Docket No. 23-2020

IN THE

Supreme Court of the United States

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

BRIEF FOR THE PETITIONER

Team Number: 25

QUESTIONS PRESENTED

I. Whether the appellate court erred when it failed to hold that a professional misconduct statute prohibiting talk therapy to minors was unconstitutional under the Free Speech Clause of the First Amendment when the statute restricted what licensed healthcare providers could say while treating willing patients through talk therapy in order to accomplish the patients' healthcare outcome.

II. Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

United States Supreme Court

United States Court of Appeals

United States District Court

Constitutional Provisions

Statutes

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit appears in the record on pages 3-16.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are reproduced in the Appendix to this brief. App., *infra,* 1a-2a.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Plaintiff/petitioner Howard Sprague serves as a licensed family therapist in North Greene. R. at 3. For over 25 years, he has helped clients with various issues, including sexuality and gender identity. *Id.* When working with clients on sexuality or gender identity issues, Mr. Sprague engages in "talk therapy." *Id.* Talk therapy is a method of reparative therapy that "encompasses therapeutic practices" in efforts "to change a person's sexual orientation or gender identity." Mr. Sprague's talk therapy consists of strictly non-aversive, speech-only counseling without "any physical methods of counseling or treatment." *Id*.

Mr. Sprague is also a devout Christian. *Id*. As such, he "grounds human identity in God's design." *Id.* This informs his belief that the sex each person is assigned at birth is "a gift from God." *Id*. As a "gift from God," one's gender at birth "supersedes an individual's feelings, decisions, or wishes" and therefore, should not be changed. *Id.* Moreover, Mr. Sprague's Christian beliefs teach "that sexual relationships are beautiful and healthy, but only if they occur between a man and a woman committed to another through marriage." *Id.*

Mr. Sprague's Christian beliefs "inform and influence" his work as a licensed family therapist. *Id.* Although he does not work for a religious institution, he holds himself out as a

Christian provider of family services. *Id.* Many of Mr. Sprague's clients share his religious viewpoints. *Id.* In fact, many of his clients seek him out specifically because he is a known Christian provider of family therapy services. *Id.* Notably, in over 25 years of service, the record reflects no reports of harm from Mr. Sprague's clients.

North Greene (the "State"), however, passed legislation that not only strips Mr. Sprague's ability to offer such services to his clients, but also subjects him to discipline for performing talk therapy on minors. *Id*. at 3-4. In 2019, the legislature added to its licensing scheme for health care providers, which requires health care providers to be licensed in order to practice within North Greene, *see* N. Greene Stat. § 105(a), a prohibition on the practice of "conversion therapy" from licensed health care providers. R. at 3-4. Under the State's "Uniform Professional Disciplinary Act," which "lists actions deemed 'unprofessional conduct' for licensed health care providers and subjects them to discipline[,]" the legislature added "conversion therapy on a patient under age eighteen[.]" N. Green Stat. § 106(d). Section 106 (the "Statute") defines "conversion therapy" as follows:

> (1) "Conversion therapy" means 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."
> (2) "Conversion therapy" does not include 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.

Id. § 106(e)(1)-(2). Further, the legislature expressly allows for the following three exceptions in which the Statute may not be applied:

> (1) [Speech by licensed health care providers that] does not constitute performing conversion therapy[;]

> (2) Religious practices or counseling under the auspices of a religious denomination, or organization that does not constitute performing conversion therapy by licensed health care providers[;] and
> (3) Nonlicensed counselors acting under the auspices of a religious denomination, church, or organization.

N. Greene Stat. § 106(f). The Statute additionally provides an exemption for "[t]herapists, counselors, and social workers who 'work under the auspices of a religious denomination, church, or religious organization[.]'" R. at 4 (quoting N. Greene Stat. § 111). Absent in this language, however, is the legislature's definition of "under the auspices of a religious denomination." *Id.*

Given these restrictions, Mr. Sprague is barred from providing the aid specifically sought from his minor clients. Although the Statute does not bar all conversation involving reparative therapy, it precludes Mr. Sprague "from having certain conversations with clients, who, along with their parents, have consented to such therapy." *Id.* at 12. Mr. Sprague can still perform talk therapy on adults and refer minor patients seeking such therapy to out of state providers or those working "under the auspices of a religious organization." *Id*. at 4. Further, he remains able to express his views and opinions on reparative therapy to the public and minor patients, but his clients did not seek him out for his personal views or opinions. *Id*. Rather, they sought his assistance because his specific method of talk therapy was grounded on his Christian beliefs. *Id.* at 3.

The stated intent behind the Statute's enactment was to regulate the "professional conduct of licensed health care providers." *Id.* The State's General Assembly found "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*. In doing so, the General Assembly placed considerable reliance on the opinion of the American Psychological Association ("APA"). *Id*.

Such reliance doomed Mr. Sprague's ability to practice talk therapy with children seeking such services. Despite describing such counseling as religious practice, the APA categorically "opposes conversion therapy[.]" *Id.* at 4, 15. The APA acknowledged that such practices are directed almost exclusively to individuals with strong religious beliefs. *Id.* at 15. Nevertheless, the APA denies the efficacy of conversion therapy. Based off "anecdotal reports of harm," the APA concluded that "conversion therapy has not been demonstrated to be effective." *Id.* at 7.

Instead, the APA champions an opposing viewpoint, a different approach. Their recommended approach emphasizes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework." *Id*. at 4. In doing so, the APA "encourages psychologists to use an affirming, multicultural, and evidence-based approach[.]" *Id*. Despite this endorsement of an "evidence-based approach," the Legislature ignored "evidence [presented to them] that conversion therapy, and particularly talk therapy, is safe and effective" when enacting the Statute. *Id.* at 7. This, however, was not an isolated incident in the circumstances leading to the enactment of the Statute.

