No. 23-2020

IN THE

Supreme Court of the United States of America

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

Team 33
Counsel for Respondent
September 26, 2023

QUESTIONS PRESENTED

1. Under the Free Speech Clause of the First Amendment to the United States Constitution, does a law unconstitutionally restrict speech when it prohibits licensed professionals from engaging in a regime of medical conduct that incidentally involves speech while continuing to allow those professionals to express their beliefs or perform the prohibited services as part of a religious organization?

2. Under the Free Exercise Clause of the First Amendment to the United States Constitution, does a law unconstitutionally restrict religion when it burdens religious conduct as a mere incident to the valid legislative purpose of upholding a state's obligation to protect its children; and, if so, should the Court abandon its longstanding precedent, *Employment Division v. Smith*, 494 U.S. 872 (1990)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit is reported at *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023) and reproduced at R. at 2–16. The memorandum opinion of the United States District Court for the Eastern District of North Greene is reported at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

The State of North Greene ("North Greene") regulates businesses and professions operating within its borders through Title 23 of the North Greene General Statutes. R. at 3. As part of this regulatory scheme, North Greene requires all healthcare providers practicing within the state to be licensed. *Id.* As part of its commitment to maintaining the quality of its professionals at large, North Greene also enacted the Uniform Professional Disciplinary Act ("UPDA"). *Id.* The UPDA includes a list of what is considered "unprofessional conduct" for all licensed healthcare providers. *Id.* However, any therapist, counselor, or social worker working under the auspices of a religious organization is exempt from complying with the UPDA. *Id.*

To effect North Greene's compelling interest in protecting the physical and psychological well-being of minors, in 2019, the General Assembly added N. Greene Stat. § 106(d) to its list of unprofessional conduct. R. at 4. Section 106(d) specifically protects children by prohibiting licensed healthcare providers from performing conversion therapy on minor patients. *Id.* Section 106(d) is consistent with the professional position of the American Psychological Association ("APA"), which firmly opposes the use of conversion therapy by psychologists. *Id.* Instead, the APA encourages evidence-based and culturally competent approaches, which prioritize acceptance and support. *Id.*

Section 106(d) defines conversion therapy as encompassing any regime which seeks to change an individual's sexual orientation or gender identity, including any efforts to change behaviors, expressions, or attractions. *Id.* However, the statute still gives healthcare providers wide latitude to express or communicate any thoughts they may have about such a practice regime. *Id.* In fact, healthcare providers are free to communicate to the public about conversion therapy; share their viewpoints on conversion therapy with patients of *all* ages; refer patients to outside providers who are exempt from § 106(d); and even practice conversion therapy on all those over the age of eighteen. *Id.*

Petitioner Howard Sprague, despite holding himself out as a Christian provider, does not work under the auspices of a religious institution. R. at 3. Rather, as a state licensed therapist, he serves a wide variety of clients, with a wide range of needs. *Id.* Because a portion of these clients have issues surrounding sexuality and gender identity, Petitioner takes issue with the protective regulations contained in § 106(d). *Id.*

II. PROCEDURAL HISTORY

In August 2022, Petitioner brought suit against North Greene to enjoin enforcement of § 106(d). R. at 5. Petitioner contends that § 106(d) violates the Free Speech and Free Exercise Clauses of the First Amendment because it prevents him from practicing conversion therapy on children. *Id.* After opposing the preliminary injunction, the State filed a motion to dismiss. *Id.* The United States District Court for the Eastern District of North Greene denied Petitioner's motion for a preliminary injunction and granted North Greene's motion to dismiss as it rejected the existence of any viable constitutional claims. *Id.*

Upon Petitioner's appeal to the United States Court of Appeals for the Fourteenth Circuit, the court reviewed the District Court's dismissal in the light most favorable to Petitioner. *Id.* The Fourteenth Circuit reviewed the District Court's denial of Petitioner's preliminary injunction for

abuse of discretion. *Id.* The Fourteenth Circuit affirmed the District Court as to both decisions, holding that North Greene's regulations on the performance of conversion therapy do not violate any of Petitioner's First Amendment rights. R. at 11.

Petitioner appealed to this Court, which granted certiorari. R. at 17.

SUMMARY OF THE ARGUMENT

Section 106(d) merits and survives minimal scrutiny because it regulates professional conduct and only incidentally burden speech. States like North Greene have both an obligation and a compelling interest in regulating the practices of the medical profession, especially when those practices affect children. Regulations of conversion therapy—a *regime* and *practice method* aimed at converting gender identity and sexual orientation—are equivalent to regulations of any other medical practice, despite the fact that language is the medium through which treatment occurs. Outside of regulating the actual performance of conversion therapy by licensed therapists, North Greene has maintained the broadest possible First Amendment protections for these professionals to express their viewpoints on conversion therapy. This Court has traditionally subjected state regulations of professional conduct to only minimal scrutiny. Because evidence clearly reflects the dangers of subjecting minors to conversion therapy, North Greene has at least a legitimate interest in protecting children by regulating such practices, and § 106(d) is rationally related to that interest. Even if this Court concludes that § 106(d) is a regulation of professional *speech*—which it should not—this Court should treat § 106(d) as a permissible content-based regulation that survives intermediate scrutiny because conversion therapy is a proscribable class of speech.

The Fourteenth Circuit correctly treated § 106(d) as neutral and generally applicable because it only incidentally burdens religion and even primary burdens on religion are

constitutional when otherwise valid. Section 106(d) has a distinct and valid purpose of protecting North Greene's children through the regulation of professional medical conduct. Any burden § 106(d) imposes on religious conduct is only incidental to that purpose. Moreover, even laws that "primarily" burden religion should be treated as neutral and generally applicable. *Smith* and its progeny already provide sufficient protection against illicit legislative purposes, and applying different standards to burdens that are equally incidental to a law's purposes is inappropriate. Section 106(d) is thus neutral and generally applicable and should receive minimal scrutiny, which it survives. Finally, *Employment Division v. Smith* should not be overruled because it comports with the Free Exercise Clause and is further supported by stare decisis.

ARGUMENT

I. SECTION 106(d)'S REGULATION OF LICENSED COUNSELORS PERFORMING CONVERSION THERAPY ON CHILDREN COMPLIES WITH THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

North Greene's requirement that no licensed healthcare providers practice conversion therapy on patients under the age of eighteen complies with the Free Speech Clause of the First Amendment. This Court has long validated the compelling interest of the States in regulating professional standards as part of their broad authority to protect public health and safety. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). In fact, with respect to medical and healthcare providers, this has become a well settled obligation. *Shea v. Board of Med. Exam'rs*, 81 Ca. App. 3d 564, 577 (3rd Dist. Ct. App. 1978). Further, this Court has recognized that, in the context of a doctor–patient relationship, any effect on speech is merely incidental to the broader regulation of the practice of medicine. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992). Because § 106(d) regulates the practice of conversion therapy as a therapeutic regime, it restricts

conduct and survives rationale basis review. Even if this Court finds that § 106(d) regulates speech, it nonetheless survives intermediate scrutiny review.

A. Section 106(d) Is A Regulation Of Professional Conduct Which Only Incidentally Burdens Speech, And The Regulation Survives Rationale Basis Review.

While professional speech regulations are not recognized as a distinct First Amendment "category" that avoids strict scrutiny *per se*, this Court has acknowledged that professional speech has traditionally received less protection in two specific areas: disclosures of noncontroversial information and regulations of professional conduct or the practice of medicine. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (hereinafter "*NIFLA*"). States have the power to regulate professional conduct, even when those regulations incidentally burden speech. *Id.* In fact, regulations directed toward commerce, tortious malpractice guidelines, and even informed consent statutes have all been deemed regulations primarily directed at *conduct* that inherently burden speech in some lesser sense. *Id.* While it may be difficult to draw a bright line between speech and conduct, this Court has long retained the distinction. *Id.* at 2373. Ultimately, this Court has held that the combination of speech and conduct does not convert conduct into speech, nor has it ever considered it an abridgment of free speech to prohibit a course of conduct merely initiated, evidenced, or carried out by means of language. *Rumsfield v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006); *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502 (1949).

Here, North Greene has enacted legislation that subjects licensed healthcare providers to discipline if they engage in what has been deemed unprofessional conduct—performing conversion therapy on patients under the age of eighteen. R. at 4. Conversion therapy is specifically defined in § 106(d) using terms such as "regime," "efforts to change," "efforts to eliminate or reduce," and "practices." *Id.* This verbiage signifies that while therapy itself takes place through

language, regulations of conversion therapy are truly regulations of medical practice and therapist conduct.

1. North Greene has an obligation to regulate conduct within the medical profession, even if language is the primary tool used to carry out the treatment of clients.

A state's obligation to regulate the safety of treatments performed by its licensed medical professionals is not excused because those treatments are performed by means of speech rather than a scalpel. *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022). One year ago, in *Tingley*, the Ninth Circuit was presented with SB 5722, a Washington State law banning the practice of conversion therapy. *Id.* Before again characterizing this type of law as a regulation of professional conduct, the Ninth Circuit prefaced its analysis by robustly addressing any impact that this Court's recent decision in *NIFLA* had on its own prior decisions. The Ninth Circuit was clear in stating that, though *NIFLA* certainly abrogated the professional speech doctrine as a categorical rule, it by no means foreclosed all possibility for professional speech to be treated uniquely, nor did it invalidate any precedent signifying a state's broad discretion to regulate professional conduct which incidentally burdens speech. *Id.* at 1074. Rather, the *NIFLA* decision maintains the conduct-versus-speech dichotomy. *Id.* at 1076. Thus, based on the Ninth Circuit's decisions in *Tingley*, *Pickup,* and *NAAP*, courts remain entirely justified in considering the unique nature of therapy and psychoanalysis as professional practices.

Paramount here is the Ninth Circuit's precise rejection of any contention that because psychoanalysis involves a "talking cure" it must be treated as "pure speech." *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir. 2000) (hereinafter "*NAAP*"); *Pickup v. Brown*, 740 F.3d 1208, 1226 (9th Cir. 2014). The Ninth Circuit insightfully reasoned to the contrary, as the core component of any therapeutic intervention is not speech, but rather the treatment of a mental condition or illness ranging anywhere from major

depressive disorder to an anxiety condition. *NAAP*, 228 F.3d at 1054; *Pickup*, 740 F.3d at 1226. This understanding is consistent with how dentists and doctors have always been subject to regulation and malpractice claims for their medical opinions, for inaccurate diagnoses, for improper instructions, for failing to ask their patients essential questions, or for failing to refer them to a specialist, all irrespective of the fact that speech was a part of the medical practice. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 947–951 (2007). Though speech is inseparable from the practice of medicine in each of these contexts, the First Amendment does not prevent regulation. *See id.* at 950.

Conversion therapy is no different, for the bottom line is the same: the State has a responsibility for sanctioning practices which deviate from those deemed safe by the medical community. *Id.* at 950 (citing *Larsen v. Yelle*, 246 N.W.2d 841, 844 (Minn. 1976)). The District Court and the Fourteenth Circuit understood this. In fact, because North Greene's regulations in § 106(d) mirror those in the Ninth Circuit cases in all material aspects, both should be categorized as regulations of medical *conduct*. This is because conversion therapy encompasses a broad range of practices and intervention regimes all aimed at "repairing" or changing the individual who is exploring gender identity and sexual orientation. R. at 3. Based on robust medical research, § 106(d) is strictly directed at prohibiting these change efforts—not at prohibiting all discussion or expression of beliefs surrounding the practices. This Court should acknowledge, as did the Ninth Circuit, that therapeutic interventions are, at their core, medical treatments; they are simply implemented through means of language. To treat them as anything less is to both undermine the education, research and pedagogies of the field and, worse yet, reinforce ignorant stigmas that

diminish the critical importance of mental health by suggesting that therapeutic methods can reduced to merely "talking".

2. Outside the context of conducting treatment, North Greene's regulations afford medical professionals wide latitude to express their First Amendment-protected views on conversion therapy.

Outside the context of actually treating patients, where the State rightly prioritizes competence, not debate, medical professionals like those licensed in North Greene are afforded wide latitude to contribute to the marketplace of ideas within the medical field. Post, *supra*, at 949–950; *see Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). In fact, this Court has long recognized the value of freely exchanging ideas, even when unpopular—so much so that, for First Amendment purposes, there is no such thing as a "false idea." *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988) (quoting *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 339 (1974)). This Court's decision in *NIFLA* illustrates such freedoms in the context of medical practices, as it distinguishes between the diminished speech protections afforded within the doctor–patient relationship and the greater protections afforded outside the setting of medical treatment.

At issue in *NIFLA* were two California notice requirements, which required licensed and unlicensed crisis-pregnancy centers to post messages within their facilities that directly contradicted the message and purpose for which those facilities existed. *NIFLA*, 138 S. Ct. at 2369–2370. This Court made clear that neither of the two triggers for treating professional speech regulations with deference were implicated: the notice requirements did not ask the professionals to disclose noncontroversial information, nor were the notices regulations of professional conduct or the practice of medicine. *Id.* at 2372. In doing so, this Court made a point to contrast the facts before it, with informed-consent requirements, which *are* considered regulations of the practice of medicine. The California notice requirements, on the other hand, were not tied to any procedure at all. *Id.* at 2373. Rather, because the notices were communications between the facility and anyone

who walked within its doors, regardless of whether medical procedures were ever sought or performed, this Court found that minimal scrutiny was inappropriate. *Id.* at 2372–2374, 2378. In other words, the medical professionals operating out of those facilities received broad speech protections because the notice regulations were not tied to delivering patient care.

This same type of distinction can be found in the jurisprudence of courts throughout the country. With respect to professional commercial speech, this Court has noted that the dangers of fraud and deception within personal professional relationships—the driving force behind the requirement that all investment advisors be licensed—are simply not present with publications sold and advertised in an open market. *Lowe v. SEC*, 472 U.S. 181, 210 (1985). On a similar note, the Ninth Circuit in *Conant* enjoined a policy that prevented physicians from even recommending or conveying approval for the use of medical marijuana. *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002). Though the government was enjoined from revoking a doctor's license on such a basis, it was not enjoined from investigating doctors who actually distributed or possessed marijuana as a form of treatment. *Id.* There, the court protected professional speech because it was not merely incidental to treatment. Even state court decisions are persuasive here, like *Bailey v. Huggins Diagnostic & Rehabilitation Center*, where the Colorado Court of Appeals has explained that a dentist would not be liable for any alleged negligent misrepresentations within his published work, for there is no duty of care owed to patients in such a context. *Bailey v. Huggins Diagnostic & Rehab. Ctr.*, 952 P.2d 768, 771 (Col. Ct. App. 1997). Each of these decisions reflects the value of professional First Amendment freedoms, notwithstanding the State's ability to regulate the conduct of professionals delivering medical treatment.

North Greene crafted § 106(d) in accordance with these principles. Much like the way many other state laws which have addressed the issue of conversion therapy have, § 106(d) affords

licensed therapists the broadest possible range of free speech protections while still upholding its regulatory duties. Licensed healthcare providers are free to speak publicly about conversion therapy, communicate their personal views on conversion therapy with patients of any age, actually practice the conversion therapy on those over eighteen, and even refer minors to other providers who are exempt from the statute. R. at 4. In fact, a licensed provider operating under the auspices of a religious organization can even perform conversion therapy on a minor patient without fear of discipline. *Id.* By openly maintaining such freedoms for licensed therapists, North Greene has demonstrated its commitment to preserving the ability of licensed providers to freely contribute their differing viewpoints on conversion therapy and converse openly with patients. As such, § 106(d) regulates merely a *method* of delivering therapeutic treatment. That regulation is well within the State's authority to enact.

3. Section 106(d) survives minimal scrutiny because it is rationally related to North Greene's legitimate interest in protecting minors.

Regulations of the conduct of medical professionals, including licensed therapists, must be merely reasonable in that they must only be rationally related to a legitimate state interest. *See Casey,* 505 U.S. at 884. In light of this country's vigilance for protecting the safety and welfare of minors, a state's interest in protecting minors from the dangers of conversion therapy is more than legitimate—it is incontrovertible. This Court's own seminal cases virtually presuppose that a state's interest in protecting the physical and psychological well-being of minors is not merely legitimate, but compelling. *New York v. Ferber*, 458 U.S. 747, 756–757 (1982); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 607 (1982). In fact, this Court has acknowledged that this nation's democratic society rests upon raising healthy, well-rounded young people. *Ferber*, 458 U.S. at 757; *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). Accordingly, this Court has

upheld legislation protecting the emotional and physical health of young people, even when those laws tread in the sensitive areas of constitutional rights. *Ferber*, 458 U.S. at 757.

Even courts like the Third Circuit, which have categorized conversion therapy regulations as regulations of *speech* rather than conduct, have nonetheless unreservedly held that such regulations survive even intermediate scrutiny. This is attributable to the important interests at stake. In both *King v. Governor of New Jersey*, as well as in *Doe v. Governor of New Jersey*, the Third Circuit was inclined to agree with the legislature's concerns regarding conversion therapy. *Doe v. Governor of N.J.*, 783 F.3d 150, 151–52 (3rd Cir. 2015); *King v. Governor of N.J.*, 767 F.3d 216, 238 (3rd Cir. 2014). Both cases relied upon the findings of the APA's specially employed Task Force, which conducted a systemic review peer-reviewed study on the subject. *Doe*, 783 F.3d at 152; *see King*, 767 F.3d at 238. The Task Force's findings included the possibility of critical health risks for victims of conversion therapy, including suicidality, substance abuse, self-hatred, high-risk behavior, and dehumanization. *Doe*, 783 F.3d at 152–153. The American Academy of Child and Adolescent Psychiatry published similarly, finding that there was no empirical evidence indicating that sexual orientation could be altered through therapy, thus making attempts to do so harmful and misguided. *Id.* at 153. The Third Circuit, with little hesitation, recognized the interests at stake.

These concerns persist in North Greene, and the General Assembly has similarly relied upon the APA's position in opposition to conversion therapy. R. at 4. Thus, regardless of an individual therapist's position on the matter, North Greene's prohibition on performing conversion therapy on children is nearly identical to those in the Third Circuit and, at minimum, reasonably and rationally related to its interest in protecting minors from what empirical evidence shows poses great danger to minors.

B. Even If This Court Classifies § 106(d) As A Regulation Of *Speech*, Which It Should Not, The Regulation Nonetheless Warrants Only Intermediate Scrutiny.

Should this Court decide that § 106(d) is not a regulation of professional conduct, but rather, a regulation of speech and conduct, or even just speech, this Court should nonetheless hold that it is a permissible content-based regulation because it prohibits an entire class of speech as being proscribable and dangerous. Thus, § 106(d) should receive no greater than intermediate scrutiny, which it survives.

1. Even if this Court decides that § 106(d) is not subject to a traditional professional speech analysis, North Greene's interest in regulating the nonspeech is so important that it should receive no greater than intermediate scrutiny.

Of course, this Court has firmly held that it will not accept the limitless position that conduct is necessarily speech merely because the person engaging in it intends to communicate a message. *United States v. O'Brien*, 391 U.S. 367, 376 (1968). However, even assuming that the conduct is communicative enough to implicate the First Amendment, the Constitution does not conclusively protect the act as a whole. *Id.* Moreover, when elements of speech and nonspeech are combined, a sufficiently important government interest in regulating the nonspeech conduct can overcome incidental limitations on those First Amendment protections. *Id.*

Section 106(d) deals with elements of speech and nonspeech. It notifies all licensed therapists within North Greene that they cannot engage in a therapeutic regime aimed at converting a minor's sexual orientation or gender identity. R. at 4. Speech is involved, but only as the means by which the medical conduct is performed. Assuming *arguendo* that this Court does not, through traditional professional speech analysis, consider § 106(d) to be a regulation directed at the nonspeech conduct which only incidentally burdens speech, North Greene can nonetheless regulate the underlying nonspeech conduct even when combined with speech. Such regulation is

justified by the State's sufficiently important interest in protecting minors from the risks of conversion therapy. *See supra* Section I.A.3.

2. Even if this Court decides—which it should not—that § 106(d) is regulation directed entirely at speech which discriminates on the basis of content, it does so permissibly in light of the proscribable nature of speech at issue.

Although this Court has made clear that content-based restrictions on speech are generally subject to strict scrutiny, this is not a categorical rule. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). To the contrary, this Court has said that content-based discrimination is more appropriate when it consists entirely of the reason that the class of speech at issue is proscribable. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992). Further, this Court in *NIFLA* explicitly considered and left open the possibility that professional speech might receive lower scrutiny in appropriate circumstances. *NIFLA*, 138 S. Ct. at 2375. Therefore, this Court should treat regulations preventing licensed professionals from performing conversion therapy as permissible content-based regulations, subject, at most, to intermediate scrutiny. Section 106(d) is simply one such restriction.

The Third Circuit, in addressing a regulation on the performance of conversion therapy, posited that even if the regulation is one directed at speech, it rejects the contention that it should be subject to strict scrutiny. *King*, 767 F.3d at 236. In doing so, it looked to this Court's own opinion, *R.A.V. v. City of St. Paul*, which explained how strict scrutiny is not triggered "when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *R.A.V.*, 505 U.S. at 388. This Court was clear when it upheld the longstanding proposition that speech may be proscribable on the basis of one feature, even if not on the basis of another. *Id.* at 385. By way of illustration, this Court described how it has never been disputed that states may choose to regulate the advertising of prices in one industry—but not

others—simply because the risk of fraud varies across industries. *Id.* at 388. States can even, for instance, allow all obscene live performances *except* those involving minors. *Id.* This is because, in some cases, speech violates a regulation of conduct, allowing certain content-based subcategories of a proscribable class of speech to incidentally fall within these statutes. *Id.* At bottom, this Court refused to accept the notion that selective restriction *must* be attributed to the State's preference for a message; there are other valid bases. *Id.* at 390. Thus, while the Third Circuit's conclusion that the conversion therapy regulation was a permissible content-based regulation assumed that *no* professional speech regulation should receive strict scrutiny, this Court's decision in *NIFLA* left open the possibility that *some* regulations of professional speech should still receive only intermediate scrutiny. In other words, because this Court in *NIFLA* did not foreclose the possibility for treating professional speech uniquely, this Court should treat the performance of conversion therapy as a proscribable class, considering the inherent danger it presents to children.

Therefore, assuming *arguendo* that § 106(d) is not a regulation directed at conduct, this Court should treat it as a permissible content-based regulation that survives intermediate scrutiny because it prohibits an entire class of proscribable speech. The studies surrounding professionals utilizing conversion therapy on developing minors are alarming, and the risks of suicidality, self-harm, and substance abuse alone are as proscribable, if not more, than categories like obscenity or fighting words which receive no First Amendment protection. Though regulations like § 106(d) may selectively restrict based upon the content of a licensed therapist's message, they do so in a way that is substantially related to an important government interest. Section 106(d) is no broader than necessary and, in fact, only prohibits a narrow subset of speech surrounding conversion therapy; that speech which actually carries out the conversion therapy itself. *See supra* Section

I.A.3. In light of this Court's longstanding tradition of protecting minors, it should affirm North Greene's focus on doing the same.

II. THE FOURTEENTH CIRCUIT DID NOT ERR WHEN IT TREATED SECTION 106(d) AS NEUTRAL AND GENERALLY APPLICABLE, EVEN IF IT "PRIMARILY" BURDENS RELIGION; FURTHER, *EMPLOYMENT DIVISION V. SMITH* IS CONSISTENT WITH THE FREE EXERCISE CLAUSE AND SHOULD NOT BE CAST ASIDE.

Section 106(d) of North Greene's UPDA is neutral and generally applicable and should receive only minimal scrutiny. The Fourteenth Circuit correctly treated it as such and as only incidentally burdening religion. This court's decisions, the nature of judicial review, and public policy obviate any justification for treating laws that place a primary burden on religion differently from those that only incidentally burden religion. Further, this Court's longstanding rule from *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) should not be discarded. *Smith* is faithful to the text and purpose of the Free Exercise Clause, comports with this Court's free exercise precedent, and is bolstered by the doctrine of stare decisis.

A. The Fourteenth Circuit Did Not Err When It Treated Section 106(d) As Neutral And Generally Applicable Under *Employment Division v. Smith*.

The Fourteenth Circuit correctly treated § 106(d) as neutral and generally applicable and as only incidentally burdening religion. Section 106(d) imposes a burden on religion that is only incidental to its valid purpose of protecting children in North Greene. Further, characterizing the burden a neutral and generally applicable law imposes on religion as primary rather than incidental does not—and should not—offer ground for subjecting such a law to more than minimal scrutiny. Therefore, and because it meets this Court's established standard of neutrality and general applicability, § 106(d) is constitutional.

1. Section 106(d) imposes a burden on religion that is only incidental to the law's purpose.

Section 106(d) has a valid purpose and only incidentally burdens religion. The Free Exercise Clause of the First Amendment to the United States Constitution states that "Congress shall make no law . . . prohibiting the free exercise [of religion]" and is incorporated against the States by the Fourteenth Amendment. U.S. Const. amends. I, XIV; *see Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (2015). This Court has recognized for decades 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" simply because the law has the "incidental effect" of burdening religion. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 878, 880 (1990). When a neutral and generally applicable law is enacted pursuant to a valid purpose unrelated to the prohibition of religious conduct, it may proscribe some religious conduct in the process without falling subject to heightened scrutiny. *See id.*

North Greene's valid purpose of protecting the children within its borders is not only a compelling interest, but also an *obligation*. *See supra* Sections I.A.1., I.A.3.; R. at 4. With that duty as its lodestar, North Greene enacted § 106(d) to "protect[] the physical and psychological well-being of minors, including [LGBTQIA+] youth, and [protect] minors against exposure to serious harms caused by conversion therapy. R. at 4. The legislature recognized the reality of that harm based on the scientific findings of the APA. *Id.* As the Fourteenth Circuit observed, the APA's position is based not on "anecdotal reports," but "the scientifically documented increased risk of suicide and depression from having a licensed mental health provider try to change a minor." R. at 10. North Greene's purpose, informed by those scientific findings, is the sole reason § 106(d) prohibits medical conduct, and thus the sole reason it burdens the religious free exercise

of Petitioner or any other licensed provider. Thus, the burden § 106(d) imposes on religion is a burden that is purely incidental to the law's valid purpose of protecting children.

2. The First Amendment does not prohibit state laws that even primarily burden religion.

In *Smith*, this Court acknowledged the need for—and constitutional propriety of—state regulations that impose on religion a burden that is "merely the incidental effect" of the prohibition. *Smith*, 494 U.S. 878; *see also id.* at 879 ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982))). In this context, whether a burden is incidental is a function of the law's relation to the legislature's *purpose*, not of possible disparate *effects*. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437, 462 (1971) (upholding the conscription laws at issue because their *purpose* was not to obstruct or penalize religious conduct). The amount or type of religious conduct the law affects is not determinative unless it points to an illegitimate purpose. *Smith*'s progeny established exceptions to *Smith*'s "single categorical rule" that protect religious practices from regulations enacted pursuant to illicit purposes. A bifurcated analysis of the burden a law imposes is unnecessary in light of those protections, inconsistent with the nature of judicial review, and contrary to public policy.

a. The exceptions created by Smith*'s progeny adequately protect against constitutionally proscribed regulations.*

This Court's free exercise jurisprudence did not stagnate with *Smith*. Since 1990, several decisions have illustrated that *Smith* left ample room for religious conduct. *Smith*'s "neutral and generally applicable" standard has evolved to identify several legislative errors that can lead to strict scrutiny, such as a hostile purpose or the absence of fair and equal treatment. These cases in

Smith's line adequately protect against unconstitutional legislative action, rendering unnecessary any distinction between burdens that do not directly result from an illicit legislative purpose.

This Court's leading decisions regarding *Smith*'s requirement of neutrality provide that a law cannot target religious conduct, which can be demonstrated by clear references to religious practices or legislative animus. *Lukumi*, 508 U.S. at 533; *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1723–24, 1730 (2018). Smith's other requirement, general applicability, is violated when a law treats comparable secular activity more favorably than religious conduct, *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021), or creates a mechanism for individualized exemptions, *see Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).

Each of these cases indicates the important protections already afforded when the legislature enacts a law for an illegitimate purpose. If the law is designed to eliminate religious conduct, whether facially or through a clearly hostile legislature, that illicit purpose subjects the law to stricter scrutiny. Likewise, if the legitimacy of the legislature's purpose is questionable because it does not treat religious and secular actors equally (or threatens not to do so with individualized exemptions), strict scrutiny is also appropriate. These inquiries all seek to ferret out the *purpose* behind a restriction that burdens religious free exercise, and they provide solid protections against improper purposes.

b. Applying different standards to burdens equally incidental to the legislature's purpose is inappropriate.

In addition to the religious protection afforded by Smith's progeny, the nature of judicial review reinforces the permissibility of laws that primarily burden religion. Neutral and generally applicable laws that impose only an *incidental* burden on religion are constitutional so long as they satisfy minimal scrutiny. *Smith*, 494 U.S. at 892. The recharacterization of an otherwise neutral and generally applicable regulation's burden on religion as "primary" rather than "incidental"

misunderstands the nature of judicial review underlying this Court's free exercise jurisprudence. Further, significant policy concerns weigh against subjecting laws to disparate standards based solely on the scope of their respective impacts. As such, even if courts can aptly characterize the religious burden a law imposes as primary, it should not subject that law to heightened scrutiny unless it is not neutral or generally applicable.

Smith's understanding of the meaning of "incidental" is further supported by the very nature of judicial review outlined by Chief Justice Marshall in *McCulloch v. Maryland*. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819).[1] Courts should evaluate the legitimacy of a legislature's purpose and the validity of the means used to achieve it, not the desirability of outcomes or the perceived weight of inherently unquantifiable burdens. The legislature should retain discretion because it is "better equipped" for weighing competing interests[2]—just as North Greene did when it enacted § 106.

Long-recognized policy concerns also weigh against restricting the State's ability to enact legislation pursuant to its police powers. As this Court observed nearly 150 years ago, laws must sometimes burden religious conduct lest "every citizen . . . become a law unto himself." *Reynolds*

[1] "Let the *end be legitimate*, let it be within the scope of the constitution, and *all means which are appropriate*, which are *plainly adapted to that end*, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch*, 17 U.S. at 421 (emphasis added). Although this case was decided in the context of the Necessary and Proper Clause, Chief Justice Marshall outlined this basic nature of judicial review: courts may invalidate a law for having an illegitimate *purpose* or for employing by a means that is prohibited or not properly calculated to effect a legitimate purpose. However, the judiciary should not engage in the same balancing of interests that the legislature undertakes to determine whether a law would be prudent, notwithstanding its validity. *See id.*

[2] This Court has acknowledged in numerous contexts that the legislature is often "better equipped" than the judiciary to deal with prudential judgments. *See, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 248 (2006) ("We cannot determine with any degree of exactitude the precise restriction necessary to carry out the statute's legitimate objectives. In practice, the legislature is better equipped to make such empirical judgments.").

v. United States, 98 U.S. 145, 167 (1878). Similarly, the need to maintain an ordered system of laws in a pluralistic society means that religious free exercise cannot be absolute. This Court has stated: "To maintain an organized society that guarantees religious freedom to a great variety of faiths requires that some religious practices yield to the common good. Religious beliefs can be accommodated, but there is a point at which accommodation would radically restrict the operating latitude of the legislature." *United States v. Lee*, 455 U.S. 252, 259 (1982) (citations omitted). The level of scrutiny a law burdening religious conduct must survive has and should be tied to the legitimacy of the underlying purpose. To impose a new limitation would, as the *Lee* Court cautioned against, improperly hamper States' ability to operate in an ordered fashion.

A determination that different levels of scrutiny should apply to differently characterized burdens is either cumulative or mistaken—if not both. If the justification for different standards is the legislature's *purpose* in enacting a given regulation, this Court's decisions already account for that concern. *Smith* itself demands neutrality and general applicability; *Lukumi* and *Masterpiece Cakeshop* eliminate hostility; *Tandon* and *Fulton* ensure equal treatment. These cases all reflect the unwillingness of the judiciary and the Constitution itself to permit laws that seek to effect a bad *purpose*. Conversely, if the justification for applying different standards is an undesirable *outcome*, in that the weight of the burden a law imposes is perceived as too great, that justification is mistaken. Both the nature of judicial review and public policy promote deference to the legislature where it seeks to achieve a valid purpose with a law that it tailors to do so effectively.

3. Section 106(d) is neutral and generally applicable and survives minimal scrutiny.

Section 106(d) only incidentally burdens religion, and it should still be evaluated under *Smith* even if that burden is considered primary. Under *Smith*, a law must survive only minimum scrutiny if it is neutral and generally applicable. *Smith*, 494 U.S. at 879; *Lukumi*, 508 U.S. at 531.

Section 106(d) is constitutional because it is both neutral and generally applicable and survives minimal scrutiny.

a. Section 106(d) is neutral.

This Court has stated that a law fails to be neutral if it targets religious conduct *as such*. *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). Further, "[the] [g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 533). The hostility that condemns the statute may be facial, as in *Lukumi*, or more subtle, like the legislative animus in *Masterpiece Cakeshop*.

Here, § 106(d) is neutral. As the Fourteenth Circuit held, neither facial targeting nor a hostile animus taints North Greene's restriction. R. at 8–10. Section 106(d) is designed only to regulate therapeutic medical conduct; it only restricts religious exercise insofar as that conduct constitutes medical treatment. R. at 8. Unlike the city ordinance in *Lukumi*, which defined the conduct it prohibited in quintessentially religious terms, it does not refer to religion except where it emphasizes the freedoms licensed medical professionals *retain*. *Compare Lukumi*, 508 U.S. 533–34, *with* R. at 4, 8.

Similarly, there is no indication of an anti-religious animus that might cause § 106(d) to fail the neutrality prong. Petitioner has emphasized comments made by two North Greene legislators on the floor of the General Assembly. R. at 8–9. However, comments made during legislative debate of a potential law offer weak evidence of the body's motive as a whole, especially when contrasted with the hostility in *Masterpiece Cakeshop*, which came from an *adjudicatory* body. *Masterpiece Cakeshop*, 138 S. Ct. at 1730; R. at 9. Further, the specific comments of the legislators here do not reveal an anti-religious animus. The first, Senator Lawson, spoke against harmful practices in the medical field with no mention of religion—exactly the

admirable motive the State claimed to have when it enacted § 106(d). R. at 4, 9. Similarly, Senator Pyle's comments involved religion only in the context of his personal experiences and his desire to sympathize with his colleagues, despite possible differences in their beliefs. R. at 9. None of these comments are attributable to the legislature as a whole, and none indicate an anti-religious animus even for the individuals who made them.

b. Section 106(d) is generally applicable.

Closely linked to neutrality is the question of a law's general applicability. According to this Court, there are two prominent pitfalls that cause a law to fail to be generally applicable. First, a law is not generally applicable if it treats "*any comparable* secular conduct more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296 (emphasis added). Whether secular and religious activities are "comparable" depends on the asserted government interest; the State cannot constitutionally permit secular conduct that undermines the same interest the religious conduct implicates. *Id.*; *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 542–46). Second, a law that creates a "mechanism for individualized exemptions" and "invites the government to consider the particular reasons for a person's conduct" is also not generally applicable. *Fulton*, 141 S. Ct. at 1877.

Section 106(d) is also generally applicable. It does not treat comparable secular activity more favorably than religious conduct because it bans only a course of medical treatment—one that individuals may support (or oppose) on secular grounds just as much as religious belief. *See* R. at 4. As the Fourteenth Circuit pointed out, Petitioner's contention that permitting gender-affirming care undermines the State's interest is misguided, because the cited "risks" of gender-affirming care are speculative and nebulous, unlike the well-documented scientific findings that guided the General Assembly. R. at 4, 10. Finally, there is no mechanism for individualized exemptions, so the government has no discretion to inquire into the reasons for any individual's

conduct. R. at 4, 10. The only relevant factors for § 106(d)'s application are the age of the patient, a specified type of medical treatment, and the setting in which such treatment occurs. *See* R. at 4.

c. Section 106(d) survives minimal scrutiny.

Because § 106(d) is neutral and generally applicable, it is constitutional if it survives minimal scrutiny—which it does. Minimal scrutiny requires only that a law be rationally related to a legitimate government interest. North Greene's broad interest in defending the health, welfare, and safety of children in the State by regulating the professional conduct of medical providers is undoubtedly a compelling interest and, in fact, a duty. *See supra* Sections I.A.1., I.A.3.; R. at 4. Section § 106(d) is at least rationally related to that interest because it prohibits only conduct by licensed medical providers while permitting related expression that does not constitute medical treatment. *See supra* Section II.A.2.; R. at 4. Therefore, § 106(d) satisfies minimal scrutiny and should be upheld under this Court's existing free exercise jurisprudence.

B. *Smith* Is Faithful To The Free Exercise Clause, And Stare Decisis Further Counsels Against Discarding *Smith*.

This Court's decision in *Employment Division v. Smith* should not be cast aside. *Smith* comports with the text and purpose of the Free Exercise Clause; it is consistent with this Court's other decisions; and stare decisis further supports retaining *Smith*. Therefore, this Court should not overrule it.

1. *Smith* and its progeny are consistent with the Free Exercise Clause's text and purpose.

The Free Exercise Clause states that Congress (and, through the Fourteenth Amendment, the States) may not "prohibit the free exercise [of religion]." U.S. Const. amend. I. As a textual matter, *Smith* implicitly recognized the significance of the use of the word "prohibit," as opposed to other possible choices; for example, it is difficult to maintain that Justice Scalia's opinion would not have been significantly different if the Clause stated that Congress may not *burden* religious

free exercise. *See Smith*, 494 U.S. at 878. The recognition of that word choice is not novel; John Marshall himself made a similar argument in 1799, though it was not met with unanimous acceptance. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1487 (1990). The precise meaning and application of the text of the Free Exercise Clause have been the subject of decisions in this Court for centuries, and scholars have hotly debated the Clause's implications.[3] However, the historical understanding of religious free exercise leading up to the ratification of the First Amendment also indicates that *Smith* rightly evaluated the scope of the freedom.

The Free Exercise Clause does not grant citizens an unlimited right to act according to their convictions. In the words of James Madison, religious freedom cannot justify "trespass on private rights or the *public peace*." *See* McConnell, *supra*, at 1463 n.267 (emphasis added). Multiple state constitutions at the time of the founding reflected the understanding that States could constitutionally burden religious conduct to preserve health and safety. *Id.* at 1455–58. When the State regulates pursuant to its police powers for the general safety and welfare of minors, it does so in furtherance of the public peace. As Professor Hamburger has argued, "late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws." Hamburger, *supra* note 3, at 916. The "caveats" in state constitutions dealing with "public peace" indicated a "willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions." *Id.* at 918. Breaches of public peace included not just violent or criminal behavior, but all violations of the law. *Id.* at 918–19. *Smith* held true to

[3] *Compare, e.g.*, McConnell, *supra*, *with* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992).

this understanding that States *can* relieve citizens from complying with generally applicable civil laws that burdened religious free exercise, but are not *constitutionally required* to do so.

2. *Smith* and its progeny are consistent with this Court's free exercise jurisprudence.

Further supporting *Smith* and its fidelity to the Free Exercise Clause is *Smith*'s consistency with this Court's surrounding free exercise decisions. As far back as 1878, this Court has recognized the constitutionality of laws that are neutral and generally applicable, even if they impose an incidental burden on religious free exercise. *See Reynolds*, 98 U.S. at 166–67. These decision recognize the value of individuals rights of conscience and religious freedom, but simply decline to accept the "large step further" necessary to conclude that free exercise compels exemption form generally applicable laws. *Smith*, 494 U.S. at 878; *see, e.g.*, *Reynolds*, 98 U.S. 145 (1878); *Gillette*, 401 U.S. 437 (1971); *Lee*, 455 U.S. 252 (1982).

Since *Smith*, it has only become more at home in this Court's free exercise jurisprudence. Subsequent decisions have clarified *Smith*'s place in the First Amendment framework and illustrated that *Smith* does not extinguish religious conduct as some of its critics maintain. *See supra* Section II.A.2.a. In addition, *Smith* allows Congress and the States to provide *greater* protections that the Constitution itself requires, as demonstrated by Congress's enactment of the Religious Freedom Restoration Act. 42 U.S.C. §§ 2000bb–2000bb-4. Contrary to Petitioner's assertion that *Smith* is an anomaly among this Court's decisions, it is firmly founded on longstanding principles and has become further solidified since it was decided in 1990. This Court should not abandon it now.

3. Stare decisis supports retaining *Smith*.

In addition to the harmony between *Smith*, the Free Exercise Clause, and this Court's other free exercise precedents, the doctrine of stare decisis counsels this Court against overruling *Smith*.

An axiom of this Court's jurisprudence is the principle that precedent commands respect. "Precedent is a way of accumulating and passing down the learning of past generations, a font of established wisdom richer than what can be found in any single judge or panel of judges."[4] It promotes many valuable goals, including stability, consistency, judicial restraint, and this Court's legitimacy. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261–62 (2022). Although stare decisis is not an "inexorable command" in constitutional interpretation, it nevertheless remains the "preferred course." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Payne v. Tennessee*, 501 U.S. 808. 827–28 (1991).

As discussed, *Smith* was *correctly* decided because it comports with the text and purpose of the Free Exercise Clause and is consistent with this Court's precedent. *See supra* Sections II.B.1.–II.B.2. Thus, this Court should not abandon *Smith*. However, even if this Court disagrees with *Smith*'s result or the rule it promulgated, overruling *Smith* is improper without a "special justification." *Haliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014); *Casey*, 505 U.S. at 864. Without a special justification, overruling precedent disrupts the rule of law and jeopardizes this Court's perceived legitimacy.

Beyond correct reasoning and consistency with other decisions, another relevant factor that sometimes offers a special justification for overruling is the workability of the precedent's rule. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2479, 2481–84 (2018); *Dobbs*, 142 S. Ct. at 2265. *Smith* is often criticized as unworkable; however, *Smith* is *more* workable than suggested alternatives. As Justice Barrett observed in her *Fulton* concurrence, there is no clear alternative waiting to replace *Smith*. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring).

[4] Neil Gorsuch, *A Republic, If You Can Keep It* 215 (2019).

The prominent suggestion, a broad strict scrutiny regime, raises far more questions than it answers. *See id.* Further, such an approach requires courts to continually question the propriety of generally applicable regulations, an impracticable prospect in a complex society. *See Smith*, 494 U.S. at 888. Another proposed alternative is a "text, history, and tradition" approach to free exercise, which calls for analysis similar to that endorsed by this Court in other contexts. *See, e.g.*, William J. Haun, *Keeping Our Balance: Why the Free Exercise Clause Needs Text, History, and Tradition*, 46 Harv. J. L. & Pub. Pol'y 419 (2023). But this approach, too, is poorly suited to the free exercise context, where developing social issues and religious beliefs mean that many necessary regulations will not have clear analogs in history or tradition. Courts will be left with little guidance for reconciling modern and historical practices, which will inevitably lead to inconsistent and absurd results. Instead, this Court should retain *Smith* as a default rule that is both clear and flexible, allowing the protections contemplated in the Free Exercise Clause to persist.

CONCLUSION

Section 106(d) of North Greene's UPDA is constitutional under the First Amendment because it is a regulation of professional medical conduct, only incidentally burdens speech, and survives minimal scrutiny based on the State's compelling interest in protecting children. Even if this Court treats § 106(d) as a regulation of speech, § 106(d) should still receive at most intermediate scrutiny because it primarily regulates conduct and only affects a proscribable class of speech. Further, § 106(d) is neutral and generally applicable under *Employment Division v. Smith* because it only incidentally burdens religion, and even laws that primarily burden religion should not be treated differently. Finally, *Smith* reflects a correct understanding of the Free Exercise Clause, and this Court should not abandon it. For the foregoing reasons, this Court should deny Petitioner's challenge, and the judgment of the Fourteenth Circuit should be AFFIRMED.

Respectfully submitted,

Team 33
Counsel for Respondent

APPENDIX A—CONSTITUTIONAL PROVISIONS

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

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part: "[N]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

APPENDIX B—STATUTORY PROVISIONS

Chapter 45 of Title 23 of the North Greene General Statutes, the "Uniform Professional Disciplinary Act," provides, in relevant part, the following:

The Uniform Professional Disciplinary Act "lists actions that are considered 'unprofessional conduct' for licensed health care providers and subjects them to disciplinary action." R at 4 (citing N. Greene Stat. §§ 106, 107, 110).

The list of acts constituting unprofessional conduct includes "[p]erforming conversion therapy on a patient under age eighteen." N. Greene Stat. § 106(d); R. at 4.

Conversion therapy is defined as:

> (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.

N. Greene Stat. § 106(e)(1)–(2).

N. Greene Stat. § 106(d) may not be applied to (1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene Stat. § 106(f); R. at 4.

The North Greene General Assembly's stated intent for enacting N. Greene Stat. § 106(d) was to regulate "the professional conduct of licensed health care providers." It found that it had "a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." The General Assembly pointed to the position of the American Psychological Association ("APA"), noting that the APA opposes conversion therapy "in any stage of the education of psychologists" and instead "encourages psychologists to use an affirming, multicultural, and evidence-based approach" that includes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework." R. at 4.

Therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization" are exempted from the Chapter's requirements. N. Greene Stat. § 111; R. at 4.