Conversion therapy" does not include counseling or psychotherapies that provide acceptance, support and understanding of clients or the facilitation of client's coping, social support, and identity exploration and development that do not seek to change sexual orientation. or gender identity.

Mr. Sprague only engages in verbal counseling, or what some refer to as "talk therapy" with his clients. He does not utilize any physical methods of counseling or treatment with his clients.

PROCEDURAL HISTORY

Mr. Sprague brought suit against the State of North Greene in August 2022, seeking to enjoin enforcement of N. Greene Statute Section 106(d). He alleged that North Greene's prohibition on practicing conversion therapy on minor violates his free speech and free exercise right under the First Amendment, as well as those of his clients. The petitioner sought preliminary injunction, which the State of North Greene opposed, and the defendant filed a motion to dismiss the complaint.

The District Court denied Mr. Sprague's motion for preliminary injunction and granted the State's motion to dismiss. While concluding that the Petitioner has the standing to assert his claim, the court rejected his constitutional claims and dismissed the action.

The Petitioner appealed the District Court decision in the U.S. Court of Appeals for the Fourteenth Circuit. The Court of Appeals denied Mr. Sprague's appeal. The U.S. Supreme Court granted his petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

I. Freedom of Speech

North Green Statute Section 106(d) is a content-based regulation of Mr. Sprague's free speech rights. The District Court and the Court of Appeals for the Fourteenth Circuit erred in their decisions to reverse Mr. Sprague's claim for the following reasons.

First, North Green Statute is a content-based restriction on speech and thus, is subject to the strictest scrutiny. Characterizing speech as professional conduct does not change the standard of review for a statute that facially suppresses speech. Additionally, North Green statute restricts the communications between counselor and patient when no other treatment or procedure, besides merely words, is used in the therapy. Furthermore, the statute cannot pass strict scrutiny because it is not narrowly tailored to meet a compelling governmental interest.

Second, North Green statute unconstitutionally discriminates against Mr. Sprague's, and all licensed health providers, viewpoint. The government cannot suppress viewpoints that contain messages it disfavors or finds controversial.

Lastly, North Green law is unconstitutionally vague and overbroad. Laws that include subjects which are too difficult to define are vague and laws that violate free speech and leave no alternative methods of communication open are overbroad.

North Green Statute 106(d) discriminates against the content of speech, viewpoint of speech, and is vague and overbroad, therefore the statute should be reviewed under strict scrutiny analysis not rational basis. Furthermore, the statute cannot pass strict scrutiny because it is not narrowly tailored to meet a compelling state interest.

II. Free Exercise

The North Greene Law section 106(d) provision unconstitutionally targets and infringed on the free exercise of rights of the Petitioner thus violating his constitutional rights under the First Amendment. The District Court and the Court of Appeals for the Fourteenth Circuit erred in their decisions to reverse Mr. Sprague's claim for the following reasons.

First, the North Greene Statute Section 106 (d) is not a neutral law of general applicability as it's adverse impact on Petitioner's religious activities is a targeted design. North Greene Law is designed to silence people of faith and their religious belief about human sexuality. The statute is not of general applicability as it specifically targets those who hold conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs. It also describes counselling as a religious practice. Such religious speech is vigorously protected by the First Amendment.

Second, this court should overrule Employment Division v. Smith, 494 U.S. 872 (1990), as North Greene state interests in enforcing the proposed law prohibiting licensed health care providers from practicing any form of conversion therapy on children is not sufficiently compelling to outweigh respondent's right to the free exercise of his religion under the First Amendment. The State's interest in enforcing its prohibition, to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. However, in the instant case the State of North Greene relies on mere speculation about potential harm to the children under eighteen that is allegedly associated with conversion therapy. Speculative harm cannot suffice to abrogate the free exercise of religion right of individuals especially that the beliefs are proven to be sincere and honest.

Therefore, this Court should overrule the decision in Employment Division v. Smith and rule that the North Greene Law section 106(d) provision unconstitutionally targets and infringed

on the free exercise of rights of the Petitioner thus violating his constitutional rights under the First Amendment.

