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
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Team 28

QUESTIONS PRESENTED

I. Do censorship restrictions that provide for greater regulation of licensed healthcare providers practicing conversion therapy on minor patients in a non-religious capacity satisfy a rational basis?

II. Should this Court ignore fundamental principles of the Free Exercise Clause by denying facially neutral laws of general applicability when longstanding precedent, the cruciality of secular regulations, and the legitimacy of modern perspectives provide otherwise?

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TO THE SUPREME COURT OF THE UNITED STATES:

Respondent, the State of North Greene, appellee in Docket No. 22–1023 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 judgment of the Fourteenth Circuit.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of North Greene is unreported 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 is available at *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023) and set out in the record. R. at 2-16.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution, U.S. Const. amend. I is relevant to this case and is reprinted in Appendix A.

STATUTORY PROVISIONS

North Greene's Uniform Professional Disciplinary Act is relevant to this case and is partially reprinted in Appendix B.

STATEMENT OF THE CASE

Factual Background

Licensed Conversion Therapists. Howard Sprague ("Sprague") is a licensed family therapist who has practiced for over twenty-five years, assisting clients with various issues, including sexuality and gender identity. R. at 3. While Sprague does not work for a religious organization, he draws on his deep Christian beliefs to influence and inform his talk therapy techniques. R. at 3. Crucial to his practices, Sprague acknowledges that "he grounds human identity in God's design, believing that the sex each person is assigned at birth is a 'gift from God' that should not be changed and supersedes an individual's feelings, decisions, or wishes." R. at 3. Because Sprague holds strong religious views, many of his clients specifically seek him out as a "Christian provider of family therapy services." R. at 3.

Pursuant to his beliefs, Sprague often engages in verbal counseling, or talk therapy, and he has continuously worked to build his reputation around such techniques. R. at 3. Since Sprague primarily engages in the reparative practice of "talk therapy," and the text of the State's law prohibits "conversion therapy," the two terms are used synonymously throughout this brief. *See* N. Greene Stat. § 106(e).

North Greene's Disciplinary Act. Due to the incredibly invasive effects of conversion therapy, the State of North Greene (the "State") enacted a provision in its "Uniform Professional Disciplinary Act" (the "Act") to ensure licensed healthcare providers did not engage in any form of conversion therapy on minors. R. at 3-4. As such, conversion therapy on minors is now considered "unprofessional conduct," and since all healthcare providers must be licensed prior to practicing therapy in North Greene, the new licensing scheme restricts any provider who engages in these practices. R. at 3.

The North Greene General Assembly's (the "Legislature") stated intent for the added provision was for "better regulation of the professional conduct of licensed healthcare providers." R. at 4. The State found that it had "a compelling interest in protecting the physical and psychological well-being of minors…and in protecting its minors against exposure of serious harms caused by conversion therapy." R. at 4. To support its position, the General Assembly relied on scientific evidence from the American Psychological Association ("APA"), which denounces conversion therapy techniques for all psychologists and instead advocates for "culturally competent" therapies of acceptance, development, and identity exploration. R. at 4.

While the Act demands greater regulation of licensed healthcare providers, it does not prevent them from "communicating with the public about conversion therapy;

expressing their personal views [about conversion therapy, sexual orientation, or gender identity] to patients (including minors)…; practicing conversion therapy on patients over 18 years old; or referring minors seeking conversion therapy to [religious] counselors." R. at 4.

Procedural History

Eastern District of Greene. Howard Sprague filed suit in the United States District Court for the Eastern District of Greene, challenging the constitutionality of the State's prohibition of licensed healthcare providers practicing conversion therapy on minors. *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). Sprague sought declaratory and injunctive relief on the grounds that the policy violated the Free Speech and Free Exercise Clauses of the First Amendment, by restricting his healthcare license, preventing conversion therapy techniques on minors, and denying the deeply Christian motives of both himself and his clients. *Id.* at *3 (referencing U.S. Const. amend. I). The district court granted the State's motion to dismiss and found that Sprague failed to state a claim upon which relief may be sought. *Id.* at *5.

Fourteenth Circuit. Howard Sprague timely appealed the district court's decision. R. at 3. On appeal, the United States Court of Appeals for the Fourteenth Circuit—applying rational basis review—affirmed the district court's decision and determined that North Greene's restriction on healthcare providers did not infringe on his First Amendment rights. R. at 5.

SUMMARY OF THE ARGUMENT

Free Speech: Rational Basis and Incidental Effects. The Fourteenth Circuit correctly held that North Greene's limitation on psychotherapy satisfies rational basis review since its incidental effects are rationally related to the State's legitimate interest of protecting

the health and well-being of minors. Importantly, this Court has always recognized this interest as a legitimate and sufficient avenue to justify the use of regulatory schemes with incidental effects. Moreover, as long as the statutory provision is otherwise a valid exercise of the state's regulatory power, individuals who experience any incidental effects are not immunized from adhering to the law. Here, North Greene considers conversion therapy on minors as an unnecessary harm that must be regulated and does not do so to intentionally bar religious practices or expressive speech. Further, extensive examination of religious and secular perspectives proves that conversion therapy is a dangerous technique across the board, and the Legislature and the Fourteenth Circuit correctly determined that a validly proscribed regulation was the only way to protect minor patients from any harmful effects.