Leading up to the Statute's enactment, multiple bill sponsors expressed animus towards the practice of conversion therapy. One sponsor, State Senator Floyd Lawson, announced his intent was to eliminate "barbaric practices" such as electroshock therapy and inducing vomiting. *Id.* at 8-9. Another sponsor, State Senator Golmer Pyle, made comments that he attempted to justify based on contrasting his experiences having a gay daughter, but also having a friend who tried conversion therapy and "found [it] to be ineffective and stressful." *Id*. Given that context, Senator Pyle denounced those who try to "worship" or "pray the gay away." *Id*

II. PROCEDURAL BACKGROUND

In August of 2022, Mr. Sprague filed the present action against the State of North Greene in the Eastern District of North Greene, alleging its prohibition of talk therapy violated his free speech and free speech exercise rights under the First Amendment of the United States Constitution. R. at 5. Mr. Sprague sought a preliminary injunction to enjoin enforcement of the Statute. The State opposed and, in response, filed a motion to dismiss the complaint. *Id*.

The District Court denied Mr. Sprague's motion for preliminary injunction and granted the State's motion to dismiss. *Id*. Following this denial, Mr. Sprague appealed the District Court's entry of judgment in favor of the State. *Id*.

On January 15, 2023, Fourteenth Circuit Judges Griffith, Howard, and Knotts affirmed the district court's judgment in an order penned by Circuit Judge Howard. *Id*. at 2, 3. The court held that the State's "licensing scheme for healthcare providers, which disciplines them for practicing conversion therapy, including talk therapy, on minors, does not violate the First Amendment." *Id*. The court upheld the Statute against Mr. Sprague's free speech challenge under rational basis review after finding the Statute regulated conduct and any burden on speech was "incidental." *Id*. at 7. Similarly, the court applied rational basis review to Mr. Sprague's free exercise claim upon finding the Statute to be both neutral and generally applicable. *Id*.

In turn, Sprague filed for writ of certiorari from the Order of the Fourteenth Circuit, which this Court granted. *Id*. at 17.

SUMMARY OF THE ARGUMENT

The Statute prohibits Mr. Sprague's religious speech. In doing so, it violates both Mr. Sprague's free speech rights and free exercise rights protected by the First Amendment under the United States Constitution. As such, this Court should reverse the holding of the Court of Appeals for the Fourteenth Circuit and find the Statute unconstitutionally infringes upon Mr. Sprague's rights.

First, this Court should reverse the appellate court's holding because the Statute regulates speech, not conduct. The State may not control speech by labeling it as conduct. As applied here, the Statute regulates exclusively Mr. Sprague's speech. Further, application of the Statute turns on the content of the speech. If Mr. Sprague simply used his talk therapy to affirm conduct that his sincerely held religious beliefs lead him to oppose, then the regulation would not apply. Consequently, in addition to regulating speech as speech, the Statute does so based on content. Because the Statute constitutes a content-based regulation of speech, it is presumptively unconstitutional and warrants strict scrutiny.

Yet, even if this Court does not find Mr. Sprague's speech merits the full protections of the First Amendment, the Statute at the very least warrants intermediate scrutiny. The Statute's incidental burdens on speech subject it to intermediate scrutiny. As such, the Fourteenth Circuit erred in applying rational basis review.

Regardless, if either intermediate or strict scrutiny are applied, the Statute fails to pass constitutional muster.

Additionally, by prohibiting religious speech, the Statute violates Mr. Sprague's rights under the Free Exercise Clause. Looking past the text and focusing on the operational effects and legislative history reveal the Statute is neither neutral nor generally applicable, rendering it

subject to a strict scrutiny analysis. The Statute will not survive a strict scrutiny analysis because it is not narrowly tailored enough to achieve its professed intent. The Statute fails to be neutral because the *object* of the Statute is to target religion; it only affects members of the Christian faith and leading up to its enactment the legislature relied on a report that considered conversion therapy to exclusively be a *religious* practice, and members of the legislature made disparaging comments toward the practice. Furthermore, the Statute fails to be generally applicable because it only applies to one religion rather than all, and the language allows for a *discretionary* mechanism for providing exemptions. However, even if this Court finds the Statute to be neutral and generally applicable, the Statute is unconstitutional under a "hybrid" analysis, and alternatively, it is unconstitutional because *Smith* directly contradicts the intentions of the Framers when drafting the Bill of Rights and should thus be revisited by this Court.

ARGUMENT

I. THE STATUTE IS UNCONSTITUTIONAL UNDER THE FREE SPEECH CLAUSE BECAUSE IT IS A REGULATION OF SPEECH AND IS BASED ON THE CONTENT OF THE SPEECH.

The Statute imposes licensure penalties for prohibited speech by licensed health care providers based on the content of their speech when the speech is presented before minors. In doing so, it impermissibly infringes upon Mr. Sprague's free speech rights protected under the First Amendment of the Constitution. The Free Speech Clause of the First Amendment provides, "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend I. The Free Speech Clause and its protections are applied against the states. *See Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) [hereinafter *NIFLA*].

Speech is among the most stringently guarded rights because the government's "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-

based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). Laws that suppress disfavored speech are "content based" restrictions which receive some of the First Amendment's strongest protections. *Id*. at 163. This Court reasoned that the state has "no power to restrict expression because of its message, its idea, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972). This Court further proclaimed that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. Under a facial review, a content or speaker-based law will disfavor speech due to the particular content, disfavor speech due to particular speakers, or be determined through examining legislative intent. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 563-64 (2011). Recently, the Eleventh Circuit clarified this test holding a law is content based when "the ordinances depend on what is said." *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). If the factors from *Reed* and *Sorrell* are present, heightened or strict judicial scrutiny is warranted. *Sorrell*, 564 U.S. at 565.