ARGUMENT

I. NORTH GREEN STATUTE SECTION 106(D) RESTRICTING STATE LICENSED COUNSELORS FROM PRACTICING CONVERSION THERAPY ON MINORS VIOLATES SPRAGUE'S FIRST AMENDMENT RIGHT TO FREE SPEECH

North Green Statute Section 106(d) subjecting state licensed health care providers to discipline if they practice conversion therapy involving only spoken or written words on patients under 18 years of age is a content-based regulation of Mr. Sprague's free speech rights. Mr. Sprague is a hardworking licensed family therapist of the Christian religion, who has helped many clients, who share the same religious viewpoints, with issues including sexuality and gender identity. Mr. Sprague only engages in verbal counseling, never using any physical methods of counseling or treatment. The First Amendment of the United States Constitution, applicable to the States through the fourteenth amendment, grants citizens the right to freedom of speech, "Congress shall make no law...prohibiting the free exercise... or abridging the freedom of speech." USCS Const. Amend. 1. Under the first amendment the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972). Since Mr. Sprague's treatment consists only of spoken words, North Green law is a content-based regulation not a conduct-based regulation, therefore, strict scrutiny should apply. Additionally, North Green law suppresses Mr. Sprague's viewpoint simply because it is a controversial issue that the government disagrees with. Viewpoint discrimination is strictly forbidden by the Unites States Constitution.

A. North Green Statute Restricting Conversion Therapy on Minors is a Content-Based Restriction That Fails to Survive Strict Scrutiny.

North Green Statute Section 106(d) which adds preforming conversion therapy on a minor client to the list of unprofessional conduct for licensed health care providers, facially suppresses the constitutional right to free speech. Strict scrutiny standard of review applies to laws burdening fundamental rights such as the first amendment right to freedom of speech. Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 642–43 (1994). The logic applies even if the infringement of speech is a byproduct as opposed to the underlying intent of a statute. Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd., 502 U.S. 105, 116 (1991). Under strict scrutiny standard of review, a law is upheld if it is proven necessary to achieve a compelling governmental interest and the government holds the burden of proof. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

Content-based discrimination regulates the message, subject, or idea of the law. It discriminates against speech based on the substance of what is communicated. North Green statute restricting state-licensed health care providers from practicing conversion therapy on minors facially discriminates against the content of speech because it regulates speech-only therapy, and no conduct exists in spoken words. Therefore, strict scrutiny must be applied regardless of the "government's benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech." Cincinnati v. Discovery Network, Inc., 507 U. S. 410, 429 (1993). Additionally, North Green cannot meet the burden of proving its statute meets strict scrutiny because the law is not necessary to serve a compelling state interest.

Characterizing speech as professional conduct does not change the standard of review for a statute that restricts free speech. In NAACP v. Button, 371 U.S. 415 (1963) (holding that the first amendment freedom of speech cannot be avoided by labeling speech as conduct). Wollschlaeger v. Governor, 848 F.3d 1293 (11th Cir. 2017) (holding that a law restricting speech by doctors to patients about firearm ownership is a content-based restriction on speech. Just

because the speakers are professionals does not mean rational basis review applies since if rationality was the standard, the government could restrict speech based on its disagreement with the message conveyed). National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (US 2018) (holding that a state law requiring licensed clinics to disclose to pregnant patients that the state provides free abortions and requiring unlicensed clinics to give notice of their unlicensed status violates the first amendment because the law is a content-based restriction and cannot survive strict scrutiny). Otto v. City of Boca Raton, 981 F.3d 854 (11th Cir. 2020) (holding that an ordinance that prohibited therapists from engaging in conversion therapy was a content-based regulation of speech that could not survive strict scrutiny; characterizing the ordinance as professional conduct cannot lower the bar). Furthermore, respondent relies on a U.S. Supreme Court case to argue speech based conversion therapy is professional conduct, Pickup v. Brown 740 F.3d 1208, 1221 (9th Cir. 2014) (holding that a state's ban in sexual orientation change efforts did not violate the first amendment because it was a regulation of professional conduct only incidentally burdening speech) but this case should not be considered because it has been rejected by other U.S. Supreme court decisions.