Upholding *Smith*: Valid Proscriptions and *Stare Decisis*. The Fourteenth Circuit also correctly applied the principles of neutrality and general applicability as set forth in *Employment Division, Department of Human Resources of Oregon v. Smith* when upholding the use of restrictive regulations on licensed healthcare providers. This Court has always emphasized the need for continued adherence to precedent to maintain predictable and consistent application of legal doctrines. While compliance with *stare decisis* is not always demanded, it may be ignored only under extraordinary circumstances where the Court observes such an obviously egregious error in a past decision that abiding by it would be an injustice. This Court looks to several factors when evaluating the applicability of past precedent, including reasoning, workability, errors, reliance, and disruptive effects. Nevertheless, the *Smith* framework lives on in several subsequent opinions of this Court, as witnessed by the Fourteenth Circuit's decision here. Restrictive regulations that incidentally effect speech not only adhere to constitutional standards, but they are often recognized as an

important necessity to societal well-being. Here, North Greene has meticulously tailored its restriction to adhere to *Smith*'s framework, and its legitimate interest in protecting minors and specific exclusion of therapists practicing under religious organizations proves the absence of religious animus.

STANDARD OF REVIEW

On appeal from a district court's motion to dismiss, this Court reviews questions of law *de novo*. *See Lawrence v. Dep't of Interior*, 525 F.3d 916, 920 (9th Cir. 2008). This Court must also review the constitutionality of a statute *de novo*. *United States v. Jones*, 231 F.3d 508, 513 (9th Cir. 2000); *United States v. Shim*, 584 F.3d 394, 395 (2d Cir. 2009). As such, the reviewing court must consider the issue anew, and no deference is given to the district court. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006); *Rabkin v. Or. Health Scis. Univ.*, 350 F.3d 967, 971 (9th Cir. 2003) ("When de novo review is compelled, no form of appellate deference is acceptable."). As for denials of injunctive relief, this Court reviews for abuse of discretion. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

ARGUMENT

I. This Court should affirm the Fourteenth Circuit's judgment because North Greene's restriction on licensed healthcare providers performing conversion therapy is uniquely designed to protect minor patients who are susceptible to an array of mental and physical harms.

In essence, the First Amendment protects freedom of religion and expression from invasive government intrusion but will defer to a state's executive power in limited circumstances. The First Amendment demands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I. This Court's precedent further instructs that there

are "limited categories of speech that the government may regulate because of their content." *See* Khatia Mikadze, *How the First Amendment is Failing to Protect Minors from Conversion Therapy*, Am. U. J. of Gender, Social Policy & L., https://jgspl.org/how-the-first-amendment-is-failing-to-protect-minors-from-conversion-therapy/. Because some content is "constitutionally proscribable," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992), First Amendment protection has thus been characterized as a spectrum for analyzing the constitutionality of regulations to ensure that appropriate freedoms are maintained while still acknowledging a state's legitimate exercise of power.

Howard Sprague asserts that North Greene's law prohibiting the practice of conversion therapy on minors by licensed providers is a violation of his free speech rights. R. at 3. It is well established that incidental infringement on speech is acceptable in pursuance of legitimate regulations on conduct. *See, e.g., Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) (explaining that regulation of professional conduct "may have an incidental effect on speech"). Sprague does not claim to work under the auspices of a religious institution, but instead disputes North Greene's regulation simply because of his deeply religious beliefs. R. at 3.

A. This Court has a history of affirming conversion therapy as conduct, and thus healthcare providers using these tactics are awarded less protection under the First Amendment.

Conduct-based restrictions have historically complicated First Amendment jurisprudence. However, this Court and appellate courts routinely agree that these restrictions—such as North Greene's limitation on conversion therapy—do not violate the Constitution because they do not regulate inherently expressive speech. *See Rumsfeld v. F.*

for Acad. And Institutional Rts., Inc., 547 U.S. 47, 66 (2006) (emphasizing that this Court "extend[s] First Amendment protection only to conduct that is inherently expressive.").

Conversion therapy is a controversial psychotherapy practice that involves sexual orientation or gender identity change efforts, usually of a minor, and is grounded in the belief that homosexuality is abnormal. *See* Judith M. Glassgold et al., Am. Psych Ass'n, Report of the Am. Psych. Assoc. Task Force on Appropriate Therapeutic Responses to Sexual Orientation 22 (2009). It typically includes both aversive and non-aversive treatments and is commonly practiced in association with traditional religious doctrines. *Id.* Since the development of modern mental health advocacy, twenty states and the District of Columbia have banned conversion therapy and six states have partially banned it. *See Conversion "Therapy" Laws*, Movement Advancement Project, https://perma.cc/FM3A-XPEH. The sentiments of the medical community fueled this change, where the pseudoscience of psychotherapy was rejected, instead being characterized as a harmful and inherently immoral practice. *See* John J. Lapin, *The Legal Status of Conversion Therapy*, 22 Geo. J. Gender & L. 251, 256 (2021) (noting that policymakers recognized the "normalcy and immutability of being LGBT[] and the fact that conversion therapy has been denounced as a pseudoscience by major medical groups").

This significant shift in sociocultural attitudes has sparked legislative developments across the country, allowing many judiciaries to uphold doctor-patient restrictions on the controversial practices of "reparative therapies." *See* Amanda Maze-Schultz, *Challenges Facing LGBTQ Youth*, 24 Geo. J. Gender & L. 417, 455 (2023). To be sure, this Court has consistently applied medical professional speech restrictions to a "continuum" of First Amendment protection, with complete protection on one end and no protection on the other.

