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

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BRIEF FOR RESPONDENT

Team 29

Attorneys for Respondent

QUESTIONS PRESENTED

I. Whether the regulation of a professional health care license comports with the Free Speech Clause of the First Amendment of the U.S. Constitution when it limits conduct that incidentally burdens speech, such as conversion therapy, to protect children from severe mental health issues and suicide?

II. Whether a neutral and generally applicable law comports with the Free Exercise Clause of the First Amendment of the U.S. Constitution when it incidentally burdens religion to protect children from the threats of conversion therapy, and whether *Employment Division v. Smith* is the proper test for the Free Exercise Clause when it follows *stare decisis* and has been consistently applied?

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First Amendment of the United States Constitution, which provides in relevant part: "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 case also involves the Fourteenth Amendment of the United States Constitution, which provides in relevant part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § I.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The Statute. Respondent, the State of North Greene (the "State") enacted § 106(d) ("the statute") under Chapter 45 of the Uniform Disciplinary Act in 2019 and made it applicable to all licensed health care providers in the State. R. at 3–4. The statute categorized conversion therapy

as "unprofessional conduct" when performed on children under eighteen years old. *Id.* at 4. The legislature defined "conversion therapy" as "a regime that seeks to change an individual's sexual orientation or gender identity" and included spoken and written methods. *Id.* at 3–4. Licensed therapists engage in prohibited conversion therapy when they attempt to change a child's sexual orientation, gender identity, or feelings toward another person of the same sex. *Id.* at 4. The State's legislature was careful to exempt "therapists, counselors, and social workers who work under the auspices of religious denomination, church, or religious organization" from Chapter 45. *Id.* at 3–4.

The legislature included its religious exemption in the statute and made it inapplicable to religious practices or licensed professionals under the auspices of religious organizations as long as therapists do not conduct conversion therapy while acting as licensed health care providers. *Id.* at 4. Unlicensed counselors under religious guidance are also exempt from the statute. *Id.* Licensed therapists are not prohibited from discussing sexuality and gender altogether. *Id.* They may give therapy that offers acceptance, coping skills, and social support for sexual orientation and gender identity. *Id.*

The Legislative Intent. The statute's objective was merely to regulate licensed health care providers in their professional capacity to ensure children's well-being and thus narrowed this restriction to exclude adult patients. *Id.* The State's legislature researched the effects of conversion therapy and determined that children's physical and psychological well-being was a compelling reason for the statute's enactment. *Id.* The legislature turned to the American Psychological Association for guidance and found that subjecting children, especially those of the LGBT[1] community, to conversion therapy would expose them to serious developmental

[1] "LGBT" refers to lesbian, gay, bisexual, and transgender.

harm. *Id.* The legislation's actions were not meant to and do not prohibit licensed health care providers from discussing conversion therapy with children. *Id.* In fact, licensed providers are free to express their support for conversion therapy and refer children to counselors who work "under the auspices of a religious organization" to obtain such treatment. *Id.*

The Therapist. Petitioner, Howard Sprague ("Sprague"), is an experienced licensed family therapist who specializes in sexuality and gender identity therapy. *Id.* at 3. He does not work for a religious organization, yet his therapy style is deeply rooted in his religious beliefs. *Id.* Sprague believes that individuals should not have intimate feelings towards people of the same sex nor attempt to change their birth-given gender. *Id.* Sprague believes that each person's identity is a "gift from God" that should be honored without challenge. *Id.* The statute's enactment affected Sprague's practice because his religious views were not a valid exemption to the statute. *Id.*

II. PROCEDURAL HISTORY

The Eastern District Court of North Greene. Sprague filed a lawsuit in August 2022. *Id.* at 5. He alleged that the State's enactment of § 106(d) under the Uniform Disciplinary Act violated his free speech and free exercise rights under the First Amendment of the United States Constitution. *Id.* Sprague moved for a preliminary injunction of the statute's enforcement. *Id.* The State responded in opposition and filed a motion to dismiss for failure to state a claim. *Id.* The court denied Sprague's preliminary injunction motion and granted the State's motion to dismiss. *Id.*

The U.S. Court of Appeals for the Fourteenth Circuit. Sprague appealed the court's decision to the Fourteenth Court of Appeals. *Id.* The court of appeals affirmed the district court's decision and held that § 106(d) did not violate Sprague's free speech and free exercise rights under the First Amendment. *Id.* The court of appeals found that the district court's decision was

consistent with longstanding history and tradition. *Id.* at 11. Judge Knotts delivered a dissenting opinion in support of Sprague's claims. *Id.* at 12.