Statutes restricting pure communications violate the first amendment. Conant v. Walters, 309 F.3d 629 (9th Cir. 2002) (holding that a federal mandate prohibiting recommendation of certain controlled substances by physicians violates the first amendment rights of physicians because the mere discussion of the benefits of a controlled substance do not violate federal law). Reed, 576 U.S. 155. (holding that a law regulating the posting of signs is a facially content-based restriction because it creates restrictions that depend entirely on the communicative content of the sign, thus there is no need to consider the governments justifications or purposes for enacting the code to determine whether it is subject to strict scrutiny). Simon & Schuster, Inc., 502 U.S. 105 (holding that a state law requiring entities to relinquish income from the depiction of crimes

violates the first amendment because it is a content-based regulation since it is directed only at works with a specific communication). Nevada Comm'n Ethics v. Carrigan, 564 U.S. 117 (2011) (holding that a vote is expressive conduct and not speech because it only serves a direct legal effect and has no further meaning or communication).

Similarly to the doctors in Wollschlaeger, here the speech of licensed counselors cannot be restricted and labeled as professional conduct simply because the speakers have a license. If this was the case, the state could restrict speech it finds offensive or distasteful of any licensed professional since rational basis review almost always means a law is upheld. Similarly to the decision in NIFLA, where the statute was controlling the speech of clinics, here North Green law is controlling the content of counselor's speech. Just because the speech is spoken by professionals does not mean it is conduct and subject to less strict scrutiny. Under North Green law the words counselors can speak are being censored, this is content not conduct restriction. Therefore, if content of speech is being restricted, the statute can only survive if it passes strict scrutiny. Similarly to the statute in Otto, North Green statute is restricting the content of health care providers speech. The state cannot get away with restricting speech merely by relabeling the speech as professional conduct when speech therapy consists solely of words and does not include any procedure that can be considered conduct. Similar to how doctors can discuss medical marijuana in Contant, health care professionals have the right to provide speech-based conversion therapy to any client since it only involves communications between the patient and health care provider. Just as the law regulating the content of signs in Reed, here North Green law is regulating the content of health care provider's speech, and the restriction depends entirely on the communicative content of the words spoken. Therefore, strict scrutiny applies regardless of the state's justifications for enacting the law. Similarly to Simon, North Green law is a content-based regulation because it is directed only at works with a specific content, in this case

that is speech-based conversion therapy. North Green law does not regulate all topics that may cause mental harm to minors, it focuses specifically on the content of conversion therapy. Unlike the holding in Carrigan, speech-based conversion is different from a vote because it has no effect beyond what is communicated therefore, it cannot be labeled as conduct.

In Pickup, the U.S. Supreme Court held that therapeutic speech is non-speech conduct and protected only by rational basis review. But the U.S. Supreme Court in NIFLA rejected Pickup's holding and held that therapeutic speech is protected by the first amendment. Pickup compared speech treatments to medical procedures, but there is a clear difference, one includes the content of speech and the other involves conduct. The first amendment does not protect medical procedures, but it does protect therapeutic speech. NIFLA also rejected categorizing speech as professional conduct simply because the speech takes place in a professional setting. Id. at 2373. Therefore, Pickup's holding should not be considered when determining which scrutiny should apply.

North Green statute cannot pass strict scrutiny. North Green justifies its statute by stating that it intends to protect minors against exposure to serious harm caused by conversion therapy. The state's justification may be a compelling state interest, but it is not narrowly tailored because there are other ways the state can protect children from harm besides suppressing the speech spoken by licensed health care providers. Plaintiffs in Vazzo v. City of Tampa, 425 F. Supp. 3d 1087 (2019) argued that "informed consent provisions outlining the required disclosure prior to engaging in SOCE counseling with a minor would have been far less restrictive on the plaintiff's speech." The same idea can apply in this case, informed consent provisions would allow parents and minors to be more aware of the therapy to be provided thus, if both the parent and the child agree to proceed, any mental harm to the child should be lessened if not eliminated. Additionally, North Green provides no evidence proving conversion therapy, that relies solely on speech,

causes any direct physical harm to children therefore failing to show that the statute directly advances a government interest.

