Docket No. 23–2020

In The

Supreme Court of the United States

October Term, 2023

Howard Sprague,

Petitioner,

v.

State of North Greene,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR RESPONDENT

Attorneys for Respondent
September 26, 2023

Team 27

QUESTIONS PRESENTED

I. 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?

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

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BRIEF FOR RESPONDENT

TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, the State of North Greene, appellee in Docket No. 23–2020 before the United States Court of Appeals for the Fourteenth Circuit, respectfully submits this brief on the merits, and asks this Court to affirm the United States Court of Appeals for the Fourteenth Circuit.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of North Greene is unpublished but is available at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The decision of the United States Court of Appeals for the Fourteenth Circuit opinion citation is *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023) (R. at 3-16).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution is relevant to this case and is reprinted in Appendix A.

STATEMENT OF THE CASE

Factual Background

The State of North Greene ("North Greene"), like many states, requires health care providers to be licensed before they may practice in North Greene. *See* N. Greene Stat. §105 (a). (R. at 3). Beyond licensing, other statutes regulate the conduct of said professionals. Specifically, Chapter 45 of Title 23, North Greene's "Uniform Professional Disciplinary Act," enumerates actions that are considered "unprofessional conduct" for licensed health care providers and subjects them to discipline for failing to adhere to those standards. *See* N. Greene Stat. §§ 106, 107, 110. (R. at 4). Psychologists and therapists are included in the medical professionals subject to these regulations. Therapists work with a variety of clients in North Greene including LGBTQ youth, and the North Greene legislature addressed the specific concerns of this vulnerable group by adding "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct in 2019 ("UPDA"). N. Green Stat. § 106(d). (R. at 4). The legislature specifically drafted the UPDA to define conversion therapy as "a regime that seeks to change an individual's sexual orientation or gender identity" and not as "counseling…that provide[s] acceptance." (R. at 4).

The American Psychological Association ("APA") opposes conversion therapy and encourages therapists to affirm their clients' experiences instead. (R. at 4). Additionally, the legislature stated purpose was to regulate "the professional conduct of licensed health care providers" and "protect the physical and psychological well-being of minors." (R. at 4). Additionally, Senators Pyle and Lawson expressed their personal views on the matter on the record. (R. at 8,9). The legislature specifically exempted three situations from its UPDA: "(1) speech by licensed health care providers that 'does not constitute performing conversion therapy,'

(2) '[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers,' and (3) '[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization.' N. Greene Stat. §106(f)." (R. at 4). Thus, the UPDA does not prevent licensed health care providers from speaking freely in public about conversion therapy, discussing their views about the practice with their patients, offering conversion therapy to those over 18 year old, or handing out references to clients for finding conversion therapy elsewhere. (R. at 4).

Howard Sprague ("Sprague") is a licensed family therapist and a deeply religious person whose beliefs permeate his entire existence. (R. at 3). He believes that a sexual relationship should only be between a man and a woman within the confines of a marriage. (R. at 3) Consequently, he is personally a proponent of conversion therapy. During his sessions, he only engages in verbal counseling and does not utilize physical methods of counseling with his LGBTQ youth.

Procedural History

Eastern District of North Greene. Sprague filed suit against North Greene in the United States District Court for the Eastern District of North Greene, challenging the constitutionality of the UPDA. *Sprague v. North Greene*, 2022 WL 56789, at *5 (E.D. N. Greene 2022). He sought injunctive relief on the grounds that the UPDA violated his free speech and free exercise rights under the First Amendment. *Id.* Accordingly, the court denied Sprague's motion for preliminary injunction and granted North Greene's motion to dismiss. *Id.*

Fourteenth Circuit. Sprague timely appealed the district court's decision. (R. at 8) On appeal, the United States Court of Appeals for the Fourteenth Circuit affirmed the district court's holding. (R. at 11). Using rational basis review, the Fourteenth Circuit found that the UPDA was

rationally related to a legitimate government interest in regulating the medical profession. (R. at 7). Furthermore, the Fourteenth Circuit held that the UPDA was neutral and generally applicable. (R. at 10). Thus, the UPDA did not violate Sprague's free speech or free exercise rights under the First Amendment. (R. at 11).