SUMMARY OF THE ARGUMENT

I.

The court of appeals correctly held that North Greene's statute was valid under the Free Speech Clause of the First Amendment of the U.S. Constitution. Conversion therapy is treatment provided by health care professionals to eliminate or reduce feelings of gender identity and sexuality toward the same sex. Conversion therapy is conduct even if it consists of purely speech-based treatment. North Greene used its state police powers to enact law prohibiting licensed professionals from conducting this type of therapy on children under eighteen. North Greene's goal for the statute was to protect children from the dangers caused by conversion therapy, including severe mental health issues and suicide. North Greene specifically exempted religious practices and both licensed and unlicensed professionals under the auspices of a religious organization. The court of appeals found that conversion therapy was conduct that incidentally burdened speech and that North Greene acted rationally to prevent such harms.

II.

The court of appeals also held that North Greene's statute comported with the Free Exercise Clause of the First Amendment. When North Greene enacted the statute, its goal was to regulate health care professionals and protect children from conversion therapy. The language of the statute focused on the specific treatment that was being limited without referencing religion. North Greene's reasoning for enacting the statute was to protect children from the dangers caused by conversion therapy, like severe mental health issues and suicide. The statute applied to children regardless of motivation. North Greene applied the statute to all licensed health care

professionals but exempted religious practices. The court of appeals held that North Greene's statute was neutral and generally applicable.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews legal questions of law using the de novo standard. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). This case only addresses legal questions therefore de novo is the proper standard of review. *Id.*

I. NORTH GREENE'S STATUTE COMPORTS WITH THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

The First Amendment of the U.S. Constitution commands that "Congress shall make no law . . . abridging freedom of speech." U.S. Const. amend. I. Speech protected by the First Amendment goes beyond spoken or written words. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). But, there are limitations. *United States v. Stevens*, 559 U.S. 460, 468 (2010). Specifically, restrictions on conduct that incidentally burden speech are afforded a lesser level of protection than content-based restrictions on speech. *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). These permissible restrictions extend to a state's ability to direct the practice of licensed professionals, namely, professional conduct. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Sprague alleges that the State violated his free speech rights by prohibiting conversion therapy. But, this argument is meritless. North Greene's statute is permissible under the First Amendment because states are permitted to regulate licensed health care professionals' conduct in certain situations. Such conduct includes conversion therapy because it directly relates to the practice of a licensed therapist. Therefore, the court of appeals correctly held that the statute was a lawful licensing limitation under the First Amendment.

A. Conversion Therapy Is Professional Conduct and Therefore Afforded Less First Amendment Protection.

Under North Greene's statute, prohibited conversion therapy occurs when a licensed therapist engages in the treatment with a child under eighteen years of age. This treatment may consist of only spoken words. R. at 3 n.3. But, a licensed health care professional is not given First Amendment protection just because mental health treatment is primarily practiced by spoken word. *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014), *overruled on other grounds by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018). Although there is not a "professional speech" category granting lower constitutional protection, licensed professionals are still subject to First Amendment limitations when speaking while engaged in professional conduct. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018). Additionally, this Court affirmed that the First Amendment may properly restrict a professional's conduct that incidentally burdens speech. *Id.* at 2373.

1. Conversion therapy is conduct, not speech.

Mental health treatment and mental health advocacy are two separate activities that licensed professionals may engage in. The difference between the two is far from marginal. For example, Sprague has the right to advocate for controversial treatments, such as conversion therapy, without First Amendment implications. *Pickup*, 740 F.3d at 1228 ("Outside the doctor-patient relationship . . . [a doctor's] speech receives robust protection under the First Amendment."). Conversion therapy treatment, however, can be regulated without regard to the First Amendment. *Id.* at 1228 (discussing how doctors may be "held liable for giving medical advice . . . that is inconsistent with the accepted standard of care"). This idea was evident in *Pickup v. Brown*, and the court of appeals correctly held that the facts and decision in *Pickup* was on point with this case. Similar to North Greene, the *Pickup* state legislature restricted "licensed

mental health providers from engaging in 'sexual orientation change efforts' ("SOCE") with patients under eighteen years of age." *Id.* at 1221. SOCE may also be referred to as conversion therapy. *Id.* at 1222. The plaintiffs in that case claimed a First Amendment violation for the very reason Sprague did: that the state violated his free speech rights by restricting a method of therapy, specifically conversion therapy. *Id.* at 1224. The *Pickup* court rejected the idea that speech-based therapy deserved a higher level of constitutional protection simply because the therapy consisted of "pure speech." *Id.* at 1226. Specifically, conversion therapy is centered around the treatment children undergo to change their sexual orientation and identity, not around the particular words used in the process. *Id.* at 1226 ("[T]he key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech."). Therefore, Sprague's use of speech to treat a patient does not automatically afford him full First Amendment protection. *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych. (NAAP)*, 228 F.3d 1043, 1054 (9th Cir. 2000).