North Green Statute Section 106(d) does not regulate professional conduct but rather the content of the speech spoken by state licensed health care providers. Since the statue regulates conduct, the statute can only survive if it passes struct scrutiny. North Green statute cannot pass strict scrutiny because North Green fails to prove that the law is narrowly tailored to prove a compelling state interest.

B. **North Green Law Section 106(d) Unconstitutionally Discriminates Speakers Viewpoint.**

North Green Statute Section 106(d) not only discriminates against the first amendment right to free speech based on content but also based on viewpoint. Viewpoint discrimination occurs when the government targets specific views speakers have on a subject. Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). To prevail on a viewpoint discrimination claim, a plaintiff must prove (1) the government law regulating his or her speech is unreasonable and (2) the law is not viewpoint neutral. Vazzo, 2019 U.S. Dist. LEXIS 35935. Conversion therapy is grounded in a particular viewpoint about sex, gender, and sexual ethics. The government cannot restrict a speaker's speech merely because it disagrees with the viewpoint of the speech. Regulating the content of professionals' speech allows the risk that the "government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." Turner Broadcasting Sys., 512 U.S. 622, at 641.

A statute violates the first amendment freedom of speech when it suppresses viewpoints that contain messages it disfavors or finds controversial. Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) (holding that an ordinance making it illegal to play movies depicting nudity at drive in theaters with screens visible from public streets is an unjustifiable content-based

discrimination since a city may not target certain types of speech that it deems more offensive than others, except where speech invades an unwilling viewer's privacy to such a degree that the speech cannot be avoided). R. A. V. v. St. Paul, 505 U.S. 377 (1992) (holding that a law prohibiting the placement of hateful symbols goes beyond content discrimination to viewpoint discrimination since it is a prohibition of fighting words that contain certain messages of racial supremacy). Rosenberger, 515 U.S. 819 (holding that when a university denied a student's request for funding of a publication for the sole reason that the publication promoted a particular religious belief while funding other secular student publications it violated the free speech clause by discriminating based on the speaker's viewpoint). Otto, 981 F.3d 854 (discussing that an ordinance that prohibited therapists from engaging in conversion therapy discriminates a viewpoint since the counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics). Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (US 2018) (holding that a law barring discrimination against customers on the basis of sexual orientation violated the state's duty under the first amendment not to base laws or regulations on hostility to a religion or religious viewpoint when a baker declined to bake a wedding cake for a gay couple due to his religious beliefs).

In Erznoznik, the court did not allow the restriction of speech to protect minors from exposure to movies depicting nudity because any person can choose not to watch the movie, similarly in this case, any minor or parent can choose not to seek out conversion therapy. Conversion therapy is not being forced upon anyone, instead people who feel they need conversion therapy because they have certain beliefs or unwanted desires seek conversion therapy. It is clear North Green is specifically against conversion therapy because the statute does not address other therapies that have ever caused harm to a minor. A state cannot target certain types of speech that it deems offensive than others, that would be an unjustifiable

content-based discrimination of speech. Additionally, the government cannot suppress speech just to restrict certain ideas minors may be exposed to. Just as the holding in R.A.V., North Green statute discriminates against the viewpoint of health providers because it prohibits speech that contains messages of religious perspective that disagree with certain sexualities and identities. Under North Green statute, patients can only receive one perspective on an issue, in this case, patients can only receive therapy that supports their sexual orientations or gender identities but cannot receive therapy that attempts to change it. Similar to the matter in Rosenberger, North Green prohibits conversion therapy for minors for the sole reason that it promotes a religious belief that the state disagrees with or finds offensive. The justification the state uses is not the real reason it suppresses speech on conversion therapy because the statute does not address other issues that have caused mental harm to minors and there are other ways the state could have protected minors without restricting speech. Also, if North Green's goal was to prevent harm to minors, why are unlicensed counselors allowed to provide conversion therapy to minors? Therefore, North Green state discriminates against the viewpoint of health providers who provide conversion therapy to minors. Similar to the holding in Otto, this court should also find that North Green statute discriminates viewpoint because conversion therapy is grounded in a viewpoint about sex, gender, and sexual ethics and this point of view cannot be suppressed simply because the state finds it wrong or unethical. Similar to the baker who acted according to his religious beliefs in Masterpiece, here Mr. Sprague chooses to perform conversion therapy due to his deeply rooted religious beliefs about sex and gender. North Green bases its law on hostility towards this religious based viewpoint and thus, the law is unconstitutional viewpoint discrimination which violates the first amendment right to freedom of speech.