In examining content-based restrictions, this Court clarified that the theory of "professional speech" is not a blanket protection. *NIFLA*, 138 S. Ct. at 2372 ("Speech is not unprotected merely because it is uttered by professionals."). This Court determined that laws requiring professionals to disclose factual, noncontroversial information in their "'commercial speech' and when the regulation of 'professional conduct' . . . incidentally involves speech" may be reviewed under less than strict scrutiny. *Id*. (quoting *Sorrell*, 564 U.S. at 567 ("The first amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech and professional are no exception to this rule.")). Limited to these

two areas of speech, this Court held "neither . . . turned on the fact that professionals were speaking." Founded in that, "[a] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963).

When professional speech and content-based restrictions intersect, "[t]his court has stressed the danger of content-based regulation in the fields of medicine and public health, where information can save lives." *NIFLA*, 138 S. Ct. at 2374; *See Sorrell*, 564 U.S. at 566. Those dangers do not disappear just because the speech is given in a professional setting. *See NIFLA*, 138 S. Ct. at 2374 ("The dangers associated with content-based regulations of speech are also present in the context of professional speech.").

To apply the exceptions listed in *NIFLA*, it must be determined if the law restricts conduct or speech. *See NIFLA*, 138 S. Ct. at 2373 (noting that, although a "difficult" distinction to draw, "this Court's precedents have long drawn it"). This is determined by examining the "speech" and "nonspeech" elements of the regulation. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). For a burden to survive, the applied Statute should regulate "separately identifiable" conduct where the burden to speech is incidental. *Cohen v. California*, 403 U.S. 15, 18 (1971).

Courts examine the statutory text, applied effects of the statute and statutory intent. Even if a statute is labeled as regulating conduct, the applied and practical effects of the statute govern the classification. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (Even if a law is "described as directed at conduct" the "applied" effects could trigger coverage under communicating a message.); *Thomas v. Collins*, 323 U.S. 516, 536 (1945) (examining the "practical" effects). Further, legislative intent to regulate conduct will not save a regulation from being classified as a regulation of speech instead of conduct. *See King v. Governor of N.J.*, 767

F.3d 216, 228 (3rd Cir. 2014) ("[L]]abeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation.").

If a regulation has been determined to regulate conduct, then the court must determine if there is an incidental burden on speech. *See Otto*, 981 F.3d at 865 ("But there is a real difference between laws directed at conduct sweeping up incidental speech on the one hand and law directly regulate it on the other"). For the Court to apply less than strict scrutiny to a law that incidentally burdens speech, the law must be content neutral. *See Sorrell*, 564 U.S. at 567. Finally, the "content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *O'Brien*, 391 U.S. at 377).

The Fourteenth Circuit erred in finding that the Statute was a regulation of conduct with only incidental burdens on Free Speech. In doing so, the appellate court circumvented this Court's principle that content-based speech deserves highest degree of scrutiny. As a result, the appellate court ignored Mr. Sprague's constitutionally protected rights and extended regulation to his speech, based on the content of his speech, "under the guise of prohibiting professional misconduct[.]" *Button*, 371 U.S. at 439.

A. The Statute is content-based and speaker-based because it prohibits specific speaker's speech on a particular topic.

"[A] central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978). Here, however, the State has picked its preferred message. In doing so, the Statute imposes penalties on Mr. Sprague's speech based on its opposing message. *See NIFLA*, 138 S. Ct. at 2375 (quoting

Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423-424, n. 19 (1993) ("States cannot choose the protection that speech receives[,]" "as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'"). By defining conversion therapy in such a way that includes speech "that seeks to change a person's sexual orientation or gender identity[,]" the State's prohibitions are directed at specific speech. N. Greene Stat. § 106(d)(1). The Statute expressly allows for speech of the opposite belief as it permits speech that "do not seek to change [a minor's] sexual orientation or gender identity." *See id*. § 106(d)(2).

By enacting this Statute, the State targets "specific subject matter" based on the State's decision of what content is allowed and what is not. *Reed*, 576 U.S. at 169. The single subject to the Statute is conversion therapy. Defining it in a way to include Mr. Sprague's talk therapy, however, the State has decided what speech is permitted and what speech is not allowed based on its content. The Statute provides the definition for conversation therapy and what is not conversion therapy. This illuminates that the State will permit speech that affirms a minor's sexual beliefs while punishing the opposite, specifically speech sought by Mr. Sprague's clients.

To determine if a statute is content-based, the court may simply inquire "whether enforcement authorities must 'examine the content of the message that is conveyed' to know whether the law has been violated." *Otto*, 981 F.3d at 862 (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)). Here, it is essential that the state examines the content of Mr. Sprague's speech in order to determine whether the Statute has been violated. The application of the Statute turns on Mr. Sprague's speech during talk therapy. Unlike other forms of medical treatment, such as setting bones or performing surgery, the State is required to examine the content of what Mr. Sprague says to his clients to determine if his speech mirrors the state's desired opinion. Thus, application of the Statute turns on the content of his speech.

In *Sorrell*, Vermont's statute regulating the speech of pharmaceutical manufacturers was ruled unconstitutional because the First Amendment provides greater protections when a regulation is content and speaker based. *Sorrell*, 564 U.S. at 580. In an attempt to lower "the costs of medical services" and promote "public health," Vermont restricted the speech of pharmaceutical employees when interacting in the sales process. *Id*. at 576. In a sharp rebuke, this Court held the law did "not simply have an effect on speech but is directed at certain content and is aimed at particular speakers[,]" which failed under a test of strict scrutiny. *Id*. Consequently, *Sorrell* underscores the importance of free speech "in the fields of medicine and public health, where information can save lives." *Id.* at 575.

Moreover, the State's prohibition targets the speech of certain speakers. Mr. Sprague's clients seek out his services as a licensed family therapist because of his ability to provide talk therapy as state licensed practitioner. The Statute only applies to state licensed health care providers having exceptions for unlicensed and religiously affiliated persons. This means that again the State will have to examine not only the content of the message but the speaker.