Pickup and *NIFLA*'s holdings affirm that statutes—like the one at issue—conform with the First Amendment because they only incidentally burden speech. Sprague's belief that *NIFLA* overruled *Pickup* in its entirety is misplaced. *NIFLA* rejected "professional speech" as a First Amendment category in regard to a statute that ordered licensed pregnancy centers to disclose free or low-cost pregnancy-related state programs. 138 S. Ct. at 2371. This Court's rejection of "professional speech" in *NIFLA* subjected that statute to strict scrutiny, as it related to speech rather than professional conduct. *Id.* at 2376. That statute was a content-based restriction of speech that mandated licensed clinics to promote state services. *Id.* at 2371. It required clinics to promote the availability of contraception, abortions, and prenatal care. *Id.* at 2369. None of which related to a medical procedure or the regulation of professional conduct. *Id.* at 2373. It

was speech that could have been promoted by anyone regardless of a professional license. The statute in *NIFLA* was entirely different that North Greene's statute because North Greene did not prevent licensed professionals from discussing conversion therapy to their patients. Alternatively, North Greene's statute did not require licensed professional to tell their patients the consequences of the treatment. It only prevented them from treating children with conversion therapy.

NIFLA's rejection consequently overruled *Pickup*'s holding that there was a lower level of constitutional protection for "professional speech." *Id.* at 2371–72; *see also Pickup*, 740 F.3d at 1227. *NIFLA*, however, confirmed that a lower level of protection for professional conduct comported with the First Amendment. 138 S. Ct. at 2372. Given that conclusion, *Pickup*'s holding must survive. 740 F.3d at 1229 (discussing how the statute fell under professional conduct, not professional speech). Just like the statute in *Pickup*, North Greene's statute prevents conduct that incidentally burdens speech.

2. Conversion therapy incidentally burdens speech.

A law is not protected by the First Amendment when it targets non-expressive conduct, even if that conduct is controversial. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992). It has never been a violation of free speech to restrict impermissible conduct purely because "the conduct was in part initiated, evidenced, or carried out by means of language." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Holding that every activity be protected by the First Amendment just because speech is involved would defeat the purpose of most First Amendment limitations. Alternatively, just because an activity involves speech does not mean that the speech involved is sufficient to command First Amendment protection. *NAAP*, 228 F.3d at 1054.

This Court has been consistent in upholding laws that regulate conduct even if they burden speech. *R.A.V.*, 505 U.S. at 389. Additionally, states have retained the power to regulate such laws when the conduct is harmful to people. Some of these regulations have included obscene performances involving minors, location of adult theatres, burning a service registration card, and the restriction of certain accounting terms used by certified public accountants. *See respectively id.*; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988). *Pickup* followed this Court's precedent to conclude that preventing conversion therapy has only an incidental burden on speech. 740 F.3d at 1231.

Much like everything, mental and medical health treatments require speech to communicate. *Id.* at 1229. And just like states have the power to restrict other conduct, they have the power to restrict mental health treatments. *Id.* Like the statute in *Pickup*, North Greene's statute only prevents conversion therapy for children under eighteen, and nothing more. *Id.* Both statutes allow licensed therapists to advocate and provide resources for conversion therapy. *Id.* at 1223. Allowing the practice of harmful treatment merely because it is given through speech diminishes a state's power to keep people safe. *Id.* at 1229. *NIFLA* confirmed *Pickup*'s holding by affirming that professional conduct comports with the First Amendment even if it incidentally burdened speech. 138 S. Ct. at 2372. Given *NIFLA*'s conclusion, *Pickup*'s holding must survive. *Pickup*, 740 F.3d at 1229 (holding that the statute fell under professional conduct, not professional speech). The decisions in *NIFLA* and *Pickup* support the constitutionality of North Greene's statute. North Greene's statute is a proper restriction of professional conduct, similar to the statute in *Pickup*.

