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 10
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether North Greene's law prohibiting certain conversations between a therapist and a client violates the Free Speech clause of the First Amendment.

2. Whether North Greene's law, which 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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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Petitioner, Howard Sprague, plaintiff in the United States District Court for the Eastern District of North Greene and appellant in the United States Court of Appeals for the Fourteenth Circuit, submits this brief in support of his request that this Court reverse the Fourteenth Circuit's ruling affirming the District Court's granting of the respondent, State of North Greene's motion to dismiss and denial of Petitioner's motion for a preliminary injunction.

OPINIONS BELOW

The United States District Court of the Eastern District of North Greene's opinion is reported at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The United States Court of Appeals for the Fourteenth Circuit's decision affirming the District Court's holding is printed on pages 2-16 of the record. This 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." U.S. Const. amend. I.

STATEMENT OF THE CASE

Statement of Facts: Howard Sprague is a licensed family therapist in the state of North Greene. R. at 3. Through talk therapy, Sprague has helped families and individuals navigate sensitive sexual and gender identity issues for 25 years. R. at 3. Sprague incorporates his faith into his counseling practice. R. at 3. Despite his experience, Sprague fears that he will lose his license if he continues to counsel his patients. R. at 5. In North Greene, therapists who perform "conversion therapy" on minor patients engage in unprofessional conduct and may be disciplined. N. Greene Stat. § 106(d). North Greene's Uniform Professional Disciplinary Act defines "conversion therapy" as "a regime

that seeks to change an individual's sexual orientation or gender identity" and 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." *Id.* § 106(e)(1).

The law does not apply to talk therapy that provides "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do[es] not seek to change sexual orientation or gender identity." *Id.* § 106(e)(2). It exempts unlicensed therapists affiliated with a religious organization. *Id.* § 106(f). Therapists may discuss "conversion therapy" with patients, refer patients to unlicensed, religious "conversion therapy" providers, and perform "conversion therapy" on adult patients. R. at 4.

The North Greene General Assembly's stated intent in enacting N. Greene Stat. 106(d) was to regulate professional conduct. R. at 4. The legislature found that "conversion therapy" exposed children to "serious harms" and that it had a compelling interest in protecting the physical and psychological wellbeing of minors. R. at 4. It only cited the American Psychological Association's general opposition to "conversion therapy" to support its finding. R. at 4. During debate over the law, several North Greene legislators denounced the predominantly religious practice of "conversion therapy" and chastised those who seek it for religious reasons. R. at 9.

Procedural History: Sprague filed this First Amendment claim seeking to enjoin the law's enforcement in the United States District Court for the Eastern District of North Greene. R. at 5. Sprague argued that the law violated his free speech and free exercise rights. R. at 5. The Court granted the State's motion to dismiss and denied Sprague's motion for a preliminary injunction. R. at 5. The Court of Appeals for the Fourteenth Circuit affirmed the District Court's holding. R. at 5.

SUMMARY OF THE ARGUMENT

This Court should reverse the Fourteenth Circuit's holding and find that N. Greene Stat.

106(d) ("the law" or "North Greene's law") violates the Free Speech and Free Exercise clauses of the First Amendment. Talk therapy is neither conduct nor speech incidental to conduct; it is pure speech. North Greene may not censor speech by imposing an intrusive licensing requirement. The law censors speech based on content and viewpoint, so it must be narrowly tailored to further a compelling government interest to survive this Court's review. It fails that demanding test because North Greene cannot demonstrate how the law remedies an actual harm to minors. The law is not narrowly tailored because it exempts a significant amount of speech the legislature deemed dangerous to children and allows licensed therapists to refer minor patients to exempt providers. The law is an attempt to censor therapists and violates the First Amendment.

North Greene's statute does not qualify for the *Smith* standard because it is devoid of neutrality and general applicability. Government regulations must be strictly neutral when they burden religion. As the legislative history and real operation of this law show, North Greene's law targets a predominately, if not exclusively, religious practice. Further, the State's law finds no protection in the general applicability requirement. The law creates a formal mechanism for granting exceptions that invites the government to consider the religion of "conversion therapy" providers. The statute goes further and bans religious speech while permitting comparable secular speech. Since this law is not neutral or generally applicable, it must face, and ultimately fail, strict scrutiny.

If this law survives *Smith*, then it is clear that this Court should overrule *Smith*. *Smith* misunderstands the text of the First Amendment and glosses over the historical understanding of religious freedom. This Court's *stare decisis* factors counsel in favor of overturning *Smith*. The reasoning is hopelessly flawed and seriously inconsistent with this Court's precedent. *Smith*'s rule is unworkable and developments since the decision highlight its offensiveness to the Constitution. This Court should overrule *Smith* and restore the Free Exercise clause to its proper place.

ARGUMENT

Standard of Review: The Court reviews questions of law *de novo*. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 867 (2005). A lower court's decision to deny a preliminary injunction is reviewed for abuse of discretion. *Id.* When reviewing dismissal for failure to state a claim, the Court credits all factual allegations as true and construes them in the light most favorable to the non-moving party. *See Papasan v. Allain*, 478 U.S. 265, 283 (1986).

I. NORTH GREENE'S LAW VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

North Greene's law is an unconstitutional attempt to censor therapists. The First Amendment forbids laws that abridge the freedom of speech and applies to North Greene through the Fourteenth Amendment. U.S. Const. amend. I.; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Talk therapy consists entirely of speech. R. at 3 n.3. It is fully protected by the First Amendment because it is neither conduct nor speech incidental to conduct. North Greene's law regulates talk therapy, so it regulates therapists' speech. R. at 4. The law regulates speech based on the content and viewpoint therapists express to clients. N. Greene Stat. § 106(d). Content- and viewpoint-based speech restrictions are subject to strict scrutiny review. *R.A.V. v. City of Saint Paul,* 505 U.S. 377, 395 (1992). The law fails to further North Greene's interest in protecting children because the state failed to establish a causal connection between conversion therapy and harm to minors. It is not narrowly tailored because it leaves a substantial amount of supposedly harmful speech unregulated and available. This Court should find that the law violates the Free Speech Clause of the First Amendment.

A. Talk Therapy is Pure Speech Subject to Full First Amendment Protection.

Sprague's conversations with patients during counseling sessions are fully protected by the Free Speech clause of the First Amendment. Sprague does not treat patients using physical methods.

R. at 3 n.3. He only practices through talk therapy. R. at 3 n.3. But the Fourteenth Circuit found that a law that censors Sprague's speech-only practice based on the content of his conversations did not trigger heightened First Amendment scrutiny. R. at 7.

This Court forbids states from relabeling speech as conduct subject to government regulation. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 (2011). Speech is the *entire* treatment in talk therapy, neither an "incidental" aspect of administering a more invasive, physical procedure nor basic professional conduct subject to licensure. R. at 3 n.3, 7. No justification transforms the pure speech of counseling into something unprotected by the First Amendment.

1. Talk therapy is pure speech, not conduct.

North Greene's law regulates speech, not conduct. The rule is clear: when the only "conduct" the state punishes is the "fact of communication," the state punishes speech. *Cohen v. California*, 403 U.S. 15, 18 (1971). This Court must reiterate that the government may not circumvent the First Amendment by relabeling pure speech as conduct. *See id. Holder v. Humanitarian Law Project* solidified this rule. 561 U.S. at 26. There, the government argued that providing specialized knowledge to foreign terrorist organizations constituted conduct, not speech, and could be criminalized. *Id*. This Court disagreed and reviewed the law under strict scrutiny. *Id*.

Holder clarified that, even when an individual communicates specialized knowledge, their speech does not lose First Amendment protection and become conduct. *Id.* at 22. Several lower courts correctly understood *Holder* as the end to the speech-as-conduct debate, especially in the context of censoring therapists. *See King v. Governor of the State of N.J.*, 767 F.3d 216, 224 (3rd Cir. 2014) *abrogated by Nat'l Inst. of Family & Life Advocates v. Becerra*, —— U.S. ——, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*"). Ruling on a First Amendment challenge to a therapy censorship law, the Third Circuit found that therapists engage in speech, not conduct, when counseling a client.

Id. ("Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during [conversion therapy] are 'conduct.'") (citing *Holder*, 561 U.S. at 26 (2011)). The Eleventh Circuit agreed. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 861 (11th Cir. 2020).

This Court and several circuits have refused to classify speech as conduct, even when ruling on content that is much closer to the margin between the two categories than conversations between a therapist and client. The "sale, transfer, and use" of data that captures how individual doctors prescribe medication is speech. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 569 (2011). Selling T-shirts that display inspirational messages constitutes speech. *One World Family Now v. City & Cnty. of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996). Guides who offer historical walking tours of cities engage in protected speech. *Billups v. City of Charleston, S.C.*, 961 F.3d 673, 683 (4th Cir. 2020). Courts generally recognize the danger of conflating conduct and speech, and when the line between the two categories is faint, they err on the side of protecting speech.

The Ninth and Fourteenth Circuits ignored this danger. In *Pickup v. Brown*, the Ninth Circuit found a law censoring talk therapy regulated only conduct in the form of "therapeutic treatment," even though that treatment was administered exclusively through verbal communication. 740 F.3d 1208, 1229 (9th Cir. 2014) *abrogated by NIFLA*, 138 S. Ct. at 2371-72. After this Court abrogated *Pickup*'s professional speech doctrine, the Ninth Circuit continued to insist that talk therapy is conduct. *Tingley v. Ferguson*, 47 F.4th 1055, 1075 (9th Cir. 2022). The Fourteenth Circuit followed the Ninth Circuit's isolated reasoning. R. at 6. Citing *Pickup*, the court found that North Greene's law is "primarily concerned with the conduct of treating patients with certain health conditions." R. at 6.

The Fourteenth Circuit engaged in the exact relabeling courts recognize to be a "dubious

Constitutional enterprise." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017). Sprague treats his patients by speaking to them and communicating a message. R. at 3 n.3. This case is not at the margin, where drawing the line between speech and conduct can be difficult. *NIFLA*, 138 S. Ct. at 2373 (2018). The North Greene General Assembly recognized the distinction, and at least one of the law's sponsors intended it to target physical conduct, meaning procedures such as electroshock therapy. R. at 8-9. But when it comes to practices that consist entirely of speech, "[t]he government's *ipse dixit* cannot transform speech into conduct that it may more freely regulate." *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Sprague, like the lawyers and physicians in *Holder*, works by communicating a message to his clients. R. at 3; 561 U.S. at 26. Communicating a message qualifies as speech subject to First Amendment protection, and this Court does not allow the government to perform an end-run around the Constitution by using different terms. *Holder*, 561 U.S. at 26.

2. States dictate who may practice as a therapist, not what is said between therapists and their clients, by imposing licensure requirements.

North Greene may not censor individuals by imposing a licensure requirement that defines speech as professional conduct. Despite *NIFLA*'s abrogation of the professional speech doctrine, the Fourteenth Circuit insisted that North Greene may censor licensed healthcare providers' speech as conduct in the interest of protecting public health according to a "longstanding history" of similar regulations. R. at 6 n.6, 7. This Court warned of justifying state censorship as a mere licensing action in *NIFLA*. 136 S. Ct. at 2375. There, the Court recognized that a lower threshold of First Amendment protection for licensed professionals would grant states "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id*.

Licensing creates state-set standards individuals must meet to practice psychology, not a free pass to regulate every conversation between therapist and client as conduct. This Court recognized

that distinction in *Riley v. Nat'l Fed'n of the Blind*, where it subjected a licensing requirement that "directly and substantially…affect[ed] the speech [fundraisers] utter" to strict scrutiny. 487 U.S. 781, 801 (1988). The Ninth Circuit cited *Riley* in upholding California's licensing statute for psychologists. *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1056 (9th Cir. 2000) ("*NAAP*"). It found that the California statute did not violate the First Amendment because it "merely determined who was qualified as a mental health professional," not "the content of what is said in therapy." *Id*. To hold that state licensure transforms speech into regulatable conduct is to give North Greene "unfettered power" to suppress disfavored viewpoints and is incompatible with the First Amendment. *NIFLA*, 138 S. Ct. at 2375.

North Greene cannot evade the First Amendment by subjecting therapists to intrusive licensing requirements. Recognizing talk therapy as protected speech protects the First Amendment rights of therapists and clients without eliminating the state's power to regulate psychotherapy.

3. Talk therapy does not incidentally involve speech; it is entirely speech.

North Greene's law does not "incidentally burden" Sprague's talk therapy sessions, it completely burdens them, because those sessions consist entirely of speech. *NIFLA*, 138 S. Ct. at 2373; R. at 3 n.3. Laws that regulate professional conduct and only incidentally restrict speech may comport with the First Amendment. *See NIFLA*, 138 S. Ct. at 2373 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, —— U.S. ——, 142 S. Ct. 2228 (2022)). But this narrow rule only applies when factual, informative disclosures are necessary to carry out a separate medical procedure. *Id*. North Greene and the Fourteenth Circuit attempt to equate an entirely verbal treatment with an informed consent requirement. R. at 7. When "'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in

regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). This principle does not apply to this case, because talk therapy does not compliment some separately identifiable conduct. R. at 3.

States may regulate how lawyers engage in business transactions. Speech is an "essential but subordinate component" in a business transaction, so the speech retains a lower level of First Amendment protection because it is incidental to the conduct of engaging in a business transaction. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978). Commercial speech itself is less protected under the First Amendment, so states may even require a lawyer to include "purely factual and uncontroversial information about the terms under which his services will be available" in his advertisements. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985). Medical treatment regulations may also incidentally burden speech. In *Casey*, this Court upheld a state law requiring doctors to provide specific information about the abortion process to abortion patients. 505 U.S. at 884. The law also required doctors to provide state-published materials explaining abortion alternatives. *Id.* Although the law compelled physicians to speak, the Court upheld it as a basic informed consent requirement "as part of the practice of medicine, subject to reasonable licensing and regulation by the state." *Id*.

NIFLA discussed both the legal and medical examples of incidental speech regulation. There, the Court struck down a state law that required pregnancy resource centers to disclose specific information to patients. *NIFLA*, 138 S. Ct. at 2378. The Court held that *Zauderer* did not apply because the information clinics were required to transmit to patients was not related to commercial advertising, nor was it "uncontroversial." *Id. Casey*'s incidental-burden doctrine did not apply because "[t]he notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all." *Id.* Instead, the law at issue in *NIFLA* regulated "speech as speech." *Id.*

Several circuits recognized *NIFLA* as an affirmation of the incidental-burden doctrine first articulated in *Casey*. *See Otto*, 981 F.3d at 865; *Hines v. Quillivan*, 982 F.3d 266, 271 (5th Cir. 2020); *Vizaline*, *L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020) ("[T]he relevant question is whether…Mississippi's licensing requirements regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct."). *Id*.

The Fourteenth Circuit ignored the "incidental" aspect of this narrow exception and applied it to direct regulations on speech. The court held that because the law applied to *all* treatments administered with the goal of changing an individual's sexual orientation, the fact that some healthcare providers use speech to affect that goal is "incidental." R. at 7 (quoting *NIFLA*, 138 S. Ct. at 2372). This approach misapplies the doctrine. If the law required healthcare providers to describe the potential dangers of a physical "conversion therapy" treatment to minor patients before engaging in that specific procedure, the incidental-burden doctrine would apply. In that situation, the law's target is the procedure (the conduct) and it only touches speech (the informed consent requirement) that the healthcare provider utters for the express purpose of performing the physical procedure. The regulated speech must be linked with a separately identifiable conduct. *NIFLA*, 138 S. Ct. at 2373.

North Greene's law targets "speech as speech." *Id*. There is no gap between speech and conduct where this Court could insert the incidental-burden exception. *See Otto*, 981 F.3d at 865 (finding that a ban on verbal "conversion therapy" directly regulated speech and that the incidental-burden exception did not apply). The state is not banning therapists from relaying factual information about a procedure to clients, nor is it attempting to restrict commercial speech, taking the law even further from the justifications examined in *Zauderer* and *Casey*. *Zauderer*, 471 U.S. at 637; *see King*, 767 F.3d at 236 (noting that the *Casey* court recognized that laws compelling the

disclosure of factual information to patients are less likely to infringe significant First Amendment interests). To agree with the Fourteenth Circuit is to allow North Greene to censor a disfavored viewpoint by misappropriating this Court's precedent. Talk therapy is protected speech.

B. North Greene's Law is a Content- and Viewpoint-Based Speech Restriction.

Talk therapy is pure speech, so North Greene's law is a content-based law that punishes therapists based on the messages they convey. The law also restricts speech based on viewpoint, because it allows therapists to affirm a client's same-sex attraction but forbids them from doing the opposite. N. Greene Stat. § 106(e)(1)-(2). Content and viewpoint-based speech restrictions are presumptively unconstitutional, and they must satisfy strict scrutiny to avoid violating the First Amendment. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

1. The law regulates speech based on its content.

The law is content based because it requires the Court to examine the speech's subject in determining whether the statute applies. Courts apply strict scrutiny to content-based speech restrictions because the government may not "regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Content-based speech regulations are "presumptively invalid" and trigger strict scrutiny. *R.A.V.,* 505 U.S. at 382.

Determining whether a law is content based is simple when that law explicitly allows or forbids a speaker from expressing an idea. If a statute criminalizes the production and distribution of an online video based only on what that video depicts, the government is regulating the video based on its content. *United States v. Stevens*, 559 U.S. 460, 470 (2010). If an ordinance forbids citizens from picketing near a school unless the picket relates to a labor dispute, it regulates the content of picketing. *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

The law at issue is plainly content based; its definition of "conversion therapy" restricts talk therapy based on the content of the conversations between therapists and their clients. R. at 4. The law does not ban talk therapy or counseling outright, nor does it limit therapy based on when, where, or how it is carried out. R. at 4. It regulates the practice solely based on what the therapist says to the patient. R. at 4. This is the essence of a content-based restriction because compliance requires therapists to avoid communicating certain messages. *See Reed*, 576 U.S. at 163.

2. The law regulates speech based on the viewpoint the speech expresses.

The law violates Sprague's First Amendment rights because it regulates conversations between therapists and clients based on the viewpoints expressed in those conversations. N. Greene Stat. § 106(d), (e)(1)-(2). A viewpoint-based restriction censors speakers based on the idea they express and may allow the government to "drive certain ideas or viewpoints from the marketplace." *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). A public university may not pick and choose which student publications to fund based on the viewpoint each publication expresses. *Rosenberger*, 515 U.S. at 837. A school district that allows the public to use its facilities to host events but forbids a religious group from using them to show religion-focused films violates the First Amendment via viewpoint discrimination. *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

North Greene's law is a viewpoint-based speech restriction because it allows therapists to affirm a client's sexuality or gender identity but forbids the therapist from helping the client change those characteristics. R. at 4. In enacting this statute, North Greene is impermissibly favoring one side of a larger debate. If a client agrees with the state's position and seeks affirming counseling, they may seek help from a licensed therapist. But if a client deeply believes that their same-sex attraction is morally wrong, and they seek relief from a licensed therapist, they will be turned away.

The law criminalizes one belief while uplifting another. It is exactly the type of viewpoint-based speech restriction this Court considers an egregious violation of the First Amendment.

C. The Law Violates the First Amendment Because It Does Not Further the State's Interest in Protecting Children and is Underinclusive.

North Greene's law violates the First Amendment because it fails to advance the State's interest in protecting children and leaves equally harmful speech unregulated. Content- and viewpoint-based speech restrictions must be narrowly tailored to further a compelling state interest to satisfy strict scrutiny. *R.A.V.,* 505 U.S. at 395. The law fails to meet this high standard because the North Greene General Assembly failed to articulate an appropriate link between its interest in protecting children and banning "conversion therapy." The law is also not narrowly tailored to further the state's interest because it is significantly underinclusive of allegedly harmful speech.

1. The law does not further North Greene's interest in protecting children.

Banning "conversion therapy" does not further North Greene's mission of protecting children from harm. The interest in "protecting the physical and psychological well-being of minors" may be compelling. R. at 4; *see New York v. Ferber*, 458 U.S. 747, 756-57 (1982). But North Greene bears the burden of proving that its "conversion therapy" ban truly furthers that interest. *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 799-800 (2011). To satisfy strict scrutiny, North Greene must "specifically identify an actual problem" in need of solving and establish that "conversion therapy" harms minors. *See Brown*, 564 U.S. at 799 (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822-23 (2000)). North Greene must support that premise with more than "anecdote[s] and supposition." *Playboy,* 529 U.S. at 822.

Laws that protect children may overcome First Amendment scrutiny when the link between the speech at issue and harm to minors is sufficiently developed. State laws prohibiting the production, sale, and possession of child pornography restrict speech without violating the First

Amendment. *Ferber*, 458 U.S. at 774; *Osborne v. Ohio*, 495 U.S. 103, 110 (1990). This Court placed that entire category of speech outside the First Amendment's protection. *Ferber*, 458 U.S. at 774. In reaching this conclusion, it relied on legislative findings from "virtually all of the states and the United States" and scientific evidence from various sources indicating that using children as the subjects of pornography is harmful to children. *Id.* at 758 n.9.

Under strict scrutiny, when the legislature fails to establish the direct causal link between the speech regulated and the harm, the interest cannot justify the speech restriction. This Court refused to extend *Ferber*'s holding to include virtual child pornography because the causal link between virtual child pornography creation or possession and harm to children was "contingent and indirect." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250 (2002). The gap between interest and furtherance also doomed a California law that banned the sale of violent video games to children. *Brown*, 564 U.S. at 799. This Court found that California could not establish a "direct causal link" between violent video games and harm to minors. *Id*. Even though the state cited studies conducted by research psychologists, the Court found that those studies only established a correlative, but not a causal, relationship between the speech and harm alleged. *Id*. at 800-801.

North Greene fails to provide the requisite causal connection between conversion therapy and harm to minors. The General Assembly cited a single source in establishing conversion therapy as harmful: the American Psychological Association's (APA) opposition to "conversion therapy" in any form. R. at 4; American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts* 1 (2021). The mere opposition of a professional society to a particular practice is not sufficient justification for imposing broad bans on protected speech. *See Otto*, 981 F.3d at 869. Ruling on a similar "conversion therapy," ban, the Eleventh Circuit characterized this singular reliance as "arguing that majority preference can justify a speech restriction." *Id*. This is especially

relevant in relation to the discussion of Sexual Orientation Change Efforts (SOCE), because the American Psychiatric Association and other professional organizations officially considered homosexuality to be a mental illness until the 1970s. *Id.*; *see* Sara E. McHenry, *"Gay is Good": History of Homosexuality in the DSM and Modern Psychiatry*, 18 Am. J. Psychiatry Residents' J. 4, 5 (2022). Pointing to a professional organization's opposition to a particular type of speech is not sufficient to establish harm.

Even the APA cannot establish a true causal link between "conversion therapy" and harm to minors. The APA supports its position by claiming that "former participants in SOCE look back on those experiences as harmful to them" and "there is no evidence" to suggest that SOCE is effective. American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts* 3 (2021). And although the APA cites scientific studies that may show a correlation between SOCE and harm, it refrains from alleging that SOCE directly *causes* harm. *Id.* It claims that SOCE "put[] individuals at significant risk of harm" and clarifying that it "opposes SOCE because of their association with harm." *Id*. at 8. But it never reaches the causation that this Court requires to uphold a wide-ranging ban on speech. As this Court held in *Brown*, mere correlation is not enough to satisfy strict scrutiny, and neither is purely anecdotal evidence. 564 U.S. at 799.

Instead of protecting children from a harmful practice, North Greene is unconstitutionally censoring the ideas to which they are exposed, even if children directly seek out those ideas. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). North Greene's law fails to truly advance its interest in protecting its children.

2. The law is underinclusive because it fails to restrict speech that is equally harmful to North Greene's purported interest.

North Greene's interest in protecting children from the alleged harms of "conversion therapy" is undermined by the state's deliberate exemption of unlicensed and religious providers

from its ban. An underinclusive law fails to address speech that is equally or more harmful to the state's interest as the speech the law bans. *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994). Underinclusive laws are not narrowly tailored because they raise "doubts about whether the government is in fact pursing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 448 (2015) (quoting *Brown*, 564 U.S. at 802).

Finding that a law is underinclusive can be fatal to a state's effort to censor speech. In *Florida Star v. B.J.F.*, this Court found that state tort law prohibiting only "instrument(s) of mass communication" from disseminating the identity of sexual assault victims was underinclusive. 491 U.S. 524, 541 (1989). The Court found that a "smalltime disseminator" could inflict even greater harm than the mass media by communicating information about the victim's sexual assault to people close to the victim. *Id*. at 540. Florida's failure to close off this equally harmful avenue of communication rendered the law underinclusive. *Id*.

Even a statute drafted with the purpose of protecting minors may be struck down for being entirely underinclusive. In *Brown*, the Court found a California statute that banned the sale of violent video games to minors was underinclusive for several reasons. 564 U.S. at 802. First, the legislature banned only the sale of violent video games while leaving other forms of entertainment—like cartoons, books, and films—untouched. *Id.* The record indicated that those untouched mediums were just as harmful to minors as video games. *Id.* The legislature provided no persuasive reason for targeting video games, specifically, and children could still purchase violent video games with parental consent. *Id.* The legislature left equally harmful material easily accessible, so the law was underinclusive. *Id.*

Like California's violent video game law, North Greene's law is substantially underinclusive because it fails to fully restrict the speech the legislature deemed harmful to minors. The North

Greene legislature attempted to narrowly tailor its law by applying the ban to licensed healthcare providers and the specific practice of "conversion therapy." But the legislature's definition of "conversion therapy" includes the broad category of sexual orientation change efforts beyond those provided by a licensed therapist. R. at 4. Any "effort to…eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex" qualifies as "conversion therapy." N. Greene Stat. § 106(e)(1)-(2). The law exempts unlicensed therapists working "under the auspices of a religious denomination, church or organization" or "religious practices or counseling under the auspices of a religious denomination, church, or organization." *Id.* § 106(f). The law only applies to licensed therapists, but licensed therapists are not the only "conversion therapy" providers. *Id.* The purportedly harmful speech—any form of counseling that seeks to change sexual orientation—is still widely available. This alone makes the law underinclusive and undermines the state's interest.

North Greene may justify its law's narrowness as an effort to avoid violating the Free Exercise clause. The General Assembly may not pass laws with an "official purpose to disapprove of a particular religion or of religion in general." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). This concern has illuminated similar discussions on "conversion therapy" bans in other states. *See Otto*, 981 F.3d at 879 (Martin, J., dissenting). But the law goes beyond averring this basic principle. It allows licensed therapists not only to discuss their personal views on "conversion therapy" with minors, but to refer those minors to religious organizations that provide "conversion therapy" or providers in other states. R. at 4. The legislature turned healthcare providers into middlemen that *guide* the minors to what it considers to be a terrible harm. R. at 4. "That is not how one addresses a serious social problem." *Brown*, 564 U.S. at 802.

North Greene's law neither furthers the state's interest, nor is it narrowly tailored to achieve that interest. It fails to meet the demanding standard of strict scrutiny and is unconstitutional.

II. NORTH GREENE'S LAW IS NEITHER NEUTRAL NOR GENERALLY APPLICABLE

The First Amendment guarantees the free exercise of religion. U.S. Const. amend. I. This freedom protects "the ability of those who hold religious beliefs of all kinds to live out their faiths." *Kennedy v. Bremerton Sch. Dist.*, —— U.S. ——, 142 S. Ct. 2407**,** 2421 (2022). For most of this country's history, this Court has applied strict scrutiny to laws that burden religious practice. *See Lukumi*, 508 U.S. at 531-32. However, the Court added an asterisk to religious freedom in *Emp. Div. Dep't of Hum. Res. of Or. v. Smith. See* 494 U.S. 872, 878 (1990) ("*Employment Division v. Smith*"). After *Smith*, laws with "the incidental effect of burdening a particular religious practice" receive rational basis review if they are neutral and generally applicable. *Lukumi*, 508 U.S. at 531-32.

In 2019, North Greene added "[p]erforming conversion therapy" to its list of "unprofessional conduct," which subjects Sprague to professional discipline for adhering to his religious beliefs. *See* R. at 4. This law seriously undermines Sprague's free exercise rights, and those of his clients, by targeting and silencing religious practices. This statute is neither neutral nor generally applicable.

Under *Smith*, if a law is neutral and generally applicable with respect to religion, the Court will only uphold the law after determining that it is rationally related to a legitimate government interest. *Lukumi*, 508 U.S. at 531-32. Otherwise, laws that burden religious expression will face the exacting demands of strict scrutiny. ***Id.*** North Greene's law fails to be neutral or generally applicable because it predominately burdens religion.

A. North Greene's Law Is Not Neutral.

The initial step is to determine whether the law is neutral. *See Fulton v. City of Philadelphia*, —— U.S. ——, 141 S. Ct. 1868, 1877 (2021). A "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Id*. To determine whether a law is neutral, the Court reviews the purpose of the law to find

if it "restrict[s] practices because of their religious motivation." *Lukumi*, 508 U.S. at 533-34. Courts examine the statute's text, history, and operation to determine its neutrality. *Id.* at 534-36. The First Amendment prevents "subtle departures from neutrality." *Id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). North Greene's law fails this standard of neutrality.

The object of this law is to target religious practice. North Greene's law targets "conversion therapy," which is almost exclusively practiced by faith-based counselors. As the American Counseling Association admitted in 2013: "[c]onversion therapy…is a religious…practice." Joy S. Whitman et al., *Ethical Issues Related to Conversion or Reparative Therapy*, Am. Counseling Ass'n (2013). The North Greene General Assembly knew as much, which is why it implicitly acknowledged that this was religious speech by including a carve out for non-licensed speech under the auspices of a religious organization. R. at 4. However, this carve out does not hide the law's true objective, because it acknowledges that what the legislature regulated is predominantly religious speech. That the object of this law was to curtail religious speech is further demonstrated by its legislative history and actual operation.

1. The legislative history of this law demonstrates religious animus.

When lawmakers display hostility towards religion during the legislative or judicial process, the law fails to be neutral. *See Lukumi*, 508 U.S. at 540. The circumstances surrounding the enactment of North Greene's law show sharp animus towards religion. *See* R. at 8-9.

In *Lukumi*, the Court held that several city ordinances violated the Free Exercise clause because, in part, the laws were enacted with a "discriminatory object." 508 U.S. at 540. There, a Florida town attempted to stifle a principal religious practice of adherents to Santeria by effectively outlawing animal sacrifices made by those in the faith. *See id.* at 526-27. In passing these ordinances, city councilors and other city officials made comments calling the practice "foolish[]"

and a "violation of everything this country stands for." *Id.* at 541. Borrowing from its equal protection cases, the Court considered the "legislative…history, including contemporaneous statements made by members of the decisionmaking body" to find that the ordinances were created with a discriminatory object and thus failed to be neutral. *Id.* at 540-41 (internal citation omitted).

In *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n.*, the Court deemed comments made by members of the Colorado Civil Rights Commission improper under the Free Exercise clause. *See* —— U.S. ——, 138 S. Ct. 1719, 1729 (2018). The Commission, pursuant to a Colorado anti-discrimination statute, punished a bakery that refused–on religious grounds–to bake a cake for a same-sex wedding. *Id.* at 1723-25. During an adjudicatory hearing, the commissioners made comments disparaging the baker's faith and even described his religious beliefs as a "despicable piece[] of rhetoric." *Id.* at 1729. The Court found that the "official expressions of hostility" failed to give the baker the neutrality that the Free Exercise clause requires. *Id.* at 1732.

Understanding *Lukumi* and *Masterpiece*, the en banc Ninth Circuit recently held that improper comments by a school committee were not neutral. *See Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ*., No. 22-15827, 2023 U.S. App. LEXIS 24260 (9th Cir. Sep. 13, 2023) ("*FCA*"). There, a high school teacher discovered that the FCA required its leaders to affirm that marriage is proper only between heterosexual couples. *Id.* at *13. Members of the school's "Climate Committee," (a group of school leaders) discussed the controversy and determined that the FCA statement of faith clashed with the school's non-discrimination policy. *Id.* at *18-20. During the meeting, committee members expressed their belief that the FCA was "perpetuat[ing] ignorance" and "choos[ing] darkness." *Id.* at *64. The Committee took these thoughts to district leadership, resulting in the club losing its school registration status. *Id.* at *18-20. The Ninth Circuit, citing *Masterpiece and Lukumi*, held that the Committee's comments depicted

animus towards religion. *Id.* at *64. Even though this committee was "unlike *Masterpiece Cakeshop*" since "none of these statements were made during an actual adjudication," the court found that the role of the committee in advising the district failed neutrality. *Id.* at *65.

Lukumi and *Masterpiece*, complemented by *FCA*, show that North Greene's law's legislative history fails to be neutral. During consideration of the law, State Senator Pyle deprecated those who "worship" or "pray the gay away." R. at 9. Senator Pyle based his feelings on the fact that he received similar comments regarding his daughter. R. at 9. He ended his speech by admitting that this law would be difficult for his religious colleagues to support. R. at 9. These comments exhibit religious animus similar to what this Court has already deemed to fail neutrality. Just like the city council members in *Lukumi* or the commissioners in *Masterpiece*, the lawmakers in North Greene exhibited hate for religious people and belief. *See Lukumi*, 508 U.S. at 541; *Masterpiece*, 138 S. Ct. at 1729. Pyle's depiction of religion as the cause of his hurt feelings shows hostility towards the religious underpinnings of "conversion therapy." This blatant bias against religion fails to approach a modicum of neutrality, certainly less than required by *Lukumi* and *Masterpiece.*

The Fourteenth Circuit found this Court's precedent unpersuasive. Despite Pyle's hostile comments towards "worship" and "prayer," the lower court believed there was no anti-religious sentiment. R. at 9. These were "isolated comments" that did not match *Masterpiece*'s religious animus. R. at 9. The court said that this case differed from *Masterpiece* since those comments were made in an adjudication, not by legislators. It held that this Court "has 'long disfavored arguments based on alleged legislative motives.'" R. at 9 (quoting *Dobbs*, 142 S. Ct. at 2255-56).

The Fourteenth Circuit's decision cannot stand. First, the court failed to actually address how these comments were not about religion. It merely mentioned that they reflect Senator Pyle's experiences, but those were experiences *with* religion. *See* R. at 9. Second, the court conveniently

forgot to mention *Lukumi* in this section of its opinion. *See* R. at 9. Those discriminatory comments were made by city counselors acting in a legislative role. *See Lukumi*, 508 U.S. at 526-27, 540. In striking down those laws, this Court thought it proper to rely on "contemporaneous statements made by members of the decisionmaking body." *Id.* at 540. Third, the lower court failed to contextualize *Dobbs*, which discussed the role of determining motive via legislative history by looking at statements made by legislators across the country over a century. *See Dobbs*, 142 S. Ct. at 2256. The lower court's misapplication of the neutrality standard is highlighted by the Ninth Circuits' correct interpretation. *Compare* R. at 9, *with FCA*, 2023 U.S. App. LEXIS 24260, at *65. The legislative history behind North Greene's statute demonstrates a failure of neutrality.

2. The real operation of the law almost exclusively burdens religious practice.

The statute also fails the neutrality requirement because the "real operation" of the law almost exclusively prohibits religious speech. *Lukumi*, 508 U.S. at 535. Even if a law appears neutral, and its purposes might be unclear, it "nonetheless offend[s] the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). This law violates the neutrality principle because it predominantly impacts religious speech.

Lukumi clarified that "the effect of a law in its real operation is strong evidence of its object." 508 U.S. at 535. The city ordinances at issue in that case barred certain types of animal slaughter without reference to Santeria. *Id.* The Court determined the ordinances at issue in that case were not neutral because "almost the only conduct" affected were the practices of the Santeria. *Id.* The ordinances, along with their exceptions, effectively created a "religious gerrymander." *Id.* at 535-36. Disregarding that the law also barred unrelated practices, the Court held that a law can still fail neutrality even if it involves "multiple concerns unrelated to religious animosity." *Id.* at 535.

The Fourteenth Circuit discovered its own interpretation of operational neutrality. It thought that the law was operationally neutral because some people seek "conversion therapy" for secular reasons. R. 9-10. The Ninth Circuit used the same logic to protect similar statutes. *See Tingley*, 47 F.4th at 1087; *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016). *But see FCA*, 2023 U.S. App. LEXIS 24260, at *54-67 (showing that the Ninth Circuit has reversed course in its Free Exercise cases).

North Greene's statute fails to operate neutrally. In reality the people who administer and participate in "conversion therapy" are predominantly religious. The North Greene General Assembly relied on the position of the APA when creating this law. R. at 4. And, as the APA has said, "most [conversion therapy] currently seem[s] directed to those holding conservative religious and political beliefs, and recent research on [conversion therapy] includes almost exclusively individuals who have strong religious belief." Am. Psychological Ass'n, *Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 25 (2009). As North Greene's source shows, conversion therapy is sought and given "almost exclusively" by religious people. *Id.*

The Ninth and Fourteenth Circuit misapplied the operational neutrality standard. Those courts found that, because secular speech would also be somewhat affected by these laws, then its operation must be neutral. *See Tingley*, 47 F.4th at 1087; R. at 9. Yet, this is exactly what *Lukumi* counsels against. *See* 508 U.S. at 535. Even when a law might implicate other conduct, the actual operation can show an "impermissible attempt to target…religious practice." *Id.* The lower courts failed to consider that the law affects essentially only religious speech.

The actual operation and legislative history of this law show that the object of the statute is not neutral. Instead, the legislature sought to create this law to burden religious practice. Without neutrality, *Smith* does not apply, strict scrutiny does. *See id.* at 531-32.

B. North Greene's Law Is Not Generally Applicable.

Under *Smith*, a state's law will not get rational basis review unless it is generally applicable. *See* 494 U.S. at 878. A law can fail this requirement in two ways. First, if it allows the State to consider the reason for a person's conduct by providing "a mechanism for individualized exemptions." *Fulton,* 141 S. Ct. at 1877 (internal quotation marks and citation omitted). Second, if it bars religious conduct but allows similar secular conduct that undercuts the government's interest in promulgating the statute. *See id.* at 1878. North Greene's law fails both standards.

1. The law creates an unconstitutional mechanism for individualized exemptions.

A law is not generally applicable if it allows the government to create "a formal mechanism for granting exceptions…regardless whether any exceptions have been given, because it 'invite[s]' the government to decide which reasons for not complying with the [law] are worthy of solicitude." *Fulton*, 141 S. Ct. at 1870 (quoting *Smith*, 494 U.S. at 884). In *Fulton*, the Court held that Philadelphia's non-discrimination requirement in its city contracts failed to be generally applicable because it included "a formal system of entirely discretionary exceptions." *Id.* at 1878. The City had a contract for foster care referrals with a Catholic charity, under which the organization would help the City place children with families. *Id.* at 1875-76. Because of its faith, the charity refused to place children with same-sex couples. *Id.* The City's standard foster care contract barred rejection of a family based on sexual orientation "unless an exception is granted by the Commissioner…in his/her sole discretion." *Id.* at 1878. The Court found that the provision created an impermissible formal mechanism because the government was invited to consider the reasons for the charity's actions. *Id.*

In *FCA*, the Ninth Circuit properly applied this precedent and held the school district's policy violated the general applicability standard. *See* U.S. App. LEXIS 24260, at *50-54. The district had a non-discrimination policy for school clubs, yet it still retained the ability to grant

exemptions to student groups. *Id.* at *51. The court found this system comparable to *Fulton*, stating "that the *mere existence* of a discretionary mechanism to grant exemptions can be sufficient to render a policy not generally applicable." *Id.* (emphasis added).

Similar to *Fulton* and *FCA*, North Greene creates a "formal mechanism for granting exemptions that" tempts government discretion. *Fulton*, 141 S. Ct. at 1870. The statute bars "conversion therapy" where a therapist "seeks to change an individual's behavior." N. Greene Stat. § 106(e)(1). Yet, the State allows the counselors to engage in "identity exploration" with their clients while subjecting those engaged in "conversion therapy" to disciplinary actions. R. at 4. The mechanism that the State has concocted provides those who dole out "disciplinary action" the opportunity to consider a counselor's religious persuasions. The law invites a disciplinary body to consider the religious speech of a counselor and decide if this therapist's speech is "worthy of solicitude." *Fulton*, 141 S. Ct. at 1879. If a counselor were to *mention* the word "prayer" in a session, there is no doubt that a regulator would consider this comment during a disciplinary review. The very existence of this mechanism means the law fails to be generally applicable.

2. The law bans religious speech while allowing comparable secular speech.

Laws are not generally applicable when they "treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, —— U.S. ——, 141 S. Ct. 1294, 1296 (2021). Courts consider the asserted government interest when determining if secular and religious activities are comparable. *Id.* Further, the inquiry turns on the risk posed by the secular conduct, not the reasons behind the speech. *Id.* at 1298. In *Tandon*, the Court found California's COVID-19 gathering restrictions provided favorable treatment to secular activities. *Id.* at 1296. The state's regulations created stricter rules for at-home religious services but eased those burdens for secular gatherings. *Id.* at 1297. There was disparate treatment because the state could not explain why the

harms of the religious activity were greater than that of the secular actions. *Id.*

North Greene's law does explicitly what this Court forbids. The statute bans "conversion therapy" but allows "psychotherapies that provide acceptance" to minors. N. Greene § 106(e). In doing so, the State has barred predominately religious speech, but allowed secular speech focused on acceptance and support. According to the legislature, the disparate treatment is necessary because it must protect minors from this "harmful" therapy. R. at 4. Yet, the state cites the APA which "conclude[d] that it ha[d] 'no clear indication of the prevalence of harmful outcomes among people who have undergone' [conversion therapy]." *Otto*, 981 F.3d at 869. The State failed to heed the command of this Court in *Tandon*: "[w]here the government permits [secular] activities to proceed…it must show that the religious exercise at issue is more dangerous than those activities." *Tandon*, 141 S. Ct. at 1297. And according to the APA, there is no clear evidence that the predominantly religious "conversion therapy" creates these harmful outcomes. *See Otto*, 981 F.3d at 869. The State's disparate treatment shows that this law is not generally applicable.

North Greene's statute fails to be neutral or generally applicable. As a result, the State must pass strict scrutiny. *See Lukumi*, 520 U.S. at 546. North Greene fails to find refuge in strict scrutiny, and so, this Court should find that the law offends the Free Exercise clause. *See supra* Section I(C).

III. THIS COURT SHOULD OVERRULE *EMPLOYMENT DIVISION V. SMITH*

If this law is neutral and generally applicable, then *Smith* must be overturned. *Smith* fails to properly interpret the Constitution and has permitted governments to improperly regulate religious practice. If *Smith* survives, North Greene will be able to regulate speech almost exclusively related to religious practice. In *Smith*, the Court held that Oregon could bar the religious practices of the Native American Church. 494 U.S. at 874. The State outlawed the possession of peyote, which is used in the sacramental practice of the Church. *Id.* This ban led to the respondents' denial of state

unemployment benefits. *Id.* The Court held that a "permissible reading" of the First Amendment allowed a state to prohibit the exercise of religion if the law was neutral and generally applicable. *Id.*

Analyzed under the lens of "original meaning and history," *Smith* fails to accurately interpret the Constitution. *See Fulton*, 141 S. Ct. at 1888. This Court has recently placed a necessary emphasis on the need to align constitutional interpretation with text and history. *See* Kennedy, 142 S. Ct. at 2129-31; *see also N.Y. State Rifle & Pistol Ass'n v. Bruen*, —— U.S. ——, 142 S. Ct. 2111 (2022). *Smith* fails to properly interpret the text and history of the First Amendment.

First, *Smith* hardly acknowledges the text of the First Amendment, except to mention that its holding is a "permissible reading" of the Constitution. *See Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring). *Smith*'s reading ignores the unequivocal and categorical language of the Constitution. The "normal and ordinary meaning" of the text at its ratification, and today, simply means that the government cannot "hinder[] unrestrained religious practices or worship." *Id.* at 1896. *Smith*'s reading of the text impermissibly relaxes the standard for neutral and generally applicable laws.

Further, *Smith* fails to comport with the proper historical understanding of the First Amendment. The pre-enactment history of the Free Exercise clause demonstrates the founding generation "universally said [free exercise of religion is] an unalienable right." Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1456 (1990). Further, the Framers expected the Constitution to require compelled religious exemptions. *Id.* at 1415. Yet, *Smith* blatantly undermined this history by creating a regime that permitted governments to deny religious freedom.

Not only does the original meaning of the First Amendment highlight *Smith*'s problems, but the Court has strong grounds for overturning the decision. The doctrine of *stare decisis* is "'not an inexorable command'" and adherence to precedent is "is at its weakest when [the Court] interpret[s]

the Constitution." *Janus v. AFSCME, Council 31*, —— U.S. ——, 138 S. Ct. 2448, 2478 (2018) (internal quotation marks and citations omitted). The Court considers several factors when deciding to overrule precedent. It will evaluate the quality of *Smith*'s reasoning, the workability of *Smith*'s standard, *Smith*'s consistency with the Court's precedents, and new developments. *Id.* All of these factors weigh heavily against protecting *Smith*.

A. *Smith*'s Reasoning is Hopelessly Flawed.

The reasoning underlying *Smith* suffers interpretive flaws and relied on faulty precedent. *Smith* failed to reconcile its reading with the text and history of the Free Exercise clause, as discussed above. But the problems for *Smith* do not stop there. Another glaring flaw is *Smith*'s reliance on *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), precedent that was overruled 47 years earlier. *See Fulton*, 141 S. Ct. at 1912; *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Gobitis*). Reliance on bad precedent, and a blatant misunderstanding of text and history, demonstrate *Smith*'s flaws.

Additionally, the *Smith* Court had to explain away other valid precedents to allow them to survive under the new rule. In *Yoder*, the Court held that a Wisconsin law requiring children to attend school after eight grade unconstitutionally infringed on the religious beliefs of Amish and Mennonites communities. 406 U.S. at 207-10. Even though the law was neutral and generally applicable, it still violated the Constitution because "unduly burden[ed]" religious rights. *Id.* at 220. *Smith* insisted that *Yoder*, and other cases that invalidated neutral, generally applicable laws, often contained additional constitutional issues. *Smith*, 494 U.S. at 881. But this "hybrid rights" theory is controversial and "largely swallow[s] up *Smith*'s general rule." *Fulton*, 141 S. Ct. at 1915.

B. *Smith* is Severely Inconsistent with this Court's Precedent.

Smith is inconsistent with precedents that came before and after it. Two cases before 1990

highlight these inconsistencies. First, is *Smith*'s inconsistency with *Yoder*, as explained above. Second, is *Smith*'s treatment of the cornerstone Free Expression case that came before it: *Sherbert v. Verner*. 374 U.S. 398 (1963). There, the Court held that the California's employment commission violated the Free Exercise clause, when it decided there was "good cause" to deny benefits to a claimant because she would not work on Sunday for religious reasons. *Id.* at 399-403. In striking down the law, the Court instituted the Free Expression standard that would reign supreme until *Smith*: a law that substantially burdens religion must face strict scrutiny. *Id.* at 403. *Smith* tried to cabin this holding by explaining that this test had really only applied in the unemployment compensation context. *See Smith*, 494 U.S. at 883. However, nothing in *Sherbert* constrains its holding the way *Smith* does.

Likewise, *Smith* is inconsistent with almost all of the precedent to follow. *See Fulton*, 141 S. Ct. at 1915-17 (collecting cases). As Justice Alito's *Fulton* concurrence highlights, *Smith* conflicts with cases dealing with special exemption requirements in the Americans with Disabilities Act. *Id.* at 1916 (citing *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012)). Further, the concurrence points out the disparities between *Smith* and Free Speech cases that permitted exemptions for generally applicable laws. *See Fulton*, 141 S. Ct. at 1916 (citing *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)). These two examples, with *Sherbert* and *Yoder*, spotlight *Smith* as an inconsistent outlier with rest of this Court's jurisprudence.

C. *Smith* Created an Unworkable Rule.

Smith's rule remains unclear and unworkable. There is disagreement about the meaning and application of the neutrality and general applicability standard. Courts generally understand neutrality and general applicability to be related prongs but still apply them separately. *See Lukumi*, 508 U.S. at 531, 542. However, Justice Scalia (*Smith*'s author) suggested that neutrality and general

applicability were more like two points on a sliding scale. *See id.* at 557-58 (Scalia, J., concurring). Three years after this Court decided *Smith*, it could not agree on how to apply it.

Additional problems arise when determining if the aim of a law was to burden religion. *See Fulton*, 142 S. Ct. at 1918-19. What evidence can courts draw on to determine the goal? Can they look only at adjudications, as the Fourteenth Circuit suggested, or can they also look at legislative history? *Compare* R. at 9, *with Stormans, Inc. v. Wiesman*, 579 U.S. 942, 948 n.3 (2016) (Alito, J., dissenting from denial certiorari) ("It is an open question whether a court considering a free exercise claim should consider evidence of individual lawmakers' personal intentions.").

D. Further Developments Since *Smith* Favor Overruling the Decision.

The developments since *Smith* counsel in favor of overturning it. *Smith*'s holding led Congress to attempt to restrict it by passing the Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act. *See Fulton*, 142 S. Ct. at 1923. While these laws are in effect, they have also been partially abrogated. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). In conjunction with the case law that followed *Smith*, these developments leave courts with a foggy and unclear test for vindicating one the most fundamental human rights.

All of the *stare decisis* factors weigh in favor of overruling *Smith*. Doing so will vindicate the rights of Sprague, and millions of other religious Americans, to believe and practice their faith.

CONCLUSION

The fundamental promise of the First Amendment is that every American can live according to their conscience by speaking their mind freely and practicing their faith. North Greene has introduced a law that quashes the ability of faithful healthcare providers to have frank and open conversations with their patients. The law violates the First Amendment, and the Petitioner respectfully requests that this Court overturn the decision of the Fourteenth Circuit.