See Pickup, 740 F.3d at 1226-27 (citing *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043 (9th Cir. 2000)) ("*NAAP*"); *see also Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Speech that is deemed entirely protected and thus within the scope of the First Amendment is "speech on matters of public concern." *Pickup*, 740 F.3d at 1226-27; *see Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection."). Speech that occurs within the doctor-patient relationship falls at the midpoint of the continuum, allowing for less protection than necessary for speech in public discourse. *Pickup*, 740 F.3d at 1228 (explaining that "[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"). Even still, professional *conduct* falls on other side, where speech is afforded the least amount of protection. *Id.* at 1229 (emphasis added).

Notably, this Court has never extended First Amendment protection to speech that would otherwise be validly proscribed. *See Giboney v. Empire Storage & Ice Co*., 336 U.S. 490, 502 (1949) (emphasizing that "it has never been deemed an abridgment of freedom of speech…to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed"). For example, in *Giboney*, this Court held that a regulation of conduct does not morph unto an infringement of speech merely because speech is the vehicle for carrying out the action. *Id.* There, a Missouri statute criminalized agreements that resulted in trade restrictions, and union picketers asserted free speech claims after their protests were suppressed under this statute. *Id.* at 497. This Court not only rejected that the guarantees of the First Amendment

immunized certain classes from otherwise valid state laws but recognized the restriction as acceptable exercise of the state's governing power. *Id.* ("The Constitution has not so greatly impaired the states' or nation's power to govern.").

Most importantly, this Court has never accepted psychotherapy as protected speech. In *Pickup*, this Court held that incidental infringement of professional speech is constitutional. *Pickup*, 740 F.3d at 1235. There, a California regulation limited professional medical therapies. *Id.* at 1215. This Court opined that "[p]ursuant to its police power, [the state government] has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful," thereby rejecting arguments that the First Amendment requires protection of speech-induced psychotherapies. *Id.* at 1229 ("[T]he key component of psychoanalysis is the treatment of emotional suffering and depression, not speech.").

Here, North Greene does not unilaterally ban all instances of expressive speech in healthcare, but instead emphasizes that the statute applies only to limited circumstances where speech is incidental to controversial psychotherapy practices. R. at 4. Moreover, North Greene only enacted these restrictions in an effort to curb conduct that reaches far beyond mere expressive speech. R. at 6. North Greene's goal to protect vulnerable minors from a lifetime of irreparable harm is not illustrative of an interest to limit the free speech of medical professionals, but instead correlates invasive psychological interventions with the realities of conversion therapies. R. at 6.

1. North Greene's legitimate interest in regulating healthcare providers is well-established in "health and welfare laws" throughout the country.

Since the turn of the 19th century, modern medical advances have spread across the country to ensure increased quality of life, equity in care, and protection of individual

autonomy. *See generally* Carl G. Streed, Jr., M.D. et al., *Changing Medical Practice, Not Patients—Putting an End to Conversion Therapy*, 381 New Eng. J. Med. 500, 500-01 (2019) (noting that changing ideals in the medical field sparked the normalcy of homosexuality). Many modern medicine techniques, ranging from talk therapy to counseling, require intimate doctor-patient communications that inherently influence treatment outcomes. As it is, policymakers are increasingly enacting laws to mitigate these potentially life-altering consequences; the ratification of several health and welfare laws following the medical revolution highlight this shift, where unequal applications of controversial practices were replaced with acceptable medical standards. *See* Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. Rev. 843, 845 (2009) (discussing that newly enacted healthcare laws "can be justified as efforts to protect patients by enforcing accepted standards of medical practice"). A historical examination of such regulations proves that the principle of modern healthcare laws resulted from the idea that controversial practices—such as conversion therapy—are "not only ineffective in achieving its stated purpose but also can be extremely harmful to those subjected to it" and that limitations of these practices is imperative. Logan Kline, *Revitalizing the Ban on Conversion Therapy: An Affirmation of the Constitutionality of Conversion Therapy Bans*, 90 U. Cin. L. Rev. 623, 626 (2021).

2. Regulation of some healthcare providers who use speech is merely incidental.

The implied need for greater protection of professional conduct is what allowed *Pickup* to become an instructive opinion on doctor-patient speech restrictions and enabled this Court to hold that speech may be restricted when incidentally involved with professional conduct. *See Pickup*, 740 F.3d at 1215-16. There, this Court rationalized the use of statutory restrictions in the establishment of a rational basis by explaining that healthcare providers

are "not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word." *Id.* at 1229. This acknowledgement that healthcare treatments inevitably involve speech is thus able to withstand free speech claims because this Court can more easily ensure that restrictions are not solely labeled as "conduct" under a technicality but instead are an "[integral] part of the practice of medicine, subject to reasonabl[e] licensing and regulation by the State." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

Most importantly, *Pickup*'s application of doctor-patient speech restrictions withstood this Court's analysis repeatedly, solidifying the principle of legitimate government interests in regulating conduct as a rational basis for incidental burdens on speech. *See, e.g., Nat'l Inst. Of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*") (citing *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)) (applying *Pickup* to affirm that "the First Amendment does not prevent restrictions directed at…conduct from imposing incidental burdens on speech"); *R.A.V.*, 505 U.S. at 389 (1992) (emphasizing that "words can in some circumstances violate laws directed not against speech but against conduct"). Here, North Greene's statutory restrictions likewise mirror the incidental speech restrictions previously recognized by this Court. R. at 4. North Greene's prohibition on practicing conversion therapy strives to limit the irreversible effects minors face while still honoring First Amendment principles. R. at 7. Pursuant to that goal, North Greene's restriction is narrowly tailored to "protect the physical and psychological well-being of minors," regulating only the conduct of licensed healthcare professionals. R. at 7.