For these reasons, North Green statute restricting state licensed health providers from providing conversion therapy to minors unconstitutionally discriminates the viewpoint of health care providers and thus violates Mr. Sprague's first amendment right to freedom of speech

C. **North Green Statute Section 106(d) is Unconstitutionally Vague and Overbroad.**

North Green law prohibiting licensed health providers from providing conversion therapy to minors is unconstitutionally vague and overbroad. To prove law is unconstitutionally vague a plaintiff must prove either the law (1) fails to provide people of ordinary intelligence to understand what conduct the law prohibits or (2) authorizes or encourages arbitrary and discriminatory enforcement. Vazzo, 2019 U.S. Dist. LEXIS 35935, at 23. A law is overbroad when every application of the law creates the risk that ideas might be suppressed, such as when the law gives overly broad discretion to the person enforcing it. Id. at 25.

Laws that include subjects which are too difficult to define are vague and laws that violate free speech and leave no alternative methods of communication open are overbroad. Vazzo, 2019 U.S. Dist. LEXIS 35935 (plaintiffs sufficiently alleged that an ordinance prohibiting any provider from practicing conversion therapy on minors is unconstitutionally vague because sexual orientation and gender identity are difficult to define and the law is overbroad because it places too much discretion in government officials to restrict free speech and violates the free speech rights of all licensed mental health providers who provide conversion therapy to minors without leaving open alternative methods of communication).

Here North Green statute is unconstitutionally vague because sexual orientation and gender identity are subjects that contain so many factors making it difficult for a statute to define and thus, leaving people confused on what exactly the statute prohibits. For example, sexual orientation includes topics of gender, romantic attraction, lack of attraction, sexual fantasies,

practices, and more. Therefore, the statute is unconstitutionally vague because a licensed professional like Mr. Sprague is left to guess or assume what issues the statue includes and excludes and what is or is not considered a violation of the statute. Furthermore, North Green statute is overbroad because it violates the free speech rights of all licensed health care providers who provide conversion therapy to minors without leaving any alternative method of communication. The statute does not state an alternative way of helping minors who want to receive conversion therapy due to issues about sexual identity or gender that they wish to address. North Green statute allows counselors to discuss the pros and cons of conversion therapy with minors but if a patient wishes to eliminate unwanted sexual attractions or identity, the counselor would be forced to turn down the patient. This means many patients suffering from unwanted desires are not able to receive the therapy they may need; this can also damage a minor's mental health and cause harm.

For these reasons, North Green statute restricting state licensed health providers from providing conversion therapy to minors is both unconstitutionally vague and overbroad and thus violates Mr. Sprague's first amendment right to freedom of speech.

North Green Statute 106(d) discriminates against the content of speech, viewpoint of speech, and is vague and overbroad, therefore the statute should be reviewed under strict scrutiny analysis not rational basis. Furthermore, the statute cannot pass strict scrutiny because it is not narrowly tailored to meet a compelling state interest.

II. NORTH GREENE LAW IMPERMISSIBLY TARGETS RELIGIOUS SPEECH INFRINGING ON THE FREE EXERCISE RIGHTS OF HOWARD SPRAGUE UNDER THE FIRST AMENDMENT.

The lower court erred in its decision when it held that the State of North Greene's law banning conversion therapy does not violate the free exercise right of the Petitioner under the First

Amendment. Equally, the lower court erred in its application of the rational review test and in holding that the statute at issue is a neutral law of general applicability.