Like in *Sorrell*, the State attempts to "tilt public debate in a preferred direction" by prohibiting speech based on its content and the speaker. *Id.* at 578-79. The State cannot apply this Statute without examining the speech between Mr. Sprague and those seeking his aid. Therefore, like in *Sorrell*, the Statute constitutes a content and speaker-based restriction and is thus presumptively unconstitutional.

B. Mr. Sprague's talk therapy should be analyzed as speech for the purposes of First Amendment protections.

When analyzing the State's statutory location, the "speech" and "non-speech" elements, and applied effects of the statute, the State's argument fails as the Statute regulates speech as speech. To first understand the difference between speech and conduct for purposes of First

Amendment protections, it is important to dispel notions that portions of *Pickup v. Brown* are persuasive in light of the Supreme Court's ruling in *NIFLA*. While it is true that *NIFLA* did not directly reverse *Pickup*, it did set aside the reasoning.

Pickup is based on the now dismissed principle of "professional speech" and that said speech is worthy of less First Amendment protections than other speech. *Pickup v. Brown*, 740 F.3d 1208, 1227-29 (9th Cir. 2014). While citing *Pickup*, *NIFLA* disapproved of this new category of speech, "[b]ut this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S. Ct. at 2371-72. This disapproved principle is at the heart of *Pickup's* continuum, the same continuum cited by the Fourteenth Circuit in the present case. *Sprague v. North Green*, 2022 WL 56789, *6 (E.D.N.G. 2022). The Fourteenth Circuit is correct that *NIFLA* approved of "some situation[s] where speech by professional is afforded less protection under the First Amendment." *Id*. However, *Pickup* should not be viewed as persuasive by any Court because *Pickup* failed to thoroughly examine those "situations" due to ruling on the professional speech doctrine. *Pickup*, 740 F.3d at 1229-32. It would be imprudent to give Pickup any more credence than to understanding the reasons certiorari was granted in *NIFLA*.

To determine if the Statute regulates speech or conduct, the "speech" and "non-speech" elements of the Statute must be examined. *See O'Brien*, 391 U.S. at 376. The Statute bars the administration of any form of conversation therapy on minors, not specifically mentioning speech. The Statute, however, states that it does not apply to "speech by licensed health care providers" that is not conversion therapy. *Sprague*, 2022 WL 56789, at *4. Although the legislature labeled this as "unprofessional conduct," the text of the Statute makes clear that the regulation of "speech" was center of their goals in stopping conversion therapy on minors.

Challenges under the First Amendment must be scrutinized as applied. When applying the Statute to Mr. Sprague's practices, the Statute only regulates Mr. Sprague's talk therapy. Mr. Sprague does not practice any physical conversion therapy, nor does he seek to do so in the future. The State attempts to characterize talk therapy as professional conduct, however, their argument fails because all aspects of talk therapy are speech. The State cannot sidestep Mr. Sprague's constitutional rights simply by reclassifying his speech "under the guise of prohibiting professional misconduct." *Button*, 371 U.S. at 439.

If a licensed expert talking to a minor patient through their sexual identity is not speech, it is hard to imagine what would be classified as speech in the future. In *Bartnicki v. Vopper*, this Court applied the same logic when stating, "[i]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Bartnicki v. Vopper*, 200 F.3d 109, 120, (3rd Cir. 1999)). As was stated in *King*, "[the] enterprise of labeling certain verbal or written communications as speech and others as conduct is unprincipled and susceptible to manipulation." *King*, 767 F.3d at 228. Thus, the State cannot manipulate what is speech by labeling it as conduct within the Statute. Therefore, the Statute regulates speech as speech for the purposes of First Amendment protections.

C. Even if the Statute regulates conduct it does so with more than an "incidental burden" on Free Speech.

A statute may regulate conduct, but the First Amendment will protect the rights of Mr. Sprague because the Statute imposes more than an incidental burden on his First Amendment rights. The Fourteenth Circuit merely stated that because "some use speech to treat those conditions is 'incidental'" and that "[t]he practice of psychotherapy is not different from the practice of other forms of medicine simply because it uses words to treat ailments." *Sprague*,

2022 WL 56789, at *7. Not so. The court finds talk therapy is the same as setting a bone, however, talk therapy is conducted through speech and is a speech product unlike the cut by a scalpel on a surgical table. Here, speech encompasses the entire practice and is not analogous to other forms of medical regulation that incidentally burden speech.

Incidental burdens on free speech in the medical field commonly referred to "[l]ongstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.'" *NIFLA*, 138 S. Ct. at 2372 (quoting *Button*, 371 U.S. at 438). For example, a Pennsylvania state law required medical professionals to obtain informed consent before performing an abortion. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (overruled on other ground by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)). Although the law in *Casey* compelled the speech of medical professionals, such a burden was only incidental to the practice of medicine. *Casey*, 505 U.S. at 884-85. In *Casey,* the administration of an abortion was the medical treatment, and the speech aspect was ancillary to that treatment. Here, speech *is* the medical treatment.

Here, the Statute goes far beyond the regulation of medicine with incidental burdens on speech; the statute *solely* regulates speech when applied to Mr. Sprague's talk therapy. The Fourteenth Circuit relied upon *Dobbs,* by stating if this Statute were to be upheld as a content-based speech restriction on licensed health care professional then it would "preclude other reasonable 'health and welfare laws' that apply to health care professionals and impact their speech." *Sprague*, 2022 WL 56789, at *6 (quoting *Dobbs*, 142 S. Ct. at 2284). Yet, these concerns were not in reference to the validity of a statute under a Free Speech analysis. Instead, such concerns were raised when analyzing the rational basis of the challenged statute in *Dobbs*.

See Dobbs, 142 S. Ct. at 2284 ("A law regulating abortion, like other health and welfare laws, is entitled to a 'strong presumption of validity.'")

Consequently, *Dobbs*' reasoning is misplaced at best when applied here. By focusing on hypothetical fears, the Fourteenth Circuit overlooked Mr. Sprague's First Amendment rights by overlooking the incidental burden on speech during Mr. Sprague's talk therapy. Thus, this Court should determine that the Statute's regulation of talk therapy goes beyond an incidental burden because it directly regulates the speech in talk therapy.