Similar to the restriction recognized in *Pickup*, North Greene limits the scope of conversion therapy restrictions to psychotherapies that seek to change the sexual orientation

or gender identity. R. at 4. Further, the restriction does not prevent healthcare providers from participating in public discourse; in fact, it allows providers to express their personal opinions to patients and refer minors to other providers working under religious auspices. R. at 4. Recognizing that the typical medical process inherently impacts speech is essential in understanding the true intent of North Greene's restriction and will provide this Court a solid foundation when considering Sprague's claims.

B. North Greene has a legitimate interest in protecting minors from conversion therapy, whether performed for religious or secular reasons.

Professional medical and mental health treatments that implicate speech and incidentally impact religion are afforded deferential review. *Pickup*, 740 F.3d at 1231 ("[The state's limitation on medical professionals] is subject to deferential review just as are other regulations of the practice of medicine."); *see Casey*, 505 U.S. at 884 (applying a reasonableness standard to the regulation of medicine where speech may be implicated incidentally). For example, in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, this Court held that deference for medical regulatory schemes demands an inquiry into the relationship of the statute and a legitimate state interest. *NAAP*, 228 F.3d at 1050 (citing *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, (1955)) (emphasizing that "a statute should be upheld if 'it might be thought that the particular legislative measure was a rational way to correct' a problem"); *see also Maguire v. Thompson*, 957 F.2d 374, 377 (7th Cir. 1992). There, California imposed regulations on the licensing scheme of mental health professionals. *NAAP*, 228 F.3d at 1046. This Court reasoned that, despite the effects on speech, statements made by psychoanalysts do not insinuate fundamental rights protection and instead carry a rational relationship with the state's regulatory power over medicine. *Id*. at 1051-52.

Because restrictions that incidentally impact speech do not implicate a fundamental right, they are subject only to rational basis review. *Pickup*, 740 F.3d at 1231. Under rational basis review, a regulation "must be upheld if it bears a rational relationship to a legitimate state interest". *Id.* (citing *Casey*, 505 U.S. at 884). Protecting the health and well-being of a state's citizens has been recognized by this Court as one such legitimate interest. *See NAAP*, 228 F.3d at 1056. Namely, this Court has repeatedly sustained legislation "aimed at protecting the physical and emotional wellbeing of youth even when the laws operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). Even still, medical associations are increasingly condemning the practice of conversion therapy, stating that "[t]he potential risks of reparative therapy … include[e] depression, anxiety[,] and self-destructive behavior" and that regulation of these practices is necessary. M. PSYCH. ASS'N, *Just the Facts About Sexual Orientation and Youth: A Primer for Principals, Educators, and School Personnel* 7 (2008), https://www.apa.org/pi/lgbt/resources/just-the-facts.pdf. The APA reports that behavior therapists are "increasingly concerned that aversive therapies [such as conversion therapy] … [are] inappropriate, unethical, and inhumane." DE 1-6, APA Task Force Report 31, p. 33.

Here, the Legislature clearly recognized that conversion therapy is practiced under both religious and secular circumstances and that either avenue would expose minors to the serious harms of sexual orientation change efforts. R. at 9. As such, the Legislature relied on opinions of the American Psychological Association when writing the statute, stating that its mission was to "protect the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth." R. at 7. While the restriction implicitly restricts speech, it is rationally related to the legitimate governmental interest of protecting

vulnerable minors from the atrocious psychological effects that are inherently intertwined with talk therapy. R. at 7.

1. The Legislature did not exhibit an intent to target religion when it narrowly constructed its statutory regulation.

An incidental effect on religion alone is insufficient to force a statutory restriction to fail rational basis. *See United States v. Carolene Prods. Co*., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation…is not to be pronounced unconstitutional… [if] it rests upon some rational basis within the knowledge and experience of the legislators."). For example, in *Employment Division, Department of Human Resources of Oregon v. Smith*, this Court held that the rational basis of a neutral and generally applicable law is sufficient to withstand claims of religious animus. *Emp. Div., Dept. of Hum. Res. Of Or. v. Smith*, 494 U.S. 872, 872 (1990). There, this Court upheld a state law criminalizing the use of peyote even though it incidentally affects individuals who use it for religious purposes. *Id.* at 879-80. Observing past First Amendment jurisprudence, this Court reasoned that there must be some evidence of restrictions on liberty on the face of the statute before attributing it with a discriminatory purpose. *Id.* at 879-80 (citing *Reynolds v. United States,* 98 U.S. 145, 167 (1878) (recognizing that the freedom to act is not absolute); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[T]he family is not beyond regulation in the public interest, as against a claim of religious liberty."); *Braunfeld v. Brown,* 366 U.S. 599, 603 (1961) ("[F]reedom to act…is not totally free from legislative restrictions."); *Gillette v. United States,* 401 U.S. 437, 449-50 (1971) (emphasizing that incidental effects on conscious objectors do not invoke constitutional claims)); *see also United States v. Lee*, 455 U.S. 252, 252 (1982) (holding that a "state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest").

Here, North Greene's restriction does not show any religious animus on its face or through its application. R. at 9. The text of the law does not reference any restrictions on religious liberty and in fact makes "no reference to religion" at all. R. at 8. Further, the law was specifically tailored to regulate "only to the extent that [providers] act in a licensed and non-religious capacity," and did not overstep its bounds when doing so. R. at 8.

2. There was no evidence of anti-religious sentiment when the circumstances proved religious and secular conduct are treated equally.

Anti-religious animus may be examined under the totality of the circumstances. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 113 S. Ct. 2217, 2225 (1993); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022). For example, in *Lukumi*, this Court explained that discriminatory policies demand an inquiry into its historical background, legislative intent, or specific series of events that lead to its enactment. *Lukumi*, 113 S. Ct. at 2230-31 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977)). There, ordinances were enacted to suppress the practice of the Santeria religion. *Id.* At 2220. This Court stated that, under a totality of the circumstances, the laws in question stemmed from religious animosity and distrust of religious practices and were thus void of a neutral motivation. *Id.* at 2234.

Contrastingly, statements made by the North Greene Legislature, extensive history detailing the harmful practices of conversion therapy, and the state's interest in protecting its citizens all indicate the absence of anti-religious sentiment. R. at 7. Not only does North Greene understand that conversion therapy is sought for both religious and secular reasons, but it specifically provides exceptions for counselors practicing "under the auspices of a religious organization." R. at 4. The fact that North Greene explicitly outlaws the same conduct for all implies the absence of religious hostility. R. at 9.

II. This Court correctly applied the principles of neutrality and general applicability because the Free Exercise Clause demands protection of religiously motivated beliefs, not secular conduct.

The Free Exercise Clause of the First Amendment, applicable to the States through the Fourteenth Amendment, prevents Congress from enacting a law that prohibits the free exercise of religion. *Lukumi*, 113 S. Ct. at 2225-26; *see also Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). However, free exercise protection is not extended where the law is neutral and generally applicable. *Lukumi*, 113 S. Ct. at 2226 (citing *Smith*, 494 U.S. at 872). Therefore, if a law is otherwise valid, an individual does not have a right to assert religious freedom claims to avail himself from compliance. *Smith*, 494 U.S. at 872. This Court correctly interpreted precedent when deciding similarly situated cases and has repeatedly found that neutral and generally applicable laws will survive free exercise claims, striking down the law only where its purpose was to restrict religious exercise "because of the religious motivation of those performing the practices." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020).

Howard Sprague asserts that North Greene's restriction on licensed healthcare providers inhibits religion. R. at 8. It is well settled precedent that when a law is neutral and generally applicable, it is evaluated under rational basis review and must be rationally related to a legitimate government interest. *See, eg.*, *Stormans, Inc. v. Wiseman*, 794 F.3d 1064, 1076 (9th Cir. 2015). Since the law at issue satisfies a secular purpose and does not expressly "restrict practices because of…religious motivations," Sprague fails to meet his burden under the free exercise claim. R. at 8.

A. Modern free exercise interpretations of facially neutral and generally applicable laws permit burdens on religious speech only when aligned with a state's constitutionally valid regulation.

Constitutional interpretation of facially neutral and generally applicable laws are subject only to rational basis review. *See Stormans*, 794 F.3d at 1076. The doctrines of neutrality and general applicability are inherently "interrelated" and require an extensive analysis of the law's facial interpretation and its ultimate objective. *See Lukumi*, 113 S. Ct. 2239 (Scalia, J., concurring) ("[T]he defect of lack of neutrality applies primarily to those laws that by their terms impose disabilities on the basis of religion…; whereas the defect of lack of general applicability applies primarily to those laws which, though neutral in their terms, through their design, construction, or enforcement target practices of a particular religion for discriminatory treatment."). Further, an examination of this Court's precedent proves that the principles of neutrality and general applicability parallel equal protection; requiring laws that are neutral and generally applicable demands equal treatment under them. *See id.* at 2230-34.

1. This Court has a history of upholding laws with a secular purpose but an inadvertent effect on religious liberty.

Free exercise of religion has been defined as "the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. The government may not intervene in practices purely because they distrust or do not understand certain religious motivations; if there is any suspicion that a law was created as a result of religious animosity, then that law will not survive the Free Exercise Clause. *See Lukumi*, 113 S. Ct. at 2234. However, the crux of free exercise decisions is the *purpose* of the law rather than its incidental effects on individuals. *See* David S. Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. L. Rev. 201, 204 (1997) (emphasis added). As a result,

constitutional interpretations often turn on the nature of the "prohibited" conduct. *Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)) ("For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.").