First, the law cannot be said neutral and should be held unconstitutional under the Supreme Court decision in Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520 at 534 (1993).

Here, the North Greene statute clearly targets religious practices of the petitioner. The American Psychological Association, which was relied upon by the North Greene General Assembly in adopting the law, acknowledged that the most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs. Howard Sprague v. State of North Greene, dissenting at 15.

Given the "special solicitude" the First Amendment gives religious speech, the Supreme Court has directed lower courts to zealously guard against even "subtle departures from neutrality." Id.

Second, if a policy is determined to be unneutral and not generally applicable, the policy must pass strict scrutiny to survive a First Amendment challenge. Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

Here, it is fatal that the North Greene's law is designed to silence people of faith and their religious beliefs about human sexuality.

Third, the Constitution protects "the rights to harbor religious beliefs inwardly and secretly" and "the ability of those who hold religious beliefs of all kinds to live out their faith in daily life." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2420 (US 2022).

Mr. Sprague, the petitioner, has worked as a licensed family therapist for more than twenty-five years, helping clients with various issues, including sexuality and gender identity. He is career and his honest and sincere beliefs prove that he lives out his faith in his daily life.

For the foregoing reasons, Mr. Sprague's free exercise rights were violated.

A) **The Statute is Not a Neutral Law of General Applicability; It's Adverse Impact on Petitioner's Religious Activities is a Targeted Design.**

The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Church of Lukumi, 508 U.S. 520, 531 (1993). "Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Thomas v. Review Bd. of Indiana Employment Security Div., 450 U.S. 707, 714 (1981).

Neither the State nor the courts below have questioned the sincerity of petitioners' professed beliefs and his desire to conduct conversion therapy on minors for religious reasons. This Court, first and foremost, must consider the Petitioner's violation of the free exercise rights under the First Amendment.

In addressing the constitutional protection for free exercise of religion, this Court established the general proposition that 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. Employment Div., Dept. of Human Resources of Ore. v. Smith, supra. Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. Church of Lukumi, 508 U.S. 520, 531–32 (1993).

A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest. Id.

Here, the lower court erred in finding that the North Greene State statute is neutral and of general applicability.

Neutrality

If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, see Employment Div., Dept. of Human Resources of Oregon v. Smith, supra, 494 U.S., at 878–879; and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest. Id. There are, of course, many ways of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct. Church of Lukumi, 508 U.S. 520, 533–34.

To determine the object of a law, this Court should begin with its text, for the minimum requirement of neutrality is that a law does not discriminate on its face. Id at 534. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context. Id.

Here, the lower court determined that the law is neutral on its face stating, "North Greene's law prohibits therapists from practicing conversion therapy on minors. It makes no reference to religion, except to clarify that the law does not apply to practice by religious counselors." Id at 8. We agree that these words are consistent with the claim of lack of facial discrimination, but the argument is not conclusive. As held by Lukumi, "facial neutrality is not determinative." Id.

There are further respects in which the text of the North Greene enactments discloses the improper attempt to target the petitioner's religious beliefs.

The American Psychological Association, which was relied upon by the North Greene Central Assembly in adopting the law, acknowledged that the most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes most exclusively individuals who have strong religious beliefs. It also described counseling as a religious practice. Howard Sprague v. State of North Greene, dissenting, Knotts. J.

Such religious speech is vigorously protected by the First Amendment, Kennedy, 142 S. Ct. at 2421. And given the "special solitude" the First Amendment gives religious speech, the Supreme Court has directed lower courts to zealously guard against even "subtle departures from neutrality, Lukumi, 508 US at 534. Courts must examine a law's "real operation" and discern its true "object" id. at 535.

Under Smith, 494 U.S. 872 (1990), neutral and generally applicable laws and policies that incidentally burden religion are not subject to strict scrutiny. However, laws or policies that allow the government discretion to make individualized exemptions based on unique circumstances are not neutral and generally applicable laws. If a policy is determined to be unneutral and not generally applicable, the policy must pass strict scrutiny to survive a First Amendment challenge. Id.