B. North Greene's Legislature Has a Legitimate Interest in Protecting the Safety and Well-Being of Children.

Conversion therapy is not speech; therefore, North Greene must only have a legitimate interest in enacting the statute. *NIFLA*, 138 S. Ct. at 2372. And laws that regulate health and welfare are presumptively valid and must be sustained if they have a rational basis. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

The State properly used its police powers to create a statute regulating health care licenses. R. at 4; *see also Watson v. Maryland*, 218 U.S. 173, 178 (1910) ("Regulations of a particular trade or business essential to the public health and safety [are] within the legislative capacity of the state in the exercise of its police power."). It is well established that states have the authority to regulate certain professionals to protect people's well-being. *See Watson*, 218 U.S. at 176. These regulations extend to health care professionals like Sprague who administer treatment, such as conversion therapy. *Pickup*, 740 F.3d at 1230; *see also Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession."). Yet, a state may only infringe on a licensed therapist's free speech rights if it is regulating the practice of his profession. *Casey*, 505 U.S. at 884. This is exactly what North Greene did. The statute only prohibited the performance of conversion therapy on children. And states have a "legitimate power to protect children from harm." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011). Therefore, the statute is constitutional because the restriction focuses on protecting children.

Additionally, a state may prohibit speech to protect children if there is a legitimate prohibition. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975). The State had a legitimate interest: shielding children from harmful mental health treatment. The legislature was even careful to enact a permissible regulation without infringing on free speech rights.

Specifically, the statute permits expressive speech allowing licensed professionals to share their support and opinion of conversion therapy. In support of the statute, North Greene found that the American Psychological Association ("APA") opposes conversion therapy. The APA asserts that conversion therapy is not only ineffective, but drives children to severe mental health issues, such as depression, substance abuse, and even suicide. But the State does not actually have to fix the harms that conversion therapy brings. Rather, it is enough for the State identify a danger and develop a statute as a rational way cure it. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); *see also Dobbs*, 142 S. Ct. at 2284. These dangers—or legitimate interests—include regulating extreme medical procedures. *Dobbs*, 142 S. Ct. at 2284. Additionally, courts have held that medical regulations were rationally related to a legitimate government interest when said interest was for a person's well-being. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (upholding a ban on medically assisted suicide treatment). Therefore, North Greene's statute serves a legitimate purpose by protecting children from unduly harm.

C. The Statute Survives Even if Conversion Therapy Is Categorized as Speech and Subject to Strict Scrutiny.

Conversion therapy is conduct, yet, North Greene's statute still comports with the First Amendment if this Court finds that conversion therapy is speech and subject to strict scrutiny. A law that prevents speech based on its content is justified if the state has a compelling interest and the law is narrowly tailored to serve that interest. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

North Greene's legislature had a compelling interest in protecting children from the harm that conversion therapy causes. Additionally, the legislature limited the restriction to licensed therapists and children. It also exempted religious practices, unlicensed professionals under the auspices of a religious organization, and licensed professionals under the auspices of religious

organizations as long as they do not conduct conversion therapy while acting as licensed health care professionals. R. at 4. The statute comports with the First Amendment's free speech rights because it survives strict scrutiny.

1. The safety and well-being of children is a compelling state interest.

North Greene not only had a legitimate interest but a compelling one. It is clear the legislature had a legitimate government interest in creating § 106(d). *See supra* Section I.B. But the statute can also survive a heightened standard of scrutiny if this Court finds that conversion therapy is speech. The legislature had a compelling interest in protecting children, especially those of the LGBT community, from the harmful effects of conversion therapy. Courts have consistently held that states have an important interest in regulating medical procedures. *See Watson*, 218 U.S. at 176; *NAAP*, 228 F.3d at 1056 (holding that the statute was "a valid exercise of its police power to protect the health and safety of its citizens"). Additionally, there is a compelling interest in protecting people of the LGBT community—especially children. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). Conversion therapy lacks scientific credibility and has proven to be harmful. Am. Acad. of Child & Adolescent Psychiatry's Sexual Orientation & Gender Identity Issues Comm., *Conversion Therapy*, Am. Acad. of Child & Adolescent Psychiatry (Feb. 2018), https://www.aacap.org/AACAP/Policy_Statements/2018/Conversion_Therapy.aspx. North Greene's interest is especially compelling because children who are treated through conversion therapy are at high risk of suicide and susceptible to severe mental health issues. R. at 4. Even if this Court finds that strict scrutiny is required, North Greene's legislature passes because it had a compelling interest and the statute was narrowly tailored to serve this interest.