Early on, free exercise claims were reviewed under the "compelling state interest" test, where a law would survive scrutiny if the state could point to a "compelling interest" that justified infringement on First Amendment rights. *Id.* at 445. However, this Court began to move away from that test, refusing to apply it in *Lyng v. Northwest Indian Cemetery Protection Association*. There, the government sought to build a logging road over the sacramental land of several Indian tribes. *Id.* at 442. While this Court acknowledged that the road would impact one's ability to pursue "spiritual fulfillment," they emphasized that the compelling interest test was not determinative of such an issue. *Id.* at 450-51; *see* Amy Bowers & Kristen Carpenter, *Challenging the Narrative of Conquest: The Story of* Lyng v. Northwest Indian Cemetery Protective Association, *in* Indian Law Stories, (Carole Goldberg, Kevin K. Washburn, Philip P. Frickey, eds.) (Found. Press, 2011) ("Federal programs 'which may make it more difficult to practice certain religions' are non-actionable unless they either 'coerce' an individual 'into violating his religious beliefs'… or 'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens…"). In so holding, this Court altered the standard of free exercise infringement claims, stressing that First Amendment rights must apply to all citizens equally and that no group would be afforded veto power for laws that are nondiscriminatory in

purpose. *Lyng*, 485 U.S. at 452; compare with *Smith*, 494 U.S. at 888 (highlighting that the compelling state interest test—when applied to all laws—would cause anarchy).

Disposing of the compelling interest test, this Court instead adopted the principles of neutrality and general applicability for free exercise jurisprudence. *Smith*, 494 U.S. at 879 (stating that the compelling interest test would not be applied "to require exemptions from a generally applicable criminal law."). Neutrality and general applicability are intimately intertwined, but both still require independent analysis. Much like the discriminatory analysis previously mentioned, to determine if a law is neutral, the Court must look at the circumstances of the law's enactment, including historical background, precipitating events, legislative history, and its real-world operation. *Lukumi*, 113 S. Ct. at 2235-36; *see also Kennedy*, 142 S. Ct. at 2422. Even still, generally applicable laws must not (1) contain a "formal mechanism for granting exceptions" that allows the government "to consider the reasons for a person's conduct," or (2) "prohibit[] religious conduct while permitting secular conduct" that runs contrary to the government's interest in enacting the law. *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877-78 (2021).

The second test for general applicability is at issue here—this test focuses on whether a law "specifically targets or singles out religion," and must be evaluated against a comparable secular activity with an "asserted government interest that justifies the regulation at issue," considering any associated risks. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *see also Stormans*, 794 F.3d at 1082.

Here, the text of North Greene's law is neutral on its face. R. at 4, 8. The law makes no reference to religion and, contrary to Sprague's assertion, the circumstances of the statute's enactment do not carry any religious animus and do not undermine the facial

neutrality. R. at 8. While sponsors of the bill suggested that the purpose of the bill was to "eliminate barbaric practices" and to denounce those who "pray the gay away," these isolated comments do not demonstrate a hostility toward religion, especially given their context. R. at 9. And, they were made by the legislative body during debate of the bill, rather than by a judiciary body with the case before it. R. at 9. Even still, it is evident that legislators understood that there are both religious and secular reasons for prohibiting conversion therapy to minors; the same conduct is outlawed for all, and thus its neutral objective is satisfied. R. at 9.

Further, North Greene's law is generally applicable. R. at 10. There is no comparable secular activity that is treated more favorably than religious practice, and Sprague has failed to state any in his claim, instead characterizing the restriction as an attack on reports of "regret from sex reassignment surgery." R. at 10. Instead, the law's restriction on licensed healthcare providers is specifically targeted to mitigate the scientifically documented dangers associated with minors who receive conversion therapy; these incomparable harms prove that North Greene has a valid interest in regulating *all* such conduct, whether it be secular or religious. R. at 9-10 (emphasis added).

2. This Court has long recognized that religious conduct in violation of a criminal regulation justifies any ancillary effects.

The distinguishing factor of religious infringement decisions arises from the fact that absolute protection of free exercise is limited solely to religious beliefs and declarations of those beliefs. *Smith*, 494 U.S. at 877. While this Court has recognized that state restrictions might incidentally infringe into constitutional doctrines, it is not enough to implicate the First Amendment. *See id.* (finding that the Free Exercise Clause permits prohibition of sacramental peyote use); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986) (holding

that a state's statute did not violate the First Amendment rights of a shopkeeper who operated a prostitution business on the premises); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1211-19 (1996). As such, ancillary effects to constitutionally valid laws have repeatedly withstood free exercise claims, and this Court has repeatedly held that a neutral and generally applicable law must only satisfy rational basis review, even where there are incidental burdens on religion. *Lukumi*, 113 S. Ct. at 2235; *see also Smith*, 494 U.S. at 878-79 (differentiating laws that ban only conduct engaged in for religious purposes and laws that prohibit conduct generally and only incidentally effect First Amendment rights).