Here, it is fatal that North Greene Law is designed to silence people of faith and their religious belief about human sexuality.

The statute is not of general applicability as it specifically targets those who hold conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs. It also describes counselling as a religious practice. Such religious speech is vigorously protected by the First Amendment.

Additionally, the fact that the North Greene Law may also inhibit counseling sought for secular reasons does not cure its lack of neutrality. As Lukumi held, a law can implicate "multiple concerns unrelated to religious animosity" and still violates neutrality, Lukumi, 508 US at 535. No matter a law's impact on secular activity, courts must assess if its "adverse impact" on religious exercise is an incidental flaw or a "targeted design". id.

Additionally, the State's showing of a legitimate government interest in regulating medical profession, but in the meantime "targeting" individuals with strong religious beliefs is "self-evident". Serving one class of people at the expense of the constitutional rights of another is unjustified. The North Greene statute includes almost exclusively individuals who have strong religious beliefs.

Finally, the Constitution protects "the rights to harbor religious beliefs inwardly and secretly" and "the ability of those who hold religious beliefs of all kinds to live out their faith in daily life." Kennedy, 142 S. Ct. 2407, 2420 (US 2022).

Mr. Sprague, the petitioner, has worked as a licensed family therapist for more than twenty-five years, helping clients with various issues, including sexuality and gender identity. He is career and his honest and sincere beliefs prove that he lives out his faith in his daily life. And Mr. Sprague does not surrender his free-exercise rights through his license or through government disagreement with his views.

The Supreme court's decision in Smith should be overruled, as the holding in Smith would allow the outcasting the disfavored speech by passing laws like the North Greene law. Under the pretense of being "neutral on their face" these laws, under Smith, will severely burden the free exercise of religion.

B) **With No Historical Analogue of Censoring the Free Exercise of Religion, and in the Light of the Supreme Court's Judicial Tendency this Court should Overrule Employment Division v. Smith.**

In the free-exercise context, the best historical evidence establishes that the government cannot interfere with religious exercise absent historical analogue. Because there is no historical analogue for censoring religious counseling, this case would provide a good vehicle for the Supreme Court to overrule Smith and restore a historically based standard that genuinely protects religious exercise.

This Court has articulated a standard in previous decisions to resolve conflicts between religious expression under the Free Exercise Clause and the interests of government in regulating societal conduct. See, e.g., S. Pepper, Taking the Free Exercise Clause Seriously, 1986 B.Y.U. L. REV. 299 (1986); S. Pepper, The Conundrum of the Free Exercise Clause - Some Reflections on Recent Cases, 9 N.KY. L. REV. 265 (1982); S. Pepper, Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause, 1981 UTAH L. REV. 309.

The first case to articulate the standard now used was Sherbert v. Verner, 374 U.S. 398 (1963) involving a member of the Seventh-Day Adventist Church who was discharged by her employer for refusing to work on Saturday. 374 U.S. at 398. The state Employment Security Commission denied her unemployment benefits because she failed without good cause to accept "suitable" work. Id. at 401. The petitioner quit his job when he was transferred to a military production job in violation of his beliefs as a Jehovah's Witness. The state Employee Security Division denied his benefits because a voluntary termination motivated by religion was not good cause objectively related to the work. 450 U.S. at 712.

Sherbert contains the definitive statement of standard: "[t]he conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order." Id. Where no such threat exists, denial of unemployment benefits is permissible only where: 1. the

disqualification as a beneficiary represents no infringement by the State of the constitutional rights of free exercise; or 2. because any incidental burden on the free exercise of a claimant's religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate. Id. at 403

The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. Id.

The Sherbert decision holds that disqualification from state unemployment benefits because of religiously motivated conduct constitutes a burden on the free exercise on a claimant's religion "if the purpose or effect of a law is to impede the observance of one or all religions," even if the burden is indirect. Id. at 404.

Sherbert then analyzed the second part of the test – the nature of the state interest asserted. If the interest is compelling, whether the interest justifies the substantial infringement of First Amendment rights. Id. The Court stated in Sherbert: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation ...." id. at 406. If the state interest is compelling and the regulation would infringe on First Amendment rights, the state must demonstrate that no alternative forms of regulation avoiding Free Exercise infringement exists.