2. Conversion therapy is limited to minors and licensed therapists while exempting religious practices.

North Greene's statute is narrowly tailored to only prohibit the use of conversion therapy as treatment for children. The legislature specifically narrowed the restriction to children under eighteen years of age. *Id.* The restriction was further narrowed to only prohibit the therapy itself. *Id.* Any minor patient that Sprague treats can wait until their eighteenth birthday to obtain conversion therapy from him. Additionally, minors have many other options to receive such treatment if they do not want to wait. Sprague could suggest to the minor that he or she travel to a state allowing conversion therapy to obtain the treatment. Alternatively, minors can seek a non-licensed therapist under the auspice of a religious organization to obtain conversion therapy. *Id.*

Further, the statute is limited to licensed health care professionals. *Id.* In other words, the statute exempts religious practices or licensed professionals acting under the auspices of religious organizations as long as they do not conduct conversion therapy while acting as licensed health care providers. *Id.* Unlicensed therapists under religious guidance are also exempt from the statute. *Id.* The statute's limitations are specific to licensed health care professionals that treat minors with conversion therapy, no one else. The limitations do not extend beyond the treatment itself. The statute does not limit therapists' ability to advocate for conversion therapy. While licensed health care professionals are prohibited from administering conversion therapy, they have an unrestricted ability to promote it to their patients, which means that licensed professionals—like Sprague—can tell their minor patients, or anyone else, the pros and cons of conversion therapy, the process of how it is typically conducted, and even where to obtain it. The State's restriction on conversion therapy is narrowly tailored and furthers North Greene's interest in keeping children safe.

Conversion therapy is conduct and North Greene's statute survives rational basis. But, if this Court were to find otherwise, the statute is narrowly tailored to serve a compelling interest and survives strict scrutiny.

Lastly, ruling this statute constitutional does not mean that laws prohibiting the support of gender identity and sexuality will also be held constitutional. Judge Knotts' dissent reasoned that prohibiting conversion therapy would allow states the liberty to prohibit professionals from supporting a patient's gender identification. R. at 14. This argument is misplaced. North Greene's statute does not forbid licensed professionals from discussing or even supporting conversion therapy. Rather, the statute only prevents them from treating children with conversion therapy. R. at 4. A law in the inverse would have to pertain to specific treatment that prevents the support of a person's gender identity. And like this statute, it would have to be analyzed under the First Amendment. Like in *Dobbs*, the invalidation of one law does not necessarily mean that similar laws will also be invalidated. *See* 142 S. Ct. at 2243 (discussing that the right to contraception was fundamentally different than the right to abortion). It would be improper to prematurely assume that this restriction would lead to invalidation of gender identity support.

North Greene's statute comports with the Free Speech Clause of the First Amendment because conversion therapy is conduct that only incidentally burdens speech. North Greene had a strong interest in protecting children from the dangers of conversion therapy and the statute was rationally related to advance said interest. For these reasons, Sprague's claim must fail.

II. NORTH GREENE'S STATUTE COMPORTS WITH THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT, AND *SMITH* IS THE APPROPRIATE STANDARD FOR LAWS THAT BURDEN RELIGION.

The Free Exercise Clause of the First Amendment orders that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. States are bound to this order

through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Freedom of exercise encompasses two ideas: "freedom to believe and the freedom to act." *Id.* Unlike freedom to believe, freedom to act is not absolute. *Id.* at 303–04; *see also Reynolds v. United States*, 98 U.S. 145, 166 (1878). While North Greene lacks the power to prevent religious beliefs and opinions, it has always held the power to constitutionally limit conduct to protect society from a violation of social duties and good order. *Cantwell*, 310 U.S. at 303–04. North Greene is not required by the First Amendment to "behave in ways that [Sprague] believes will further his . . . spiritual development." *Bowen v. Roy*, 476 U.S. 693, 699 (1986). Meaning, "free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted). The court of appeals correctly affirmed that North Greene's statute did not violate the Free Exercise Clause of the First Amendment.

A. North Greene's Statute Satisfies the *Smith* Test Because It Is Neutral and Generally Applicable.

Under *Smith*, a law comports with the free exercise of religion if it is neutral and of general applicability. 494 U.S. at 879. North Greene's statute is both neutral and generally applicable. A regulation that is neutral and generally applicable does not require a compelling interest to be constitutional even if it incidentally burdens religion. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). A law is not generally applicable if it allows for individualized exemption or treats secular conduct more favorable than religious conduct. *Fulton*, 141 S. Ct. at 1877. A law is not neutral if "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533. A lawmaker's "object can be determined from both direct and circumstantial evidence." *Id.* at 540.