This Court has long recognized the paradox between mere belief and religiously motivated actions and has determined that there are two risks that could stem from certain religious beliefs: (1) their deeply offensive nature to outsiders and (2) their promotion of harmful conduct in society. *See Reynolds*, 98 U.S. at 166; *see also* Bogen, 26 Sw. L. Rev. at 206. Only the second harm carries legislative authority, and thus only laws against harmful conduct—and not belief—will be tolerated. *Id.* This distinction was explicitly defined in *Smith*. *Smith*, 494 U.S. at 879. There, the Court emphasized that, despite the law's restrictive effect on speech or religion, the government did not infringe on First Amendment rights because the law validly criminalized socially harmful conduct. *Id.*

Importantly, *Smith*'s endorsement of this principle withstood this Court's examination many times over, strengthening the presumption of validity where a neutral and generally applicable law incidentally effects religious activity. *See, e.g.*, Frederick Mark Gedicks, *One Cheer for* Hobby Lobby: *Improbable Alternatives, Truly Strict Scrutiny, and Third-Party Employee Burdens*, 38 Harv. J.L. & Gender 153, 176 (2015) (stating this Court's

concern about an "unprecedented expansion of permissive accommodation" as an "'opt-out' from generally applicable legislation"). Here, North Greene's articulated purpose satisfies the established "neutral and generally applicable" standard recognized by this Court. R. at 8-10. North Greene strives to protect vulnerable minors from the harmful realities of conversion therapy while maintaining the integrity of neutrality and general applicability doctrines. Here, the State's statute makes no reference to religion, except to clarify that it exempts religious counselors from its scope. R. at 4.

B. This Court has continuously held that a neutral and generally applicable law may incidentally burden religious conduct and that First Amendment protection does not extend to such conduct if validly proscribed.

This Court has long recognized that First Amendment protection provided to legitimate claims on the free exercise of religion does not extend to conduct that a state validly proscribed. *Smith*, 494 U.S. at 879 ("The right of free exercise does not relieve an individual of an 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)."). Upholding precedent, this Court, led by Justice Scalia, reiterated that "if prohibiting the exercise of religion…is not the object of the [law] but merely an incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878. Even still, this Court has never held that an individual's religious practices excuse him from "compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 879; *see also* Jeffrey M. Shaman, *Rules of General Applicability*, 10 First Amend. L. Rev. 419, 440 (2012) (stating that this Court has never upheld a free exercise claim when the law at issue was one of general applicability).

Here, North Greene is well within their state regulatory power when they enacted a law that legitimately prohibits licensed healthcare providers from practicing conversion therapy on minors. R. at 7. Not only does the restriction not target religion, but it also specifically provides for exceptions for non-licensed providers practicing conversion therapy under the "auspices of religion." R. at 4, 7. Similar to the restriction at issue in *Smith*, North Greene demonstrates a secular need for greater regulation over licensed healthcare providers. This acknowledgement of a secular purpose as a legitimate prohibitive act allows the state's regulatory interests to be fully realized by every member of the community and, moreover, observes the boundaries of neutrality and general applicability.

1. Equal treatment of religious and secular activities under the law is evidenced in our nation's jurisprudence and is only strengthened by modern academic, judicial, and political perspectives.

Free Exercise jurisprudence has often been evaluated in conjunction with equal protection cases. *See Lukumi*, 113 S. Ct. at 2230; *see also Smith*, 494 U.S. at 901 (O'Connor, J., concurring) (citing *Rogers v. Lodge*, 458 U.S. 613, 618 (1982)) (claiming that application of the Free Exercise doctrine would not be incompatible with equal protection). To be sure, equal protection analysis of free exercise has been a longstanding pillar of this nation, as evidenced in multiple state constitutions. *See* Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. Rev. 275, 277 (2006) ("[I]t was in discussions of religious liberty rather than race that the language of equal protection first wended its way into use in the several states."). And although few free exercise cases on the federal level depend on an equal protection analysis today, the Fourteenth Amendment has raised awareness between the issues that their effects have on both individuals and groups. *See id.* at 312.

Several scholars have recognized this important correlation, stating that a central issue to the Free Exercise Clause is "the extent to which equality, as a constitutional value, constrains our understanding of religious guarantees." Laura S. Underkuffler-Freund, Yoder *and the Question of Equality*, 25 Cap. U. L. Rev. 789, 789 (1996). This issue has constantly been reviewed by this Court, and the jurisprudence has substantially moved towards a conception of equality through endorsement of a neutral and generally applicable standard. *See Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972); *Reynolds*, 98 U.S. at 167; Meyler, 47 B.C. L. Rev. at 331. Further, this perspective was validated in *Smith* and following opinions, granting governments greater latitude when regulating conduct within the realm of secular and religious activities. *See generally id.* at 344.

While the Fourteenth Circuit's dissenter may claim that *Smith* "drastically cut back on the protection provided by the Free Exercise Clause," the impact and applications of cases post-*Smith* is obviously contrary. *See generally* William P. Marshall, *Bad Statutes Make Bad Law: Burwell v. Hobby Lobby*, 2014 Sup. Ct. Rev. 71, 74 (highlighting that "*Smith* was decided the way it was for a reason."); Haley Gray, *What You Need to Know About the Masterpiece Cakeshop Case*, 5280 Publishing, (June 28, 2017), https://www.5280.com/what-you-need-to-know-about-masterpiece-cakeshop-v-colorado-civil-rights-commission/ (defending the principle holding of *Smith*). This Court may have realigned some constitutional interpretations with text and history, but it has repeatedly declined to overrule or modify *Smith* under this premise. In *Smith*, neutrality and general applicability were the correct controlling principles, and this conclusion only came after an extensive historical analysis of cases where restrictions incidentally infringed on First Amendment rights. *See Smith*, 494 U.S. at 878-79; *see generally N.Y. Rifle & Pistol Ass'n*

v. Bruen, 142 S. Ct. 2111, 2129-31 (2022) (Second Amendment); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246-47 (2022) (Due Process Clause); *Kennedy*, 142 S. Ct. at 2427-28 (Establishment Clause).