SUMMARY OF THE ARGUMENT

Free Speech: Conduct and Rational Basis Review. First Amendment jurisprudence often has a difficult task of determining the boundaries of Free Speech and the delineation between speech and conduct. Here, it is not a difficult task because it is professional conduct, not speech that is being regulated. North Green exercised its police power to regulate a licensed profession, medical professionals. This Court has long recognized that this is a legitimate police power and has held that licensing requirements are not a burden on speech. Consequently, regulation after licensure should naturally be permitted. North Greene has passed the UPDA that limits the practice of conversion therapy on LGBTQ. And while it is true that therapists practice medicine through speech, psychology cannot be constitutionally protected from any challenges. The lower court followed this Court's precedent in utilizing *Pickup v. Brown* to analyze the UPDA at hand as professional conduct and to find for the respondent. This Court should affirm that holding.

Free Exercise: Neutral and Generally Applicable and Rational Basis Review. Justice Scalia, in his opinion in *Employment Division v. Smith*, laid out the parameters for when the practices of religious adherents may be permissively burdened. When a law is neutral and generally applicable, it need only be rationally related to a government interest to pass constitutional muster. That is the case here. Sprague is able to practice his religion as he sees fit, but as a medical professional, he may not engage in one specific form of treatment. He may view this as a religious practice, but it is indeed a medical treatment in the eyes of the law. It is a medical treatment that North Greene believes harms the vulnerable LGBTQ youth it is practiced on. As a consequence of its structure and the legislative history behind it, the law is neutral and generally applicable, essentially meaning it does not target religion, and it is rationally related to a governmental interest. The law is so narrowly tailored to its substantial goal that it could hold up against strict scrutiny

as well. Accordingly, this Court should affirm the lower courts' rulings. Furthermore, as this case showcases, *Smith* still provides a workable framework for scrutinizing laws that incidentally burden religion.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FOURTEETH CIRCUIT'S JUDGMENT BECAUSE NORTH GREENE'S PROHIBITION ON PRACTICING CONVERSION THERAPY ON MINORS IS NOT A VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

The First Amendment of the Constitution and its freedoms are the most treasured in our country by both the people and the Court. This Court has stated, "the matrix, the indispensable condition of nearly every other form of freedom," resides in the Freedom of expression. ACLU, *Freedom of Expression*, (Mar. 1, 2020), https://www.aclu.org/documents/freedom-expression. One piece of this "matrix" is the Free Speech Clause of the First Amendment, which states "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I., §1. But freedom of speech and expression have their limits. The Supreme Court has limited the exercise of freedom of speech throughout its storied history and upheld the delicate balance between the interests of freedom of expression and a need for an orderly society. In fact, "it is well understood that the right of free speech is not absolute at all times and under all circumstances." *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942). Both Congress and the states have a right to make laws that uphold order in society, and North Greene has constitutionally exercised this right in its protection of minors within its borders.

The First Amendment does not protect all communication solely because it may be recognized as a "mode of speech" or a method to convey an idea. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992). The existence of a communicative element in any activity does not immediately make that activity constitutionally protected. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). In fact, a State may regulate activities that combine speech and nonspeech elements, even when First Amendment freedoms are incidentally limited. *Id*.

Here, North Greene does not regulate the speech of licensed therapists, but rather their professional conduct. Accordingly, the decision of the Fourteenth Circuit should be affirmed.

A. *The Fourteenth Circuit correctly concluded Sprague's talk therapy is professional conduct.*

On appeal, the Fourteenth Circuit correctly affirmed the trial court's determination that Sprague's First Amendment free speech rights had not been violated. (R. at 7). In coming to their conclusion, both lower courts agreed with North Greene that its UPDA regulated professional conduct, not speech. *Id.* In fact, any effect it had on speech was merely incidental. *Id.*

1. A recognition of Sprague's speech as conduct complies with this Court's precedent allowing for the regulation of professional conduct that incidentally involves speech.