Here in this case, the State claims that the religious practices of the Petitioner allegedly result in harm to minors. However, the State does not provide any compelling evidence, that would include concrete statistical analysis, or any other reliable research data that would help this Court conclude that absent these religious practices minors would not suffer the alleged harm. The State in the instant case failed to do so. Therefore, following Sherbert, merely speculative

interest [of the State] cannot override a Free Exercise claim. Smith II, 307 Or. at 71-72. Constitutional rights of the Petitioner to practice his religion cannot be judged in the abstract. Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. Church of Lukumi Babalu Aye, Inc. v. City of Hialeah., 508 U.S. 520, at 547 (1993).

In Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) an employee converted to the Seventh Day Adventist Church and informed her employer that she could no longer work on her Sabbath. She was discharged, and the state Unemployment Appeals Commission denied benefits because her refusal to work scheduled shifts constituted misconduct connected with her work. 480 U.S. at 138. This Court in Hobbie, followed the standard established in Sherbert that such infringements are subject to strict scrutiny, requiring proof that they are justified by a compelling government interest.

Further, in Thomas, 450 U.S. 707, where the plaintiff was a Jehovah's Witness who worked for a Machinery Company. The employer transferred the plaintiff to a department that produced turrets for military tanks. Plaintiff claimed that, due to his religious beliefs, he could not work in a department that produced war materials and quit the job. The Employment Review Board denied the plaintiff's claim for unemployment benefits. This Court held that Under the Free Exercise Clause, a state may not deny unemployment benefits to an individual who leaves employment based on religious beliefs.

This Court in Thomas clearly stated: "The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is

the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." id. at 718.

The tendency of application of the Supreme Court's directory to lower courts to zealously guard against even "subtle departures from neutrality", continues with Church of Lukumi Babalu Aye, Inc., 508 U.S. 520, 534. A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous scrutiny. Id. To satisfy the commands of the First Amendment, a law restrictive of religious practice must advance "interests of the highest order'" and must be narrowly tailored in pursuit of those interests. Id.

Then in 2014 this Court in Burwell v. Hobby Lobby Stores, Inc. 573 U.S. 682 (2014) continues the tendency to protect religious belief and holds that "a regulation that requires a closely held corporation to provide health-insurance coverage for contraception violates the Religious Freedom Restoration Act of 1993 if the regulation impinges on the sincerely held religious beliefs of the corporation's owners." Id. at 733.

In the most recent cases, like Fulton v. City of Philadelphia, Pennsylvania, 141 S. Ct. 1868, 1878 (US 2021) this Court unwaveringly follows the trend and holds "A law is not generally applicable under the Free Exercise Clause if it invites the government to consider the particular reasons for a person's conduct by creating a mechanism for individualized exemptions. When such a system of individual exemptions exists, the government may not refuse to extend that system to cases of religious hardship without a compelling reason." Id. at 1877.

And finally, Kennedy, 142 S. Ct. 2407, 2422 reaffirms the Supreme Court's judicial stance on the matter and holds that a government policy will not qualify as neutral if it is "specifically directed at ... religious practice." Id.

This case is indistinguishable from the Sherbert-Kennedy line of decisions. The Supreme Court's decision in Smith only interrupts the judicial movement towards a stricter than just rational review test. In claiming speculative state interests the Respondent attempts to create an issue that has already been decided and when this Court has already articulated the standard. - "any incidental burden on the free exercise of a claimant's religion may be justified by a compelling state interest in the regulation of a subject within the State's constitutional power to regulate." Sherbert, 374 U.S. 398 at 403. Therefore, this Court should rule that the lower applied a wrong rational basis standard and ignored the existing judicial movement.

Conclusion

North Green Statute 106(d) discriminates against Mr. Sprague's first amendment right to freedom of speech and free exercise and fails to pass strict scrutiny. For these reasons, this Court should reverse the District Courts decision and hold that the challenged North Green law violates Mr. Sprague's first amendment rights.