No. 23-2020

IN THE

Supreme Court of the United States

October Term, 2023

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

On Writ of Certiorari to the

Supreme Court of the United States

BRIEF FOR RESPONDENT

Team 5

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause of the First Amendment of the United States Constitution

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

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The United States District Court for the Eastern District of North Greene's memorandum opinion is unpublished but is available at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The opinion of the United States Court of Appeals for the Fourteenth Circuit is also unreported but set out in the record on appeal. (R. at 2–16). The Court's order granting certiorari appears on page 17 of the record.

RELEVANT CONSTITUTIONAL PROVISIONS

The text of the First Amendment to the United States Constitution, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, 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.

STATEMENT OF THE CASE

The Petitioner, Howard Sprague, is a citizen of North Greene and a state-licensed family therapist. R. at 3. He provides therapy for a variety of clients, including those grappling with sexuality and gender identity issues. *Id.* Mr. Sprague is a deeply religious person, and his therapy services support his Christian viewpoint. *Id.* In Mr. Sprague's view, each person is formed according to God's design, sex is assigned at birth and should not be changed according to a person's individual feelings or decisions, and healthy sexual relationships can be formed only between a married man and woman. *Id.* Many of Mr. Sprague's clients mirror Mr. Sprague's religious views and seek out his services because he is a Christian family services provider. *Id.* Part of Mr. Sprague's services include performing spoken or written conversion therapy on minors under 18 years old. *Id.*

The Respondent, the State of North Greene, maintains licensing and professional disciplinary statutes for state-licensed therapists. R. at 3-4. To practice therapy in North Greene, N. Greene Stat. § 105(a) requires health care providers to be licensed in North Greene. R. at 3. Licensed health care providers are governed by North Greene's "Uniform Professional Disciplinary Act" ("Act"). R. at 3-4. In 2019, North Greene amended the act to include performing conversion therapy on minors as unprofessional conduct under the Act. N. Greene Stat. § 106(d); R. at 4. The Act defines 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 term includes, but is not limited to, practices commonly referred to as "reparative therapy."

N. Greene § 106(e)(1); R. at 4.

However, the Act expressly included several exceptions. R. at 4. Conversion therapy excludes 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)(2); R. at 4. Second, § 106(d) does not apply 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 ("Assembly") stated intent for the statutory framework was to regulate "the professional conduct of licensed health care providers." R. at 4. The Assembly found it had "a compelling interest" in protecting minors' physical and psychological well-being, including the well-being of lesbian, gay, bisexual, and transgender youth, and in protecting minors from harm caused by conversion therapy. *Id.* Citing the American Psychological Association's ("APA") scientific studies, the Assembly opposed "encourage[d] psychologists to use an affirming, multicultural, and evidence-based approach" that includes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework" rather than utilizing conversion therapy. *Id.*

N. Greene Stat. § 106(d) is limited in scope. It applies only to spoken and written words in connection with conversion therapy. R. at. 3. The statute does not prevent healthcare providers from generally communicating to the public the concept of conversion therapy, expressing personal views about conversion therapy, sexual orientation, or gender identity to all patients, regardless of a patient's age; practicing conversion therapy on patients who are above 18 years old; or referring to minors to licensed North Greene providers who practice conversion therapy while acting under the umbrella of religious institutions. R. at 4

While debating whether to pass the statute, State Senator Floyd Lawson, one of the bill's sponsors, stated that the purpose of the bill was to eliminate "barbaric practices" such as electroshock therapy and induced vomiting but did not specifically refer to religion. R. at 8–9. He never mentioned religion. R. at 9. Another sponsor, State Senator Golmer Pyle, denounced the practice of those who tried to "worship" or "pray the gay away." R. at 9. Senator Pyle drew on his own experience with his daughter, who is gay, and conversations the Senator had with a friend. *Id.*

Senator Pyle further acknowledged the difficulties and complexities of the relationship between conversion therapy and religion. *Id.*

Mr. Sprague brought suit against the State of North Greene in August of 2022. R. at 5. Mr. Sprague sought to enjoin enforcement of N. Greene Stat. § 106(d), alleging that the prohibition on performing conversion therapy on minors violated his free speech and free exercise rights under the First Amendment. *Id.* North Greene filed a motion to dismiss. *Id.* Mr. Sprague filed a motion for preliminary injunction/ R. at 5. The District Court denied Mr. Sprague's motion but granted North Greene's motion to dismiss, finding that Mr. Sprague's constitutional rights were not violated.

SUMMARY OF THE ARGUMENT

The North Greene statutory framework preventing licensed therapists from practicing conversion therapy on minors does not violate the Free Speech Clause of the First Amendment. When a law regulates conduct instead of speech, the Court applies rational basis review to analyze the statute instead of strict scrutiny. The Court has long held that medical treatments such as psychoanalysis are conduct, not speech. Similarly, conversation therapy, though involving words, is conduct that provides treatment. Because conversion therapy is conduct, the Court should apply rational basis review.

The North Greene's legislature passed this statutory framework to prevent harm to minors in the context of therapy. The legislature relied on scientific evidence from the American Psychological Association that demonstrated the harm that conversion therapy imposes on minors. Because preventing therapists from providing harmful conversion therapy relates to North Greene's stated interest, rational basis review is satisfied. However, even if the Court applied strict

scrutiny, the North Greene statute is narrowly tailored to promote a compelling government interest.

North Greene's statutory framework does not violate the Free Exercise Clause because the statute is neutral and generally applicable. The North Greene statute is facially and operationally neutral. Neither the text of the statute nor the legislative history, background, nor other surrounding circumstances demonstrate North Greene was motivated by anti-religious bias. The statutory framework is also generally applicable because it creates no individualized exemptions and does not treat any comparable secular activity more favorably than a religious activity.

Furthermore, this Court should embrace *stare decisis* principles and abstain from overturning *Employment Division v. Smith*. *Smith* incorporates 30 decades of precedent. This Court should affirm the Fourteenth Circuit's judgment.

STANDARD OF REVIEW

A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(6) when the pleadings fail to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Because a judgment of dismissal pursuant to Fed. R. Civ. P. 12(b)(6) can only be entered if a court determines that, as a matter of law, a plaintiff failed to state a claim upon which relief can be granted. This Court must review that legal determination *de novo*." *Melendez v. City of New York*, 16 F.4th 992, 1010 (2nd Cir. 2021).

ARGUMENT

I. NORTH GREENE'S STATUTE PROHIBITING CONVERSION THERAPY FOR MINORS DOES NOT VIOLATE THE FREE SPEECH CLAUSE BECAUSE CONVERSION THERAPY IS CONDUCT, NOT SPEECH.

When a state statute purporting to regulate conduct is challenged under the First Amendment, there are only two relevant questions: (1) is the regulated action "speech" or "conduct" and (2) should the court apply strict scrutiny or rational basis review to analyze the statute? Courts have long held that verbal interactions between patients and licensed medical practitioners constitute "medical conduct" in the context of medical malpractice. *Dobbs v. Jackson Women's Health Org.,* 142 S.Ct. 2228, 2284 (2022); Robert Post, Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech, 2007 U. Ill. L. Rev.939, 950 (2007). It should be no different here, where a state-licensed therapist holds himself out as a medical professional. Therefore, if "conduct" is the object of North Greene's statute, rational basis review is required. Under this test, North Greene's statutory framework passes muster.

A. Conversion Therapy is Conduct, Not Speech

The Court must first determine whether the conversion therapy is speech or conduct before addressing judicial scrutiny. *Pickup v. Brown*, 740 F.3d 1208, 1225 (9th Cir. 2014). Any attempt to regulate "speech" must survive the test of strict scrutiny; however, "conduct" can be regulated in service of public health and safety so long as there is a rational basis to do so. The conversion therapy in question is far more akin to conduct than speech. The Ninth Circuit had previously held that the "key component of psychoanalysis is the treatment of emotional suffering and depression, not speech," further noting psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *National Ass'n for Advancement of Psychoanalysis v. Cali. Bd. of Psychology*, 228 F.3d 1043, 1054 (2000). This Court has held

that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Pickup v. Brown is strikingly similar to the case at bar. In *Pickup*, Senate Bill 1172 ("SB 1172") prohibited licensed mental health providers from engaging in conversion therapy with minors. *Pickup*, 740 F.3d at 1222–23. SBB 1172 defined conversion therapy as "practices by mental health providers that seek to change an individual's sexual orientation." *Id.* Licensed therapists engaging in conversion therapy were actually engaging in "unprofessional conduct," violating SB1172. *Id.* at 1223. Nevertheless, licensed therapists were still allowed to communicate their ideology to the public, to individuals older than 18, and even refer minors to unlicensed counselors such as religious leaders. *Id.* The stated purpose of the law was to protect the psychological well-being of sexual minority youths. *Id.* Two conversion therapy practitioners sought injunctive relief, asking the court to prohibit enjoin the statute on Free Speech grounds. *Id.* at 1221. The Ninth Circuit found that the law merely regulated therapeutic treatment performed by licensed therapists within the context of the counselor-client relationship, not expressive speech. Id. at 1229-30. Accordingly, the court applied rational basis review rather than strict scrutiny. *Id.* at 1226.

Here, Sprague argues that North Greene violated his free speech rights by deeming conversion therapy as unprofessional conduct and prohibiting licensed therapists from providing conversion therapy. Sprague merely echoes arguments the Ninth Court rejected in *Pickup*. Though a therapist may utter words when providing conversion therapy, this does not render the conduct expressive speech for First Amendment purposes. A bar on providing conversion therapy as a

treatment for minors does not equal a speech-based restriction. N. Greene Stat. § 106(d), like SB 1172, regulates the conduct of licensed therapists, not their speech. Performing conversion therapy on minors is impermissible conduct as it relates to treating minors because the conduct is a harmful and inappropriate medical treatment, separate from the words used to facilitate that treatment. Therapy may be provided verbally and in written form, but the purpose and nature of the activity is treatment.

Further, North Greene's statutory purpose becomes crystal clear in light of the statutory exceptions. Similar to SB 1172 in *Pickup*, The N. Greene Stat. § 106(d) allows licensed therapists to preach their ideology to the public, use conversion therapy on those 18 and older, and refer minors to unlicensed therapists such as religious leaders. N. Greene Stat. § 106(d) has no stated or hidden interest in restricting speech. The regulated act is conduct in the form of therapy within a specific context of medical practitioner and patient. Further, North Greene has an interest in protecting minors from harmful medical treatment. Treating harmful treatment as expressive speech subject to First Amendment protections would open the door to any licensed therapist claiming that its therapeutic treatment is expressive speech, free from government interference.

The Petitioner may argue that North Greene is impermissibly regulating ideology and opinions under the guise of medical conduct, which would be "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Petitioner may point out that the essence of the conversion therapy is disclosing an opinion to another individual and that "disclosing" and "publishing information" must constitute speech. *Bartnicki v. Vopper,* 200 F.3d 109, 120 (1999). The Petitioner may claim that cabining pure speech as conduct opens the door to other avenues of suppression of speech. Petitioner may be tempted to draw parallels to more obvious forms of

speech, such as a radio program or to other professional settings, such as the conversations between a financial advisor and his client.

These arguments fail in the medical treatment context, as articulated by the courts in *Pickup* and *NAAP*. Within the context of a therapist-client relationship, licensed medical professionals perform the treatment. That these professionals talk to effectuate that treatment is incidental to the profession. Therapists and counselors must talk to ask questions or provide advice. But even if the professionals were advancing some viewpoint during the course of treatment, this does not necessarily mean that they are now able to marshal First Amendment objections. *Behar v. Pa. Dep't. of Transp.*, 791 F. Supp. 2d 383, 396-97 (M.D. Pa. 2011) (holding that a doctor using his mental health practice to advocate for social acceptance of disability "does not transform his professional efforts into the group advocacy" subject to First Amendment protections). Any sufficiently motivated person could spin that any statement made by a therapist indicates some political bend or religious viewpoint. That there are some connections between political or religious opinion in therapeutic treatment does not transform conduct into speech.

Consequently, the Court should find that using conversion therapy on minors is therapy-based conduct, not speech.

B. North Greene's Statute Regulates Conduct And, As Such, is Subject to Rational Basis Review

1. North Greene's Statute is Rationally Related to Protecting Minors from Harm Caused by Conversion Therapy

Because conversion therapy is mere conduct, the Court must apply rational basis review. Thus, courts will uphold a law if it bears a rational relationship to a legitimate state interest. *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 884 (1992).

In *Pickup*, the court held that SB 1172 was enacted to protect the physical and mental well-being of youths who identify as lesbian, gay, bisexual, transexual, etc. The court relied on a record enumerating the harms of conversion therapy on minors. The court examined evidence from the APA and concluded that not only is conversion therapy an ineffective treatment, but anecdotal reports reveal serious concerns about the safety of conversion therapy. *Pickup*, 740 at 1224. *Pickup* held that "[w]ithout a doubt, protecting the well-being of minors is a legitimate state interest." *Id.* at 1231.

Similar evidence from the APA and statutory purpose are present here. N. Greene Stat. § 106(d) operates to protect minors by regulating harmful conduct that some licensed therapists and counselors engage in." North Greene's General Assembly 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 grounded its position with scientific reports from the 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."

Notably, under rational basis review, only a *legitimate* governmental interest is required. *Casey*, 505 U.S. at 884. That the General Assembly heard some evidence that conversion or talk therapy may be safe, a law does not need to be completely logical to be constitutional. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955). It is enough that the General Assembly believed the APA's assessment that conversion therapy harms minors. Further, rational

basis review is extremely deferential to the government. The General Assembly went a step further in identifying the compelling interest of minor safety.

2. The North Greene Statute Can Survive Strict Scrutiny because N. Greene Stat. § 106(d) is Narrowly Tailored to the Compelling Interest of Protecting Minors' Welfare

Even if the Petitioner is correct that therapeutic treatment is actually expressive speech, N. Greene Stat. § 106(d) would survive strict scrutiny. Even if the petitioner could establish that the North Greene law restricted content-based speech, requiring strict scrutiny, we argue that the law would still be constitutional. which are "presumptively invalid." *R.A.V.*, 505 U.S. at 382. To pass this test of strict scrutiny, we must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 734 (2011) (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340) (2010); *Reed v. Town of Gilbert*, 576 U.S 155, 163 (2015).

First, North Greene has a compelling interest in protecting the mental and physical well-being of minors. APA reports, which the legislature relied on, demonstrated that conversion therapy could cause or exacerbate a minor's depression and poor self-image. Second, the law is narrowly tailored to protect minors because N. Greene Stat. § 106(d) pertains only to conversion therapy performed on minors. And though Sprague's speech rights may be implicated if North Greene prohibited even speaking about conversion therapy to minors, N. Greene Stat. § 106(d) is not that broad. The law does not prevent licensed medical professionals from speaking about conversion therapy or referring minors to out-of-state conversion therapists.

Whether the Court applies rational basis review or strict scrutiny, N. Greene Stat. § 106(d) survives. Accordingly, this Court should affirm the Fourteenth Circuit's judgment.

II. NORTH GREENE'S STATUTE PROHIBITING CONVERSION THERAPY FOR MINORS DOES NOT VIOLATE THE FREE EXERCISE CLAUSE BECAUSE THE STATUTE DOES NOT TARGET RELIGIOUS ACTIVITY AND DOES NOT TREAT RELIGIOUSLY MOTIVATED CONVERSION THERAPY LESS FAVORABLY THAN A COMPARABLE SECULAR ACTIVITY. FURTHERMORE, THIS COURT SHOULD AFFIRM ITS PRECEDENTIAL DECISION IN EMPLOYMENT DIVISION V. SMITH.

The Free Exercise Clause of the First Amendment, incorporated to the States by the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), bars the government from enacting laws "prohibiting the free exercise" of religion. U.S. const. amend. I. The Free Exercise Clause protects religious liberty and religious practices by safeguarding religion from the government. *Abington School District v. Schempp*, 374 U.S. 203, 222-23 (1963). While religious exercise enjoys broad constitutional protections, the right to freely engage in religious exercise is not unfettered. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990).

Where a law is neutral and generally applicable, the government does not violate the Free Exercise Clause, even if the law incidentally burdens religion. *Employment Div. v. Smith*, 494 U.S. 872, 878 (1990) (finding that the Oregon Employment Division did not violate the Free Exercise clause when it denied unemployment benefits to two men who used peyote during a religious ceremony because the men's religious beliefs did not excuse their failure to comply with a valid law).

Post-*Smith*, valid laws that are neutral and generally applicable, only incidentally burdening religion, are subject to rational basis review. *Fulton v. City of Philadelphia*, 141 S.Ct. 1868, 1876 (2021). Under rational basis, the government must only demonstrate that a law is rationally related to a legitimate government interest. *Box v. Planned Parenthood of Ind. & Ky.*, Inc., 139 S.Ct. 1780, 1782. Conversely, laws that lack neutrality and are not generally applicable require the strictest judicial scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S.

520, 531-532 (1993). Where strict scrutiny is applied, the government must prove the law is narrowly tailored to justify a compelling government interest. *Lukumi*, 508 U.S. at 531-532.

Here, North Greene's statute is neutral and generally applicable because it is targeted at minimizing the harm perpetuated by conversion therapy on minors and does not treat religious activity less favorably than any comparable secular activity. Accordingly, North Greene need only demonstrate that the law is rationally related to a legitimate government interest.

A. North Greene's Statute is Facially Neutral, and the Totality of the Circumstances Do Not Demonstrate that North Greene Targeted Religious Activity

1. The Law's Purpose is to Protect Minors From Harm—Not Restrict Religiously Motivated Conversion Therapy—and The Law's Terms Do Not Bear Religious Connotations

In cases involving Free Exercise, the plaintiff must prove that a law violates the Free Exercise Clause, including showing that the law is not neutral. *Kennedy v. Bremerton* Sch. Dist., 142 S.Ct. 2407, 2421-22 (2022). A law is not facially neutral, where the very purpose of the law is to restrict religious activity. *Smith*, 494 U.S. at 878; *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020). If a law refers to a religious practice that does not have a secular meaning, the law is not facially neutral. *Stormans, Inc. v. Wiesman*, 749 F.3d 1064, 1076 (9th Cir. 2015). A law that is silent regarding "religious practice, conduct, belief, or motivation" is facially neutral. *Id.* at 1076. Even if words in a text may have a religious meaning, a law may still be facially neutral if a secular purpose is discernible from the words. *Lukumi*, 508 US at 533-534 (finding that, although the words "sacrifice" and "ritual" have religious meanings, the words adopted secular meanings). While facial neutrality is one step in the Free Exercise analysis, *Spell v. Edwards*, 500 F. Supp. 3d 503 (M.D. La. 2020), failing at this step is a death knell for a statute. *Lukumi*, 508 U.S. at 533 (stating "to determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its

face"). In this case, the purpose of North Greene's law is not to target religious practices, and the text's plain meaning is secular in nature.

A law lacks neutrality when it specifically targets a religious practice. *Kennedy*, 142 S.Ct. at 2422. In *Kennedy*, this Court held that a school district that disciplined a football coach because the coach prayed silently on his own violated the coach's right to engage in religious exercise. *Id.* at 2422. The school district admitted that it targeted the football coach because he engaged in religious conduct. *Id.* at 2422-2423.; *Kennedy v. Bremerton Sch. Dist.*, 991 F.3d 1004, 1020. Because the school district disciplined the coach for engaging in religious activity, the Court determined the school district did not act according to a neutral rule. *Id.* at 2422.

Far from targeting conversion therapy and counseling because those with a religious persuasion may want to practice it, North Greene amended its Uniform Disciplinary Act to regulate the conduct of licensed healthcare providers, not to regulate religious conduct. North Greene added performing conversion therapy on patients under 18 to the list of unprofessional conduct to protect children from practices that lead to physical and psychological harm. North Greene's General Assembly relied on information from the APA. The APA opposes conversion therapy and promotes affirming care and identity exploration. Based on that information, North Greene endeavored to create an environment protective of children.

Further, North Greene's exception for healthcare providers who provide services as part of a religious institution further demonstrates that North Greene's aim was not to restrict religious exercise. North Greene's law specifically exempts "[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 "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene Stat.

§ 106(f); R. 4. This exemption demonstrates that North Greene carefully considered the interest of minors and sought to create a system that regulates conversion therapy only when a licensed healthcare provider offers conversion therapy in a non-religious capacity.

In addition to North Greene's statute abstaining from targeting religiously motivated conversion therapy, the law's text also supports North Greene's religiously neutral purpose. North Greene's statute defines 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 term includes, but is not limited to, practices commonly referred to as "reparative therapy."

N. Greene Stat. § 106(e)(1).

The statute further provides that 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)(2); R. 4. Sections 106(e)(1)-(2) are free from any words with religious connotation, unlike the words sacrifice or ritual in *Lukumi*. The only reference to religion in the statutory framework is in § 111, where the law specifically exempts all therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization." *Id.* at § 111.

2. The Totality of the Circumstances Surrounding North Greene's Statutory Framework Demonstrate the Law's Neutrality

Since facial neutrality is not determinative of whether a law violates the Free Exercise Clause, courts must evaluate the surrounding circumstances of a law's enactment. *Lukumi*, 508

US at 533. If the circumstances demonstrate that the government enacted a law with the objective of restricting religious practices, the law is not neutral. *Id.* Courts rely on the law's historical background, the series of events leading to the law's enactment, legislative history, and the statements made by decision-makers. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719, 1731 (2018) (quoting *Lukumi*, 508 U.S. at 540). In looking at the totality of the circumstances, a law is not neutral if the record compels a court to find that religious suppression was the object of the ordinance. *Parents for Privacy*, 949 F.3d at 1235 (quoting *Lukumi*, 508 US at 534, 542.

Official statements expressing hostility, intolerance, and disrespect toward religious beliefs are inconsistent with the Free Exercise Clause. *Masterpiece Cakeshop*, 138 S.Ct. at 1731-1732. In *Masterpiece Cakeshop*, a Colorado baker refused to bake a wedding cake for a same-sex couple based on the baker's religious opposition to same-sex marriages. *Id.* at 1723. The couple filed a charge with Colorado's Civil Rights Commission under the Colorado Anti-Discrimination Act. *Id.* The Commission held a hearing where commissioners made several remarks about religious beliefs, including that religious beliefs did not hold legitimate space in a public or in a commercial setting, that people had historically used religion to justify slavery and the holocaust, and that religion was "one of the most despicable pieces of rhetoric that people [could] use." *Id.* at 1729.

The Court found the commissioners' statements demonstrated unfairness and religious discrimination. *Id.* Notably, the statements were made "by an adjudicatory body deciding a particular case." *Id.* at 1730. Because the official statements showed a clear hostility to religion, the Court found the Commission violated the baker's rights under the Free Exercise Clause. *Id.* at 1731-1732.

The statements made by North Greene senators about conversion therapy during a debate are a far cry from the comments made in *Masterpiece Cakeshop*. Senator Lawson's comments about barbaric practices pertained to electroshock therapy and inducing vomiting, neither of which relate to religion. Although Senator Golmer Pyle criticized individuals who try to "pray away the gay," Senator Pyle was commenting on his own personal experience with a child who is gay. R. at 9. During the same debate, Senator Pyle discussed his own religious beliefs, acknowledging the difficulty and complexity of laws that may incidentally burden religion. R. 9. Further distinguishing the North Greene senators from the *Masterpiece Cakeshop* commissioners is that the senators were engaged in a debate, not a hearing deciding a particular case. A few comments made by senators cannot be attributed to the legislative body as a whole. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. (quoting *United States v. O'Brien*, 391 U.S. 367, 384 (1968)). Simply, the senators' statements were not official expressions of hostility.

In addition to the purpose, text, and statements made by decision-makers, courts analyze neutrality by asking whether a law operates neutrally. *Lukumi*, 508 U.S. at 535. In *Lukumi*, the Court analyzed whether a collection of city ordinances worked to single out ritual animal sacrifice, a major component of the Santeria religion. *Id.* For example, one ordinance prohibited animal sacrifice but defined sacrifice to exclude most animal killings unless the killings were done for religious sacrifice. *Id.* at 535-36. The ordinance specifically exempted kosher slaughter. *Id.* The Court found that the definition proscribed religious animal killings but permitted animal killings for almost any other reason. *Id* at 536. The effect of the law was to prohibit only Santeria sacrifice. *Id.* The Court noted that when governments design laws that carve out exemptions for conduct except religious conduct, the government participates in impermissible religious gerrymandering. *Id.* at 535-537.

A law does not violate the Free Exercise Clause when it operates to punish conduct because of the harm the conduct causes, not because the conduct is religious, even if a religious group or person is more likely to engage in that conduct. *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995); *see Stormans, Inc., v. Wiesman*, 794 F.3d 1064, 1077 (2015). In *American Life League, Inc.*, anti-abortion activists claimed the Freedom of Access to Clinic Entrances Act of 1994 violated the Free Exercise Clause. *Am. Life League,* 47 F.3d at 654. The Act prohibited forceful or threatening conduct aimed at injuring, intimidating, or interfering with anyone seeking to obtain or provide reproductive healthcare. *Id.* Though the Act prohibited some religiously motivated conduct, the Fourth Circuit upheld the Act because it punished harmful actions, not the religious beliefs that may prompt a person to undertake that action. *Id.* at 654. The Court reasoned that the Free Exercise Clause did not insulate those who violate laws that protect people from physical harm. *Id.* at 656. Because the conduct itself was illegal, the Court found the Act did not violate the Free Exercise Clause, whether people engaged in the conduct for religious reasons or not. *Id.* at 654.

Like the Fourth Circuit in *Am. Life*, the Ninth Circuit similarly determined that a law that permits or prohibits conduct regardless of the person's motivation is operationally neutral. *Stormans*, 794 F.3d at 1076-77. In *Stormans*, the state of Washington required licensed pharmacists to deliver all prescription medications, including Plan B and other contraceptives. *Id.* at 1071, 1073. However, if an individual pharmacist had a religious objection to delivering the medication, the pharmacist could deny delivery. *Id*. In the event a pharmacist asserted a religious objection to delivery, the rule required another pharmacist to provide timely delivery. *Id*. A pharmacy itself was not permitted to deny delivery unless the delivery was prevented by a specified exemption. *Id.* at 1073.

The Ninth Circuit found that the rule specifically protected pharmacists refusing to deliver medications for religious reasons. *Id.* at 1076. Unless exempted, no pharmacy was entitled to refuse delivery. *Id.* at 1077. The system was practical, ensuring safe and timely delivery of medications while also respecting religious objections. *Id.* Further, neutrality was neither undermined nor destroyed, even though pharmacy owners with religious objections may be disproportionately burdened. *Id.* at 1077; *see Reynolds v. United States*, 98 U.S. 145, 166-67 (1878) (finding a ban on polygamy permissible even though members of the Mormon Church primarily practiced polygamy).

Here, N. Greene Stat. §§ 106(d), 106(e)(1)-(2), and 111 operate to prohibit harmful conduct, not punish religious beliefs. Unlike the ordinance in *Lukumi*, North Greene's laws do not adversely single out healthcare providers based on their religious beliefs. Rather, the laws prohibit conversion therapy because of the damaging effect on minors, not the reasons why a provider may want to engage in conversion therapy. Thus, unless specifically exempted, no one is allowed to perform conversion therapy on a minor. Whether a health care provider seeks to perform conversion therapy on a minor as a method of expressing religious beliefs is of no consequence.

Even if most conversion therapy is directed at persons with conservative religious beliefs, as Judge Knotts noted, R. at 12 (dissenting), and even if conversion therapy is believed to be religiously motivated, N. Greene Stat. § 106(d) remains valid. That those who are religiously motivated are more likely to practice or endure conversion therapy does not undermine the law's neutrality. Even the APA's definition of conversion therapy as a religious practice does not undermine neutrality. Petitioner does not have a right to engage in harmful practices where no one, neither the staunchest religious advocate nor the firmest religion rejector, is allowed to

subject minors to conversion therapy. North Greene's law targets the harm to a minor, not the therapist's belief system. As the two men in *Smith* could not reap unemployment benefits because they engaged in criminal conduct, Petitioner likewise cannot continue to practice conversion therapy where North Greene law permissibly outlawed the conduct.

B. North Greene's Law is Generally Applicable Because It Provides No System for Discretionary, Individualized Exceptions and Does Not Treat Religious Conversion Therapy Less Favorably than a Comparable Secular Activity

A law that treats those who practice religion unequally is not generally applicable. *Parents for Priv.,* 949 F.3d at 1210. Laws that offer individualized, discretionary exemptions, *Fulton*, 141 S.Ct. at 1877; *Sherbert v. Verner,* 374 U.S. 398, (1963), or that treat a religious activity less favorably than a comparable secular activity are not generally applicable. *Tandon v. Newsom*, 141 S.Ct. 1294, 1296 (2021) (*per curiam*). A law is not generally applicable if it is substantially underinclusive. *Stormans*, 794 F.3d at 1080.

1. North Greene's Law Does Not Allow the Government to Examine the Underlying Circumstances of a Case and Grant an Exception

A law that gives the government the discretion to grant exemptions based on the circumstances of each case is not generally applicable. *Fulton,* 141 S.Ct. at 1877. In *Fulton,* Philadelphia's foster care system relied on cooperation between the City and private foster care agencies. *Id.* at 1875. As a part of the placement process, the City was allowed to review and certify foster families to state-licensed agencies. *Id.* A Catholic agency entered into a contract with the City to provide services to foster families but refused to consider a same-sex couple as prospective foster parents for religious reasons. *Id.* The City refused to contract with the agency unless the agency certified same-sex couples. *Id.* at 1875-76. The Court held that such a requirement violated the Free Exercise Clause because the provision incorporated a system of individual exemptions at the Commissioner's "sole discretion." *Id.* at 1878.

North Greene's law bears no similarity to the ordinance at issue in *Fulton*. The law does not create a formal system for exemptions and does not permit a government actor to analyze applications for an exemption on a case-by-case basis.

Unlike in *Fulton*, where the discretionary language was plain on the face of the statute, any claim that North Greene's law will allow for secular exemptions and not religious ones is speculative. The key to this Court's individualized exception cases is whether the statute allows the government to consider the reasons for a person's conduct. *Id.* at 1877; *see Smith*, 949 U.S. at 884 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)). North Greene's law applies to both secular and religiously motivated therapists, counselors, and social workers. The only people the law does not apply to are those who "work under the auspices of a religious denomination, church, or religious organization." N. Greene Stat. § 111. Although this is an exemption, it is not individualized or discretionary. Either a licensed therapist performs conversion therapy and belongs to a religious intuition, thereby qualifying for the exception, or the therapist does not.

2. North Greene's Law Does Not Treat Secular Conduct More Favorably than Comparable Religious Conduct

A law triggers strict scrutiny when it treats a comparable secular activity more favorably than a religious one. *Tandon*, 141 S.Ct. at 1296. To determine whether activities are comparable, courts must analyze the activities against the backdrop of the government's asserted interest. *Id.* The court must compare the risks posed by engaging in allegedly comparable activities. *Stormans*, 794 F.3d at 1079.

A substantially underinclusive law is not generally applicable because an underinclusive law prohibits religiously motivated conduct to achieve a government interest while failing to prohibit substantial, comparable secular conduct that threatens the same government interest.

Parents for Priv., 949 F.3d at 1210 (citing *Lukumi*, 508 U.S. at 545); *see also Stormans*, 794 F.3d at 1079.

Here, Sprague failed to offer a comparable secular activity that North Greene treats more favorably than conversion therapy. Sprague identified a risk of regret should minors receive gender-affirming therapy. According to Sprague, allowing gender-affirming care could cause psychological harm to minors who later determine gender-affirming care caused more harm than good. But, the risk identified by Sprague is not the same risk North Greene's law is targeted at reducing. North Greene's law is targeted to decrease the risk of suicide and depression from pressure exerted on minors by healthcare providers who provide conversion therapy. Sprague points to the potential for minors to regret gender-affirming care, but North Greene's law is not aimed at speculation or guesswork. It is based on scientific evidence that conversion therapy harms minors.

Further, the law is not underinclusive because non-religiously motivated conversion therapy is prohibited. The law makes no exception for secular healthcare providers offering conversion therapy. Any effort to change behaviors or gender expressions is deemed unprofessional, whether the effort stems from a secular or religious viewpoint. There are no "unwritten exemptions." *Stormans*, 794 F.3d at 1080. The only exception is where a health care provider works for a religious institution. Petitioner, while certainly holding sincere religious beliefs, does not work for a religious institution.

Because North Greene's law is neutral and generally applicable, it must be rationally related to a legitimate government interest to survive judicial scrutiny. Here, North Greene's interest is in protecting minors from severe physical and psychological harm caused by

conversion therapy. The law rationally relates to North Greene's stated interest because it prevents healthcare providers from using verbal or physical conversion therapy methods.

C. The Court Should Reject Sprague's Request to Overturn *Employment Division v. Smith*

For over thirty years, *Employment Division v. Smith* has stood for the principle that an individual's religious beliefs do not excuse compliance with a valid law prohibiting conduct that the government is free to regulate. *Smith*, 495 U.S. at 878; *Minersville School Dist. Bd. Of Ed. Gobitis*, 310 U.S. 586, 594-595 (1940) ("Conscientious scruples have not . . . relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs) (ellipses added). Because Petitioner cannot meet his burden of showing that North Greene's law is not neutral and generally applicable, he is forced to play the game of alternatives. In the alternative, Petitioner asks this Court to overturn *Smith*. This Court should refuse to follow Petitioner down such a path.

Stare decisis is a judicial bedrock. *Dobbs,* 142 S.Ct. at 2320 (J, Kagan, dissent). *Stare decisis* protects reliance interests, saves litigants and courts the time and expense of litigation, fosters even-handed decision-making in requiring similarly situated cases to be treated in the same way, and contributes to bolstering the integrity of the judicial process. *Id.* at 2261-2262.

While it is true members of this Court have discussed overturning Smith, *Kennedy*, 139 S.Ct. 634, 637 (J, Alito, joined by J, Thomas, Gorsuch, and Kavanaugh, respecting denial of certiorari); *Fulton* 141 S.Ct. at 1882-83 (J, Barrett, joined by J, Kavanaugh, concurring), the Court has declined to address whether *Smith* should be overturned as recently as 2021. *Id.* at 1876-1877. The Court should not divert from that trend now.

Further, it is insufficient that the Court might decide *Smith* differently in 2023 than it did in 1990. *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). And it is not enough to

believe that a case was wrongly decided. *Id.* (quoting *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014)). Though overturning precedent may be stronger in constitutional cases, *Dobbs*, 142 S.Ct. at 2262, special justification for overturning Smith must be present. *Gamble v. United States*, 139 S.Ct. 1960, 1969 (2019). That the Court has recently decided cases on an interpretation framework rooted in examining history and tradition is not a special justification for why *Smtih* demands reversal.

In Judge Knott's dissent, the judge discussed the Court's most recent ventures in constitutional interpretation, claiming that the Court must overturn *Smith* to "[r]estore a historically based standard that genuinely protects religious exercise." R. at 16. But the Court did examine the history of religious exercise in *Smith*. Writing for the majority, Justice Scalia examined numerous cases pertaining to religious exercise, tracking how the Court handled questions pertaining to religious exercise from *Reynolds v. United States* (decided in 1879) up until the Court's *Smith* decision. *Smith*, 494 U.S. at 879. The Court detailed the scope and tradition of the Free Exercise Clause. *Id.* at 878-79 (stating "we have 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. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition"). Simply, the Court did not decide Smith without examining the history and tradition of religious exercise. Thus, this Court should follow *stare decisis* and reject Sprague's request to overturn Smith.

Sprague cannot meet his burden of demonstrating that North Greene's law is not neutral and generally applicable, thereby entitled only to rational basis review. Accordingly, Respondent respectfully requests this Court to affirm.

CONCLUSION

North Greene's statutory framework does not violate the Free Speech Clause because conversion therapy is conduct therapists engage in while providing treatment, not speech. Furthermore, North Greene's statutory framework is neutral and generally applicable. The statutes' texts are facially neutral, and targeting religion played no role in enacting the framework. The statute operates without singling out religious exercise. The law is generally applicable because it does not create a formal mechanism for individualized exceptions, nor does it treat comparable secular conduct more favorably than religious conduct. As such, the Court should apply rational basis review.

Finally, the Court should adhere to stare decisis principles and reject Petitioner's request to overturn *Smith*. Overturning this Court's precedent requires more than a determination that the current makeup of the Court might have decided *Smith* differently. The Court should affirm.