D. The Statute is unconstitutional as it fails on multiple levels of scrutiny.

The level of scrutiny depends on if the Statute regulates speech or conduct and if the regulation of speech is content-based or content-neutral. The content-based Statute here directly implicated speech, therefore must satisfy strict scrutiny. The Statute, however, even fails under intermediate scrutiny because there is not an important or substantial government interest and the Statute unnecessary restricts speech in furtherance of the State's goal.

i. The Statute fails under intermediate scrutiny because the State's goals are not closely connected to the Statute's application.

Even if the Statute is content-neutral and regulates conduct with only an incidental burden on speech, it fails under intermediate scrutiny. Intermediate scrutiny requires the Statute further "an important or substantial governmental interest," that the "interest is unrelated to the suppression of free expression," and that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The State announced its intention was to "regulate the professional conduct of licensed health care providers" because of its interest in protecting the physical and psychological well-being of minors . . . against exposure to serious harms caused by conversion therapy."

There is no doubt that the State has an interest in ensuring its citizens safety, however, that does not mean that the state may restrict the ideas they seek. The State having the burden of proof has not shown the "serious harms" they believe may, in application, harm their citizens. The State's main reasoning included that the APA opposes conversion therapy, however, any potential fears presented by the APA are not present in the legislative record. There has been no evidence that Mr. Sprague's talk therapy practices include the "serious harms" that the legislature intended to prohibit. The legislature also ignored evidence that talk therapy does not harm minors and instead banned minors from voluntarily participating in a mental health resource.

The legislative record reveals that the General Assembly was ill-informed on talk therapy, specifically. One bill sponsor, Sen. Pyle, feared "barbaric practices" such as electroshock therapy and inducing vomiting. This was a clear reference to the aversive practices commonly associated with "conversion therapy." Mr. Sprague's talk therapy, however, is non-aversive and uses *speech only*. Moreover, the lack of concrete harms only furthers the position that the State has done nothing more than pick a side in a debate in which reasonable people can fall on either.

ii. The Statute fails narrow tailoring because it is overly inclusive.

The government is required to show a narrow tailoring of the restrictions so that it does not unnecessarily restrict speech in furtherance of the goal. However, the State cannot overcome this hurdle because the State is unable to show why the goal is facially connected to the restrictions as applied. See *McCullen v. Coakley*, 573 U.S. at 486 ("[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'").

The State *could* have created a more narrowly tailored restrictions but chose to prohibit speech. If the legislature's goal was to ban electrotherapy and induced vomiting as means of

conversation therapy, then the legislature *should* have done just that. Instead, the legislature chose to paint with a broad brush and in doing so, painted over the constitutional rights of Mr. Sprague's talk therapy. By doing so the State has "burden[ed] substantially more speech than is necessary." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Thus, the State has enacted an overly broad law that restricts speech as a result.

Further, the State cannot separate its interests from the suppression of free speech as the law is currently written. Best exhibited through the Statute's exceptions which state the law may not be applied to "speech by licensed health care provides that 'does not constitute performing conversation therapy'". The State cannot regulate conduct when the opinion is undesired and then claim speech of the opposite opinion.

iii. The content-based Statute fails under strict scrutiny.

If this Court does hold that the Statute is a content-based regulation of speech, then strict scrutiny applies, and the State is "presumptively unconstitutional." *Reed*, 576 U.S. at 163. Because the Statute fails under intermediate scrutiny, it also fails under heightened strict scrutiny.

II. NORTH GREENE STATUTE § 106(d) IMPERMISSIBLY VIOLATES MR. SPRAGUE'S RIGHTS UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND IS THUS UNCONSTITUTIONAL.

The Free Exercise Clause states that Congress cannot enact a law that "prohibit[s] the free exercise" of religion. U.S. Const. amend. I. The Clause invariably reveals our Country's "essential commitment to religious freedom[.]" *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 524 (1993) [hereinafter *Lukumi*]. In fact, the Framers of the Bill of Rights were particularly motivated by "historical instances of religious persecution and intolerance[.]" *Id.* at 532 (internal citation and quotation marks omitted). The Framers were well aware of the "varied and extreme views of religious sects, of the violence of disagreement among

them, and of the lack of any one religious creed on which all men would agree." *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). Thus, they meticulously crafted "a charter of government which envisaged *the widest possible toleration* of conflicting views." *Id.* (emphasis added).

The freedom of religious belief and practice "is basic in a society of free men." *Id*. Inherent to such a society is the notion that its members can believe what they want to believe; religious "experiences which are as real as like to some may be incomprehensible to others[,]" but this does not mean that their beliefs can "be made suspect before the law." *Id*. If a citizen could be vilified because a court found their beliefs to be false, "little indeed would be left of religious freedom." *Id.* Thus, the magnitude of the Free Exercise Clause *cannot* be overstated. As this Court has asserted, it "ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and *so central to their lives and faiths*[.]" *Obergefell v. Hodges*, 576 U.S. 644, 679–80, (2015) (emphasis added).

The Free Exercise Clause is unique in that it attempts to equate belief with activity and in doing so embraces two concepts: the freedom to believe in the religion of your choice, and the freedom to live and act according to that religion. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The first concept is absolute, but the second "in the nature of things … cannot be." *Id.* at 303-04. Essentially, the Founders sought to protect our right to live and practice in accordance with our chosen faith or lack thereof, however, the "freedom to act must have appropriate definition to preserve the enforcement of that protection." *Id.* at 304.

