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 Court of Appeals for the Fourteenth Circuit

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BRIEF FOR RESPONDENT

Team 26

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause of the First Amendment of the United States Constitution.

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

OPINIONS BELOW

The Eastern District of North Greene's opinion is unpublished and can be found at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The opinion of the Fourteenth Circuit Court of Appeals can be found at *Sprague v. North Greene* (14th Cir. 2023).

This case involved the Free Speech Clause and the Free Exercises Clause of the First Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involved the Free Speech Clause and the Free Exercises Clause of the First Amendment.

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STATEMENT OF THE CASE

In an effort to protect the minor children of the State, the North Greene Legislature passed laws regulating the ability of State-licensed therapists to provide conversion therapy to minors. (R. 3). In 2019, the legislature added "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct for licensed health care providers in North Greene. N. Greene Stat. § 106(d). (R. 4). Conversion therapy is defined in the statute as "a regime that seeks to change an individual's sexual orientation or gender identity" including "efforts to change behaviors or gender expressions" and efforts to "eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. N. Greene Stat. § 106(e)(1)-(2). (R. 4). The law explicitly exempts therapists working under a "the auspices of a religious denomination, church, or religious organization" from these requirements. (R. 4). In addition, the law does not apply to broad discussions about conversion therapy, nor does it censor therapists from publicly expressing their views on the matter. (R. 4). The Statute, North Greene's "Uniform Professional Disciplinary Act," regulates licensed health care providers within the state and lists actions that are considered "unprofessional conduct" for licensed health care providers and subjects them to disciplinary action. *See* N. Greene Stat. §§ 106, 107, 110.

Petitioner Harold Sprague is a licensed therapist in the state of North Greene. Sprague is a self-identified religious individual espousing Christian belief, but he does not work as a therapist for a religious institution. (R. 3). Sprague believes that one's gender is a "gift from God," not subject to change based on an individual's own desires. (R. 3). He also believes that sexual relationships are only healthy between a man and woman within the confines of marriage. (R. 3). Sprague has provided family therapy services, including therapy regarding sexual orientation and gender, for twenty-five years. (R.3).

Sprague sued the state of North Greene in 2022, claiming that N. Greene Stat. §106(d) violated his free speech and free exercise rights. He sought a preliminary injunction on the statute, which the District Court refused. (R. 3). The District Court dismissed the case in favor of the State. The Fourteenth Circuit Court of Appeals affirmed. (R. 3, 11).

SUMMARY OF THE ARGUMENT

North Greene's Statute does not violate the First Amendment's Free Speech Clause nor the Free Exercise Clause.

The Statute does not violate the Free Speech Clause because it seeks to regulate conduct rather than speech. Though speech is incidentally implicated through the conduct the Statute targets, the speech itself is not targeted. Even if this Court found that the Statute primarily targets speech as opposed to unprotected conduct, it should find that the Statute is "content-neutral," meaning it is only subject to intermediate rather than strict scrutiny. The Statute would overcome an intermediate scrutiny analysis because it targets a secondary effect of the speech rather than the content of the speech itself. The Statute does not prohibit therapists from discussing conversion therapy with patients or the public, rather, it simply prohibits them from performing the act of conversion therapy on minor patients. Finally, even if the Court found that the Statute was content-based rather than content-neutral, it should still find that the Statute passes a strict scrutiny analysis because of North Greene's compelling interest in protecting its minor citizens.

The Statute does not violate the Free Exercise Clause because it does not target religious institutions or practices. It is a neutral law of general applicability across religious and secular individuals alike. On its face, the Statute does not target religion. Its object is to protect members of the LGBTQ+ community, not to target religious institutions. Additionally, its legislative history does not show signs of anti-religious animus. Further, the law applies evenhandedly to all

parties, whether religious or secular, and is not subject to arbitrary exemption from officials that could potentially pick and choose enforcement for some while allowing the conduct from others. Finally, the *Smith* framework is proper because it requires a lower level of scrutiny for anti-discrimination laws making enactment more likely while still affording adequate protection for religious interests.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FOURTEENTH CIRCUIT'S DECISION BECAUSE CREATING PROFESSIONAL CONDUCT STANDARDS FOR LICENSED PROFESSIONALS DOES NOT VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

This Court has recognized traditional categories of speech that are not protected by the First Amendment, such as incitement, obscenity, and fighting words. One of the traditionally excepted categories is the speech of medical professionals in the course of treating patients. A doctor instructing a patient to take a harmful dose of a medication is not protected by the free speech clause of the First Amendment. *See Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014). North Greene's "Uniform Professional Disciplinary Act" (the "Statute") is a prophylactic measure intended to prevent harm, not a limit on the inclusion of any particular idea into the marketplace of ideas.

In analyzing regulations that potentially impact speech, courts consider a variety of factors including: (1) Whether it is speech or conduct; (2) Whether the speech falls under an excepted category; (3) Whether the statute is content-neutral or content-based; (4) What level of scrutiny should be applied based on the preceding factors; and (5) Whether the statute passes the prescribed level of scrutiny.

The Statute here is targeted at conduct, rather than speech. It does not target the mere speech of a therapist discussing conversion therapy as a concept, rather, it prohibits them from

performing conversion therapy, an act, on a minor patient. Even if the Court found that it does target speech, the Statute is content-neutral and thus only subject to intermediate scrutiny. The Statute survives intermediate scrutiny because it is directed at a secondary effect rather than the content of the speech itself.

A. Conversion Therapy is Conduct that Incidentally Implicates Speech and is Therefore not Protected by the First Amendment.

1. Statutes may regulate incidental speech arising out of conduct.

The First Amendment cannot be used as a defense for a doctor's treatment suggestions outside of the "accepted standard of care." *Pickup*, 740 F.3d at 1228 (abrogated on other grounds by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). Furthermore, incidental speech that accompanies conduct does not wholly excuse said conduct because of potential First Amendment protections. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). *See also Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (holding that statutes enacted to regulate occupations do not violate the First Amendment "so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation."); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978).

In *Giboney*, this Court considered whether an injunction to enjoin picketing violated the free speech clause. 336 U.S. at 492–93. Union members appealed a trial court injunction on their picketing. *Id.* The trial court found that the injunction was justified because it barred the union members from actions that violated a state anti-trade restraint statute. *Id.* at 493. The Missouri Supreme Court affirmed. *Id.* at 494. This Court affirmed and held that Missouri's power was "paramount" and that First Amendment free speech protections did not shield parties engaging in otherwise unlawful conduct from accountability. *Id.* at 504.

Like the case here, the court in *Pickup* considered the constitutionality of a sexual orientation change effort ("SOCE") ban. 740 F.3d at 1221. To determine if the ban primarily affected speech or conduct, the court analyzed the target on a continuum, with one end noting speech with the greatest First Amendment protection and the other end noting allowable regulation of conduct. *Id.* at 1227–29. The court noted an example of action in the middle of the continuum in *Planned Parenthood v. Casey,* which stated that "the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 1228 (citation omitted) (emphasis omitted). The Ninth Circuit held, "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Id.* at 1228. Finding that the provision of conversion therapy fell on the side of the continuum with the least First Amendment protection, the court upheld the ban. *Id*.

Like Missouri in *Giboney*, the state of North Greene has a "paramount" power to govern its own affairs and protect the people within its borders. Just as Missouri had the power to govern its business and labor concerns, North Greene has the power to govern its health and wellness concerns. States have a legitimate interest in protecting their citizens from state-licensed medical practitioners prescribing potentially harmful treatments. Petitioner cannot escape accountability from the law when First Amendment protections are either diminished or non-existent. Just as the business interference of the picketing, rather than the message of the picketing, was at issue in *Giboney*, treatment itself is the conduct subject to regulation in the present case. (R. 4). The method of treatment, speech, is incidentally implicated. On *Pickup*'s continuum, the Statute falls on the side with the least protection because the Statute does not prohibit a counselor's speech of

their own thoughts of conversion therapy, either in private with a patient or in public discussion. (R. 4). The Statute does, however, prohibit the treatment of a minor patient using conversion therapy. (R. 4). There is no discernable difference between the speech of a medical doctor prescribing treatments for cancer and a licensed therapist prescribing treatments for a psychological condition. The action itself is subject to regulation, rather than any incidental speech that might accompany the action.

Additionally, the Statute's potential chilling effect on speech is justified for two policy reasons. First, the Statute expressly allows any and all ideas contained within conversion therapy to be openly discussed and argued on the marketplace of ideas by the same state-licensed therapists that are forbidden to administer the treatment. Second, even if there is a nominal amount of chilling, there is no justification for any individual patient to be harmed by a treatment in the name of free speech.

2. Finding that the Statute is incidental speech is consistent with this Court's precedent in NIFLA.

This Court's holdings in *NIFLA* that (1) the professional speech doctrine is not a recognized exception to the Free Speech Doctrine, and (2) strict scrutiny should be applied to content-based statues, do not overrule the fundamental idea that some speech and/or conduct is afforded less First Amendment protection than others. *NIFLA*, 138 S. Ct. at 2361.

In *Pickup*, the Ninth Circuit determined that a statute restricting conversion therapy on minors was aimed at conduct, not speech. 740 F.3d at 1229. After finding that the First Amendment did not protect the conduct, the court analyzed the statute under rational basis review and held the government had a significant interest in restricting the conduct. *Id.* at 1231. The court expanded on the professional speech doctrine that had been used on the circuit level

several times. Under this doctrine, the court viewed speech by professionals on a continuum based on the communicator and the audience. *Id.* at 1227–29. On one end, the court found that the government has a compelling interest in monitoring and regulating a licensed professional's private speech to patients during treatment. *Id.* On the other end, the court determined strict scrutiny should be applied when regulating a licensed professional's speech to the public or in some other personal capacity. *Id.* at 1229.

The Eleventh Circuit caused a circuit split regarding this reasoning in *Wollschlaeger v. Governor of Florida*. In *Wollschlaeger,* a statute prohibited doctors from asking a patient about gun ownership if the ownership was unrelated to the medical condition the patient came in for. 848 F.3d 1293, 1300 (11th Cir. 2017). The court rejected the argument in *Pickup* and applied heightened scrutiny to the statute governing professionals, which the statute did not survive. *Id.* at 1311. The case here can be distinguished from *Wollschlaeger* because there, the government was attempting to restrict speech that was completely irrelevant to the treatment of the patient and here, the treatment itself is the speech in question. (R. 4). The government has a compelling interest in the prevention of harmful medical treatments, but it has no interest in prohibiting doctors from discussing unrelated topics with their patients.

Though not directly resolving the circuit split, this Court addressed the Ninth Circuit's *Pickup* methodology in *NIFLA v. Becerra,* where the Court granted cert to determine whether a statute requiring crisis pregnancy centers to provide certain notices to patients was constitutional. 138 S. Ct. at 2368 (2018). The Court held that it was not. *Id.* at 2378. Although the professional speech doctrine utilized by some circuit courts was abrogated, the Court acknowledged the existence of some unprotected categories of speech including commercial speech and professional conduct that incidentally implicates speech. *Id.* at 2372. In doing so, the Court

abandoned explicitly rationalizing restrictions targeted at professionals, but acknowledged that States can regulate professional conduct. The barred professional conduct here incidentally implicates speech. (R. 4). Furthermore, the Statute here can be distinguished from the statute in *NIFLA*, because it prohibits a certain type of treatment whereas the *NIFLA* statute specifically mandated certain speech for crisis pregnancy centers.

NIFLA also cited this Court's opinion in *Holder v. Humanitarian Law Project*, which weighed in on defining conduct versus speech. *Id.* at 2366. In *Holder*, a group challenged a federal statute that forbid providing "material support" to terrorist organizations. 561 U.S. 1, 10–11 (2010). This Court found that the "conduct triggering coverage under the statute consists of communicating a message" and was therefore protected speech and not merely conduct. *Id.* at 27. The Statute here is distinguishable from *Holder* because *Holder*'s statute prevented specific knowledge from being shared under any circumstance, while this Statute only prevents a specific medical treatment from being administered and does not prevent the information from being shared. If the Statute here prohibited licensed therapists from ever discussing conversion therapy, even in public, it would be facially unconstitutional. However, this is not what the Statute mandates.

The Ninth Circuit addressed the impact of *NIFLA* and revisited conversion therapy bans in *Tingley v. Ferguson*, a case notably similar to the one here. In *Tingley*, the court examined a Washington state law that listed the performance of conversion therapy on minors as "unprofessional conduct." 47 F.4th 1055, 1064 (9th Cir. 2022). The court noted the similarity to the statute in *Pickup*. *Id.* at 1071. The court acknowledged the abrogation of the professional speech doctrine from *NIFLA*, but doubled down on its reasoning that this set of circumstances was consistent with precedent that the conduct in question is not protected speech and thus

affirmed the district court's dismissal. *Id.* at 1091. The court reasoned that finding the conduct was not protected speech was not inconsistent with *NIFLA* and cited previous decisions in which this Court has acknowledged there may be previously unrecognized exceptions to protected speech that have a "tradition of regulation." *Id.* at 1079–80. While there is not a specific exemption for speech by occupational healthcare providers, this Court has held that there is speech that falls under "historic and traditional categories long familiar to the bar," *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991). The court also cited *Dent v. West Virginia*, a case from 1889, in which this Court recognized the validity of medical licensing requirements to bolster the idea that the restriction of speech within the medical profession is a longstanding tradition. *Tingley*, 47 F.4th at 1080.

The Ninth Circuit's reasoning in *Tingley* fits exceptionally well here. The valid interests of a state in regulating professional conduct, especially that of licensed healthcare professionals, within its borders are not diminished by the absence of a specific "professional conduct" doctrine. The North Greene Statute falls squarely within the bounds of "traditional regulation."

Other courts have considered the balance between speech and conduct and whether incidental speech protects the regulated conduct under the First Amendment. In a recent conversion therapy case, a Colorado district court held that, "[a]lthough a state cannot ignore constitutional rights under the guise of prohibiting professional misconduct, the First Amendment does not prohibit restrictions directed [at] conduct from imposing incidental burdens on speech. *Chiles v. Salazar*, No. 122CV02287CNSSTV, 2022 WL 17770837 (D. Colo. Dec. 19, 2022) (internal citations omitted). A dissenting opinion in *Otto v. City of Boca Raton, Fla.*, held "[t]hat the treatment technique of talk therapy is administered through words does not somehow render it any less of a healthcare treatment technique or any less subject to government

regulation in the interest of protecting the public health." 41 F.4th 1271, 1294–95 (11th Cir. 2022) (Rosenbaum, J., dissenting from the denial of rehearing en banc).

When applying the reasoning from the previous cases to the Statute, it becomes clear that there is a limited set of circumstances where government can restrict professional speech. The case here is similar to *Pickup* and *Tingley*, while distinguishable from *NIFLA* and *Wollschlaeger*. When providers are administering treatments to patients, which is precisely what the Statute seeks to regulate, actions that providers take can be restricted because of the state's interest in providing for the health and welfare of its citizens. The government has historically regulated conduct within the medical field and this Statute is no different. The analysis should not change drastically simply because the delivery method of the treatment changes. If a medical treatment is determined to be ineffective and potentially harmful by a consensus of experts, the government has a significant interest in regulating its use, especially by licensed providers. (R. 4). The content of the treatment, whether a drug or talk therapy, is not restricted based on its content, but on its harmful outcome to patients regardless of its status as a controversial topic.

B. Even If This Court Finds That Conversion Therapy Is Non-Exempt Speech, it Should Find That the Statute Is Content-Neutral and Only Subject to Intermediate Scrutiny.

1. *The Statute is content-neutral because it targets a secondary effect of speech, not the suppression of ideas or viewpoints themselves.*

The third factor of consideration in analyzing a statute regulating speech is whether the statute is content-neutral or content based. The analysis considers the plain language and intent behind the statute to determine whether the speech being restricted is focused on specific content. If the statute attempts to limit a particular viewpoint or idea, it is content-based.

In *Reed v. Town of Gilbert, Ariz.*, a city ordinance placed restrictions on signs that contained certain messages, but not others. 576 U.S. 155 (2015). The Court held that an ordinance narrowly-tailored to achieve the goal of motorist safety might survive strict scrutiny, but that a facially content-based ordinance would not. *Id.* at 173. Importantly, the Court noted that content neutral laws are subject to "lesser scrutiny." *Id.* Here, the Statute is not intended to restrict any specific idea or viewpoint but instead is meant to protect patients from a potentially harmful medical treatment. It targets a secondary effect of the speech. The Statute is facially content-neutral as it does not target personal beliefs about conversion therapy, rather it targets the practice of conversion therapy.

The Third Circuit heard a similar conversion therapy case to the case here, where a state restricted licensed therapists from performing conversion therapy on minors. *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014) (professional conduct standard abrogated by *NIFLA*). By applying intermediate scrutiny, the court held that there was a compelling government interest to restrict licensed professional speech and that it was sufficiently narrowly tailored to allow the speech to be restricted. *Id.* at 237–39. The Statute here would pass the same standard of intermediate scrutiny, because it too is generally applicable and serves a legitimate government interest.

2. *The Statute overcomes intermediate scrutiny.*

When a restriction is content-neutral, meaning it does not restrict a particular topic or viewpoint, courts will apply either a rational basis or intermediate scrutiny analysis. Courts subject content-based restrictions to strict scrutiny analysis. Content-based laws are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 163. States rarely overcome the

burden of proving a narrowly tailored compelling government interest. Furthermore, this Court has held that the state has the burden to prove it has no other effective alternatives to meet the compelling interest. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000).

To withstand intermediate scrutiny, however, a restriction must further an important government interest and the restriction has to be substantially related to that important interest. Here, there is little debate that this statute advances an important government interest in the health and welfare of the people. It is hard to imagine a more important interest. A citizen cannot have life, liberty, and the pursuit of happiness if they are not alive and healthy. Not only has the regulation and licensing of medical professionals been long recognized by this court, but the practice predates the nation itself. The statute is substantially related to the promotion of this important interest. In fact, it is directly aligned with it. The sole purpose of the Statute is to protect LGBTQ+ minors from harm.

3. *Even if the court analyzed the Statute under strict scrutiny, it would still overcome its burden.*

Facially content-based statutes must overcome strict scrutiny, which can be overcome by proving a compelling government interest and by showing the statute is narrowly tailored to achieve its goal(s). *Reed*, 576 U.S. at 157.

Though the statute in Reed did not overcome strict scrutiny, this Court has affirmed the validity of several other content-based statutes or ordinances that were able to meet this high bar. *See Young v. American Mini Theatres*, 427 U.S. 50 (1976) (upholding zoning ordinances regulating movie theaters based on the content of the movies shown); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (plurality opinion) (accepting a restriction allowing commercial but not political advertising); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973) (upholding restrictions on partisan speech by state employees); *Ohralik v. Ohio State Bar Assn*., 436 U.S. 447 (1978)

(upholding restrictions on solicitation by lawyers but not doctors). Similarly, to the aforementioned cases, North Greene's Statute would survive strict scrutiny because it meets a compelling state interest and is narrowly tailored to achieve said interest. The State's interest in protecting its minor LGBTQ+ population is narrowly achieved by prohibiting speech only within the confines of therapist-patient treatment outside of the auspices of a religious group. The Statute does not overreach because it does not prohibit the discussion of conversion therapy.

II. THE STATUTE IS VALID UNDER THE FIRST AMENDMENT'S FREE EXERCISE CLAUSE BECAUSE IT IS A NEUTRAL LAW OF GENERAL APPLICABILITY, SUPPORTING RATIONAL BASIS REVIEW.

The present issue requires this Court to determine whether North Greene's ban on conversion therapy performed on minors violates the Free Exercise Clause of the First Amendment. This Court should affirm the Fourteenth Circuit's holding that the Statute did not violate the Free Exercise Clause of the First Amendment. The Statute is neutral and of general applicability, even if it may incidentally impact an individual.

The First Amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." U.S. CONST. amend. I. This Court has held the Free Exercise Clause applicable to the States under the terms of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Although the application of the Free Exercise Clause to the States prevents infringement, this right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (citation omitted). Strict scrutiny is applied only when a law fails to be neutral and generally applicable, even if the law incidentally burdens religious practice. *Church of Lukumi*

Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). If the law is a neutral law of general applicability, rational basis review is applied. *Stormans, Inc. v. Wiesman*, 794 F. 3d 1064, 1076 (9th Cir. 2015).

The North Carolina Statute prohibits therapists from practicing conversion therapy on minor patients. (R. 4). Several states have enacted similar laws. *See, e.g.,* Wash. Rev. Code §§ 18.130.020(4) and 18.130.180(27); Cal. Bus. & Prof. Code § 865.1, Ut. Code Ann. §58-1-511, Col. Rev. Stat. 12-36-102.5(5.5); Mass. Gen. Laws ch. 112, § 275. Laws prohibiting the practice of conversion therapy on minors are a growing trend in the United States.

This Court should affirm the holding of the Fourteenth Circuit because North Greene's law prohibiting conversion therapy performed on minors is a neutral law of general applicability. The law satisfies these two conditions and garners rational basis review, which is satisfied as the purpose behind the law is rationally related to the State's interest in protecting minors within the LGTBQ+ community.

A. North Greene's Law Banning Conversion Therapy is Neutral on its Face and in its Object, Creation, and Operation.

1. *North Greene's law banning conversion therapy is facially neutral.*

North Greene's law is facially neutral as to its text. The only mention of religion within the text comes from the exception for mental health professionals practicing under a religious organization. (R. 4). A law fails to be neutral if "it refers to a religious practice without a secular meaning discernible from the language or context." *Lukumi*, 508 U.S. at 533. This is not the case here. When a law contains no reference to religious practice it is facially neutral. *Tingley,* 47 F.4th at 1085. *See also Welch v. Brown*, 834 F.3d 1041, 1045 (9th Cir. 2016) (holding that a California law prohibiting the practice of conversion therapy on minors was rationally related to

a legitimate government interest and that the express exemption for religious groups survived rational basis review).

When a law contains no reference to religious practice it is facially neutral. *Tingley v. Ferguson*, 47 F.4th 1055, 1085 (9th Cir. 2022). See also *Welch v. Brown*, 834 F.3d 1041, 1045 (9th Cir. 2016). The Washington law at bar in *Tingley* made no express mention of religious practices aside from an express exception that the law did not apply to mental health professionals practicing under the auspices of a religious organization. *Id*. This Court has analyzed facial neutrality in a similar fashion. *Lukumi*, 508 U.S. at 533. In *Lukumi*, the city ordinances passed contained no express mention of religion in their text. *Id*. at 534. The Court found that the use of the words "sacrifice" and "ritual" may have had religious roots, they now have accepted secular meanings. *Id*.

North Greene's law prohibiting the practice of conversion therapy on minors makes no mention of religion outside of the express exemption given to those practicing under the auspices of a religious organization. This is overwhelmingly similar to the issues in both *Tingley* and *Welch*. Similar as well to *Lukumi*, North Greene's law makes no express mention of religion. In fact, the North Greene law is less questionable on its face than the ordinance in *Lukumi* as there are no questionably religious terms like the use of "sacrifice" and "ritual." The language in North Greene's statute enacts a ban on conversion therapy. The only mention of religion is the express protection of the practice of conversion therapy for those mental health professionals practicing under the auspices of a religious organization. The presence of this exception gives direct evidence of neutrality. Because of this, the statute is facially neutral.

2. The object of North Greene's Law prohibiting the practice of conversion therapy on minors is to protect the LGBTQ+ population, not to restrict religious practices.

Courts analyze the object of laws that potentially impact religious institutions for neutrality. This Court has held that if "the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of Lukumi,* 508 U.S. at 533 (citation omitted). The object of North Greene's law is the protection of minors within the LGTBQ+ community, not to target or restrict religious practices.

Restricting an individual's actions because of their religious character fails the test of neutrality. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). In *Kennedy*, a high school football coach in the Bremerton School District engaged in a silent prayer at the fifty-yard line after every game. *Id.* at 2416. The superintendent of the district received a complaint and gave notice to Kennedy that the practice of post-game prayer needed to be performed out of the vicinity of students. *Id.* at 2417. The district was concerned with violating the Free Exercise Clause by allowing Kennedy to "engage in a public religious display" during his employment and attempted to insulate themselves from liability. *Id.* at 2419. After multiple attempts to comply with the order, Kennedy again prayed at midfield but was joined by parents and players in a demonstration of prayer. *Id.* at 2418. The district put Kennedy on paid administrative leave for engaging in a public demonstration of faith while performing his duties as an assistant coach. *Id*. at 2418–19. This Court found that prohibiting a religious practice was the district's unquestioned "object." *Id.* at 2423.

When a law provides an explicit exemption for religious groups, coupled with the purpose of the law serving to protect a vulnerable group, the law cannot be found to have the purpose of restricting religious practices. *Tingley,* 47 F.4th at 1085 (9th Cir. 2022). *See also Welch,* 834 F.3d at 1045. In *Tingley*, the state of Washington passed a law prohibiting the practice of conversion therapy on minors. *Id.* at 1064. The law contained an express exemption

for mental health professionals practicing under the "auspices of a religious denomination, church, or organization." *Id.* at 1065. The legislature asserted that it had the intent of protecting members of the LGBTQ+ community from the noted harms resulting from conversion therapy. *Id.* The Ninth Circuit held that Washington's law served the purpose of protecting a vulnerable group and the express exemption for mental health professionals made the object of the law neutral, not attempting to target or restrict religious practice. *Id.* at 1085.

The present case is different from *Kennedy* and overwhelmingly similar to *Tingley* and *Welch*. In *Kennedy*, the district prohibited Kennedy from the public expression of his faith out of the fear that they, themselves, may face liability for violation of the Free Exercise Clause. Thus, their entire objective, target, and purpose, was to restrict the religious conduct of Kennedy. In the present case, the object of North Greene's statute is the protection of a vulnerable class of people, and in no way is it targeted to restrict religious freedom. The State providing an express exemption for mental health professionals working under the auspices of a religious group is evidence that the State had no intention of infringing upon religious practices. In *Tingley* and *Welch*, the Ninth Circuit found the object of the law to be seeking out the protection of a vulnerable class of people from the noted harms of conversion therapy. Washington and California's laws included an express exemption for mental health professionals practicing under a religious group's auspices. This exact same situation takes place in the present case, and thus the same rationale should be applied to North Greene's law. Protection is the object of the law, not infringement.

The object of North Greene's law is the protection of minors within the LGTBQ+ community, not to target or restrict religious practices. Conversion therapy is grounded in the outdated notion that being within the LGBTQ+ community is abnormal, stemming from mental

health problems. *See* Christy Mallory, Taylor N.T. Brown, and Kerith J. Conron, *Conversion Therapy and LGBT Youth: Update*, UCLA Williams Institute (June 2019). Currently, most conversion therapy is "talk therapy," however, some practitioners have also used "aversion therapy, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when the individual became aroused to same-sex images or thoughts." *Id*. The American Psychology Association warned of potential harms in an amicus brief to the Ninth Circuit, stating that conversion therapy can lead to harms such as "depression, suicidal ideation, anxiety, [and] substance abuse. . .." Brief for Ferguson as Amicus Curiae, p. 5, *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022). North Greene's law serves the legitimate purpose of trying to protect this class of people from the demonstrated harm from potentially dangerous practices, instead of providing acceptance and encouragement.

3. The legislative history surrounding the enactment of North Greene's statute does not give rise to anti-religious animus.

In addition to examining a law's facial neutrality, courts may examine both direct and circumstantial evidence, such as the law's historical background, the series of events leading to its enactment, and its legislative history. *Lukumi*, 508 U.S. at 540. Negative comments regarding religion, made by a governing body, can evidence a lack of neutrality. *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018). *See also Lukumi*, 508 U.S. at 542.

In *Masterpiece Cakeshop*, a same-sex couple entered a Colorado cake shop to purchase a custom cake for their wedding, and the owner declined to make the cake because of his religious views on marriage. 138 S. Ct. at 1724. The couple filed a complaint against the shop and its owner. The Civil Rights Division investigated the complaint and referred it to the Civil Rights Commission for hearings. *Id.* at 1725–27. At the first hearing, commissioners endorsed the view that religious beliefs "cannot legitimately be carried into the public sphere or commercial

domain." *Id.* at 1729. At the second hearing, the commissioner stated that freedom of religious exercise has been used to justify both the Holocaust and slavery. *Id.* This Court held that these comments evidenced the reality that there was no way that an adjudicating body making these comments and endorsing these beliefs could be found to be acting neutrally. *Id.* at 1731.

In *Lukumi*, this Court found that negative comments towards religious practices or beliefs in the course of law-making evidence a lack of neutrality and disclose the underlying true object of a law. 508 U.S. at 542. A church practicing the Santeria religion, which is known for practicing animal sacrifice, leased land in the respondent city and announced plans to create a house of worship. *Id.* at 520. The city council held an emergency session and passed a series of ordinances prohibiting many Santerian practices that were "inconsistent with public morals, peace, or safety" and notably prohibited animal sacrifice within the specific context of the Santeria religion. *Id.* This Court analyzed comments made by city councilmen to help determine if the law was neutral. *Id.* at 541. One councilman, a native of Cuba, pointed out that that people "were put in jail for practicing this religion" and noted that this religion stood "in violation of everything [the United States] stands for." *Id.* Another councilman distinguished the ban on animal sacrifice in the Santerian context from that of Kosher slaughter, stating that Kosher slaughter serves a "real purpose." *Id.* Finally, another councilman asked how the council could stop the church from opening. *Id.* This Court found that the history behind this ordinance disclosed the true object of law: targeting Santerian animal sacrifice because of its religious motivation. *Id.*

Petitioner claims that the comments of two North Greene State senators, Senator Lawson and Senator Pyle, display anti-religious animosity and reveal the object of the law as targeting religious practices. (R. 9). Senator Lawson explained his intent in sponsoring the bill was to

eliminate the "barbaric practices" associated with conversion therapy and does not mention religion anywhere in the record. (R. 9). Senator Pyle was criticized for denouncing those who try to "worship" or "pray the gay away." (R. 9). When taken in context, these comments do not evidence anti-religious animosity, rather, the product of the Senator contrasting his own experience having a gay daughter with that of a friend whose experience with conversion therapy on his own daughter. (R. 9).

The comments from North Greene's legislature fail to meet the threshold of hostility set in *Masterpiece* and *Lukumi.* Though the Court in *Masterpiece* distinguished the case on the fact that the comments were made during an adjudication, rather than from a legislative body, the case still provides a threshold for what comments rise to the level of anti-religious animosity. The comments in *Masterpiece* are much more hostile than those made by North Greene's legislature. In *Masterpiece*, the comparison of free exercise of religion to justify past horrors like the Holocaust and slavery directly displayed anti-religious animus. In *Lukumi*, the city councilmen directly mentioned the "horrors" of the Santeria religion's practices and publicly held the belief that there was no place in the city for that type of practice. The comments in the present case come nowhere close to the threshold of hostility on the record in these two Supreme Court cases. Senator Lawson's comments do not even mention religion, nor do they reveal some veiled hostility to religion. (R. 8). Lawson simply described the practice of conversion therapy as "barbaric" in secular terms which give no indication of anti-religious hostility. (R. 9). Senator Pyle was speaking of his own experience as a man of faith with a gay daughter. (R. 9). While he did use religious terms, the use was more colloquial jargon in nature. (R. 9). Combining the context of his own experience with a gay daughter, with his monologue on his own religious faith, these comments cannot be construed to demonstrate anti-religious hostility. Certainly,

these comments in the present case are much more neutral than comparing free exercise of religion with the Holocaust and slavery.

Even if this Court were to find that these comments displayed anti-religious hostility, the Supreme Court has "long disfavored arguments based on alleged legislative motives" because such inquiries are a "hazardous matter." *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2255–56 (2022) (citation omitted). The Court has "been reluctant to attribute those motives to the legislative body as a whole" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 2256. Even if the Court found that the Senators' comments evidenced a lack of neutrality, they are not dispositive because it is impossible to represent the views of one as the views of the whole.

4. North Greene's statute banning conversion therapy is neutral in its operation because the same conduct is outlawed for all regardless of religious beliefs.

Courts may analyze the real-world operation of a law to help determine if it is neutral. *Lukumi*, 508 U.S. at 535. The law must prohibit the same conduct for all. *Stormans, Inc. v. Weisman*, 794 F.3d 1064, 1077 (9th Cir. 2015) (citation omitted). Strict scrutiny is applied only when a law fails to be neutral and generally applicable, even if the law incidentally burdens religious practice. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

When a law contains enough exemptions so that it effectively only applies to a particular group, there has been in effect a "religious gerrymander," therefore showing that the law is not neutral in its operation. *Lukumi*, 508 U.S. at 535. In *Lukumi*, a city ordinance prohibited the sacrifice of animals, but defined sacrifice to mean the unnecessary killing of an animal on a ritual or ceremony not for the primary purpose of consumption. *Id.* at 535–36. The definition excluded almost all killing of animals except for religious sacrifice and provided an exception for Kosher

slaughter. *Id.* at 536. A second ordinance prohibited the possession, sacrifice, or slaughter of any animal if it was to be used for food purposes but provided an exemption for licensed food establishments. *Id.* The Court found that these ordinances, coupled with their exceptions, did not apply evenly to different groups and that this evidenced the target of the ordinances as an attempt to restrict the church's religious practices. *Id.* at 535.

North Greene's ban on conversion therapy operates neutrally and prevents the practice on minors, whether the therapy is sought for religious or secular reasons. Distinguishable from *Lukumi*, the North Greene statute does not contain multiple exceptions or provisions that cause it to be narrowly applied solely to religious groups. The legislative history and evidence before the North Greene General Assembly show that the legislators understood that people seek conversion therapy for both religious and secular reasons and that the potential harms are present in either scenario. (R. 9). The law prohibits health care providers from performing conversion therapy on minors whether those minors are seeking it for religious or secular reasons, as evidenced by the law's express protection for those practicing under the auspices of a religious organization. The ordinance in *Lukumi* created a narrow prohibition to covertly restrict religious practices in the area. Further, nothing in the Statute invites a potential exception or favorable treatment for conversion therapy performed for secular reasons. Thus, the Statute applies evenly across all groups, prohibiting conversion therapy performed on minors regardless of who is practicing.

Even if the Statute incidentally burdens religious practice, under *Lukumi*, rational basis still applies. The Statute allows for an exception for the practice of conversion therapy for those practicing under the auspices of a religious organization, so the fair treatment of religious groups is a nonissue. However, Petitioner is now prevented from practicing conversion therapy in an

individual capacity because he does not act under the umbrella of a religious group. This effect is incidental to the Statute, not the target. The goal of enactment was to protect a vulnerable class. In addition, Petitioner is still permitted to discuss his personal views on conversion therapy and refer a patient to someone who can perform the requested treatment. (R. 4). This explicit allowance for Petitioner to continue to share his beliefs further evidences North Greene's efforts not to inhibit the free exercise of religion. Petitioner's inability to practice conversion therapy is incidental to the enactment of the statute, and following *Lukumi*, is not enough to move the needle from rational basis to strict scrutiny.

B. North Greene's Law is Generally Applicable Because it Provides Neither a Formal Mechanism for Granting Exceptions by the Government, nor Does it Prohibit Religious Conduct While Permitting Secular Conduct.

A law lacks general applicability when the law prohibits religious conduct while permitting similar secular conduct that undermines the government's asserted interest. *Lukumi*, 508 U.S. at 542–46. Generally, there are two ways by which a law is deemed not generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). The first is the existence of a "formal mechanism for granting exceptions" that "invite[s] the government to consider the particular reasons for a person's conduct." *Id.* at 1879 (citation omitted). The second occurs if the law "prohibits religious conduct while permitting secular conduct" that infringes against the asserted government interest. *Id.* at 1878.

1. There is no formal and discretionary mechanism within North Greene's statute which would allow individual exceptions.

A formal mechanism for granting exceptions that vests discretion in individual officers in charge of enforcing a law violates general applicability. *Id.* at 1879. Philadelphia stopped referring children to a Catholic adoption agency because of the agency's refusal to place children

in families headed by same-sex couples due to religious beliefs. *Id.* at 1875. In terminating the relationship, the City relied upon a provision in the contract preventing adoption agencies from discriminating against prospective adoptive parents on account of their sexual orientation. *Id.* at 1878. The only way this provision could be bypassed was through an exception granted by the Commissioner at his or her sole discretion. *Id.* This Court found that the formal mechanism for granting individual exceptions at the sole discretion of an officer of the government violated general applicability. *Id.* at 1878–79.

North Greene's ban on conversion therapy does not provide a formal and discretionary mechanism by which the State could grant individual exceptions. There is nothing within the text of the law that grants any such mechanism. The text of the law clearly prescribes who is prevented from doing what and does not provide any exceptions aside from the religious exception that is expressly contained within the law. There is no exemption system, simply just an exemption for those individuals practicing "under the auspices of a religious organization."

2. North Greene's law does not treat any comparable secular conduct more favorably than religious conduct.

Treating comparable secular activity more favorably than religious exercise violates general applicability. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). In *Tandon*, plaintiffs sued seeking the injunction of restrictions placed on private gatherings during the COVID-19 pandemic, claiming that the restrictions violated the Free Exercise Clause. *Id.* at 1294. California was providing more favorable treatment to non-secular activity such as permitting hair salons, retail stores, movie theaters, and indoor restaurants to gather more than three households at a time. *Id.* at 1297. The State was unable to prove why these non-secular activities posed less of a risk than the at-home religious exercise. *Id.*

Petitioner has failed to identify comparable secular activity that goes against North Greene's interest in protecting minors from the harms of conversion therapy yet is still permitted under the Statute. North Greene's statute is designed and intended to protect minors from the proven harms resulting from conversion therapy. The present case is different than *Tandon*, where the State of California restricted religious gatherings during the COVID-19 pandemic and permitted secular activities to continue. There is no comparable secular activity which North Greene is currently treating more favorably than the ban on conversion therapy. The Statute is evenly applied.

C. This Court Does not Need to Revisit *Employment Division v. Smith* Because Subjecting Free Exercise Claims to Rational Basis Allows for more Protection to Vulnerable Groups.

This Court held in *Smith* that although the application of the Free Exercise Clause to the States prevents infringement, this right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion requires (or proscribes)." *Smith*, 494 U.S. 872, 879 (1990) (citation omitted). Thus, any law or statute that is subject to review under a Free Exercise claim will be subject to rational basis review and will only need to establish that the law or statute in question is rationally related to a legitimate government interest. *Id.* This level of scrutiny presents a significantly lower burden for the party defending the law or statute in question than a law being challenged under strict scrutiny which can "only survive if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests." *Fulton*, 141 S. Ct. at 1881.

Smith is the proper framework to review Free Exercise Claims because rational basis review allows for easier ratification for LGTBQ+ anti-discrimination laws. Arianna Nord of

Washington Law Review noted that subjecting a law to rational basis review allows for an easier pathway to ratification for anti-discrimination laws while still providing adequate protections for the free exercise of religion. Arianna Nord, Comment, *Queer and Convincing: Reviewing Freedom of Religion and LGBTQ+ Protections Post-Fulton v. City of Philadelphia*, 97 Wash. L. Rev. 265 (2022). While the protection of the Free Exercise of Religion has been and will continue to be of paramount importance to this country, modern school of thought demands that the law accounts for protecting vulnerable groups. *Smith* promotes this modernized theory and does not erode protections for religious groups.

Religious groups are still protected through analysis of a law's object, impact, and applicability. Violating any one of these factors will remove the law to face strict scrutiny. In the present case, North Greene has satisfied its burden by displaying that the statute served the purpose of protecting a vulnerable group of people while applying the law evenhanded across all groups and providing an express exemption for religious groups. This case is not one that demands revisiting *Smith* because there is no substantial infringement or restriction on the free exercise of religion.

CONCLUSION

This Court should AFFIRM the Fourteenth Circuit's decision and UPHPOLD the constitutionality of North Greene's Uniform Professional Disciplinary Act.