1. The statute is neutral on its face.

Laws can be neutral on their face and in application. A law is neutral on its face if the text of the regulation does not discriminate against religion. *Id.* at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* In other words, religious language without a secular context is a strong indication that the law lacks neutrality. *Id.* at 534 ("We agree that these words are consistent with the claim of facial discrimination, but the argument is not conclusive."). The plain language of North Greene's statute does not discriminate against religion. Rather, it prohibits the practice of conversion therapy by licensed health care professionals. Additionally, the statute is codified under the State's Uniform Professional Act, applying only to "businesses and professions." R. at 3. In fact, the only instance where the statute mentions religion is to allow religious practice. Meaning, children can obtain conversion therapy from any religious organization or by a licensed therapist under the auspices of a religious organization. The statute is silent on religious discrimination and describes "conversion therapy" only in a secular context.

Sprague's claim that the statute violates the Free Exercise Clause is without merit. The statute is valid because it is neutral on its face and lacks religious references.

2. The circumstances surrounding the statute are evidence of neutrality.

A law may lack neutrality when evidenced by discrimination in "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision[-]making body." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 540).

The court in *Welch* analyzed a statute like North Greene's. The statute in *Welch* restricted "licensed mental health providers from engaging in [conversion therapy] with" patients under eighteen. *Welch v. Brown*, 834 F.3d 1041, 1043 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Oct. 3, 2016). *Welch* reasoned that the statute comported with the Free Exercise Clause because it was neutral. *Id.* at 1047. The statute's object—like in North Greene—was to protect children from the dangers of conversion therapy, regardless of the motivation. *Id.* North Greene created the statute to regulate the conduct of professional health care providers. The legislature's motivation was entirely secular: protecting children from the physical and psychological harm that conversion therapy creates. North Greene relied on the APA's research as motivation for the creation of the statute. Specifically, the statute's enactment was motivated by evidence demonstrating the inefficacy of conversion therapy and reports detailing significant harm inflicted by the practice, including depression, substance abuse, and even suicide.

The Free Exercise Clause also protects against "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534. State action targeting religious conduct is not saved by compliance with facial neutrality. *Id.*; *see also Masterpiece Cakeshop*, 138 S. Ct. at 1731. North Greene Senator, Golmer Pyle, made a remark denouncing people who try to "pray the gay away" based on an anecdote he was told and because his daughter identifies as gay. R. at 9. Here, the Senator's commentary may show a religious intent for enacting the statute. *Id.* In *Lukumi*, however, Justice Scalia held that the First Amendment did not require a determination of legislative motive. 508 U.S. at 558 (Scalia, J., concurring in part and in judgment); *see also Dobbs*, 142 S. Ct. at 2256 ("The Court has recognized that inquiries into legislative motives are a hazardous matter."). Justice Scalia reasoned that the language of the "First Amendment [did] not refer to the purposes for which legislators enact laws, but to the effects of the laws enacted." *Lukumi*, 508 U.S. at 558

(Scalia, J., concurring in part and in judgment). The single comment made by Senator Pyle is not evidence of legislative intent because "the remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

3. The statute is neutral in application.

North Greene's statute is neutral in application. A law is not neutral in application if its object is to restrict a practice because of its "religious motivation." *Lukumi*, 508 U.S. at 533. Typically, laws aimed solely "at persons with religious motivations may raise constitutional concerns." *Welch*, 834 F.3d at 1045. But a law does not necessarily impermissibly target religion merely because it has an adverse effect on it. *Lukumi*, 508 U.S. at 535. There is no First Amendment concern when "a particular group, motivated by religion, [is] more likely to engage in the proscribed conduct" than someone with secular motivations. *Welch*, 834 F.3d at 1047 (quoting *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015)).

The legislature in *Welch* relied on psychological journals and reports to conclude that conversion therapy brought grave effects to children. *Id.* at 1046–47. Even though the reports found that some people who undergo conversion therapy have strong religious views, "persons seek [conversion therapy] for many secular reasons." *Id.* at 1047. Ultimately, *Welch* held that "an informed and reasonable observer would conclude that the 'primary effect' of [statute] SB 1172 [was] not the inhibition . . . of religion." *Id.* The same applies here. An informed and reasonable observer would not conclude the effect or application of North Greene's statute was to inhibit religion. Sprague's argument that his patients specifically obtain his services because he is a Christian does not render the statute invalid. The primary effect of the statute was not to hinder religious practices.

North Greene's statute meets the requirement of neutrality. Its plain language does not reference religious practice, there is no circumstantial evidence of hostility towards religion, and the statute's application was not targeted at religion.

4. The statute is generally applicable.

North Greene's statute is generally applicable. "General applicability addresses whether a law treats religious observers unequally." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020). Under *Smith*, a law is not generally applicable "when it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (internal quotation marks omitted). North Greene's statute does not create discretionary exemptions. The exemptions are plainly laid out without allowing the State to decide who may conduct conversion therapy on children. The statute is clear on who is prohibited and exempt from conducting conversion therapy on children. Individual exemptions outside from those provided for are impermissible.

Additionally, a law fails to be generally applicable when it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.*; *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). The school district in *Kennedy* reprimanded a high school coach for failing to "supervise student-athletes" when he prayed after each game ended. 142 S. Ct. at 2423. But, the district allowed other staff members to visit with others and even take phone calls after the games. *Id.* The policy failed general applicability because "the postgame supervisory requirement was not applied" evenhandedly. *Id.* The coach was reprimanded for his religious conduct while other staff members were not reprimanded for their impermissible secular conduct. This case is not like *Kennedy*. Here, North Greene prohibits all licensed health care professionals from using

conversion therapy on children. In other words, the statute applies to all licensed health care professionals, regardless of their religious practice or motivation. Additionally, the statute applies to all children, regardless of the reason they seek conversion therapy. North Greene's statute is generally applicable because it does not "treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021). North Greene prohibited conversion therapy by licensed therapists, a secular activity. It also exempted conversion therapy when done as part of religious exercise. It cannot be said that North Greene has treated conversion therapy in a secular context more favorably.

Additionally, the only cases that have barred the application of the *Smith* test for Free Exercise claims are those "in conjunction with other constitutional provisions, . . . [like] freedom of speech." *Smith*, 494 U.S. at 881. In *Wisconsin v. Yoder*, this Court invalidated a law that applied to Amish parents when they refused to send their children to school based on religious reasons. 406 U.S. 205, 233 (1972). *Smith*'s hybrid dicta does not apply to Sprague because his free speech claim is without merit and there are no other constitutional provision at issue. 494 U.S. at 881.

North Greene's statute is generally applicable because it lacks individualized exemptions and does not treat a comparable secular activity more favorably than religious exercise. North Greene's statute is constitutional because it is neutral and of general applicability.

B. North Greene's Statute Survives Strict Scrutiny Even if This Court Finds That the Statute Is Not Neutral and Generally Applicable.

Strict scrutiny under the Free Exercise Clause is used when a law is not neutral nor generally applicable. *Lukumi*, 508 U.S. at 546. The law must be narrowly tailored to advance an interest "of the highest order." *Id* (quoting *McDaniel v. Paty*, 435 U.S. 618, 629 (1978)).

North Greene's statute survives strict scrutiny even if the Court were to find that conversion therapy is speech, not conduct. *See supra* Section I. B–C. It would be erroneous to determine that the statute could not meet strict scrutiny in a free exercise context. North Greene had a compelling interest for enacting the statute: to protect children from severe mental health issues and suicide. R. at 4; *see supra* Section I.C.1. The statute was also narrowly tailored to limit licensed health care professionals and children under eighteen. R. at 4; *see supra* Section I.C.2. North Greene further narrowed its restrictions to allow religious exercise. R. at 4.

North Greene's statute survives strict scrutiny under both Free Speech and Free Exercise Clauses of the First Amendment.

C. *Smith* Is the Proper Test to Analyze the Free Exercise Clause of the First Amendment.

Smith is the proper analysis for laws that incidentally burden religion. Overruling *Smith* would destroy decades of precedent and leave the judicial system without a proper way to analyze the protections provided by the Free Speech Clause. Additionally, overruling *Smith* would leave many unanswered questions for this Court to decide, such as: whether entities acting as arm of a religion should "be treated differently than individuals," whether there should be a "distinction between indirect and direct burdens on religious exercise," and the type of scrutiny that should apply. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

1. *Stare decisis* favors affirming *Smith*.

This Court is cautious when approaching the possibility of overturning precedent. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) ("This Court does not overturn precedents lightly."); *see also Dobbs*, 142 S. Ct. at 2264 ("Overruling a precedent is a serious matter."). This is because *stare decisis* "serves many valuable ends." *Dobbs*, 142 S. Ct. at 2261. It is preferable as "it 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." *Bay Mills*, 572 U.S. at 798 (citation omitted). Additionally, *stare decisis* is the way generations of judicial officers accumulate more knowledge than a single panel ever could. *Id.* "To reverse a decision, [this Court] demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'" *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (citation omitted). This Court determines if precedent should be overturned based on five factors: quality of the reasoning, workability of the established rule, consistency with other decisions, developments since decision, and reliance. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018). These factors weigh in favor of affirming *Smith*.

2. *Smith* is supported by sound reasoning.

The quality of *Smith*'s reasoning favors affirming it. *Smith* was decided in response to *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* held that it was a violation of the Free Exercise Clause to deny unemployment benefits to an employee who would not work on Saturday due to her religion. *Id.* at 400. "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. In *Smith*, this Court reasoned that *Sherbert* was too limited in scope for challenges beyond unemployment compensation. *Id. Sherbert* was so narrow in scope that it never invalidated a law outside unemployment compensation. *See United States v. Lee*, 455 U.S. 252, 254 (1982); *Gillette v. United States*, 401 U.S. 437, 461 (1971). *Smith* narrowed *Sherbert* because its application was too limited to be widely applicable and against "constitutional common sense" for other Free Exercise Clause claims beyond unemployment discrimination. *Smith*, 494 U.S. at 885.

The *Smith* test arose from *Sherbert*'s "compelling interest" test and its lack of applicability "across the board." *Id.* at 888. *Smith*'s reason for applying a different standard was to have a more applicable test for claims of different natures. *Id.* at 886–87. Thus, *Smith*'s quality of reason was sound, derived from past precedent, and favors continued application.

3. *Smith* has a workable application.

Since its creation, *Smith* has been constantly applied to Free Exercise cases. A law is workable when "it can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. 2272. *Smith* can be applied to virtually any law that affects religious freedom. Robin Cheryl Miller, Annotation, *What Laws Are Neutral and of General Applicability Within Meaning of* Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 167 A.L.R. Fed. 663 (2001). Though it has been questioned by some, *Smith* has been consistently applied. *Compare Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring), *with* Miller, *supra*. Overturning *Smith* would not result in a more workable alternative. Rather, it would leave the judiciary with more questions than answers. *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring). *Smith*'s workable application favors affirming it.

4. *Smith* is consistent with related decisions.

Smith is consistent with prior related decisions and subsequent developments. This Court followed precedent when making its decision in *Smith*. Jurisprudence—regarding religious exercise—has long held that Congress is "free to reach actions which [are] in violation of social duties or subversive of good order." *Reynolds*, 98 U.S. at 164. The same legal concept was then incorporated to the states. *Cantwell*, 310 U.S. at 304 ("It is equally clear that a state may by general and non-discriminatory legislation regulate . . . and . . . safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the

Fourteenth Amendment."). *Smith* adopted these cases and re-affirmed that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3). This Court's consistent application is in favor of upholding *Smith*.

Additionally, subsequent cases favor affirming *Smith* because they have followed and clarified *Smith*. Even though *Smith* received criticism from *Lukumi* and *Fulton*, both cases accepted the *Smith* standard and invalidated the laws at issue for failing the *Smith* test. *See Lukumi*, 508 U.S. at 547; *Fulton*, 141 S. Ct. at 1882. Three years after *Smith*, *Lukumi* expanded its definition of "neutrality" and clarified that a law could be neutral in three ways: on its face, in application, and by the circumstances of the government action. 508 U.S. at 534–40. Most recently, *Fulton* elaborated on what it meant to have a "generally applicable" law. 141 S. Ct. at 1877. Even though these cases are almost twenty years apart, they both analyzed the law at issue under *Smith* and offered further clarification. This Court's continuous application of *Smith* weighs in favor of upholding *Smith*.

5. Courts have consistently relied on *Smith*.

"Reliance provides a strong reason for adhering to established law." *Janus*, 138 S. Ct. at 2484. Courts have consistently used and relied on *Smith* to determine if laws discriminate against religion. Miller, *supra*. Overruling *Smith* after decades of consistent opinions would leave judicial officers without established precedent to determine religious discrimination. *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring) ("Yet what should replace *Smith*?"). Specifically, overruling *Smith* would raise many questions that courts have never had to address in a Free Exercise context. Some of the questions include: whether entities acting as arm of a religion should "be treated differently than individuals," whether there should be a "distinction between

indirect and direct burdens on religious exercise," and the type of scrutiny that should apply. *Id.* at 1883. This factor is also in favor of keeping *Smith* because of the uncertainty and confusion that would result if it were overturned.

These factors favor following precedent because of *Smith*'s reasoning, workability, consistently, developments, and reliance.

CONCLUSION

Conversion therapy is professional conduct that accidentally burdens speech and therefore given less First Amendment protection. North Greene's statute is also neutral and generally applicable under *Smith*. Additionally, *stare decisis* is in favor of upholding *Employment Division v. Smith*. The court of appeals correctly held that North Greene's statute was valid under the Free Speech and Free Exercise Clauses of the First Amendment of the U.S. Constitution.

For these reasons, this Court should AFFIRM the decision from the Fourteenth Court of Appeals.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT