No. 23-2020

In The

Supreme Court of the United States

October Term 2023

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

Team 1
Counsel for Petitioner
September 26, 2023

QUESTIONS PRESENTED

1. Is Uniform Professional Disciplinary Act § 106 a violation of the First Amendment when it restricts private verbal and written speech between a counselor and his clients based on whether or not his words constitute "conversion therapy" which is grounded in his religious perspective?

2. Is Uniform Professional Disciplinary Act § 106 subject to strict scrutiny under *Employment Division v. Smith* when it prohibits religious speech between a Christian counselor and his clients; and if not, should this Court overrule *Smith*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourteenth Circuit has not yet been reported in the Federal Reporter, but it is reported at *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023) and reprinted in the Record on Appeal ("Record") at 2–11. The district court's order has not yet been published in the Federal Supplement but is reported at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022).

CONSTITUTIONAL PROVISIONS

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

The Fourteenth Amendment to the United States Constitution provides in relevant part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS.

Petitioner, Howard Sprague, is a licensed family therapist with more than twenty-five years of experience. Record 3. Although he does not work for a religious institution, Mr. Sprague professes to be deeply religious and his Christian beliefs and viewpoints inform all aspects of his work, including counseling clients with sexuality and gender identity issues. *Id.* Mr. Sprague bases human identity in God's design, he believes that the sex of each person is given at birth and is "a gift from God," and he believes that one's sex should not be changed based on feelings, decisions, or wishes. *Id.* Mr. Sprague also adheres to the biblical view of sexual relationships in that they are

"beautiful and healthy, but only if they occur between a man and a woman committed to one another through marriage." *Id.* Many of Mr. Sprague's clients share his religious viewpoints and seek his assistance specifically because he holds himself out as a licensed *Christian* counselor. *Id.*

The State of North Greene, however, has enacted a law that prohibits licensed health care providers from engaging in any form of conversion therapy—including that which Mr. Sprague practices using only spoken or written words—on patients younger than eighteen years old. *Id.* at 4; N. Greene Stat. § 106(a). To practice within the state, North Greene requires all health care providers, including Mr. Sprague, to be licensed with the state. N. Greene Stat. § 105(a). North Greene's Uniform Professional Disciplinary Act ("UPDA"), codified in Chapter 45 of Title 23 of the North Green General Statutes, subjects licensed health care providers to discipline for engaging in "unprofessional conduct," and the UPDA lists various forms of conduct that are considered unprofessional. UPDA §§ 106, 107, 110; Record 4. In 2019, North Greene added conversion therapy to the list of actions that are considered "unprofessional conduct." UPDA § 106(d); Record 4. UPDA § 106 defines conversion therapy:

> (1) "Conversion therapy" means a regime that seeks to change an individual's sexual orientation or gender identity. The term includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. The term includes, but is not limited to, practices commonly referred to as "reparative therapy."
>
> (2) "Conversion therapy" does not include counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity.

UPDA § 106(e)(1)–(2). The North Greene legislature specified that UPDA § 106 may not be applied to (1) speech 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." UPDA § 106(f).

The North Greene General Assembly's stated purpose for enacting UPDA § 106(d) was to regulate the conduct of licensed professionals. Record 4. It determined that it had an interest in "protecting the physical and psychological well-being of minors," including LGBT youth. *Id.* The General Assembly pointed to the American Psychological Association ("APA") for support, pointing out that the APA opposes conversion therapy and supports gender and identity affirming therapy. Record 4. Believing that his constitutional rights were at risk, Mr. Sprague then sought protection from the courts. Record 3, 5.

II. PROCEDURAL HISTORY.

In August of 2022, Harold Sprague, Petitioner, sued the State of North Greene, Respondent, seeking to enjoin—through a preliminary injunction—the enforcement of its recently passed legislation N. Greene Stat. § 106(d). Record 5. The State opposed his claim for injunctive relief and filed a motion to dismiss which was granted by the District Court. *Id.*

Mr. Sprague then appealed to the United States Court of Appeals for the Fourteenth Circuit. On January 15, 2023, the Court of Appeals affirmed the judgement of the District Court. *Id.* at 2, 3, 11. It held "that the State of North Greene's licensing scheme for health care providers, which disciplines them for practicing conversion therapy, including talk therapy, on minors, does not violate the First Amendment." Record 3. Mr. Sprague subsequently appealed the decision of the Court of Appeals, and this Court granted certiorari. *Id.* at 17.

SUMMARY OF THE ARGUMENT

UPDA § 106 is a content-based and viewpoint discriminatory restriction on the speech of licensed health care providers that fails strict scrutiny. There is no professional

speech doctrine recognized by this Court. As a result, regulations that restrict private conversations restrict speech because there is no authority to support the idea that verbal communication can be characterized as conduct solely "based on the function [the] communication[] serves." A restriction of this type of speech is content-based if speech is banned based on whether the content satisfies the criteria of the content that is allowed under the restriction. It is viewpoint-based if the content restricted allows certain viewpoints but restricts others. UPDA § 106 is a restriction of speech because it prohibits counseling which consists only of verbal and written speech. Additionally, it is both a content and viewpoint-based restriction because speech is banned only based on the determination of whether the content of the speech qualifies as "conversion therapy"—prohibiting a religious view of gender and sexual orientation while allowing the state's view to be spoken. As a result, it is subject to strict scrutiny. It fails strict scrutiny because the statute is not the least restrictive means of achieving the government's interest in the health and safety of its minors.

UPDA § 106, which primarily burdens religious speech, is also unconstitutional under the Free Exercise Clause as interpreted by *Employment Division, Department of Human Resources v. Smith*. For a law that places substantial burdens on religious exercise to avoid strict scrutiny, *Smith* requires it be neutral and generally applicable. UPDA § 106, however, is neither neutral nor generally applicable. UPDA § 106 is not neutral because its object is to suppress religious conduct and speech. It is not generally applicable because it treats comparable secular activity more favorably than religious exercise. Even if this Court determines UPDA § 106 is neutral and generally applicable, it is still subject to strict scrutiny under the hybrid-rights exception established in *Smith* because it implicates Mr. Sprague's Free Exercise and Free Speech rights, along with the rights of parents to direct the education and upbringing of their children.

If this Court finds that UPDA § 106 escapes strict scrutiny under the Free Exercise Clause as interpreted by *Smith*, then *Smith* should be overruled. *Smith* was wrong when it was decided, and it is still wrong today. It is entirely incompatible with the text and purpose of the Free Exercise Clause of the First Amendment, and it creates inverted policy-making incentives. Furthermore, stare decisis considerations do not warrant continued deference to *Smith* and, in fact, those considerations weigh in favor of overruling *Smith*. With *Smith* overruled, this Court should return substantive power to the Free Exercise Clause and reinstitute the strict scrutiny framework from *Sherbert v. Verner* and *Wisconsin v. Yoder*.

ARGUMENT

I. UPDA § 106 IS A CONTENT-BASED AND VIEWPOINT BASED RESTRICTION ON THE SPEECH OF LICENSED HEALTH CARE PROVIDERS THAT FAILS STRICT SCRUTINY.

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. A prohibition that applies equally to the federal government and state governments via the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925). "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). It "forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). When the government does choose to regulate speech in a way that favors the content of the speech or viewpoint of the speaker, strict scrutiny applies, and the law must surmount a heavy burden to be upheld. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Here, the State of North Greene passed UPDA § 106 which determines—on the basis of the content of the speech—whether licensed counselors can engage in a certain form of counseling

consisting entirely of written or verbal speech. Record 4. Speech it labels as "conversion therapy" is restricted, but the alternative viewpoint—gender-affirming care—is allowed. *Id.* As a result, UPDA § 106 is both content-based and viewpoint discriminatory meaning that strict scrutiny applies. UPDA § 106 fails strict scrutiny because the statute is not the least restrictive means of achieving the government's interest in the health and safety of its minors.

A. UPDA § 106 Is Both A Content-Based And Viewpoint-Based Restriction On The Religious Speech Of Licensed Health Care Professionals.

Verbal communication cannot be characterized as conduct solely "based on the function [the] communication[] serves," which means that private conversations are speech regardless of whom they occur between. *King v. Governor of N.J.*, 767 F.3d 216, 224–25 (3d Cir. 2014). Once communication has been determined to be speech, "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. A restriction is viewpoint based if it "favor[s] some viewpoints or ideas at the expense of others." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). UPDA § 106 prohibits speech by banning the content of conversion therapy and thereby excluding those whose viewpoint contradicts the state's view—for which UPDA § 106 contains a specific exception—of gender and sexual orientation. As a result, UPDA § 106 is both content-based and viewpoint discriminatory.

1. UPDA § 106 is a regulation of speech because it prohibits counseling which consists only of speech.

The Fourteenth Circuit, following the lead of the Ninth Circuit, erroneously determined that UPDA § 106 is a regulation of conduct, based on a so-called special category of professional speech. *See Pickup v. Brown*, 740 F.3d 1208, 1226–28 (9th Cir. 2014) (establishing a professional speech doctrine and holding that a California conversion therapy ban regulated conduct and only had an incidental burden on speech); *Tingley v. Ferguson*, 47 F.4th 1055, 1071–1079 (9th Cir.

2022) (holding that a law almost identical to UDPA § 106 regulated conduct); Record 6–7. As recently as 2022, in *Tingley v. Ferguson,* the Ninth Circuit has held that a restriction of counseling—which consists only of speech—is not a restriction on speech but professional conduct, meaning that the government can regulate it freely and that it is only subject to rational basis review. 47 F.4th at 1071–1079.

However, this is at odds with this Court's precedent which has never adopted a professional speech doctrine. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018). Instead, in response to the circuits that tried to create a separate category of speech, this Court strongly stated: "[t]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* ("This Court has afforded less protection for professional speech in only two circumstances—neither of which turned on the fact that professionals were speaking."). In *Nat'l Inst. of Family & Life Advocates*, the court explicitly contradicted the Ninth Circuit's decision in *Pickup v. Brown*, but, despite this, the Ninth Circuit has continued to rely on *Pickup*, using it to form the basis of the court's decision in *Tingley*. *See NIFLA*, 138 S. Ct. at 2371. The professional speech continuum that *Pickup* outlined allowed the Ninth Circuit to conclude that a prohibition of conversion therapy—consisting purely of speech—is a regulation of professional conduct that only incidentally burdens speech and is not a restriction of speech. *Tingley*, 47 F.4th at 1077.

However, private conversations are not conduct—they are speech. As the third circuit noted, there is no authority to support the idea that verbal communication can be characterized as conduct solely "based on the function [the] communication[] serves." *King*, 767 F.3d at 224–25 (taking the opposite position of the Ninth Circuit, holding that laws restricting speech, that is considered "conversion therapy," are restrictions of speech), *abrogated in part by NIFLA*, 138 S. Ct. at 2371–

72. The only conclusion consistent with this Court's holdings is that this speech does not magically turn into conduct just because the speech takes place—voluntarily—between a licensed counselor and his client. *See NIFLA*, 138 S. Ct. 2371–72. If it did, it would allow the government to transform any speech into conduct that it can censor. This would be antithetical to the First Amendment because at its heart "lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641.

As Judge Knotts pointed out in his dissenting opinion, statutes like the one at issue here, plainly prohibit "therapists from having certain conversations with their clients." Record 13. Unlike the majority's contention, UPDA § 106, does not simply incidentally burden speech, it directly burdens speech by preventing licensed counselors from having conversations with their clients that fall under what is labeled "conversion therapy." *Id.* at 4. Petitioner, Mr. Sprague, whose speech qualifies as "conversion therapy" under the statute, only engages in "talk therapy," which consists wholly of verbal communication—the quintessential form of speech. *Id.* at 3. If this speech can be labeled as conduct, then, as Judge Knotts pointed out, there is nothing stopping activities such as debating, teaching, protesting, or book clubs from being labeled conduct as well—a clearly absurd result. Record 13. Consequently, UPDA § 106 is a restriction of speech.

2. UPDA § 106 is a content-based restriction of speech because speech is banned only based on the determination of whether the content of the speech qualifies as "conversion therapy."

Once we have determined that a regulation restricts speech, we have to determine whether it is a content-based restriction of that speech. "The First Amendment generally prevents government from proscribing [or prohibiting] speech . . . because of disapproval of the ideas expressed." *R. A. V. v. St. Paul*, 505 U.S. 377, 382 (1992). Content-based laws "are presumptively invalid." *Id.* "As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal,

but to suppress unpopular ideas or information.'" *NIFLA*, 138 S. Ct. at 2374 (alteration in original) (quoting *Turner*, 512 U.S. at 641). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

"Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. A "mere assertion of a content-neutral purpose" is insufficient "to save a law which, on its face, discriminates based on content." *Turner*, 512 U.S. at 642–43 (1994). This is because a law can be content-based on the basis of what it plainly says, not just its purpose.

In *Otto v. City of Boca Raton*, the Eleventh Circuit considered two ordinances—prohibiting counseling that amounts to "conversion therapy" for minors—that were substantially the same as UPDA § 106. *Compare Otto v. City of Boca Raton*, 981 F.3d 854, 859–60 (11th Cir. 2020) (describing both the City and County ordinances at issue), *with* Record 4 (describing UPDA § 106). The Eleventh Circuit held that the ordinances were unconstitutional content-based restrictions of speech. *Id.* at 861, 871–72. It reasoned that given the nature of the ordinances, the determination of whether it was content-based is easy "because the [application of the] ordinances depend[s] on what is said." *Id.* at 861.

Similarly, here, there is no way that UPDA § 106 can be considered without looking at the content of what is being said. It specifically prevents licensed health care providers from engaging in any speech "that seeks to change an individual's sexual orientation or gender identity." Record 4. However, it clearly states that this prohibition does not include counseling that "do[es] not seek to change sexual orientation or gender identity." *Id.* The only way to decide whether UPDA § 106 prohibits certain speech is to look at the content of what is being spoken and determine if it is

impermissible verbal conversion therapy or permissible verbal gender-affirming therapy. As a result, UPDA § 106 is a classic example of content-based discrimination and is subject to strict scrutiny.

3. UPDA § 106 is a viewpoint-based restriction of speech because the statute is grounded in the State's view of gender, sex, and sexual ethics, a view that is in conflict with the beliefs of the counselors whose speech is being prohibited.

Not only is UPDA § 106 a content-based restriction of speech but it is also a viewpoint-based restriction. Viewpoint-based discrimination is a particularly egregious form of content-based discrimination because "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). "[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members*, 466 U.S. at 804. "[G]overnment must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 829.

In *Otto*, the Eleventh Circuit held that both of the ordinances at issue were content-based and viewpoint discriminatory. *Otto,* 981 F.3d at 864 (considering two ordinances substantially the same as UPDA § 106). The circuit court reasoned that petitioner's "counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics." *Id.* A view that is clearly in opposition to the government's view. *Id.* However, the Court rightly acknowledged that while the government can promote its view, it cannot do so in a way that censors the views of others—which is exactly what the ordinances banning conversion therapy did. *Id.* The government's viewpoint discrimination was illustrated clearly by the exception the ordinances provided which allowed for "counseling that provides support and assistance to a person undergoing gender transition." *See id.* at 860, 864. The Eleventh Circuit said this clearly indicated a view that gender

is not immutable while preventing counselors from presenting any view to the contrary. *Id.* The "speakers' viewpoint [was] determin[ing] his license to speak." *Id.*

This finding is consistent with the precedent of this Court in *Rosenberger* and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.* where this court held a university policy and a school district's policy, respectively, were viewpoint discriminatory because they allowed speech about certain issues from every viewpoint except a religious viewpoint. *See Rosenberger*, 515 U.S. at 831 ("By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.* 508 U.S. 383, 393 (1993) ("It discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.").

Similarly, UPDA § 106 is viewpoint discriminatory. Like the ordinances in *Otto*, UPDA § 106 prohibits "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex[,]" but explicitly allows counseling that "do[es] not seek to change sexual orientation or gender identity." Record 4. This clearly illustrates that North Greene is censoring the viewpoint of those who believe gender identity or sexual orientation is fixed while actively allowing the alternative viewpoint. Mr. Sprague's speech as a counselor is informed by his Christian beliefs and viewpoint. *Id.* at 3.

> [H]e grounds human identity in God's design, believing that the sex each person is assigned at birth is "a gift from God" that should not be changed and supersedes an individual's feelings, decisions, or wishes. [He] also believes that sexual relationships are beautiful and healthy, but only if they occur between a man and a woman committed to one another through marriage.

Id. His patients *voluntarily* come to him because they share this same viewpoint—they seek counsel that is informed by the worldview they hold. *Id.* However, UPDA § 106 specifically

restricts Mr. Sprague's viewpoint while allowing the viewpoints of those who disagree with him and do not ground their thoughts about gender identity and sexual orientation in their religious beliefs—instead affirming gender transition. Whether a viewpoint is considered contentious or not is irrelevant because "speech does not need to be popular in order to be allowed." *Otto,* 981 F.3d at 864. As a result, UPDA § 106 is viewpoint discriminatory.

B. UPDA § 106 Fails Strict Scrutiny Because The Statute Is Not The Least Restrictive Means Of Achieving The Government's Interest In The Health And Safety of Minors.

"[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals." *Turner*, 512 U.S. 622 at 641. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. "[S]peaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner*, 512 U.S. 622 at 658. In other words, content and viewpoint-based restrictions are subject to strict scrutiny. As a result, since UPDA § 106 is both content-based and viewpoint discriminatory, it is subject to strict scrutiny. However, it does not survive strict scrutiny because it is not the least restrictive means of achieving the government's compelling interest.

To survive strict scrutiny, the Respondent must prove first that it has a compelling state interest. Here, the government's stated interest in passing the law is protection of "the physical and psychological well-being of minors." Petitioner does not dispute that this is a compelling interest. *See New York v. Ferber*, 458 U.S. 747, 756–57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a

minor' is 'compelling.'"). However, simply because this interest is compelling, does not mean that it "include[s] a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794-95 (2011). As this court has stated, the government cannot suppress speech "solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). However, that is exactly what North Greene's legislature did here—it thinks that access to conversion therapy is unsuitable for minors and seeks to prevent them from having access to it. Record 4.

To survive strict scrutiny the respondent must also show that the means—the legislation—is narrowly tailored to or the least restrictive means of achieving or furthering the compelling interest. Here, however, the respondent cannot show that. The means that the State of North Greene has chosen to use to effectuate its goal of protecting the health and safety of minors is enacting a statute prohibiting licensed healthcare professionals from being able to engage in any type of "conversion therapy" including therapy that consists entirely of verbal or written speech. *Id.* However, there is no indication that this is a threat to the health and safety of minors who agree to go through this type of therapy. Mr. Sprague and other licensed counselors who perform similar verbal conversion therapy only engage in it if both the minor client and the client's parents have consented to it—there is no coercion involved that would threaten the health or safety of the minor. *See id,* at 13.

The legislature considered, in passing this statute, a statement from the APA "concluding that conversion therapy has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse." *Id.* at 7. However, the APA itself does not present definitive statements confirming that conversion therapy is harmful to the health and wellbeing of children. Instead, a peer-reviewed report from the APA's task force says "[r]ecent research reports indicate that there are individuals who perceive they have

been harmed and others who perceive they have benefited from nonaversive [conversion therapy]," and it concludes that there is "no clear indication of the prevalence of harmful outcomes among people who have undergone" conversion therapy.[1] Additionally, there is also research that indicates following through with gender affirmation and transition—an approach the statute explicitly carves out as permissible speech—can lead to substantial risks to health and safety. For example, studies have found that "among individuals who undergo full transition, the suicide rate significantly increases—not decreases."[2]

As a result, given the lack of consensus as to the benefits or harmful implications of either approach, it is clear that a law allowing one form of treatment and prohibiting the opposing form is not the least restrictive means of ensuring the health and safety of minors. This Court has pointed out that the burden that has to be overcome in order to survive strict scrutiny is incredibly demanding. The Respondent carries the burden and "because it bears the risk of uncertainty, ambiguous proof will not suffice." *Brown*, 564 U.S. at 799–800 (internal citations omitted). The ambiguous "proof" submitted by the Respondent here is not enough to surpass this burden. Therefore, UPDA § 106 fails to survive strict scrutiny and is unconstitutional.

II. UNDER *SMITH*, UPDA § 106 IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE AND, THEREFORE, IS SUBJECT TO STRICT SCRUTINY; HOWEVER, SHOULD THIS COURT DISAGREE, IT SHOULD REVISIT AND OVERRULE *SMITH* WITHOUT DELAY.

Under this Court's decision in *Employment Division, Department of Human Resources v. Smith*, UPDA § 106 is subject to strict scrutiny. The United States Court of Appeals for the

[1] Judith M. Gladdgold et. al., *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* APA 1, 42 (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

[2] Cecilia Dhejne, et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, PLOS ONE (Feb. 22, 2011), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0016885.

Fourteenth Circuit wrongly held that UPDA § 106 is a neutral law of general applicability. The Fourteenth Circuit also failed to recognize that UPDA § 106, even if it is a neutral law of general applicability, is still subject to strict scrutiny under the "hybrid rights" exception as articulated in *Smith*. Importantly, if this Court determines that *Smith* demands that UPDA § 106 be upheld, then this Court should revisit and overrule *Smith* without delay.

A. UPDA § 106 Is Not Neutral Or Generally Applicable And, Therefore, Is Unconstitutional Under *Smith*.

UPDA § 106 is subject to strict scrutiny because it is not a neutral law of general applicability. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the *free exercise thereof*." U.S. Const. amend. I (emphasis added). In *Smith*, this Court held that a law that places a substantial burden on religious exercise is not subject to strict scrutiny if it is a "valid and neutral law of general applicability." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). Accordingly, *Smith* requires a law that substantially burdens religious exercise to be both neutral *and* generally applicable to avoid strict scrutiny. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)*; Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421–22 (2022). Because UPDA § 106 is neither neutral nor generally applicable, it is subject to strict scrutiny. UPDA § 106 cannot survive strict scrutiny and is therefore unconstitutional. *See supra* Section I.B.

1. UPDA § 106 Is Not Neutral Because Its Object Is To Target Religion.

UPDA § 106 is not a neutral law because its object is to suppress religious conduct and speech. While UPDA § 106 may not "discriminate on its face," the neutrality inquiry does not "end with the text of the [UPDA]." *Lukumi*, 508 U.S. at 534. This Court has made clear that the Free Exercise Clause "extends beyond facial discrimination" and "forbids subtle departures from neutrality." *Id.* In other words, the Free Exercise Clause does not allow sly legislators to avoid its

umbrella of protections through artful drafting around a "facial discrimination" challenge. *See Id*. at 533–36. Even subtle departures from neutrality are sufficient to trigger strict scrutiny. *Id.* at 534. When facial discrimination is not present, courts must look at "the effect of a law in its real operation" as "strong evidence of its object." *Id.* at 535. The fact that a law implicates "multiple concerns unrelated to religious animosity" does not render it neutral. *Id.*

In his dissenting opinion below, Judge Knotts correctly noted that "it is fatal that [the UPDA] is designed to silence people of faith and their religious beliefs about human sexuality." Record 15. That it is possible for individuals to seek conversion therapy for secular reasons does not "cure its lack of neutrality." *Id.* To hold otherwise "would be like saying a law that prohibits steeples on buildings is 'neutral' because it applies against the religious and non-religious alike." *Id.* at 15–16 (citing *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring in the judgment)). The APA, which North Greene relied upon when instituting the conversion therapy ban, "acknowledged that most conversion therapy and counseling is [] directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." *Id.* at 15. The APA also recognized the therapy as a *religious practice*. *Id.* But this Court has repeatedly affirmed that "[a] government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice.'" *Kennedy*, 142 S. Ct. at 2422 (quoting *Smith*, 494 U.S. at 878). UPDA § 106 specifically bars licensed professionals from engaging in talk conversion therapy, a *religious practice*. That is its object, its targeted design. Therefore, UPDA § 106 is not neutral under *Smith* because it targets religious practice in its real operation. To hold otherwise would "effectively neuter[] *Lukimi*." Record 15.

That North Greene has included a carveout for "religious counseling" does not render UPDA § 106 neutral. In fact, it puts UPDA § 106's lack of neutrality on full display. UPDA § 106

provides at best "illusory" religious exemptions. It exempts conduct that was not covered to begin with. For example, sections 106(f)(2) and (3) of the UPDA exempt conduct by a non-licensed professional and conduct by a licensed professional under the auspices of religion that "does not constitute performing therapy by licensed health care professional." UPDA § 106(f)(2)–(3). But the UPDA provision at issue governs *licensed professionals* that engage in *conversion therapy*. UPDA §§ 106(d), (e). UPDA § 106 does nothing when it "exempts" licensed professionals from conduct that is not conversion therapy, and does even less when it "exempts" non-licensed counselors as if they were governed by the UPDA to begin with. What North Greene has really done with these so-called exemptions is make an incredibly clear statement: "If you want to be a licensed professional in North Greene, leave your religion at the door." The only purpose these illusory exemptions serve is as a smoke screen, a ruse to hide the UPDA's lack of neutrality.

Not only must courts look at a law's "real operation," but also circumstantial evidence to determine its object. *Lukumi*, 508 U.S. at 540. This circumstantial evidence is especially strong when it reveals anti-religious animus as a law's object. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1723–24 (2018). This Court has identified objective factors to help determine a law's object. *Lukumi*, 508 U.S. at 540. These factors include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." *Id.* While the record is silent as to some of these factors, the "contemporaneous statements" made by North Greene state legislators indicate a "discriminatory object." *Id.* For example, North Greene State Senator Floyd Lawson described conversion therapy as a barbaric practice. Record 8–9. Additionally, State Senator Golmer Pyle denounced conversion therapy and its practitioners for trying to "worship"

and "pray the gay away." *Id.* at 9. While the Fourteenth Circuit below tried to downplay these comments, their import is clear: the UPDA's legislative history contains anti-religious animus. This coupled with the UPDA's real operation reveals that the UPDA's true object is religious practice. Therefore, UPDA § 106 is not neutral.

In a more fundamental sense, North Greene violated the neutrality requirement when it chose a side on a religious and philosophical issue in counseling. North Greene failed to recognize and respect that the issues of sexuality and gender identity are "hotly contested matter[s] of public concern." *Meriweather v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021). Instead, North Greene decided that the religious viewpoint on these issues is wrong (licensed professionals disallowed from engaging in verbal conversion therapy), but expressly allowed speech and conduct that expressed the opposite viewpoint (licensed professionals allowed to engage in gender-affirming therapy). UPDA § 106(d). Not only is this blatant viewpoint discrimination, *see supra* Section I.A.3., but it is also plainly not neutral. "Neutrality" demands that counselors be free to take either side of this contested issue or not address it at all. Instead, North Greene has required Mr. Sprague to leave his beliefs behind if he wants to engage in professional counseling. But the requirement of neutrality "appl[ies] just as much to professionals like Sprague as to anyone," and "Sprague does not surrender his free-exercise rights through his license or through government disagreement with his views." Record 15. Accordingly, the UPDA's ban on conversion therapy does not satisfy the neutrality requirement of *Smith*.

2. UPDA § 106 Is Not Generally Applicable Because It Treats Comparable Secular Activity More Favorably Than Religious Exercise.

UPDA § 106 is not a generally applicable law because it treats comparable secular activity more favorably than religious exercise. This Court has specifically stated that laws are not generally applicable "whenever they treat *any* comparable secular activity more favorably than

religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (*per curiam*) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (*per curiam*)). Comparability is determined based upon the "risks various activities pose, not the reasons why" people engage in those activities. *Id.* The risk North Greene sought to prevent with UPDA § 106 is harm to the physical and psychological well-being of minors. Record 4. But the Fourteenth Circuit below framed the risk more narrowly: an increase in the risk of suicide and depression of minors resulting from conversion therapy. Record 10. Even taking as true the contention that verbal conversion therapy increases the risk of depression and suicide, UPDA § 106 is still not generally applicable.

As previously established, verbal conversion therapy is a religious exercise. *See supra* Section II.A.1. That some people may engage in conversion therapy for secular reasons does not render secular conversion therapy the appropriate comparator. *See Tandon*, 141 S. Ct. at 1296. Rather gender-affirming therapy, which "can lead to the very types of . . . harms" North Greene wants to eliminate, Record 10, is the appropriate comparator. *See Tandon*, 141 S. Ct. at 1296. And because UPDA § 106 flatly prohibits verbal conversion therapy while expressly endorsing gender-affirming therapy (the secular comparator), UPDA § 106 is not generally applicable. The Fourteenth Circuit played with the level of generality to manufacture a reality where Mr. Sprague's speech is not comparable to gender-affirming therapy. *See Masterpiece Cakeshop*, 138 S. Ct. at 1738 (Gorsuch, J., concurring). But this exercise in analytical gymnastics does not render UPDA § 106 generally applicable. The reality is that verbal conversion therapy and gender-affirming therapy are opposite sides of the same coin. The Free Exercise Clause prevents North Greene from rigging the coin to always land with the gender-affirming therapy side up.

Furthermore, UPDA § 106 is not generally applicable because it invites individualized exemptions. "A law is not generally applicable if it invites the government to consider the

particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*, 141 S. Ct. at 1877 (internal citations and quotation marks omitted). In this respect, UPDA § 106 is fatally vague. *See* Record 4. UPDA § 106 encourages government officials to make "judgment calls" as to which speech is allowed. It expressly allows therapy that "facilita[tes] identity exploration and development" but disallows therapy that "seeks to change an individual's sexual orientation or gender identity." UPDA § 106 (d), (e)(1)–(2).

Common sense reveals that "exploration and development" can and often will lead to a change in "an individual's sexual orientation or identity." This begs the question: where is the line between permissible and impermissible therapy under the UPDA, and who draws it? UPDA § 106 as written gives North Greene's enforcement authority "sole discretion" to draw that line. *Fulton*, 141 S. Ct. at 1879. Given the religious targeting detailed above, *see supra* Section II.A.1, it is reasonable to expect that "change" from gender-affirming therapy will be allowed while "change" resulting from counseling informed by faith-based convictions will not. In other words, UPDA § 106 invites North Greene's enforcement authority to consider the reasons for a counselor's conduct. *Fulton*, 141 S. Ct. at 1877. Thus, UPDA § 106 is not generally applicable.

B. UPDA § 106 Falls Within The Hybrid-Rights Exception To The General Rule Set Forth In *Smith* Because It Implicates Mr. Sprague's Free Exercise and Free Speech Rights, Along With The Parental Rights Of His Clients.

Even if this Court finds that UPDA § 106 is a neutral law of general applicability, which it should not, UPDA § 106 is still subject to strict scrutiny under the "hybrid-rights" exception. Specifically, UPDA § 106 implicates free exercise along with constitutional protections of free speech and parents' rights. Where a free exercise claim is connected "with other constitutional protections[,]" such as "[a] communicative activity or parental right," the Court may subject even a neutral, generally applicable law to strict scrutiny. *Smith*, 494 U.S. at 881–82. The *Smith* Court

created this hybrid-rights exception to its general rule allowing neutral and generally applicable laws to avoid strict scrutiny. *Id.* at 882.

Wisconsin v. Yoder is the clearest example of the hybrid-rights exception implicating the right of parents to direct their children's education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, this Court invalidated a Wisconsin law compelling school attendance as applied to Amish parents whose religious beliefs prevented compliance. *Id.* at 234. The Court reasoned that *Sherbert v. Verner* required the state to satisfy strict scrutiny and it did not. *Yoder*, 406 U.S. at 236; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

In establishing the hybrid-rights exception, the *Smith* Court distinguished *Yoder*, by concluding that it had applied strict scrutiny there because of the multiple rights involved: religious free exercise and parents' rights to direct their children's education and upbringing. *Smith*, 494 U.S. at 881; *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). But in *Smith*, this Court considered the free exercise claim at issue in isolation and not in connection with another constitutional right because the challengers did not contend that Oregon's prohibition "represent[ed] an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs." *Smith*, 494 U.S. at 882.

Here, however, Mr. Sprague's free exercise challenge is connected with his own free speech rights. As demonstrated above, UPDA § 106 violates Mr. Sprague's First Amendment free speech rights. *See supra* Section I.A. However, even if this Court determines that UPDA § 106 does not violate Mr. Sprague's free speech rights, UPDA § 106 sufficiently implicates both free exercise concerns and free speech concerns to warrant strict scrutiny under the hybrid-rights exception.

Furthermore, Mr. Sprague's free exercise challenge is not only connected with his own free speech rights, but also the right of his clients to direct the upbringing and education of their

children. *Smith*, 494 U.S. at 881. Most of Mr. Sprague's clients "share his religious viewpoints and seek his assistance specifically because he holds himself out as a Christian provider of family therapy services." Record 3. These clients, as Christians, often believe in a biblical view of gender and human sexuality based on scripture. "Male and female he created them, and he blessed them and named them Man when they were created." *Genesis* 5:2 (ESV). "Thou shalt not lie with mankind, as with womankind: it is abomination." *Leviticus* 18:22 (KJV). Whether the state of North Greene agrees with these views is irrelevant. UPDA § 106 prevents parents from seeking professional help in bringing up their minor children in conformity with these values. And this Court has already made it clear that "those who adhere to religious doctrines[] may continue to *advocate* with utmost, sincere conviction that, by divine precepts," homosexuality and transgenderism should not be condoned. *See Obergefell v. Hodges*, 576 U. S. 644, 679 (2015) (emphasis added). Because UPDA § 106 implicates Mr. Sprague's free exercise rights along with parents' rights to direct the upbringing of their children in accordance with their religious values, strict scrutiny applies under the hybrid-rights exception.

C. If This Court Decides That The UPDA Is Valid Under *Smith*, Then *Smith* Should Be Overruled.

If this Court determines that *Smith* demands that the UPDA be upheld, then this Court should revisit and overrule *Smith* without delay. This Court should overrule *Smith* because *Smith* was wrong when it was decided, and it is still wrong today. We can no longer pretend that mere neutrality and general applicability are sufficient to secure the great promise of the First Amendment: to safeguard religious freedom and the free exercise thereof. Furthermore, stare decisis factors do not require *Smith* to be upheld and, in fact, they weigh in favor of overruling *Smtih*. To replace *Smith*, this Court need only breathe life into the precedent that existed before *Smith* and return to the *Sherbert*/*Yoder* framework.

1. *Smith* Was Wrong When It Was Decided, And It Is Still Wrong Today.

Smith was wrong from its inception and has remained so ever since. *Fulton*, 141 S. Ct. at 1883–1926 (Alito, J., concurring) (explaining in painstaking detail why *Smith* is wrong and should be overruled). *Smith* distorted the religious freedom protections of the First Amendment by contradicting the Amendment's text and purpose, and it established backwards incentives. The First Amendment states, in relevant part, that "Congress shall make no law . . . prohibiting the *free exercise* of [religion]." U.S. Const. amend. I (emphasis added). This prohibition against religious restrictions applies to the states through the Due Process Clause of the Fourteenth Amendment. *See* U.S. Const. amend. XIV; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

There is no doubt that *Smith* cannot be squared with the text of the First Amendment. In fact, *Smith* "paid shockingly little attention to the text of the Free Exercise Clause." *Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring in the judgment). "Exercise" means the same today as it meant at the founding: action or conduct. "As defined by dictionaries at the time of the framing, the word 'exercise' strongly connoted action." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1489 (1990) (collecting definitions). In other words, the text of the First Amendment protects the right to *act* and engage in *conduct* commensurate with religious beliefs. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2026 (2017) (Gorsuch, J., concurring). But what many justices have observed, and what has become quite apparent through observation, is that *Smith* relegated the Free Exercise Clause to a mere afterthought, converting it from a substantive right to an equality right that "offers nothing more than protection from discrimination." *Fulton*, 141 S. Ct. at 1883 (2021) (Barrett, J., concurring in the judgment). To illustrate, *Smith* essentially rewrote the Free Exercise Clause to operate as though it reads as follows: "Congress shall make no law prohibiting the free exercise of religion, unless the law is neutral and generally applicable, in which case it is fine." But that is not

what the Free Exercise Clause says, and it is past time this Court recognized that fact. Because *Smith* is inconsistent with the text of the First Amendment, it should be overruled.

Not only is *Smith* inconsistent with the text of the Free Exercise Clause on its face, *but Smith* is also inconsistent with the purpose of the Free Exercise Clause as intended by the Framers. This Court's primary focus when interpreting the religious freedom clauses of the First Amendment is discerning their original meaning. *See Hosanna Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–85 (2012); *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014); *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2087 (2019). The Framers understood religion to require action and sought to protect such action accordingly. *See* Office of Legal Policy, Dep't of Justice, Report to the Attorney General: Religious Liberty Under the Free Exercise Clause 19–27 (1986) (hereinafter "Report to the Attorney General"); *see also* McConnell, *Origins*. The Free Exercise Clause reflects the Framers' understanding that religious individuals owe a duty to God with which the state must not interfere "unless and until that duty becomes an overt act against the rights of others." Report to the Attorney General at 26. This demonstrates that the Free Exercise Clause, as the Framers intended it to be, requires strong protections for religious conduct, even when that conduct is burdened by neutral and generally applicable laws. McConnell, *Origins* at 1490; see, e.g., Va. Declaration of Rights of 1776, § 16. *Smith*, however, indicates that the Free Exercise Clause is limited to merely prohibiting purposeful discrimination. *Smith*, 494 U.S. at 878. This grossly understates the extent to which the Free Exercise Clause was designed to protect the right to conduct oneself in accordance with one's religious convictions. Because *Smith* is inconsistent with the original meaning and purpose of the First Amendment, it should be overruled.

Finally, *Smith* should be overruled because it inverts policy-making incentives. *Smith* has inadvertently encouraged states, including North Greene, to pursue blanket policies that satisfy the "neutral and generally applicable" law requirement regardless of such a law's effect on religion. *Smith* encourages government entities to regulate more behavior for the sake of "neutrality" instead of encouraging respect for religious practices. This runs counter to "the very purpose of [the] Bill of Rights": denying the government the power to regulate inalienable rights, such as the free exercise of religion. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). In fact, *Smith* expressly held that the protection of the free exercise of religion is almost entirely subject to and dependent upon the political process. *Smith*, 494 U.S. at 890. But the whole point of the Bill of Rights is to remove from the political process those rights we hold most dear, including the free exercise of religion. That *Smith* reflects a view antithetical to the purpose of the Bill of Rights should be enough to require it to be overruled.

More troubling, however, is the effect the inverted policy-making incentives under *Smith* have on individuals burdened by neutral, generally applicable laws. Even if an individual challenges a state restriction of religion and prevails, *Smith* incentivizes the state to revise its statute to satisfy "neutrality" and "general applicability" without clearly targeting the challenger. In other words, *Smith* serves as more of an instruction on how to restrict religious practice without running afoul of the First Amendment than an actual protection of the free exercise of religion. An individual's options then are to abandon the challenged religious conduct or anticipate and participate in further litigation—which is possible only if the individual can afford to fight in the courts. *See Fulton*, 141 S. Ct. at 1929–31 (Gorsuch, J., concurring). Therefore, this Court should overrule *Smith* and rid its jurisprudence of these inverted policy-making incentives.

2. Stare Decisis Considerations Do Not Warrant Continued Deference To *Smith* and, In Fact, Those Considerations Weigh In Favor Of Overruling *Smith*.

The doctrine of stare decisis does not require this Court to retain *Smith* and, in fact, suggests that it should be overruled. Stare decisis encourages this Court to follow its precedent for the sake of stability, consistency, judicial restraint, and the Court's legitimacy. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2261–62 (2022). However, this Court has been adamant that stare decisis is not an "inexorable command," and that the doctrine is at its weakest when the Court interprets the Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 US. 393, 405 (1932) (Brandeis, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring in the judgment). Recently, this Court has laudably emphasized the importance of correcting wrongful constitutional precedent. *See Dobbs*, 142 S. Ct. at 2265–72; *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–86 (2018); *Citizens United v. FEC*, 558 U.S. 310, 363–65 (2010). This Court considers a variety of factors in determining whether to overrule a past decision. These factors include: the decision's reasoning, its compatibility and consistency with other decisions, the workability of the rule that it established, legal and factual developments since it was decided, and reliance interests. *Dobbs*, 142 S. Ct. at 2265; *Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring in the judgment). And not a single "relevant factor, including reliance, weighs in *Smith*'s favor." *Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring in the judgment). First, as Petitioner has argued, *Smith* was wrongly decided and poorly reasoned. *See supra* Section II.C.1. Smith's contradiction of the text and purpose of the Free Exercise Clause and the incentives *Smith* creates all favor overruling.

It is also plainly apparent that the rule promulgated by *Smith* is unworkable. "One of *Smith*'s supposed virtues was ease of application, but things have not turned out that way." *Fulton*, 141 S. Ct. at 1917 (Alito, J., concurring in the judgment). Judicially created rules should be useful,

practically applicable, consistent, and clear. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992); *Dobbs*, 142 S. Ct. at 2272. *Smith*'s "neutral and generally applicable" rule is none of those things. As Justice Alito has recently explained, "at least four serious problems have arisen and continue to plague courts when called upon to apply *Smith*." *Fulton*, 141 S. Ct. at 1917 (Alito, J., concurring in the judgment). These include cases implicating the "hybrid-rights" exception, cases where a law targets religion, cases analyzing the nature and scope of exemptions, and cases where courts must identify the appropriate comparators between a law's treatment of secular and religious conduct. *Id,* at 1917–22. "*Smith* seemed to offer a relatively simple and clear-cut rule that would be easy to apply. Experience has shown otherwise." *Id.* at 1922.

Furthermore, subsequent legal and factual developments since *Smith* have provided additional reasons to change course. *Id.* Justice Scalia expressed his worry in *Smith* that adherence to the *Sherbert* analysis would invite "anarchy" and allow every individual to become "a law unto himself." *Smith*, 494 U. S., at 879, 888. But Congress' adoption of strict scrutiny at the federal level, thirty years ago through the Religious Freedom Restoration Act (RFRA), "has shown that fear unfounded." *Fulton*, 141 S. Ct. at 1922 (Alito, J., concurring in the judgment). Worse yet, when complicated free exercise questions are presented to this Court, this Court often flatly avoids applying *Smith*. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). Accordingly, legal and factual developments since *Smith* suggest it should be overruled.

Additionally, *Smith*'s inconsistency and incompatibility with other precedents suggest it should be overruled. When a decision lacks coherence with prior and subsequent cases such that it distorts an area of law, overruling it is likely proper. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring). In creating the "neutral and generally applicable"

standard, *Smith* relied heavily on *Minersville School District v. Gobitis*. But *Smith* conveniently failed to mention that this Court overruled *Gobitis* just three years after it was decided. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594 (1940), *overruled by W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). Additionally, *Smith* disregarded a significant body of precedent, including *Sherbert*'s requirement of strict scrutiny for laws that substantially burden religion and *Yoder*'s clear determination that neutral and generally applicable laws do not escape the First Amendment's protections. *Fulton*, 141 S. Ct. at 1889–90 (Alito, J., concurring). Although *Smith* did not overrule these cases per se, *Smith* distinguished them in peculiar ways and "looked for precedential support in strange places." *Id.* at 1912. Instead of following the simple rules of *Sherbert* and *Yoder*, *Smith* created a rule that is "tough to harmonize with those precedents." *Id.* at 1915. *Smith* is both incompatible and inconsistent with other precedent, and it should be overruled.

Lastly, reliance interests do not suggest this Court should affirm *Smith*. While overruling may be improper when it would significantly upset the reasonable expectations of third parties relying on the precedent, *Janus*, 138 S. Ct. at 2484*; Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring), *Smith* faces no such hurdle. *Smith* was widely condemned from its inception: scholars across the ideological spectrum criticized *Smith* from the beginning, and Congress responded to the outcry by enacting RFRA with the express motive of undoing *Smith*. *See* James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1409–10 (1992); *see also* 42 U.S.C. §§ 2000bb to 2000bb-4; *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997). Although this Court later cabined the application of RFRA to federal law, twenty-one states enacted their own versions of RFRA to reinstate, at the state level, the religious protections *Smith* stripped away. *Factsheet: Religious Freedom Restoration Act of 1993 (RFRA)*, Bridge: A Georgetown University Initiative (Mar. 16, 2021)

(https://bridge.georgetown.edu/research/religious-freedomrestoration-act-of-1993-rfra/). The breadth and severity of the backlash against *Smith* reveals that its elimination is widely expected, if not desired. Accordingly, reliance interests do not weigh in favor of retaining *Smith*.

3. This Court Should Return Substantive Power To The Free Exercise Clause And Reinstitute The *Sherbert*/*Yoder* Strict Scrutiny Framework.

In her concurring opinion in *Fulton*, Justice Barret posed the critical question: "[W]hat should replace *Smith*?" *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring in the judgment). "The answer that comes most readily to mind is the standard that *Smith* replaced: A law that imposes a substantial burden on religious exercise can be sustained only if it is narrowly tailored to serve a compelling government interest." *Fulton*, 141 S. Ct. at 1924 (2021) (Alito, J., concurring in the judgment). In other words, strict scrutiny. *Yoder*, 406 U.S. at 236; *Sherbert*, 374 U.S. at 406. Strict scrutiny aligns with the founding-era understanding that Americans are free to exercise their religion without infringing on others' rights. *See* Report to the Attorney General at 26.

As previously addressed, there is an unfounded fear that retuning to the *Sherbert/Yoder* analysis will "permit every citizen to become a law unto himself." *Smith*, 494 U.S. at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166–67 (1879)). But strict scrutiny has been the rule at the federal level under RFRA for thirty years now, and the feared "anarchy" is nowhere to be found. That is not to say that concerns regarding the application of strict scrutiny to any law that places a substantial burden on religion are illegitimate. Rather, this Court should recognize the insight provided by Justice Gorsuch when he said that this Court

> hardly need[s] to wrestle today with every conceivable question that might follow from recognizing *Smith* was wrong. To be sure, any time this Court turns from misguided precedent back toward the Constitution's original public meaning, challenging questions may arise across a large field of cases and controversies. But that's no excuse for refusing to apply the original public meaning in the dispute actually before us. Rather than adhere to *Smith* until we settle on some grand unified theory of the Free Exercise Clause for all future cases until the end of time, the

> Court should overrule it now, set us back on the correct course, and address each case as it comes.

Fulton, 141 S. Ct. at 1931 (2021) (Gorsuch, J., concurring in the judgment) (internal citations and quotation marks omitted). A return to the *Sherbert*/*Yoder* strict scrutiny analysis will set the Court and this country back on the correct course. Therefore, to "set us back on the correct course," it is imperative that this Court overrule *Smith* immediately.

CONCLUSION

UPDA § 106 is a content-based and viewpoint discriminatory restriction of speech which requires the application of strict scrutiny under the Free Speech Clause of the First Amendment. Additionally, UPDA § 106 is also subject to strict scrutiny under the Free Exercise Clause pursuant to *Smith* because it is neither neutral nor generally applicable, and because it implicates the hybrid-rights exception. However, if this Court finds that *Smith* prevents the application of strict scrutiny under the Free Exercise Clause to UPDA § 106, then *Smith* should be overruled. UPDA § 106 is unconstitutional and does not survive strict scrutiny because it is not narrowly tailored or the least restrictive means of achieving the government's interest. Therefore, this court should reverse the judgment of the Court of Appeals for the Fourteenth Circuit.

Team 1
Counsel for Petitioner