No. 22-2020

IN THE UNITED STATES SUPREME COURT

HOWARD SPRAGUE

PETITIONER,

v.

STATE OF NORTH GREENE,

RESPONDENT

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

No. 22-1023

Howard, J., Griffith, J., and Knotts, United States Circuit Judges

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BRIEF FOR RESPONDENT

STATE OF NORTH GREENE

Respectfully submitted,

Team Los Angeles - 35

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INTRODUCTION

There is no denying that the First Amendment is a bedrock principal of this great nation. There is no greater place for the free exercise of speech and religion, but these principals must have boundaries delimiting the extent of these freedoms or risk a state of lawlessness and political disorder. This case is a prime example of one of those necessary boundaries.

Every state and jurisdiction within the United States, including North Greene, requires health care providers be licensed before providing health care services. This system has been upheld to protect the public and ensure health care professionals are meeting the minimum standards of competency. North Greene has identified a major governmental concern to add to this protection of its citizens. This concern stems from a broad consensus in the scientific community, as exemplified by the American Psychological Association, that states that homosexuality is not a disease, condition, or disorder in need of a "cure." And that conversion therapy should not be used "in any stage of the education of psychologists." Specifically, the North Greene General Assembly noted the compelling interest of "protecting the psychical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting minors against exposure to serious harms caused by conversion therapy." Accordingly, North Greene enacted N. Green State. § 105(d), which prohibits health care providers from practicing conversion therapy on children while operating under a state license.

This statute was not created to harm, infringe upon, or prevent religious conduct. Instead, the primary focus was on the protection of North Greene's most vulnerable citizens, children. The State of North Greene does not oppose any religious views and encourages its citizens to contribute to public discourse and engage in any religion that they believe in. While certain

religions may be incidentally burdened by this statute, it is not enough to override the compelling governmental concern, especially as this statute is a neutral and generally applicable law.

For the aforementioned reasons, we ask this Court to affirm the decision of the Fourteenth Circuit and allow North Greene the opportunity to protect its citizens.

JURISDICTIONAL STATEMENT

The jurisdiction of the Supreme Court of the United States to review the decision of the United States Court of Appeals for the Fourteenth Circuit is conferred by 28 U.S.C. Section 1253.

STANDARD OF REVIEW

Plaintiff Howard Sprague appealed the District Court's denial of Sprague's motion for preliminary injunction against the State of North Greene's licensing scheme for health care providers. The Eastern District held that the licensing scheme did not violate the Free Speech Clause nor the Free Exercise Clause of the First Amendment. The Fourteenth Circuit affirmed the District Court's decision that North Greene's statute does not violate the First Amendment. This Court reviews the decision of the Fourteenth Circuit based on a writ of certiorari. Interpretation of the United States Constitution is subject to *de novo* review. *Ornelas v. United States*, 517 U.S. 690 (1996).

QUESTIONS PRESENTED

I. Is North Greene § 106(d) a violation of Petitioner Sprague's First Amendment right to free speech in its attempt to prohibit licensed healthcare providers from performing conversion therapy on minors? No, because protecting the physical and psychological well-being of minors is a compelling state interest, and the law is narrowly tailored so as to allow licensed therapists to share their opinions about conversion therapy during sessions, conduct conversion therapy on adults, and recommend their minor patients to professionals which the law does not prohibit from performing conversion therapy.

II. Is North Greene's statute neutral and generally applicable despite primarily burdening religious speech? Yes, the statute does not restrict practices *because of* their religious motivation nor does it selectively burden religious conduct. Lastly, the statute survives Rational Basis Review as North Greene has a compelling governmental interest in protecting minors from harm.

STATEMENT OF THE CASE

A. Statement Of Facts

In 2019, North Greene's legislature added "[p]erforming conversion therapy on a patient under the age of eighteen" to the list of unprofessional conduct for licensed health care providers. The North Greene General Assembly stated this statute was enacted after finding compelling interest of "protecting the psychical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting minors against exposure to serious harms caused by conversion therapy." This concern was grounded in the American Psychological Association's (APA) position that conversion therapy should not be used "in any stage of the education of psychologists" and that psychologists should "use an affirming, multicultural, and evidence-based approach" instead. The statute defined conversion therapy as: "[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 Act specifies that discipline will not apply to "(1) speech by licensed health care providers that does not constitute performing conversion therapy, (2) religious practices or counseling under the auspices of a religious denomination, church, or religious organization that does not constitute performing conversion therapy by licensed health care providers, and (3) non licensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene § 106(f) (cleaned up). Thus, the North Greene statutes do not prevent health care providers from communicating with the public *about* conversion therapy, expressing their personal views to patients (including minors) about conversion therapy, sexual orientation, or gender identity, practicing conversion therapy on patients over 18 years old, or referring

minors seeking conversion therapy to counselors practicing under the auspices of a religious organization.

Howard Sprague is a licensed family therapist within the State of North Greene. He does not work for a religious institution but holds himself out as a Christian provider of family therapy services. Specifically, he has testified that his work is influenced and informed by his Christian beliefs and viewpoint. Further, Sprague claims that many of his clients share his religious beliefs and seek him out because he incorporates these beliefs in his services. He does not utilize any physical methods of counseling or treatment but only engages in verbal counseling. Relevant here, Sprague professes that his belief that "the sex each person is assigned at birth is a gift from God" influences his work with sexuality and gender identity.

Sprague argues that because his treatments consist entirely of speech, the Uniform Professional Disciplinary Act necessarily places restrictions on his speech based on the content and viewpoint of his words and infringes upon his free exercise of religion.

B. Procedural History

In August 2022, Sprague filed a motion for preliminary injuction against North Greene's prohibition on practicing conversion therapy on minors, claiming the statute violated his free speech and free exercise rights under the First Amendment. North Greene opposed this motion and filed a motion to dismiss Sprague's complaint. The District Court of the Eastern District of North Greene denied Sprague's motion and granted the State's motion to dismiss. The Fourteenth Circuit of the United States Court of Appeals reviewed the denial of Sprague's motion for abuse of discretion but ultimately affirmed the District Court's judgment, finding the prohibition on conversion therapy by licensed health care providers does not violate the First Amendment.

SUMMARIES OF THE ARGUMENT

I. Courts apply Rational Basis Review when a law aims to regulate conduct that only has an incidental effect on speech. States have a light burden in showing that the law is rationally related to a state's interest, regardless of if the law is successful in its attempt. Here, North Greene's passage of a ban on conversion therapy is clearly rationally related to protecting the physical and psychological well-being of minors. Hatley's therapy sessions, where he conducts conversion therapy on minors, is deemed conduct because of the professional nature of the counselor-client relationship. Sprague's license is a marker to society that his words are a form of medical treatment that aims to exercise judgment over the client's concerns, not a casual conversation where opinions and views are shared.

In the alternative, even if this Court found that Sprague's conversion therapy on minors constituted speech, North Greene would still prevail under a strict scrutiny analysis. The Supreme Court has noted that laws generally are presumptively unconstitutional, but if the State sufficiently shows that the law is "narrowly tailored to serve compelling state interests," then it will survive. Here, North Greene did exactly that. The State has put the physical and psychological well-being of minors at a foundational motivating factor for creating their ban on conversion therapy by licensed healthcare professionals. The State's interest in minors is no doubt compelling, and the law itself is as narrow as it can be. First, it allows licensed therapists to voice their personal opinions on conversion therapy to minors during therapy, refer patients to unlicensed practitioners, and conduct conversion therapy on adults. In short, the law could not be narrower in achieving the compelling State interest.

Accordingly, North Greene's statute does not violate the Free Speech Clause of the First Amendment.

II. Courts apply Rational Basis Review when a regulation is neutral and generally applicable to determine whether the law is constitutional. Under the rational basis test, courts will uphold the law if the regulation is rationally related to a legitimate governmental purpose, even if there is an incidental effect on religious beliefs. Here, North Greene's licensing scheme is neutral as it does not infringe upon nor restrict practices *because of* their religious motivation. Instead, the legislation has put forth convincing evidence that the purpose of the law is to prevent the harm that results from conversion therapy on minors. Second, the statute is generally applicable because it does not selectively burden religious conduct. Rather, *all* forms of conversion therapy are prohibited by *all* licensed therapists, regardless of the minor's reason for requesting such treatment. The legislature explicitly noted that people seek conversion therapy for both religious and secular reasons, and the potential harm occurs in both cases. Lastly, the statute survives Rational Basis Review as North Greene has a compelling governmental interest in protecting minors from the harm that occurs from engaging in conversion therapy on minors.

Additionally, this Court should not overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). This case has been foundational in maintaining a functioning government. Without this decision, individuals would be able to excuse themselves from compliance with any other valid law set forth by the state or federal government. As stated in the opinion written by Justice Antonin Scalia, allowing such an exception "would open the prospect of constitutionally required

exemptions from civic obligations of almost every conceivable kind."

Accordingly, North Greene's statute does not violate the Free Exercise Clause of the First Amendment.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S HOLDING THAT PETITIONER HOWARD SPRAGUE'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH WAS NOT VIOLATED BECAUSE SPRAGUE'S TALK THERAPY IS A FORM OF HEALTH TREATMENT AND THEREFORE MORE AKIN TO CONDUCT, NOT SPEECH.

A. The North Greene Statute's Regulation of Conversion Therapy is More Akin to Conduct Because Therapy is a Medically Accepted Mental Health Treatment

Therapeutic treatments, within the confines of the counselor-client relationship, are conduct regulations, and in turn, any effect on free speech is merely incidental. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), abrogated by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018) (" *NIFLA*"). *NIFLA's* abrogation of *Pickup* purely dealt with abrogating the professional speech doctrine, not regulations of professional conduct. 138 S. Ct. at 2372 (2018). The Supreme Court in *NIFLA* held that there was a First Amendment violation because the California law, which required crisis pregnancy centers to notify their patients of the option for abortion, was unconstitutional because it infringed on the center's ability to speak freely against abortion. *Id.* However, the Supreme Court specifically stated that speech by professionals is afforded less First Amendment protection because "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* States have considerable latitude and play a "significant role . . . in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The First Amendment does not give medical professionals a blank check to say as they please. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession."); *see also Shea v. Bd. of Med. Exam'rs*, 81 Cal.App.3d 564, 557

(1978) (holding that States have an obligation to protect their "citizens by regulation of the professional conduct of its health practitioners" and that the First Amendment "does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions."). Licensed mental health providers, during their appointments, "act[] or speak[] about treatment with the authority of a state license," which goes far beyond conversing with friends because that would "minimize[] the rigorous training, certification, and post-secondary education that licensed mental health providers endure to be able to treat other humans for compensation." *Tingley v. Ferguson*, 47 F.4th 1055, 1082 (9th Cir. 2022); *see also Otto v. City of Boca Raton*, 41 F.4th 1271, 1294 (11th Cir. 2022) (Rosenbaum, J., joined by Pryor, J. J., dissenting in the denial of rehearing en banc) (highlighting that the words of licensed mental health providers have an "imprimatur of a certain level of competence."). However, the First Amendment gives medical professionals the freedom to express their personal views, regardless of its validity within the medical community. *Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.*, 952 P.2d 768, 773 (Colo.Ct.App.1997) (finding that a dentist's comments in a published book or news program are not to be held against them, even if they were contrary to medical findings).

Sprague is not immune from North Greene's law because he treats his patients with only words, because in the end, he is providing treatment, as a licensed provider, for a purported health condition. North Greene's ban on conversion therapy targets conduct that has been scientifically shown to be ineffective and dangerous. Unlike *NIFLA*, where mandatory disclosures about abortion by health centers were deemed to be content-based regulations on speech, here, conversion therapy bans do not impede Sprague's ability to discuss his personal views on the matter or even recommend patients to unlicensed therapists who can perform the

treatment. The *NIFLA* Court specifically allowed for professional conduct regulations, and here, North Greene Statute § 106(d) does exactly so–regulates licensed healthcare providers from administering pseudoscientific treatments. Just as the court in *Shea* emphasized that the First Amendment is not meant to protect health practitioners from skirting their responsibility for conduct, here, Sprague's "speech" is not what the First Amendment intended to protect because his "speech" during conversion therapy is a professional application of his licensed training as a therapist. As the *Tingley* court clearly laid out, licensed health providers speak with the authority of their state license which requires years of education and training, which is distinct from engaging in philosophical conversions with colleagues about the interplay of conversion therapy and religion. Here, Sprague's clients are minors who are entrusted into his care by their guardians for the purposes of his ability to "treat other humans" with the license and training that the guardian does not possess. The minors are not there to discuss politics, fashion, social issues, religion, etc.; they are there to be treated by a licensed healthcare provider. It would be illogical not to allow North Greene the capacity to regulate medical treatment just because the delivery is verbal instead of physical, because just as the concurrence in *Lowe* said, one who purports themselves to "exercise judgment on behalf of the client . . . in [] light of the client's individual needs . . . [is] engaging in the practice of a profession. Furthermore, this Court should not feel more comfortable with protecting minors from shock therapy when they are aroused by the same sex but not protecting that same minor who endures homophobic slurs and is driven to suicide by the person who is meant to nurture their mental health. Sprague is not expressing personal views or opinions, as the dentist in *Bailey* was, instead, he is actively suing on grounds that he is unable to *practice* conversion therapy on minors. Even so, the North Greene statute is broad enough that it does not restrain Sprague from expressing his personal opinions on conversion therapy or even

discussing the pros and cons.

1. Under a rational basis review, North Greene is successful in its showing that banning conversion therapy on minors by licensed health providers is rationally related to the state's compelling interest in protecting the physical and psychological well-being of minors

If the court deems the regulated activity to be conduct, the State has only a "light burden" to prove that the statute was "rationally related to a legitimate state interest." *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018); (quoting *Cleburne v. Cleburne Living Ctr. Inc.*, 105 S.Ct. 3249, 3287 (1985)); *see also Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (highlighting the "strong presumption of validity" for health and welfare laws) (quoting *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 (1993)). This Court need only determine if the government had a conceivable basis for passing the law, regardless of if the law "actually advance[d] its state purposes." *Dittman v. California*, 191 F.3d 1020, 1031 (9th Cir.1999) (quoting *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir.1995) (citation and internal quotation marks omitted)). Furthermore, under *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), the Court highlighted that "States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." More specifically, courts have found that bans on conversion therapy for the protection of minors is a legitimate state interest. *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014), abrogated by *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018); *see also Tingley v. Ferguson*, 47 F.4th 1055, 1078 (9th Cir. 2022) (holding that a ban on conversion therapy

satisfied rational basis review). There has been an emphasis on especially protecting the LGBTQ+ community, with the Court in *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) noting that, "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." The Court, although dealing with civil rights, went on to note that "the Constitution can, and in some instances must, protect them." *Id.*

Protecting vulnerable minors' physical and psychological well-being is undoubtedly a legitimate state interest. The objective for North Green Statute § 106(d), per North Greene, was to "protect the physical and psychological well-being of minors," specifically those who identify on the LGBT spectrum, and "to protect its minors against exposure to serious harms caused by sexual orientation change efforts." (R. at 7). As the *Goldfarb* court noted, States with a compelling interest, like protecting vulnerable minors, are able to regulate professionals. Here, North Greene's legislature was focused on regulating licensed healthcare providers to ensure the safety of minors, the relationship between the law and the purpose has a clear and rational connection. North Greene's reliance on the American Psychological Association (APA) findings that "conversion therapy has not been demonstrated to be effective and there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse," directly parallels *Pickup* and *Ferguson*, which both also highlighted the same findings. *Ferguson* went further by noting that the APA's adoption of a resolution again conversion therapy was published more than a decade ago. With that said, the scientific evidence and anecdotal data have not stopped pouring in. So, the intent of North Greene to take affirmative action is entirely legitimate and rational. Furthermore, Judge Knotts, in their dissenting opinion from the District Court, quoted *Erznoznik v. City of Jacksonville*, which said that although the protection of

children is paramount when considering new governmental legislation, speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. 205, 213–14. However, *Erznoznik* was focused on a city ordinance that banned nude films from being shown at drive-in theaters with screens that were visible from public roads. Just as the Court in *Masterpiece Cakeshop* highlighted, the protection of vulnerable LGBTQ+ youth is paramount and deserves special attention and protection, which cannot be likened to exposing children to nude films.

B. Alternatively, if Sprague's therapeutic treatment is labeled speech, it is not only incidental to the North Greene statute, but the narrow compelling interest exception for the strict scrutiny standard is satisfied regardless

Courts apply strict scrutiny once they determine that a subset of messages constitutes content-based restrictions of speech. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). If the statute is to survive, there must be a showing that the law is "narrowly tailored to serve compelling state interests." *Id.* For example, the Supreme Court in *NIFLA* held that the California law was not tailored narrowly enough because there were many alternatives for informing women about their options when it came to abortion instead of forcing the centers to speak on the issue. 138 S. Ct. at 2376 (2018). In the dissenting opinion in *Otto v. City of Boca Raton*, Judge Martin noted, "[i]nstances in which a speech restriction is narrowly tailored to serve a compelling interest are deservedly rare. But they do exist." 981 F.3d 854, 880 (11th Cir. 2020) (Martin, J. dissenting). The court in *Johnson v. California* highlighted that "[s]trict scrutiny is not 'strict in theory, but fatal in fact'…The fact that strict scrutiny applies 'says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.'" 543 U.S. 499, 514-15 (2005) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229-30 (1995).

Assuming arguendo that this Court does not find that rational basis review is appropriate,

North Greene still succeeds under strict scrutiny because the statute is so narrowly tailored so as to use the least restrictive means to achieve the compelling state interest of the protection of minors. As stated above in Part I.A., North Greene clearly has a compelling interest in the protection of vulnerable minors. As for the law being narrowly tailored, unlike *NIFLA*, where the court held that forcing centers' hands in providing information about abortions wasn't narrow enough to address public awareness for abortions, here, § 106(d) allowed licensed healthcare providers to voice their opinions on conversions therapy, recommend their patients to other professions, and does not limit their practice on consenting adults. In short, the law could not be narrower when it comes to protecting minors from debunked treatment to "cure" their homosexuality by means of conversion therapy. As the court in *Johnson* and Judge Martin's dissent in *Otto* emphasized, strict scrutiny is not a faux review for judges to quickly move beyond. It requires genuine analysis, and here, as shown, North Greene Statute § 106(d) is intended for the purpose of addressing the physical and psychological detriments to minors who receive conversion therapy, and the law does not cover more than it needs to. If this Court deems that a statute that aims to ban a scientifically debunked mental health treatment that has been linked to teen suicide, depression, and substance abuse doesn't constitute a compelling enough state interest, then what does? The United States is no stranger to extreme views on both ends of the spectrum for certain charged social issues, but nonetheless, there is an understanding and acceptance that the welfare of children is to be protected.

In conclusion, whether this Court decides to review Sprague's actions under a rational review basis or strict scrutiny, North Greene remains successful under both. Therefore, we respectfully ask this Court to affirm the District Court's judgment that Sprague's First Amendment freedom of speech rights was not violated.

II. NORTH GREENE'S STATUTE DOES NOT VIOLATE THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT AND IS A VALID AND NEUTRAL LAW OF GENERAL APPLICABILITY THAT SHOULD BE UPHELD UNDER RATIONAL BASIS REVIEW.

The freedom to act, unlike the freedom to believe, cannot be absolute. While the Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise of religion," "to say that [a] person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the [religiously related] conduct." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 894 (1990) (O'CONNOR, J., concurring in judgment).

Over time, courts have interpreted the free exercise of religion to mean "the right to believe and profess whatever religious doctrine one desires." *Id.* at 877. However, the Supreme Court has "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. Specifically, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' *Id.* at 879 (citing *United States v. Lee*, 455 U.S. 252, 263 (1982). Accordingly, if a government regulation is alleged to infringe on one's religious liberties, courts must determine whether the statute in question is neutral and generally applicable in order to apply the appropriate standard of review. If the regulation is neutral and generally applicable the court will apply a rational basis test. It follows that strict scrutiny applies only when a law is neither neutral nor generally applicable. *Parents for Priv. v. Barr*, 949 F.3d 1210 (9th Cir. 2020).

A. The Statute Is A Valid And Neutral Law Of General Applicability That Should Be Upheld Under Rational Basis Review.

1. The Statute is a valid and neutral law with general applicability.

When a court considers the neutrality of the statute in question there are several factors to consider. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508, 533 U.S. 520 (1993). First, courts look to the plain text of the statute to see if the law "refers to a religious practice without a secular meaning discernable from the language or context." *Id.* For example, in *Lukumi*, the court held the statute was facially neutral despite the words "sacrifice" and "ritual" having strong religious connotations when they also had secular meanings. *Id.* at 134.

Second, even if a law is facially neutral, courts will look beyond the text to see if the law imposes "covert suppression of particular religious beliefs." *Id.* One factor courts have weighed involves whether the statute creates "religious gerrymandering." Religious gerrymandering exists "if a law pursues the government's interest 'only against conduct motivated by religious belief', but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government's interest." *Lukumi* at 542-46. In *Lukumi*, the court found that the collection of ordinances, taken together, showed the city council had manipulated the laws to gerrymander against particular religious practices. There, the Santeria religion was prevented from engaging in animal sacrifice, one of its principal forms of devotion, while the commercial slaughter of "small numbers" of cattle and hogs was permitted. The court noted this discrepancy despite the allowance of "small slaughterhouses" implicating the ordinances' professed desire to prevent cruelty to animals and preserve the public health. *Id.* at 545.

Asides from religious gerrymandering, courts will look to the historical background of the law, the specific series of events leading to the enactment or official policy in question, and any contemporaneous statements made by members of the decision-making body. *Masterpiece*

Cakeshop, Ltd. V. Colorado Civil Rights Comm'n, 138 S.Ct. 1719. 1731 (2018). For instance, the *Lukumi* Court gave substantial weight to the fact that the city council called an emergency meeting to consider the city ordinances after the Santeria church announced its plans to move to the city. Additionally, in *Masterpiece*, the Court found that the legislative body showed clear hostility towards the defendant's objection to creating a same-sax couple's wedding cake by making inappropriate comments "showing lack of due consideration for [plaintiffs'] free exercise rights." *Id.* at 1729. For example, the Supreme Court referenced one statement made by the commissioner, said discrimination on the basis of religion was "one of the most despicable pieces of rhetoric that people can use" and another statement compared the plaintiff's invocation of religious beliefs to defenses of slavery and the Holocaust. *Id.*

Second, the regulation must be generally applicable. This means the regulation may not selectively burden conduct that is motivated by a religious belief. First, courts must consider whether the regulation is substantially underinclusive. In practice, the law should prohibit secular acts that raise the same alleged government concerns as the restricted religious acts. Generally, this means that the law may not carve out exemptions for similarly functioning secular acts. As noted above, the ordinance in *Lukumi* created an exemption to the killing of animals on small farms despite triggering the alleged governmental interest that prompted the statute impacting animal sacrifice for religion.

Here, the North Greene law is a valid and neutral law of general applicability that is rationally related to a legitimate government interest. First, North Greene's law satisfies the neutrality requirement of rational basis review. Looking at the text of the statute, it is plain that the law is neutral on its face. As in *Lukumi*, there is no reference to a religious practice in the language or context. While, Sprague may argue that conversion therapy is inextricably related

with the Christian belief that "the sex each person is assigned at birth is a 'gift from God' that should not be changed," there is a secular meaning of conversion therapy that makes no mention of religion. *Sprauge v. North Greene*, 2022 WL 56789, at *3 (E.D. N. Greene 2022). Particularly, the record notes that "[c]onversion therapy encompasses therapeutic practices and psychological interventions that seek to change a person's sexual orientation or gender identity. *Id.* Second, the regulation was not created as a covert method to suppress particular religious beliefs. Unlike, *Lukumi*, where the city council used multiple ordinances to exempt many other secular acts of animal killing despite raising the same governmental concerns as religious animal sacrifice, North Greene has taken deliberate care to create space for those that may be incidentally impacted to carry out forms of religious conversion therapy. Specifically, the regulation listed three methods that proponents of conversion therapy could engage in. Lastly, the historical background of the regulation does not weigh towards a lack of neutralilty. Rather, the record notes that the General Assembly was prompted by the release of a report by the APA that denounced the use of conversion therapy in any part of training for licensed health care providers. Unlike *Lukumi*, where the city council called an emergency meeting directly after Santeria church announced its plans to move to the city, Sprague did not point to any series of religious events that would have prompted this regulation. In contrast, North Greene consistently points to the action stemming from a place of concern based on scientific study. And unlike *Masterpiece*, where the legislatures showed clear animus for the plaintiff's religious beliefs, there is no matching rhetoric by the North Greene General Assembly. While Sprague points to a statement made by one council member about his personal experience with his own LGBTQ daughter, the statement comes nowhere near the statements in *Masterpiece* that compared the plaintiff's religious motivated choices to that of Holocaust or slavery.

The regulation is also generally applicable because it does not selectively burden religious conduct. As noted in *Lukumi*, courts tend to find against general applicability when the legislature has created special carveouts for similar conduct that is secular. Here, *all* forms of conversion therapy are prohibited by *all* licensed therapists, regardless of the minor's reason for requesting such treatment. The statute does not exempt the practice of conversion therapy is sought out for non-religious purposes. Additionally, the legislature explicitly noted that people seek conversion therapy for both religious and secular reasons.

2. The State of North Greene has identified a compelling governmental interest that satisfies Rational Basis Review.

In the past, the courts have upheld neutral and generally applicable laws when the law is rationally related to a legitimate governmental purpose, even if it primarily burdens a religion incidentally. Specifically, leeway giving more breathing room when the compelling interests relates to the protection of minors. One analogous case was decided in the Ninth Circuit, where the court upheld a "law prohibiting state-licensed mental health providers from engaging in "sexual orientation change efforts" ("SOCE") with minor patients." *Welch v. Brown*, 834 F.3d 1041, 1043 (9th Cir. 2016). Here, the stated purpose of the legislature "was to protect the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and to protect its minors against exposure to serious harms caused by sexual orientation change efforts." *Id.* at 1045. The Ninth Circuit first determined that the law was neutral because "many persons seek SOCE for secular reasons." *Id.* at 1047. And, that even if those with certain religious beliefs are more likely to seek SOCE, the Free Exercise Clause "is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct." *Id.* at 1047. *See also Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (finding a ban on polygamy did not violate the Free Exercise Clause despite the fact that

polygamy is primarily practiced by members of the Mormon Church). Further, the law does not impose religious gerrymandering because "the conduct of all other persons, such as religious leaders not acting as state-licensed mental health providers, is unaffected" and "the law leaves open many alternative paths" for minors who wish to change their sexual orientation. *Id.* Next, the court held the law was generally applicable because the law regulates the conduct of *all* state-licensed mental health providers and regulates all licensed counselor-client relationships. *Id.* at 1045. Lastly, the court concluded that the legislative record supported the stated purpose of the law, which is to protect minors from harm. The court pointed to an APA Task Force report stating that "the scientific evidence considered by the legislature noted that some persons seek SOCE for religious reasons, [and] the document also stressed that the persons seek SOCE for many secular reasons." *Id.* at 1047. As this further supports the objective while maintaining neutral general applicability, the court held that there was a compelling government interest. *Id.* Accordingly, the Court correctly applied the rational basis test and found that the Free Exercise Clause was not violated. *Id.*

Another relevant example is seen in *Parents for Privacy*, where plaintiffs argued that a school district's policy violated their free exercise of religion when it allowed transgender students to choose to use restrooms and locker rooms that did not match their biological sex. 949 F.3d at 1239. There, the Ninth Circuit found that the policy satisfied the neutral element of a free exercise analysis. First, the policy was facially neutral because the policy made "no reference to any religious practice, conduct, belief, or motivation." *Id.* at 1235. Second, that the plaintiffs failed to offer sufficient evidence that the policy was adopted "with the specific purpose of infringing on Plaintiffs' religious practices or suppressing Plaintiffs' religion," while the school district pointed to evidence that the purpose of the plan was "created to support a

transgender male." Based on the text and evidence in the record, the Ninth Circuit found the policy was neutral. Additionally, the *Parents for Privacy* Court found the policy satisfied the general applicability test because the policy did not treat religious observers unequally.

When a regulation is neutral and generally applicable, courts apply a rational basis review. Under the rational basis test, the court will uphold the law if the regulation is rationally related to a legitimate governmental purpose, even if there is an incidental effect on religious beliefs. *Parents for Privacy*, 949 F.3 at 1239. As stated by the Fourteenth Circuit, this Court is not tasked with assessing the appropriateness or efficacy of conversion therapy, rather this court is charged with applying the rational basis test and determining whether the General Assembly had a compelling reason for implementing the rule. *Id.* at *5. Based on the reasoning of the Ninth Circuit in *Welch*, rational basis review is appropriate and there is a compelling governmental reason in protecting minors against exposure to serious harms caused by conversion therapy. Based on *Welch* and *Parents for Privacy*, it is apparent that courts have given more weight to government interests that serve to protect minors from harm. In *Welch v. Brown*, 834 F.3d 1041, 1047 (9th Cir. 2016), the Ninth Circuit upheld a law that prohibited… The court pointed to the legislative record citing American psychiatric Association ("APA") reports that spoke to the "sexual stigma, manifested as prejudice and discrimination directed at non-heterosexual sexual orientations and identities." *Id.* at 1046. Ultimately, the court held this was sufficient evidence that the object of the law is "the prevention of harm to minors." In *Parents for Privacy*, the court held that the government's interest in supporting minors feel safe was a compelling government interest.

Here, the North Greene statute mirrors these same compelling interests. The record shows that the North Greene General Assembly intion for enacting the statute was to regulate "the

professional conduct of licensed health care providers" and that there exists "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. Similar to *Welch*, the General Assembly based their decision on a report given by the APA which opposed conversion therapy for minors. *Id.* at 4.

B. This Court Should Uphold The Reasoning *Smith* To Avoid Lawlessness and Public Discord.

In *Smith*, the Supreme Court considered whether an Oregon Law that prohibited the knowing or intentional possession of a controlled substance unless prescribed by a medical practitioner violated the Free Exercise clause when it included the prohibition of peyote used for religious purposes. There, two employees of a private drug rehabilitation organization were fired because they ingested peyote during a religious ceremony at their Native American Church. As the individuals were discharged for work-related "misconduct" their applications for unemployment compensation were denied by the State of Oregon. Respondents filed this action claiming the denials violated their First Amendment free exercise rights.

The Court held that "the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990).

Here, Howard Sprague argues that his work is influenced and informed by his Christian beliefs and viewpoint. This is an argument that can be made to get out any necessary and proper law promulgated by this nation. Blind acceptance that religious belief may override general laws aimed at addressing a compelling government interests risks creating a system

where “each conscience is a law unto itself.” For the betterment of society, we have seen several examples of federal and state laws which impact religious beliefs in practices in different ways. In United States v. Lee, the Supreme Court held that the generally applied requirement of paying taxes could not be circumvented by an individual who claimed his religious beliefs prevented him from contributing to funds to be disseminated to war efforts. 455 U.S. 252 (1982). In Goldman v. Weinberger, the Supreme Court declined to strike down a law that prohibited members of the military from wearing yarmulkes. Overall, creating a presumption against laws that significantly burden religion would open “the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.” 475 U.S. 503 (1986).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Fourteenth Circuit and find that North Greene's statute does not violate the First Amendment.

Respectfully submitted,

Date: _____ By:_____

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