The Fourteenth Circuit's conclusion that the North Greene UPDA regulates conduct is consistent with this Court's precedent. Specifically, the UPDA regulates professional conduct that incidentally involves speech which this Court has recognized is an appropriate abridgement of First Amendment rights.

a) North Greene's regulation of SOCE is professional conduct recognized by this Court's precedent.

While the Court has been unwilling to delineate a category of "professional speech," the Court has nevertheless held that two categories of professional speech are afforded less protection: "[S]ome laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, *e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985); *Milavetz, Gallop & Milavetz, P.A. v. United States,* 559 U.S. 229, 250,

130 S.Ct. 1324, 176 L.Ed.2d 79 (2010); *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 455–456, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978). Second…States may regulate professional conduct, even though that conduct incidentally involves speech. See, *e.g., id.,* at 456, 98 S.Ct. 1912; *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (opinion of O'Connor, KENNEDY, and Souter, JJ.). *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("NIFLA"), 138 S. Ct. 2361, 2372 (2018). It is this second condition that is satisfied here.

In *Planned Parenthood of Southeastern Pa. v. Casey*, this Court upheld a law that regulated a medical professional's speech because that speech was " [a] part of the practice of medicine subject to reasonable licensing and regulation by the State." *NIFLA*, 138 S. Ct. at 2373 (citing *Casey*, 505 U.S. at 884.) In coming to its conclusion, the Court established a doctor's speech within the direct practice of medicine received the "same solicitude it receives in other contexts." *Casey*, 505 U.S. at 884. In *NIFLA*, the distinction of what constitutes professional conduct became clear. Specifically, the Court of *NIFLA* reasoned, a regulation of professional conduct like the one in *Casey*, must be applied to interactions related to a medical procedure sought, offered, or performed. *NIFLA*, 138 S. Ct. at 2374. Here, the UPDA, like the regulation at issue in *Casey* is intimately linked to the harmful medical treatment being administered to minors. Therefore, North Greene's regulation of speech therapy is a constitutional regulation of professional conduct.

b) The UDPA is a constitutional regulation of conduct that only incidentally burdens speech.

Justice Knotts incorrectly worries a state's characterization of professional conduct will result in significant regulation of purely expressive speech. (R. at 13). This Court has already provided a test to prevent States and legislatures from impermissibly regulating

broad swaths of speech under the characterization of conduct. In *United States. v. O'Brien*, this Court held that a regulation aimed at the noncommunicative impact of conduct may incidentally limit First Amendment freedoms. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The defendant, O'Brien, and three others burned their draft cards on the courthouse steps to protest the war in Vietnam. *O'Brien*, 391 U.S. at 369 . They were charged for burning their cards under the Universal Military Training and Service Act of 1948 (the "card-destruction statute"), which made it illegal to knowingly destroy or mutilate draft registration certificates. *Id.* at 370. The District Court rejected the defendant's Free Speech claims. *Id.* The Court of Appeals, however, found the card-destruction statute to be unconstitutional as to Free Speech. *Id.* at 371. In affirming the district court's judgment, this Court laid out a three-part test for determining when a regulation of conduct can justify incidental limitations on First Amendment Freedoms: "Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; 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." *Id.* at 377, 386. Consequently, a statute aimed at the noncommunicative independent impact of conduct is subject to intermediate scrutiny. *Id.* at 382. This Court concluded the card-destruction statute was strictly related to non-communicative conduct because it was not aimed at suppressing communication. *Id.* Therefore, because the card-destruction statute was aimed at non-communicative conduct and served the government's interest in the smooth functioning of

the Selective Service, the card-destruction statute was a constitutional regulation even though it incidentally burdened speech. *Id.*

The *O'Brien* test's applicability does not change because the conduct at issue is that of medical professionals relying upon speech. Here, the expressive elements of conversion therapy are left completely untouched by the UPDA: therapists are free to discuss SOCE with their clients; they just cannot perform it on them. (R. at 4).

Even if professional conduct did overlap with expressive elements protected by the First Amendment, the UPDA is still a permissible regulation of speech and content neutral. Under *Young v. American Mini-Theatres,* a statute that is only aimed at the secondary effects of something, not the actual expressive content, is permissible. *See Young v. Am. Mini Theatres, Inc.,* 427 U.S. 50 (1976). In fact, then the law can be considered content-neutral once more. *See City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986).

Under the UPDA, therapists are still permitted to discuss SOCE as a treatment option. If a therapist was not allowed to discuss it at all then the law would definitely be content-based. Additionally, the secondary effects i.e. the harm of SOCE is not fully experienced by a patient until it is put into practice, so by banning the conduct, the statute is aiming at the result or the effects of SOCE. Thus, if the UPDA is considered content-based, it is aimed at secondary effects and therefore neutral.

Because SOCE is a medical treatment, the actions themselves are not expressive. Accordingly, the UPDA satisfies this Court's *O'Brien* test and is subject to lowered scrutiny. The Fourteenth Circuit was correct in relying on *Pickup* to come to its decision regarding Sprague's conduct.

2. The Fourteenth Circuit was correct in relying on *Pickup* to come to its decision regarding Sprague's conduct.

In accordance with this Court's precedent in *NIFLA* and the other abovementioned cases, the Fourteenth Circuit was correct in utilizing *Pickup v. Brown* to analyze the UPDA of North Greene and to determine that the UPDA regulates professional conduct. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), abrogated (**on other grounds**) by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); (R. at 7).

To come to its decision in *Pickup* regarding a SOCE statute much like the one at issue here, the Ninth Circuit first had to determine whether the statute was a regulation of conduct or speech. *Pickup v. Brown,* 740 F.3d 1208, 1225 (9th Cir. 2014). For this finding, the Ninth Circuit relied on "*National Association for the Advancement of Psychoanalysis v. California Board of Psychology ("NAAP"),* 228 F.3d 1043 (9th Cir.2000), and *Conant v. Walters,* 309 F.3d 629 (9th Cir.2002)." *Pickup,* 740 F.3d at 1225. The Ninth Circuit discussed the cases' theoretical underpinnings to conclude: "(1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation." *Pickup,* 740 F.3d at 1228. To point one, North Greene's UPDA allows for discussion *about* SOCE treatment, only prohibiting the treatment itself. (R. at 4). To points two and three, it is clear that psychotherapy presents the most challenging category of speech versus conduct and must be carefully considered, but psychotherapy is a medical treatment like any other. Patients

go to therapists assuming they conduct themselves by the same "do no harm" maxim that other healthcare professionals operate under. *See* American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts,* (Feb. 2021), https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf ("APA Resolution"). To hold out psychotherapy above other medical professions because of its unique characteristics would be untenable. It would be afforded protection that no other profession is afforded, simply because the means by which psychotherapy is administered is the spoken word. Potentially, the First Amendment could be a shield from the vast majority of regulation. Psychotherapy does not warrant such heightened consideration.

In continuing its analysis, the Ninth Circuit then described a continuum between speech and conduct, finding that the statute at hand landed squarely on the end of the spectrum as conduct. *Pickup,* 740 F.3d at 1229. Justice Knotts in his Dissent takes issue with this construction, labeling this "professional conduct" as a sort of "twilight zone" where the government is regulating speech by relabeling it as conduct. (R. at 13). While that is an important admonition to keep in mind, that is not what is occurring here. During a session with a therapist, many words are spoken: words of introduction, storytelling and the like. Each therapist comes to his or her practice with a theoretical framework in mind as to how to administer treatment. For example, a therapist may employ behavioral therapy based on the belief that behaviors are learned and a reward system may help to change a patient's behavior. These treatment theories are no different from the treatment that doctors prescribe. Each professional sees a problem with a patient and aims to fix it through what the doctor or psychologist believes is the most appropriate treatment, and just like medical treatments that are no longer backed by science may be prohibited, so too can psychological

treatments, even though those treatments invariably use speech. Administering a treatment is at the heart of a psychotherapist's professional conduct.

Thus, the Fourteenth Circuit followed this Court's precedent in utilizing *Pickup v. Brown* and correctly determined that North Greene's UPDA regulated professional conduct.

B. *Because North Greene regulates professional conduct, its Uniform Professional Disciplinary Act should be subject to intermediate scrutiny.*

Even though the Fourteenth Circuit applied rational basis review due to its analysis of the issues, intermediate scrutiny could also be satisfied. (R. at 7). Intermediate scrutiny applies when speech is content-neutral, and the court decides whether the government is advancing a substantial or important governmental interest in a narrowly tailored way. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). North Greene's UPDA satisfies this intermediate level of scrutiny as well as rational basis.

1. North Greene is entitled to regulate the licensed provider's treatment of health conditions.

The police powers of a state cover a wide range of interests from law and order to public health. *See Berman v. Parker,* 348 U.S. 26, (1954). "It is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions." *Whalen v. Roe*, 429 U.S. 589, 603 n. 30 (1977) (citing *Robinson v. California*, 370 U.S., at 664-665, 82 S.Ct., at 1419-1420; *Minnesota ex. rel. Whipple v. Martinson*, 256 U.S., at 45, 41 S.Ct., at 426; *Barsky v. Board of Regents*, 347 U.S. 442, 449, 74 S.Ct. 650, 654, 98 L.Ed. 829). "It is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection." *Barsky v. Bd. of Regents of Univ.*,

347 U.S. 442, 451 (1954). Exercise of these police powers also takes many forms. Justice Jackson in his concurrence in *Thomas v. Collins* summarizes well one particular exercise of these powers through a licensing system: "The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system." *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) (internal citations omitted). And while this case is not about licensing requirements, instead focusing on professional misconduct, the sentiment remains the same. "It has been made unequivocally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing." *Barsky v. Bd. of Regents of Univ., 347 U.S. 442*, 451 (1954). Because licensing requirements dictate how a practitioner legally enters a profession, a state should be able to regulate those practitioners once they are established in those professions. To leave them free from regulation would render the initial requirements futile. Just like you need an ID to get into a bar, you can still be kicked out if you become unruly.

The debate just about the proper terminology around SOCE implicates Justice Jackson's concerns. The fact that many practitioners of SOCE don't even refer to it as therapy should call the use of it in a therapeutic environment into question. The use of the term therapy connotes that there is a disorder to be treated and "mainstream mental health professions have rejected this idea [that being gay is mental illness] since the 1970s. (APA

Resolution at 1). While it is true that not every reason that someone finds themselves in therapy is a diagnosable condition, the fact that there is even debate as to whether to call SOCE therapy is deeply problematic and leaves the practice much more open to regulation by the state. Additionally, because the UPDA is aimed squarely at the mental health of minors, it would be irresponsible for North Greene to not act in this way. Consequently, the UPDA is a valid exercise of North Greene's police powers, but North Greene's stated purpose goes even further, and because the UPDA is narrowly drawn, it also passes intermediate scrutiny.

2. The State has a substantial interest in protecting the physical and psychological well-being of minors.

The North Green General Assembly's "compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting minors against exposure to serious harms caused by conversion" led to the passage of UPDA. (R. at 4). This is a legitimate state interest for which the UPDA is narrowly drawn.

The well-being of all citizens is important but particularly those most vulnerable, and one of the most vulnerable populations are LGBTQ youth who are more than four times as likely to attempt suicide as their peers. *See* The Trevor Project, *Facts about LGBT Suicide,* (Sept. 15, 2023) https://www.thetrevorproject.org/resources/article/facts-about-lgbtq-youth-suicide/. A variety of factors lead to this disparity including stigmatization and bullying. *Id.* The American Psychological Association also identified SOCE as a possible contributor, and a number of professional organizations from around the world agree. (APA Resolution at 2). The mere existence of SOCE communicates to LGBTQ youth that

the way they experience the world is something that should be eradicated because it does not fit the norm.

Justice Knotts dismisses these findings by the APA arguing that professional societies have gotten things wrong in the past. (R. at 14). While he does not provide a single example (instead making a sweeping statement about the grandeur of the First Amendment), this situation is undoubtedly different from the one he is imagining. The recommendations by the APA are attempting to have a more open and inclusive society rather than one that excludes or degrades a segment of society which is generally what has happened when professionals have been wrong i.e. when people were labeled mentally ill for being gay or when those with low IQs were "justifiably" sterilized. *See Buck v. Bell*, 274 U.S. 200 (1927).

But it is not enough to have a substantial state interest as North Greene does, the law must also be narrowly drawn. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 565 (1980). This means that the UPDA does not cover any more speech than is necessary with its provisions. Because the UPDA still allows for discussion *about* SOCE with a therapist's clients and merely regulates the actual administration of SOCE which is professional conduct, the law is narrowly drawn. Consequently, the UPDA passes intermediate scrutiny as well. North Greene enacted the UPDA to regulate professional conduct and it passes intermediate scrutiny, so the Fourteenth Circuit's decision should be affirmed.

II. THIS COURT SHOULD AFFIRM THE FOURTEENTH'S CIRCUIT JUDGMENT BECAUSE THE UPDA IS A NEUTRAL LAW OF GENERAL APPLICABILITY AND IS RATIONALLY RELATED TO A LEGITIMATE GOVERNMENT INTEREST.

Just as freedom of expression as enshrined in the First Amendment is a fundamental American value, so too is freedom of religion. The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I., §1. Thus, two clauses set the boundaries of freedom of religion: the establishment clause and the free exercise clause. This case concerns the Free Exercise clause.

Strict scrutiny was the law of the land until *Employment Division v. Smith* when the *Sherbert* test was rendered null and void. *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990). Justice Scalia argued that religious practices may be interfered with because "to permit [non-compliance with any law] would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879. Furthermore, "the right of free exercise 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.)" *Id.* Currently, *Smith*'s test is still good law and should be applied here.

A. *The Law is Neutral and Generally Applicable and Should Be Subjected to Rational Basis.*

The Fourteenth Circuit correctly applied rational basis review to the UPDA because it is a statute that is neutral and generally applicable. The court first determined the statute was neutral because North Greene did not set out to target religion. (R. at 8). Secondly, the court correctly determined that the statute was generally applicable. (R. at 10). The

court reasoned that Sprague was unable to prove that a system for granting exemptions existed or that the law "prohibit[ed] religious conduct while permitting secular conduct." *Id.* (citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021)).

1. The Law Specifically Exempts Religious Counseling.

On its face, the UPDA is neutral because it does not 'refer[] to a religious practice." (R. at 8) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 533 (1993)). In fact, the only mention of religion is to clarify that the UPDA does not apply to "[r]eligous 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." (R. at 4). This exemption proves that the State is not targeting religion and directly contradicts Sprague's assertion that the law inhibits religion. (R. at 8). The law is focusing on health care providers who practice SOCE, no matter whether they are religious or not. The UPDA does not prohibit Sprague from engaging in conversion counseling all together, it prohibits him from incorporating those techniques into his licensed medical practice. Additionally, the Dissent argues that the APA (whom North Greene got guidance from) refers to SOCE as a religious practice, but the APA's resolution merely mentions that some aspects of SOCE have included religious practices, not that SOCE in and of itself is a religious practice. (APA Resolution at 1).

Facial neutrality does not end the inquiry though, "the circumstances of the law's enactment" must also be examined. (R. at 8) (citing *Lukumi,* 508 U.S. at 540). This ensures that the object of the law is a neutral one as well. *Lukumi,* 508 U.S. at 540. That can be "determine[d] through…direct and circumstantial evidence." *Id.*

2. Unlike *Lukumi*, the Comments of the Legislators Were Not Directed Towards Religion.

The comments from North Greene legislators are Sprague's smoking gun to overcome neutrality, but their comments are far different from those found in *Lukumi* or *Masterpiece Cakeshop. Lukumi,* 508 U.S. at 541; *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rights Commn*., 138 S. Ct. 1719, 1723-24 (2018). In *Lukumi*, this Court held that a municipality violated a church's rights by passing a ban on killing animals. *Lukumi,* 508 U.S. at 541. There are two factors in *Lukumi* which can be distinguished from the instant case. The first is that the ban in *Lukumi* was carefully drafted to ensure that while the church's activities were illegal, "killing that [were] no more necessary or humane in almost all other circumstances are unpunished." *Id.* at 536. The second factor is that the legislators enacting the ban made statements that explicitly discriminated against the members of the church. *Id.* at 541.

Unlike in *Lukumi*, the comments made by State Senators Floyd Lawson and Gomer Pyle are not targeted at a specific religion. (R. at 8, 9). Lawson alludes to "barbaric practices" including electroshock therapy and inducing vomiting, while Pyle takes issue with those who try to "pray the gay away." (R. at 9). The two senators are speaking of specific practices that are hardly associated with any religious practice and to a personal experience of SOCE's inefficacy, respectively. (R. at 9). This is hardly an "official expression[] of hostility to religion" as the Dissent argues. (R. at 15) (citing *Kennedy v. Bremerton School Dist*., 142 S. Ct. 2407, 2422 n.1 (2022)). That would be more akin to a statement such as "what do we do to prevent the Church from opening?" or saying "freedom of religion has been used to justify discrimination." *Lukumi,* 508 U.S. at 541; *Masterpiece Cakeshop,* 138 S. Ct. 1719 at 1729. This Court rightly sensed an open hostility to religion in those statements, but that is not found here.

3. The Law Is No Different from Banning Creationism in Biology Class.

Though the Dissent argues that the law is "designed to silence people of faith and their religious beliefs about human sexuality," the record does not support such a contention. (R. at 15). The counselors are still allowed to discuss SOCE with their patients so that those patients may know their beliefs. It is the treatment of SOCE, by unofficially religious and secular people alike, that is prohibited. "The same conduct is outlawed for all." (R. at 9) (citing *Stormans II*, 794 F. 3d, 1064, 1077 (9th Cir. 2015)).

This conduct is banned for all because this is no different from banning creationism in a biology classroom. Biologists do not posit creationism as a theory verified by biological methodology, just as the APA does not see SOCE as an effective means of treatment for LGBTQ youth. *See generally* APA Resolution. If a biologist teaches creationism in a classroom, they are not accurately expressing the findings of the field. A licensed therapist practicing SOCE would also not be aligned with the field of psychology. Hence, North Greene banned SOCE for those acting in their capacity as a medical professional, not as a private citizen or a religious counselor. Furthermore, while it would be unconstitutional to ban a biology teacher from speaking about creationism in a variety of contexts, it would not be unconstitutional to prohibit her from doing so while in the scope and course of her duties as a biology teacher. Thus, the real-world operation of the law is neutral (and constitutional) as well. (R. at 9).

4. The Comparison Aspect of the "Test" is Moot as the Religious Version of Counseling is Exempt from the Law.

It is not enough that a law is neutral, it must also be generally applicable to pass *Smith,* and this part of the test is effectively moot because religious counseling is exempted from the UPDA. "A formal mechanism for granting exceptions that invite[s] the

government to consider the particular reasons for a person's conduct" and a prohibition on "religious conduct while permitting secular conduct" fails general applicability. (R. at 10) (citing *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021)). Not only is there no exemption system that invites government interference, the only wholesale exemption in the UPDA is for religious counseling. (R. at 10). Additionally, North Greene doesn't treat any comparable secular activity more favorably than religious exercise. *Id.* (citing *Tandom v. Newsom,* 141 S. Ct. 1294, 1296 (2021)). There is no activity that undermines North Greene's stated purpose of protecting the well-being of children that is allowed under the law. (R. at 10). Gender-affirming therapy does not have scientifically based risks of harms associated with it as Sprague contends. *Id.* Consequently, the UPDA is generally applicable as well. Thus, the UPDA must only be rationally related to a governmental interest which it goes beyond.

B. *The State Has a Compelling Interest in Protecting Children Which Survives Strict Scrutiny.*

While the Fourteenth Circuit correctly applied rational basis based on the statute being a neutral law of general applicability, North Greene also has a compelling interest in protecting children. This Court has recognized this as a compelling interest numerous times. *New York v. Ferber*, 458 U.S. 747, 757 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944). But the UPDA cannot just serve this compelling interest, it must also be narrowly tailored to that end. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). The UPDA is narrowly tailored. Thus, the law passes strict scrutiny as well.

1. The UPDA Was Passed in Order to Protect Children.

"Given the pervasive heterosexism and monosexism in society, it is no surprise that some sexual minority individuals seek to change their sexual orientation through SOCE

and some parents, guardians, and custodians (e.g., foster care) seek SOCE for their sexual and/or gender minority children." (APA Resolution at 2). Unfortunately, those change efforts have been proven to cause great harm to the individuals' well-being who go through it. And it is this well-being, that the United States, as a whole, and states, in particular, hope to safeguard. For if a country's youth are not in a happy, healthy position, what does the future of that country look like?

2. The Combination of "Compelling Interest" And "Narrow Tailoring" Is Satisfied in This Case.

Clearly protecting children from treatments that are not the best medical practices is a compelling state interest. In fact, it is imperative that a state only allow sound, scientifically proven treatments to be administered to any of its citizens. Thus, the UPDA also protects unaware parents from having their children subjected to SOCE as well. The Court has recognized parental rights to raise their children as they see fit, but it is important that mechanisms are in place for parents to access the most-up-to-date and medically sound advice that there is. *See Meyer v. Nebraska,* 262 U.S. 390 (1923)*; Pierce v. Society of Sisters,* 268 U.S. 510 (1925). While the UPDA serves a compelling government interest, it also narrowly tailors the statute to this end because the statute only restricts licensed practitioners who are practicing in a non-religious capacity from performing SOCE. (R. at 4). Religious counselors are free to perform SOCE as they see fit. Thus, the UPDA survives strict scrutiny as well.

C. *Smith should not be overturned.*

The Dissent argues that there is "no historical analogue of censoring religious counseling." (R. at 16). North Greene does not dispute that contention. The Dissent's point is moot in the instant case as the UPDA explicitly does not censor religious counseling. (R.

at 4). The statute merely prohibits medical treatments that lack APA approval from being practiced by licensed therapists. Medical professionals are the people best positioned to determine which treatments should be approved and which should not. Ensuring that New Greene's licensing requirements conform to the reasoned opinions of the relevant experts is precisely what legislators ought to do as a matter of policy. While each therapist undoubtedly has personal religious views outside of his office, those views are not interfered with. It is his official capacity as a therapist that is regulated. *Smith* continues to be a viable lens through which to view religious exercise cases.

CONCLUSION

Under free speech analysis and this Court's precedent, professional conduct is subject to intermediate scrutiny. North Greene followed the guidance of the APA in drafting UPDA to promote the well-being of its youth. Talking *about* SOCE is still permitted, so no unnecessary speech is implicated within the UPDA's parameters. The UPDA survives intermediate scrutiny.

Under a free exercise claim, *Smith* holds that a neutral law of general applicability must be rationally related to a governmental interest. North Green's UPDA is such a law. Its compelling interest is narrowly tailored in a way that it survives strict scrutiny as well.

It is for these reasons this Court should affirm the United States Court of Appeals for the Fourteenth Circuit and its affirmation of the district court's dismissal of the Petitioner's claims.

Respectfully submitted,

_/s/_____
Attorneys for Respondent

CERTIFICATE OF SERVICE

We certify that a copy of Respondent's brief was served upon Petitioner, Howard Sprague, through the counsel of record by certified U.S. mail return receipt requested, on this, the 26th day of September 2023.

_/s/_____
Attorneys for Respondent

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I

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.