To establish a claim under the Free Exercise Clause, the claimant must demonstrate that: "(1) he espouses a bona fide religion; (2) his beliefs are sincerely held; and (3) the desired activity is essential to the practice of his religion." *Van Dyke v. Washington*, 896 F. Supp. 183, 187 (C.D. Ill. 1995) (citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). The protections afforded

by the Free Exercise Clause apply when the law in question targets or "prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Courts will not investigate the *sincerity* of a claimant's stated desire to perform a certain action for religious reasons. *Id.* at 531; *see also Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1247 (11th Cir. 2019) (holding that what "constitutes a 'sincerely held belief' is not a probing inquiry," and this Court has "consistently refused to 'question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.'") (internal citation omitted). Only after the initial requirements are established does "the court inquire into the state's intrusion and a standard of review." *Van Dyke*, 896 F. Supp. at 187.

As it stands today, the test for adjudicating claims arising from the Free Exercise Clause stems from this Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) [hereinafter *Smith*]. Under *Smith*, a law that is both neutral and generally applicable does not need to be justified by a compelling government interest even if the law incidentally burdens a religious practice. *Id*. Neutrality and general applicability are assessed with respect to religion "rather than . . . the person or groups to which the law most directly pertains." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1234 (9th Cir. 2020). However, even if a law is found by a court to be "neutral and generally applicable," this Court has expressly recognized that combining a Free Exercise claim with another constitutional protection claim, such as a Free Speech claim, can render a law unconstitutional and bar its applicability. *Smith*, 494 U.S. at 881; *see also Wisconsin v. Yoder*, 406 U.S. at 233 (finding that strict scrutiny analysis applied when "the interests of parenthood are combined with a free exercise claim").

A law's neutrality and general applicability "are interrelated," and the "failure to satisfy one requirement is a likely indication that the other has not been satisfied[,]" however it is

imperative to evaluate each requirement in turn. *Lukumi*, 508 U.S. at 531. Under the *Smith* test, courts first look to the contested law's neutrality. The Free Exercise Clause strictly forbids "even subtle departures from neutrality" on matters of religion. *Id*. at 534 (internal citation and quotation marks omitted). Therefore, for a law to be deemed constitutionally neutral under the Free Exercise Clause, the object of the law must not be aimed "at the promotion or restriction of religious beliefs[,]" *Smith*, 494 U.S. at 879, and the object of the law must not be to "infringe upon or restrict *practices* because of their religious motivation[.]" *Id.* at 533 (emphasis added).

As this Court has stated, there are many ways "of demonstrating that the object or purpose of a law is the suppression of religion or religious conduct." *Id.* at 533. Thus, as a threshold matter, courts first look to the plain language of the statute to assess whether it is discriminatory *on its face*, "for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. A law "lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* at 533.

However, the facial neutrality of a law is not determinative, as the Free Exercise Clause "extends beyond facial discrimination" and forbids "covert suppressions of particular religious beliefs[.]" *Id.* at 534 (internal citations omitted). The Free Exercise Clause protects *both* masked as well as overt facial neutrality, therefore courts must carefully guard against "religious gerrymandering," which is an unconstitutional attempt to "target religious practices through careful legislative drafting." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015)*; contrast Smith*, 494 U.S. 872 (finding a law that incidentally burdened religious practice was constitutional when it was not targeted at restricting a particular religious belief) with *Lukumi*, 508 U.S. 520 (finding a law that incidentally burdened religious practice was *not* constitutional because it specifically targeted a particular religious practice).

Furthermore, even if a case is facially neutral and generally applicable, the government must reasonably make accommodations for the contested sincerely held religious practice when the Free Exercise interests of the religious group involved outweigh the government's interest in enforcing the contested law. *See generally, Wisconsin v. Yoder*, 406 U.S. 205 (1972) (reasoning that although the contested law itself was generally applicable, the reasons for the contested law were not generally applicable to the burdened religious group).

Beyond the text of the statute, "the effect of a law in its *real operation* is strong evidence of its object." *Lukumi*, 508 U.S. 520. Additionally, courts turn to an "equal protection mode of analysis," which allows the court to determine the law's "object from both direct and circumstantial evidence." *Id.* at 540. Relevant factors in an assessment of a law's object for purposes of neutrality include (1) "the historical background of the decision under challenge," (2) "the specific series of events leading to the enactment" of the law, and (3) the legislative history behind the law, "including contemporaneous statements made by members of the decisionmaking body." *Id*. at 540 (internal citations omitted). Any demonstrated hostility toward the particular religion or practice of religion in the law's text, operation, or history will heavily weigh against a finding of neutrality, *Locke v. Davey*, 540 U.S. 712, 725 (2004), as any government hostility directed at religion is a direct violation of the Free Exercise Clause. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018).

In addition to the requirement of neutrality, a law that burdens religious practice must also be generally applicable. In other words, it must have the same effect on religious constituents and non-religious constituents alike, and it must be enforced uniformly. The question of a law's general applicability "addresses whether a law treats religious observers unequally." *Barr*, 949 F.3d at 1235. Under the Free Exercise Clause, "inequality results when a

legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation." *Lukumi*, 508 U.S. at 542–43.

Accordingly, a law is not generally applicable if it is substantially *underinclusive*, meaning that in limiting religious conduct it either does not (1) consider other *non-religious* conduct, or (2) restrict other non-religious conduct that "endangers these interests in a similar or greater degree than" the restricted religious conduct does. *Id.* at 543-45. "The underinclusion is substantial, not inconsequential." *Id*. at 543. Alternatively, a law fails the general applicability requirement if it invites the government to consider "the *reasons* for the relevant conduct" that seeks exemption by providing a "mechanism for individualized exemptions." *Smith*, 494 U.S. at 884 (emphasis added); *see also Sherbert v. Verner*, 374 U.S. 398, 401 n.4 (1963) (holding that an unemployment law allows for discretionary exceptions for "personal reasons"); *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (holding that a "good cause" standard for providing an exception under a law creates a "mechanism for individualized exemptions").

Courts will apply a different standard of review for a law that limits religious exercise, depending on if the law is neutral and generally applicable, or not neutral and generally applicable. Regardless of the standard of review, courts must balance the competing interest of the government with the Free Exercise religious interest of the applicable religious group.

A neutral and generally applicable law that incidentally impacts a religious belief or practice "need not be supported by a *compelling* government interest" and will thus be subject to a rational basis scrutiny analysis and upheld as constitutional if it is *rationally related* to a legitimate government interest. *Stormans, Inc*, 794 F.3d at 1075-76, 1084 (emphasis added). However, if the law is not neutral or generally applicable, such as if it appears to have the objective of burdening or targeting a religious group or practice, the law will be subject to a strict

scrutiny analysis. *Id.* at 1075-76 (9th Cir. 2015); *see generally Lukumi*, 508 U.S. 520 (holding that a law was subject to strict scrutiny when it specifically targeted the practices of a particular religion). "Failing *either* the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (emphasis added).

Under a strict scrutiny analysis, the law will only be upheld in extremely rare circumstances where the law is justified by a "compelling government interest" that is "of the highest order," and is narrowly tailored to achieving that interest. *Lukumi*, 508 U.S. at 545-46. Furthermore, when the contested statute "has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason" under a strict scrutiny analysis. *Smith*, 494 U.S. at 884.

a. The Statute fails the test established by *Smith* because it is neither neutral nor generally applicable.

Here, the lower court strayed from and overlooked this Court's well-established principles and erred when determining that the Statute is neutral and generally applicable. Although the lower court correctly stated the legal principles established by this Court, the analysis of those legal principles is founded on a woefully insufficient quantum of evidence. Whatever this Court in *Smith* envisioned as a neutral law of general applicability, it was not this. The object of the Statute directly targets the protected exercise of the Christian faith, violating the neutrality requirement. Furthermore, it contains a discretionary mechanism dictating to whom the exception applies, violating the requirement of general applicability because it does not apply to the religious and non-religious alike.

i. The Statute fails the neutrality test established by this Court in Smith because its real-world operation and legislative history reveal that it is explicitly targeted toward the exercise of a particular religion.

The Statute in this case specifically bars the protected, religiously motivated conduct of the Christian faith. As mentioned above, courts examine a number of factors when assessing whether a law's object is to target religion, indicating that the law is not neutral. Here, the Statute is facially neutral because it does not directly mention religion in its text. However, as this Court's precedent has demonstrated, this does not end the inquiry into a law's neutrality Free Exercise Clause purposes. If a law is facially neutral, among other things this Court will look to its real-world operation and the legislative history behind the law's enactment, including statements made by members of the decision-making body at the time of the law's enactment.

As this Court reasoned in *Lukumi*, the real-world operation of the Statute is strong evidence that its object does or does not target religion. *Id.* at 535. Much like the law in *Lukumi*, when analyzing how the Statute in this case works in practice and who it affects, it is clear that the Statute does not operate neutrally by any means. In practice, the Statute will *only* impact and burden the practice of and dutiful compliance with the Christian faith. The State fails to provide any evidence whatsoever that the statute will burden *even one* other professed faith.

Additionally, the legislative history behind the Statute demonstrates that the Statute directly targets religion. Disparaging statements made by members of the State's decision-making body at the time of the law's enactment are highly indicative that the object of the Statute was to target a religious practice. *See also Masterpiece Cakeshop*, 138 S. Ct. at 1732; *Lukumi.*, 508 U.S. at 534-42. Here, State Senator Pyle expressly admitted his religious animus toward the practice of conversion therapy when he denounced those who try to "worship" or "pray the gay away." R. at 9.

Furthermore, the General Assembly relied upon the findings of the APA when adopting the Statute. As the dissent points out, the APA describes conversion therapy *exclusively* as a religious practice and acknowledges that "most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." *Sprague*, 2022 WL 56789, at *15. (Knotts, J. dissenting). The General Assembly's reliance, then, reveals that they knew such regulation would disproportionately affect the practice of one's religion, yet passed the Statute anyway.

Taken together, the bill sponsors' remarks leading up to the enactment and the legislature's reliance on the APA reveal that the object of the Statute was to target the exercise of religion. The record reflects that the Statute both "discriminates against some religious beliefs" and seeks to "regulate[] . . . conduct because it [was] undertaken for religious reasons." *Lukumi*, 508 U.S. at 532. Because the Statute targets religion in such a manner, it is not neutral.

ii. The Statute fails to be generally applicable as required by this Court because it does not apply to all religions equally, and its language leads to an explicit discretionary mechanism for providing exemptions.

Although the Statute's lack of neutrality is enough on its own to trigger a strict scrutiny analysis, the Statute's lack of general applicability is worth noting. The Statute grossly fails to have the same effect on religious constituents and non-religious constituents alike. Accordingly, the Statute is substantially *underinclusive* in that it does not consider other non-religious conduct, nor does it restrict other non-religious conduct that "endangers these interests in a similar or greater degree than" the restricted religious conduct does. *Lukumi, supra*. As this Court has held, this under inclusion is not inconsequential by any means; rather, it is *substantial* in establishing that a law is not generally applicable.

The Statute exempts activity performed "under the auspices of a religious denomination," but it does not define what exactly that phrase means. Therefore, in the real-world operational effect of the Statute, *someone* will have to decide what that means using their own discretion. As discussed in *Smith*, this invites the government to consider "the reasons for the relevant conduct," and this Court has established that courts may not inquire into the validity of a claimant's religious beliefs. Like in *Smith, Sherbert, Fulton,* and *Roy*, this discretionary system gives the person deciding who the exemption applies to unconstitutional discretion over the provision of exemptions, rendering it not generally applicable.

b. Strict scrutiny applies because the Statute is neither neutral nor generally applicable.

The Statute overwhelmingly targets and directly impacts the exercise of religion, so in order to maintain validity and constitutionality under the Free Exercise Clause, it must survive a strict scrutiny analysis. Since the practice of conversion therapy *only* applies to the Christian faith, any restrictions on the practice should be narrowly tailored to avoid infringing on religious freedom. Although protecting the well-being of youth is a compelling government interest, the Statute is far from being narrowly tailored enough to achieve its goal. Since it burdens the Christian faith and is not properly narrowly tailored, the Free Exercise interests of Mr. Sprague and the Christian faith substantially outweigh the interests of North Greene.

Additionally, the State failed to explore any possible *less* religiously restrictive means of achieving their interests. The State *could have* used a less restrictive means in achieving its desired end, but they chose the route that infringes upon the religious rights of the Christian faith. This means that under this Statute, technically a non-licensed member of a Satanic church would be permitted to perform conversion therapy upon minors. Additionally, it is evident that the General Assembly did not thoroughly consider the evidence before it. For example, during

debate on the Statute, Senator Floyd Lawson stated that his "intent in sponsoring the bill was to eliminate 'barbaric practices[,]'" even though the Senators had evidence in front of them that conversion therapy is safe, effective, and not "barbaric." *Sprague*, 2022 WL 56789, at *7-9.

c. Even if this Court finds the Statute to be neutral and generally applicable under *Smith*, Mr. Sprague's valid "hybrid" claim triggers a strict scrutiny analysis.

Here, the Statute simultaneously undermines two constitutionally protected liberty interests. Thus, even if the Statute is found to be neutral and generally applicable, combining Mr. Sprague's Free Speech and Free Exercise violation claims triggers the need for a strict scrutiny analysis under a "hybrid" doctrine. As explained above, under the hybrid doctrine raising one constitutional claim in conjunction with another strengthens the claim that the law is unconstitutional. Here, the Statute simultaneously undermines Mr. Sprague's Free Speech interests and his Free Exercise interests and will thus need to appropriately satisfy a strict scrutiny analysis.

d. Alternatively, even if the Statute is neutral and generally applicable under *Smith*, the holding in *Smith* contradicts the Framers' intent behind the Free Exercise Clause and should thus be revisited by this Court to elucidate a test that is correctly in line with the Framers' firmly held convictions.

As mentioned above, prior to the ruling in *Smith*, the test for assessing claims of Free Exercise Clause violations stemmed from *Sherbert v. Verner*. Under this original test, a law that substantially burdens a religious practice must be validated by a "compelling government interest." *Id.* at 402-403. Essentially, under the compelling interest test *any* law that substantially burdens a religious practice must satisfy the requirements of strict scrutiny.

Since the ruling in *Smith*, the test has been the subject of significant debate. To say that the test does not enjoy consensus accord among legal scholars, the judiciary, the states, and the federal government is putting it extremely mildly. Congress has attempted through the legislative

process to overrule the *Smith* test and reinstate the original "compelling interest" test established in *Sherbert*, but this attempt was held unconstitutional by this Court as it applies to the states. *Boerne*, 521 U.S. at 507. However, a claim under federal law still must comply with the original compelling interest test, even if the contested law is neutral and generally applicable. *Id.* at 536. For now, the *Smith* test is the governing analysis for a Free Exercise claim under state law.

The dissent in *Smith* makes a powerful point in furthering the contention that the *Smith* test directly contradicts the intent of the Framers. It states that the majority in *Smith* "suggests that the disfavoring of minority religions is an 'unavoidable consequence' under our system of government and that accommodation of such religions must be left to the political process[,]" however, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are *not* shared by the majority and may be viewed with hostility." *Smith*, 494 U.S. at 902 (emphasis added). To allow the government to justify a law that substantially burdens a religious practice under the guise of "neutrality and general applicability" expressly allows the government to infringe on the Free Exercise rights of *any* religion that is not commonly followed. It is a logical conclusion that any rarely practiced religion is not likely to satisfy neutrality and general applicability. In a roundabout way, it *favors* commonly practiced religions such as Christianity. It was clearly not an intent of the Framers of the Bill of Rights to indirectly favor common religions such as Christianity; they sought to protect *any* religious practice or belief, whether common or not.

For example, laws mandating testimony in a judicial proceeding is arguably neutral and generally enforceable, *but* they are not enforced against priests when the context involves a member of the Christian faith. This begs the question, if a less common or a less recognized religion *also* holds the belief that complying with an otherwise mandated part of a judicial

proceeding, would this exemption be allowed? Would the religious interest of that group be less than that of the interest of the Christian faith? As mentioned above, this Court may not inquire into the validity of a religious group's professed belief, so if a minority religious group professes that its interest in not participating in the mandated portion of a judicial proceeding is crucial to the exercise of that religion, courts must accept that at face value. However, under *Smith*, this group's sincerely held religious practice is *less* worthy of Free Exercise protection than that of the Catholic Priest, simply because it is a less commonly practiced religion than Christianity. This can hardly be said to be in accord with the intent of the Framers when they wrote the First Amendment.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court reverse the Fourteenth Circuit Court of Appeals.

Respectfully submitted,
Counsel for Petitioner

APPENDIX

1. The First Amendment of the United States Constitution provides:

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

2. The Fourteenth Amendment of the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. North Greene's Uniform Professional Disciplinary Act

§ 105(a)
The State of North Greene requires health care providers to be licensed before they may practice in North Greene.

§ 106
[. . .]
(d) Performing conversion therapy on a patient under the age of eighteen [is considered unprofessional conduct for licensed health care providers and subjects them to discipline].

(e) Definitions.

> (1) "Conversion therapy" means 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."
>
> (2) "Conversion therapy" does not include 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.

(f) Exceptions. The legislature expressly specified that N. Greene Stat. § 106(d) may not be applied to the following:

> (1) [Speech by licensed health care providers that] does not constitute performing conversion therapy,

(2) Religious 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) Non-licensed counselors acting under the auspices of a religious denomination, church, or organization.

§ 111

[Therapists, counselors, and social workers who] work under the auspices of a religious denomination, church, or religious organization [are exempted from the Chapter's requirements].