Further, requiring an exact historical analogue for every opinion runs contrary to this Court's precedent. Here, as in several cases post-*Smith*, religious exercise was explicitly protected, and the majority accurately analogized the issue against its prior jurisprudence. R. at 8. As such, this case is not a good vehicle to reevaluate *Smith*; principles of neutrality, general applicability, and the free exercise of religious practices can and will continue to co-exist—any decision otherwise invites a "pervasively unprincipled charade" that will only conclude in lawless anarchy. Ira C. Lupu, Hobby Lobby *and the Dubious Enterprise of Religious Exemptions*, 38 Harv. J.L. & Gender 35, 101 (2015); *see* Mark L. Rienzi & Stephanie H. Barclay, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1607 (2018).

2. Compliance with *stare decisis* and this Court's precedent ensures judicial economy and eliminates the confusion of religious exemptions.

The doctrine of *stare decisis* compels this Court "to stand by things decided," Black's Law Dictionary (11th ed. 2019), rationalizing that such a practice "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

While *stare decisis* is not an "inexorable command," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), it is a convincing tactic that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government." *Vasquez v. Hillery*,

474 U.S. 254, 265-66 (1986); *see also* William Baude, *Precedent and Discretion*, 2019 Sup. Ct. Rev. 313, 316 (2020). As such, any departure from *stare decisis* "demands special justification," and this Court has previously overruled erroneous precedent on such grounds. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *see, e.g.*, *Dobbs*, 142 S. Ct. at 2264-65 (overruling precedent and emphasizing that the factors considered when doing so include "the nature of their error, the quality of their reasoning, the 'workability' of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.").

However, this Court has acknowledged that the mere discretion to overrule precedent does not mean that it must always be done. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1412 (2020) (Kavanaugh, J., concurring in part); *see also* J. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334 (1944). Instead, the correct application requires ordinary adherence to the standard with only occasional departures. *Ramos*, 140 S. Ct. at 1412 (Kavanaugh, J., concurring in part); *see also Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in judgment) (stating that *stare decisis* requires "reasons that go beyond mere demonstration that the overruled opinion was wrong…otherwise the doctrine would be no doctrine at all."). Most importantly, this Court has recognized that cases surrounding constitutional interpretations involve "balanc[ing] the importance of having constitutional questions *decided* against the importance of having them *decided right*." *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).

Here, analyzing the potential to overrule *Smith* under this Court's framework yields no such "special justifications" or "strong grounds." *See generally Ramos*, 140 S. Ct. at 1412

(Kavanaugh, J., concurring in part). First, *Smith*'s decision is not grievously or egregiously wrong. While there might be disagreement over this case's reasoning, it is not such that demands invalidation—*Smith* is not only consistent and coherent with pre-*Smith* decisions, but its analysis has withstood this Court's scrutiny repeatedly, proving its workability and reliance interests outweigh any negative incidental consequences. *See generally* Rienzi & Barclay, 59 B.C. L. Rev. at 1603. In the same manner, incidental speech restrictions like North Greene's have been lengthily debated, extensively scrutinized, and adequately limited to ensure constitutional compliance at every stage. R. at 9.

Further, neutral and generally applicable standards are unquestionably settled doctrines on which state governments like North Greene have relied on for developing constitutionally-sound healthcare restrictions. Following *Smith*, North Greene defined conversion therapy narrowly and explicitly carved out an exception in efforts to limit any effect on religious practices. R. at 4, 8. The precedent here is neither newly established nor recently decided; in fact, it is intricately intertwined with the body of free exercise claims. Repudiating *Smith* would demand reevaluations of several well-established cases, undoubtedly burdening this Court with an abundance of litigation concerning religious exemptions to otherwise valid laws. Post-*Smith* reliance has stood the test of time for three decades and should continue, despite arguments to the contrary.

CONCLUSION

The use of validly proscribed laws with incidental effects in state licensing schemes is governed by the First Amendment and this Court's decisions in *Smith* and *Pickup*. Here, the State of North Greene took numerous precautions and initiated constructive dialogue to ensure its practices were consistent with this Court's precedent. This Court has repeatedly

respected the doctrine of *stare decisis* and has adopted settled law absent flagrant error. The nature and justifications behind valid laws with incidentally infringing effects prove the true scope of First Amendment protection, and because states like North Greene have relied on such established principles, this Court should allow *Smith* to persist.

The State's licensing scheme undoubtedly satisfies rational basis under *Smith*'s framework. The restriction on healthcare professionals treats religious and secular conduct the same and shows no consideration of religious animus, satisfying neutrality and general applicability. Further, the restriction is rationally related to the State's legitimate interest in protecting minors from the harmful effects of conversion therapy. In pursuance of this community's newfound healthcare, individual autonomy, and societal ideals, North Greene did not intentionally discriminate against any religion, nor did it infringe on those practicing under the auspices of religion. Even still, North Greene's restrictive provision is the most effective and narrow method of achieving these results, and as such has satisfied rational basis review.

It is for these reasons this Court should affirm the United States Court of Appeals for the Fourteenth Circuit and its affirmance of the district court's judgment.

Respectfully submitted,

/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.

APPENDIX B

Statutory Provisions

N. Greene Stat. § 106(e)

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

(2) "Conversion therapy" does not include counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity.