No. 23-2020

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE

Respondent.

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

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Brief of Petitioner

Team # 11

Questions Presented

I. Under the First Amendment of the US Constitution, does a law that censors conversations of conversion therapy between therapists and clients labeled as "unprofessional conduct" violate the Free Speech Clause?

II. Under the Free Exercise Clause of the First Amendment of the US Constitution, is a law that primarily burdens religious speech neutral and generally applicable, and, if so, should the Court overrule *Employment Division v. Smith*, 494 U.S. 872 (1990)?

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Other Authorities

Opinions Cited Below

The United States District Court for the Eastern District of North Greene found for the State of North Greene (State) in *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). That opinion denied Plaintiff's motion for preliminary injunction and granted the State's motion to dismiss for failure to state a claim. The United States Court of Appeals for the Fourteenth Circuit affirmed the District Court's decision in *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023).

Constitutional and Statutory Provisions Involved

This case concerns the First Amendment of the US Constitution, that, by way of incorporation via the Fourteenth Amendment, dictates that states "shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech…" U.S. Const. amend. I, XIV.

This case also requires interpreting the State's Uniform Professional Disciplinary Act, which outlines actions considered as "unprofessional conduct" for licensed healthcare providers and imparts disciplinary penalties for noncompliance, with the exception of therapists, counselors and social workers operating "under the auspices of a religious" group. N. Greene. Stat. § 106, 107, 110, 111.

Statement of the Case

Plaintiff-Petitioner Howard Sprague (Sprague) has dedicated over twenty-five years of his career to practicing as a licensed family therapist. R. 3. Among many areas of expertise, Sprague has offered his clients support with sexuality and gender identity. *Id*. He is a devout Christian man, striving to live his life in God's image and ground perspective he brings to clients in faith. *Id*. Throughout his career, Sprague has counseled numerous clients who share his religious beliefs. *Id*. Because of a mutual connection in faith, these clients intentionally seek out Sprague for his

guidance and perspective during the most difficult periods in life when family therapy is necessary. *Id*.

Sprague's technique consists entirely of talk therapy, providing his clients space to have nothing more than a conversation with him about issues plaguing their lives. R. 3. He does not prescribe medication nor require his clients to undergo any physical tests or similar activities as part of his talk therapy services. *Id*.

The State of North Greene-Respondent (State) recently enacted a law that eliminates healthcare providers (operating under a state license) from practicing all forms of conversion therapy to people under eighteen years of age. *Id*. The Uniform Professional Disciplinary Act (Act) outlines actions the State considers "unprofessional conduct," and in 2019, State statute § 106(d) officially added conversion therapy to the list of such conduct under the Act. R. 4. The statute defines conversion therapy as efforts "to change an individual's sexual orientation or gender identity" by targeting "behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex" *Id*. While the Act strictly forbids conversion therapy under this definition, it expressly permits services related to counseling around "coping, social support, and identity exploration and development" for those *not* looking to change sexual orientation or gender. *Id*. The Statute does not penalize unlicensed healthcare professionals or those working "under the auspices of a religious denomination" from practicing conversion therapy on minors, nor does it forbid licensed providers from discussing conversion therapy or referring patients to receive such therapy out of state. *Id*. Therapists are subject to disciplinary action if they engage in "unprofessional conduct," such as conversion therapy to minors, listed under the Act. *Id*. As a licensed professional in the State, and because the statute's exceptions do not indicate Sprague's beliefs constitute working "under the auspices of a religious

denomination," he stands to be penalized for performing the work many of his clients have relied upon. R. 4.

The State justified limiting talk therapy options to minors under a "compelling interest in protecting the physical and psychological well-being of minors," particularly those in the LGBT community. *Id*. The "compelling interest" stems from the American Psychological Association's (APA) position that conversion therapy subjects minors to a number of physical harms. *Id*. The State uses this perspective to support adopting the "affirming, multicultural, or evidence-based" approach as the only appropriate alternative to conversion therapy across all licensed professionals. *Id*.

In an effort to protect his Freedom of Speech and Free Exercise rights under the First Amendment and those of his clients who entrust him to provide vital services in their time of need, Sprague filed suit against the State in August, 2022, seeking to enjoin them from enforcing N. Greene Stat. § 106(d). R. 5. After opposing Sprague's motion for preliminary injunction, the State filed a motion to dismiss the complaint. *Id*. Despite concluding Sprague has standing to pursue these claims, the District Court denied Sprague's motion for preliminary injunction and granted the State's motion to dismiss, holding that a statute restricting conduct with an incidental effect on speech survived rational basis review. R. 5-7. Sprague appealed to the Fourteenth Circuit, where a divided bench affirmed the District Court decision. R. 5. Sprague once again appeals here. *Id*.

Summary of the Argument

This Court should overturn both the Fourteenth Circuit's incorrect decision that upheld the Act and its decision in *Employment Division v. Smith*, both of which silences constitutionally protected expression under the First Amendment of the US Constitution.

Despite the Act's title containing the word "uniform" and arbitrarily characterizing talk therapy as "conduct," the Act, when enforced, serves as a classic example of unconstitutional viewpoint discrimination, subject to the Court's highest scrutiny. Anyone choosing to practice conversion therapy must also possess a particular viewpoint about homosexuality, which in this case is informed by religious beliefs. By punishing licensed therapists who support their clients through a conversion therapy journey but not punishing similarly situated therapists who push gender and sexuality affirming care (the opposing viewpoint), the Act serves to silence people with Sprague's perspective and religious beliefs. By capriciously labeling a strictly verbal conversation as "conduct" that commands a lower level of scrutiny, the State masks what is–in reality–an unconstitutional, content-based restriction of pure religious expression in a law that is not neutral nor generally applied. Upholding the Act would set a dangerous precedent allowing governments to target unpopular viewpoints based on communicative content that would have a more-than-incidental effect on religion. Doing so would also overcome what should otherwise be successful legal challenges by erroneously categorizing speech to lower the level of scrutiny applied.

Appropriately analyzing the Act via strict scrutiny, the State's means are overbroad and do not serve its interest to protect members of the LGBT population. Relying on a very limited set of data whose authors openly oppose conversion therapy, the State justifies banning the practice as a whole (including *purely verbal* talk therapy and its religious underpinnings) to protect minors from only *physical* abuse. Yet, by allowing arguably less-qualified laypeople exempted from the statute's reach to perform the same physical acts, the Act does not eradicate this threat to minors either. As such, applying strict scrutiny would require overturning the Act, whose rationale does not justify silencing Sprague's constitutional rights under the First Amendment.

To ensure legislatures are unable to continue adopting seemingly neutral laws that effectively suppress viewpoints, this Court should also overturn its decision in *Employment Division v. Smith*. The very core of the Free Exercise Clause permits Americans to inform aspects of their daily lives with religious convictions. But under *Smith*, permitting legislation to institute blanket bans on religious practices naturally impedes upon the Constitutional right to worship in an unimpeded manner. Overturning *Smith* ensures individuals like Sprague need not choose between continuing to freely live out their faith or sacrificing their professional vocation.

For the aforementioned reasons, the Court should overturn the Act and reverse its decision in *Smith* to preserve our highly coveted First Amendment rights.

Argument

I. A law that silences licensed therapists based on what they say and why they say it violates the Free Speech Clause.

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. Under the free speech clause, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* The constitutional right of free speech was "intended to remove governmental restraints" from deciding what views may be voiced in our diverse population. *Cohen v. California*, 403 U.S. 15, 24 (1971). This power was granted on the hope that the use of such freedom will produce a more capable society and "that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* (citing *Whitney v. California*, 274 U.S. 357, 375-77 (1927)).

The Fourteenth Circuit determined that the Act does not violate Sprague's First Amendment right to free speech because it is a statute that restricts only "conduct" that has a mere "incidental" effect on speech, and, therefore, applied rational basis as the standard of review. R. 6-

7. Additionally, because it applied rational basis review, and determined that the Act rationally relates to the protection of LGBT youth, the statute was deemed constitutional. *Id.* at 7. However, the court erroneously determined that the Act primarily restricts conduct rather than speech by placing an inaccurate label on the speech in question. Therefore, its analysis was prematurely ended with the application of rational basis review. Thus, this Court should reverse the Fourteenth Circuit decision because allowing states to redefine recognized and protected categories of speech to offer it less protection negates the purpose of the First Amendment.

A. The Fourteenth Circuit categorized speech in a way that allows the State to surpass the Free Speech Clause.

The State's Act, regardless of the categorization as a professional "conduct" restriction by the Fourteenth Circuit, is a restriction of Sprague's speech, and this mere relabeling is insufficient to hide this fact. Certain categories of speech are afforded greater protection than others, thus, the first step in determining whether a law unconstitutionally restricts speech is assessing what exactly is being restricted. *See Cohen*, 403 U.S. at 18. For example, there are recognized categories of speech that are offered no First Amendment protection, such obscenity, incitement, or fighting words. *See U.S. v. Stevens*, 559 U.S. 460, 468 (2010). There are also certain categories where speech may be granted less constitutional protection if the law in question regulates commercial speech or professional conduct, even if that conduct "incidentally involves speech." *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373–74 (2018) ("*NIFLA*"). Aside from these specific categories, a law may only restrict speech if the government can show that the law is "narrowly tailored to serve a compelling state interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Determining what is being restricted may seem like a simple task; however, this step is the reason the Fourteenth Circuit erroneously applied rational basis review to the Act. Conduct

and speech can often become muddled, but "this Court's precedents have long drawn [the line between the two]." *NIFLA*, 138 S. Ct. at 2373.

Labeling some verbal communications as "speech" and others as "conduct" leaves the government open to manipulate what warrants First Amendment protection. *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (quoting *Wollschlaeger v. Gov., Fla.*, 848 F.3d 1293, 1308-09 (11th Cir. 2017). In *Otto*, the plaintiffs challenged a state regulation nearly identical to the State's Act which prohibited licensed therapists from engaging in Sexual Orientation Change Efforts ("SOCE") with minors. *Id.* at 859-60. The district court determined that the regulation restricted conduct with only an "incidental" restriction on speech. *Id.* at 864-65. The Eleventh Circuit reversed noting that a "governments' characterization of their ordinances" cannot "lower [the] bar" as to what constitutes speech, or the protections granted thereto. *Id.* at 861. The court cautioned that this relabeling runs an "inherent risk" of censorship and a way for the government to override First Amendment protections and "suppress unpopular ideas or information." *Id.* The court explicitly rejected the notion that a regulation only "incidentally restricts speech" if the "conduct" in question is premised *entirely* on speech and that with an incidental speech restriction there must be a "separately identifiable conduct" attached to it. *Id.* at 865-66.

The State attempts, as did *Boca Raton*, to surpass the First Amendment by categorizing speech as conduct. The Fourteenth Circuit notes the State does not lose its right to regulate the safety of treatments performed under a medical license merely because the treatment is performed through speech rather than "administering medications, setting bones, performing surgery, or the like." R. 6. Yet the court does not note another medical treatment that is composed *entirely* of speech. That is because there is none as there is a difference between physical medical procedures and talk therapy. As the court noted in *Otto*, the State's Act attempts to lower the bar for what kind

of speech is protected. To be a viable conduct regulating law that only "incidentally" restricts speech, the speech must be connected to a separate identifiable conduct and here there is none. Sprague only engages in conversations with his clients. This court should recognize, like the Eleventh Circuit, that therapy premised *entirely* on speech does not *incidentally* involve speech; it is speech. Furthermore, allowing laws such as the State's leave states wide open to suppress unpopular ideas, which Sprague's talk therapy undoubtedly is.

Additionally, this Court has been reluctant to uphold regulations that categorize speech and conduct outside of the traditionally recognized exceptions. *See NIFLA*, 138 S.Ct. at 2366 (stating that to allow relabeling pure speech into a new category of "professional speech" subjects speech to less First Amendment protection would grant a state power to "choose the protection that speech receives" by imposing "dispositive" labels). The State's labels minimize Free Speech protection. The State does just what this Court fears, it imposes dispositive labels. Furthermore, the allowance of such a statute would not only permit the State to eliminate the discussion of certain topics within its borders, but it could also encourage other states to follow in its footsteps depending on what topics certain states disagree with. Another state could just as easily ban therapy for transgender minors who are transitioning.

Finally, the Fourteenth Circuit substantially relied upon *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) in its opinion to base its decision that the Act regulates conduct. However, in doing so it ignored that this Court, and other federal courts, rejected *Pickup* by name. *See NIFLA*, 138 S. Ct. at 2371-72 ("Some Courts of Appeals have recognized 'professional speech' as a separate category of speech that is subject to different rules. See, *e.g., … Pickup v. Brown,* 740 F.3d 1208, 1227–1229 (9th Cir. 2014) … [But] [s]peech is not unprotected merely because it is uttered by professionals."). In fact, at least two circuits have explicitly rejected the holding in *Pickup*. *See*

generally, Otto, 981 F.3d 854; *King v. Governor of New Jersey*, 767 F.3d 216, 224-29 (3d Cir. 2014). This court should acknowledge that the Fourteenth Circuit's opinion directly opposes the decision in *NIFLA*. The State is minimizing protection on speech merely because it is uttered by a professional. The Act draws too thin of a line to allow a recommendation of conversion therapy but not the very speech that may provide the comfort and acceptance his willing clients seek. Therefore, the Act regulates speech.

B. An Act that cannot be enforced without considering the message of the words spoken in talk therapy is content-based.

The next step in determining the amount of protection granted to a law regulating speech is whether the law is discriminatory, which the State's Act is based on content. Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional. *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992). A regulation is content based if a government attempts to restrict speech based on the topic or the message expressed. *Reed*, 576 U.S. at 163 (citing *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552, 565 (2011)).

In *Reed v. Town of Gilbert*, the Town there issued a sign ordinance restricting the time and manner that signs could be posted based on the messages expressed. *Reed*, 576 U.S. at 163. For example, signs expressing political messages had different regulations than signs expressing religious messages. *Id.* at 160-61. The Town argued that the statute was constitutional because all types of signage had some kind of regulation on the time or manner in which they could be displayed. *Id.* at 159. This Court acknowledged that while all signs had some sort of restriction, the ordinance expressly offered different guidance for signs of a certain content as opposed to others and determined that because the ordinance singled out specific subject matter and treated them differently, the town's sign ordinance was content based on its face. *Id.* at 164.

Similarly, here there is such a facial distinction. The Act expressly notes that licensed therapists cannot engage in conversations which seek to "change an individual's sexual orientation or gender identity" including efforts to change "behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." N. Greene Stat. § 106(d). Thus, the Act cannot be enforced without considering the content of the conversations between Sprague and his clients. Like the signs in *Reed* where guidelines were dependent on the messages the topic expressed, whether a therapist is subject to disciplinary action under the Act is completely dependent on the words expressed in a therapy session. In other words, disciplinary action is dependent on the *message* of the therapy.

On the other hand, the State may argue that the Act is not content based because it allows unlicensed therapists or those acting under the auspices of a religious organization to engage in the conversations Sprague seeks to engage in. It may also argue that Sprague can still describe or recommend conversion therapy to his patients. However, the unconstitutionality of a content-based restriction is not mitigated by the allowance of related forms of expression. *See Otto*, 981 F.3d at 863-64 ("The First Amendment does not protect the right to speak about banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government."); *see also Citizens United v. FCC*, 558 U.S. 310, 340-41 (2010) ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content."). The First Amendment does not, and cannot, discriminate against unpopular messages or engage in a morality determination. Here, the State attempts just that. Thus, this argument is without merit, and the Act is discriminatory based on content.

C. An Act which allows similarly situated therapists with opposing views on sexuality to promote speech therapy without disciplinary action is viewpoint based.

Not only does the Act discriminate on content, but it also engages in viewpoint discrimination because only licensed therapists with specific views on homosexuality would engage in this kind of speech. Viewpoint discrimination targets not the message of the speech but the particular motivating ideology or the opinion or perspective of the speaker. *Reed*, 576 U.S. at 168-69 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). When the government engages in viewpoint discrimination "the violation of the First Amendment is all the more blatant." See *R.A.V.*, 505 U.S. at 391. And courts consider viewpoint discrimination an "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829.

The government cannot instill disfavored treatment on those with unpopular perspectives. *Id.* at 831. In *Rosenberger*, a university's student organization published a newspaper with a Christian viewpoint. *Id.* Although student publications normally qualified for funding, the University declined to offer funding determining that it was a "religious activity" within the meaning of the University's guidelines, and, therefore, the publication did *not* qualify for funding. *Id.* at 827. This Court held that the University violated the students' right of free speech. *Id.* at 837. It reasoned that because it was the specific perspective of the student organization that led to the university's refusal to grant funding, the university engaged in viewpoint discrimination. *Rosenberger*, 515 U.S. at 837. Furthermore, it was not dispositive that the University discriminated against an entire class of viewpoints (religion generally) because the "exclusion of several views…is just as offensive to the First Amendment as exclusion of only one." *Id.* at 831.

Like the University's guidelines in *Rosenberger*, the Act exhibits preferential treatment to therapists with certain views on gender and sexual orientation. North Green's General Assembly, in enacting the Act, specifically pinpointed the APA's position which "opposes conversion

therapy." R. 4. In other words, the State adopted a report that explicitly asserts an ideology. Conversations between a therapist and patient are allowed if they promote opposing views of Sprague's speech, while communications in line with Sprague's views, are subject to disciplinary action under the Act just as student publications with a religious viewpoint were excluded from funding opportunities in *Rosenberger*. Furthermore, it does not matter that the Act here prohibits conversion therapy "as an entire class," as opposed to only conversion therapy under a specific religion. As the court pointed out in *Rosenberger*, "the exclusive of several views" still displays viewpoint discrimination.

Viewpoint discrimination is even more clear if there are exceptions to a regulation that show bias. *See Otto*, 981 F.3d at 864 (noting that an exception to Boca Raton's conversion therapy regulation to allow "support and assistance to a person undergoing sexual transition" codifies the government's viewpoint that sexual orientation is mutable, but gender is not). Here, there is also such an exception. The Act explains that conversion therapy does not encompass speech that promotes "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 of gender identity." N. Greene Stat. § 106(d). Thus, speech that implores a minor to change their *sexuality* to align with their beliefs is subject to disciplinary action, while speech that implores a minor to change their *beliefs* (that homosexuality is not a sin), is allowed. The State asserts a viewpoint, beliefs are mutable and sexuality is not.

Furthermore, this Court recognizes that there are viewpoints that are implicit with the nature of the speech. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (holding that a law that prohibits burning the American Flag which was enacted to promote the flag as a symbol of national unity "assumes that there is only one proper view of the flag."). Similarly, the topic of conversion

therapy inherently possesses a viewpoint. This is especially apparent given the bill sponsor's statement that the Act was passed because you cannot "pray away the gay." R. 9. Conversion therapy inherently endorses a viewpoint, often accompanied by a religious motivation, that homosexuality is unnatural and that sexuality can be changed. A person would not engage in the speech that is restricted under the Act unless they possess certain views on homosexuality. It is of no consequence whether those views are unpopular. The government cannot attempt to prohibit speech on account of discomfort with its message. The Act, therefore, engages in viewpoint discrimination.

D. The Act is overbroad, does not eliminate the actual harm intended, and is not narrowly tailored.

Because the Act is both a content and viewpoint-based restriction on speech, the lower courts erroneously applied ration basis review and should have applied strict scrutiny. As previously stated, content and viewpoint-based restrictions are presumptively invalid. To survive the most demanding burden of strict scrutiny, these restrictions on speech can only be justified "if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. Whether an interest in compelling is largely guided by this Court's precedents. *Ward v. Rock Against Racism*, 491 U.S. 781, 796-97 (1989). For an act to be narrowly tailored it cannot "burden substantially more speech than is necessary" to further the compelling interest. *Id.* at 799.

This court recognizes a variety of sufficiently compelling governmental interests. *See, e.g.*, *U.S. v. Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000) (limiting children's access to sexually explicit material); *Burson v. Freeman*, 504 U.S. 191 (1992) (preventing voter intimidation and election fraud). There is no question that the protection of LGBT minors is a compelling state interest. However, while protecting minors is a crucial government interest, speech "cannot be suppressed

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). This Court made clear that it is not for the judiciary to decide what ideas children may be exposed. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794–95 (2011). Therefore, there is a compelling state interest, but a compelling interest on its own is insufficient to survive strict scrutiny.

The State all but concedes that the Act is not narrowly tailored. A law is only narrowly tailored if it is a sufficient fit to the "problem" it is intended to prevent. *See Ward*, 491 U.S. at 799 (stating that narrow tailoring "focuses on the source of the evils the [government] seeks to eliminate."). In its enactment, the Act's bill sponsors stated that the reason for such a bill was *not* to prohibit talk therapy but rather to prohibit forms of physical abuse that were historically a part of conversion therapy such as electroshock therapy and induced vomiting. None of these physical practices were or are a part of Petitioners practice. In fact, the Fourteenth Circuit's opinion acknowledges that "Sprague only engages in verbal counseling, or what some refer to as 'talk therapy,' with clients. He does not utilize any physical methods of counseling or treatment with his clients." R. 3. Therefore, the State burdens more speech than is necessary.

Furthermore, the APA report that the State substantially relies on is insufficient to show that the Act is narrowly tailored. The APA makes its position clear that it opposes conversion therapy, but it also admits that "sound data of the safety of SOCE are extremely limited." American Psychological Association, *Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 120 (2009). The Fourteenth Circuit also acknowledged that the State had evidence before it that "conversion therapy, and *particularly talk therapy*, is safe and effective." R. 7 (emphasis added). The reliance on a report with evidence to the contrary shows the adverse of a

narrowly tailored rule. *See Brown*, 564 U.S. at 800 (noting that "ambiguous proof will not suffice" to meet the high standard imposed by strict scrutiny).

Finally, the Act does not eradicate the threat to its compelling interest in protecting LGBT youth, which, as stated in *Ward*, is evidence that an Act that restricts speech is not narrowly tailored. Minors can still seek conversion therapy from unlicensed therapists or be sent across state lines to do the same. It would surely be better to engage in talk therapy with a licensed professional rather than someone without a medical degree who may very well engage in the physical treatments that the bill sponsors purported was the true target to eliminate. This Act not only stops professionals from talking with their clients, but it could also pressure a minor to seek more extreme measures. Surely, the proponents of such a bill wholly disfavor such actions. Therefore, the Act is not narrowly tailored, and it fails strict scrutiny.

II. A law that primarily burdens religious speech cannot be neutral or generally applicable, and, as such, *Smith* should be overruled for impermissibly infringing upon religious freedoms.

At the core of American jurisprudence is the understanding that the "Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). The Free Exercise Clause of the First Amendment protects "not only the right to harbor religious beliefs inwardly and secretly" but also protects "the ability of those who hold religious beliefs… to live out their faiths in [their] daily life….'" *Kennedy v. Bremerton School District*, 142 S.Ct. 2407, 2421 (2022). The government "may not enact laws that suppress religious belief or practice", *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 523 (1993), nor may it pass laws with the purpose to "restrict practices because of the religious motivations…." *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020), *cert. denied*, — U.S. —, 141 S. Ct. 894. It is not the place

of the government to determine what religious views are permissible – religious convictions "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981).

A. The statute prohibiting conversion therapy is not neutral nor generally applicable because its object is to target religious beliefs, and it overwhelmingly, if not exclusively, burdens Christian therapists.

The government violates neutrality where it acts in a "manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, *Pennsylvania*, 141 S. Ct. 1868, 1877 (2021). Where a state regulation may appear neutral on its face, it may nevertheless violate neutrality in application "if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). To determine governmental neutrality, courts look at the "whether the rules are operationally neutral", *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015), as well as "the background of the challenged decision, the sequence of events leading to its enactment, and the legislative or administrative history." *We The Patriots USA, Inc. v. Connecticut Off. of Early Childhood Dev.*, 76 F.4th 130, 145 (2d Cir. 2023).

In *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, a local religious organization (the Church) sought to strike down city ordinances which prohibited ritual slaughter of animals as a violation of the Free Exercise Clause. 508 U.S. 520 (1993). The Church engaged in animal sacrifice as one of its central forms of devotion, which was later targeted and prohibited by local ordinances. *Id.* The Court held there was a violation of the Free Exercise Clause because the ordinances' "have as their object the suppression of [the Church's] central element" and were not operationally neutral. *Id.* at 521. The Court opined "official action that targets religious conduct …cannot be shielded by mere compliance with the requirement of facial neutrality. The Free

Exercise Clause protects against governmental hostility which is masked, as well as overt." *Id.* at 534. The Court further stated that while the City had a valid interest to protect against animal cruelty and promote public health and safety, those interests "could have been achieved by narrower ordinances that burdened religion to a far lesser degree." *Id.* at 546.

Just as the ordinances in *Lukumi* had suppression of the Church's religious practices as its object, as evidenced by hostile remarks by its drafters, the State had the suppression of religious views regarding sexual identity and orientation as its object when prohibiting conversion therapy. The legislative record proves the general assembly's disdain for conversion therapy, as well as their view and understanding of it as a religious practice. One sponsor expressly stated his intent in demanding the bill's passage was to "eliminate the 'barbaric practices'" of conversion therapy. R. 9. Another sponsor categorized conversion therapy as an attempt to "pray the gay away" while further acknowledging that it presented a complicated issue due to "his colleagues… religious convictions." *Id.* The APA, of which the General Assembly relied upon in drafting this law, described conversion therapy as "a religious practice" and acknowledged the overwhelming, if not exclusive, use of conversion therapy by "individuals who have strong religious beliefs." R. 15. The State blatantly ignored evidence supporting Plaintiff's position which showed "conversion therapy, and particularly talk therapy, [was] safe and effective." R. 7. The totality of the legislative and administrative record is tainted with religious animosity towards religious practitioners and support a finding that the object of the law was to suppress religious viewpoints.

Similarly, where the ordinances were not operationally neutral in *Lukumi*, the State's statute prohibiting conversion therapy is also not operationally neutral. The burden of the *Lukumi* "ordinance, in practical terms, falls on [the Church] adherents but almost no others." *Lukumi*, 508 U.S. at 536. Likewise, while the prohibition applies to all licensed therapists in the State equally,

its impact is only felt by those holding "conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." R. 15. It cannot be said that the prohibition on conversion therapy has a mere "incidental impact" on religious freedoms when the application of such restrictions overwhelmingly, if not exclusively, burdens Christian therapists. *See Thunderhawk v. Cnty. of Morton*, 483 F. Supp. 3d 684 (D.N.D. 2020), rev'd and remanded sub nom. *Thunderhawk v. Morton Cnty.*, No. 20-3052, 2022 WL 2441323 (8th Cir. July 5, 2022) (explaining a law that burdens religious exercise cannot be deemed generally applicable "if it selectively imposes burdens only on a person's conduct that is motivated by religious belief.").

While the State may argue that the Act is neutral and generally applicable because it applies to both religious and non-religious uses of conversion therapy alike, this is not a persuasive argument. There is no evidence of any individual seeking conversion therapy for non-religious reasons. It is widely understood, as evidenced by the APA and General Assembly's comments, that conversion therapy is a religious practice. Non-religious therapists, while technically prohibited from practicing conversion therapy, are not impacted in application because it was not a form of therapy they would have engaged in to begin with. It cannot be said that a blanket ban is permissible when it applies to a wholly religious practice.

The State is attempting to circumvent the protections of the First Amendment under the guise of neutrality and general applicability by understating the impacts such legislation has upon religious therapists. It may not remedy its targeted suppression of these beliefs by being willfully blind or ignorant to the religious motivations behind therapists engaging in conversion therapy with their patients. It may not claim neutrality in the face of the masked hostility of the General Assembly, nor may it proclaim general applicability simply because the practice is outlawed for both religious and nonreligious purposes alike. The legislative and administrative record reflect

that the sponsor's of the State's bill understood its religious impact and failed to identify a secularly-motivated instance of conversion therapy. As such, the prohibition on conversion therapy is not operationally neutral and it overwhelming, if not exclusively, burdens religion and targets such practices due to their religious motivations. Where a law is not neutral or of general applicability, "it must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 546.

The State has a compelling interest in protecting the physical and psychological well-being of minors, particularly those within the LGBTQ+ community. However, the State could have achieved these interests through a more narrowly tailored law that had a far lesser impact on religion. The aim of the Act was to protect, in part, the physical well-being of minors by prohibiting the physical methods of conversion therapy, including electroshock therapy and inducing vomiting. Had the State simply banned these practices directly, the compelling interests would've been achieved by narrowly tailored means. However, the State instead chose to ban any *discussions* - oral or written - regarding changing a minor's sexual identity or orientation. This prohibition on talk therapy is overbroad and goes far beyond protecting the physical well-being of these patients. The Act is also underinclusive by allowing conversion therapy referrals to health care providers in other states. If the State's interest is in preventing children from exposure to physical harm, therapists would not be permitted to refer patients to receive such treatments in other states. Likewise, the Act fails to protect the psychological well-being of religious individuals seeking conversion therapy by depriving them access to "safe and effective" talk therapy. It is not enough for the State to have a compelling interest – those interests must be achieved through narrowly tailored laws with the least restrictive impact on religion. Here, the Act was overbroad and underinclusive, and encroached too deeply into the free exercise of religion to be permissible.

B. *Smith* is a marked departure from the traditional interpretation of the First Amendment and allows the government to infringe on religious freedom by engaging in religious gerrymandering to suppress religious beliefs.

The First Amendment ensures the protections of religious persons and organizations "as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018) (quoting *Obergefell v. Hodges*, 135 S. Ct., at 2607). While a state may pass laws pursuant to its police powers, "a state's interest, however highly ranked, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those protected by the free exercise clause of the First Amendment…." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The protections of the Free Exercise Clause prohibit even "subtle departures from neutrality on matters of religion," *Masterpiece Cakeshop*, 138 S. Ct. at 1719, to prevent "religious gerrymander[ing]" which targets "religious practices through careful legislative drafting." *Stormans*, 794 F.3d at 1076.

In *Employment Division v. Smith*, two employees were disqualified from receiving unemployment benefits after they were fired for their religious use of peyote, which had been criminalized by the State. 494 U.S. 872 (1990). The employees assert this action violated their First Amendment free exercise rights, as the use of sacramental peyote was used for religious purposes. *Id.* The Court determined that rather than adhere to the requirement for a "compelling governmental interest" when infringing on this fundamental right, it need only provide a legitimate interest furthered by a "neutral, generally applicable law." *Id.* at 873. If the restriction of religion is not the object, but rather a "merely incidental effect", the First Amendment would not be offended. *Id.* at 878.

The holding of this case is in direct conflict with the purpose of the Free Exercise Clause. Our nation was founded by individuals fleeing from religious persecution abroad. They understood the importance of preserving religious freedoms and prohibiting governmental interference with its exercise. Religious freedoms became "an essential element of liberty" and the Religion Clauses were drafted "precisely in order to avoid [religious] intolerance." *Smith*, 494 U.S. 872, 909 (1990) (Blackmun, J. dissenting). The *Smith* decision errs in departing from the historical and traditional appreciation for governmental non-interference with religious liberties, and in doing so, facilitates the occurrence of the exact infringements that the Clause sought to prevent. *See Smith*, 494 U.S. 872, 897 (1990) (O'Connor, J. concurring) (stating "the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community."). Mere compliance with facial neutrality is not, and should not, be enough to preserve an otherwise religiously discriminatory law.

It is a flagrant violation of religious freedoms for the State to force Plaintiff to choose between foregoing his religious convictions surrounding human sexuality or being subjected to disciplinary action for treating patients in accordance with these religious beliefs. *See Fulton*, 141 S. Ct. at 1876 (holding the city's requirement for a Catholic foster care agency to certify same-sex couples for adoption violated the Free Exercise Clause by forcing the agency to either "curtail its mission [of helping children] or to certify same-sex couples as foster parents in violation of its religious beliefs."); *contra Braunfeld v. Brown*, 81 S. Ct. 1144, 1147 (1961) (distinguishing a statute that imposes an economic burden on religious practitioners from one that would require

religious members to make the choice between "forsaking their religious practices or subjecting themselves to [] prosecution.").

It is precisely for this religious gerrymandering and careful legislative drafting of the statute before us that *Smith* should be overruled. Legislatures may not promulgate seemingly neutral laws with the covert objective of suppressing views they deem unfavorable. By allowing *Smith* to stand, the Court is furthering the erosion of religious freedoms and enabling the government to dictate what beliefs are acceptable in our society. Plaintiff professes to be a deeply religious individual whose work as a therapist is largely influenced and shaped by his religious convictions and beliefs. R. 3. If he is unable to live out his faith in daily life and in through his profession as a therapist, then the protections for religious freedoms set forth in the First Amendment are merely illusory. The decision in *Smith* allows legislatures to engage in religious gerrymandering through careful legislative drafting. It permits the degradation of one of the most central freedoms in the Constitution, under the guise of neutrality and general applicability. To overrule the decision in *Smith* is to restore the protections of the First Amendment and preserve the drafter's original intent.

Conclusion

For the reasons stated in this brief, and in the spirit of upholding the invaluable protections of the First Amendment, Plaintiff respectfully requests that this court overturn both the State's Act and *Smith*.

This is the 26th day of September, 2023.