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

BRIEF OF PETITIONER

Team 16
Counsel for Petitioner, Howard Sprague

Oral Argument Requested

QUESTIONS PRESENTED

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

II. Whether an analysis of history and tradition evaluates laws that primarily burden religious speech than the test from *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990), and if not, whether a law that promotes secular viewpoints and punishes religious ones can be neutral or generally applicable.

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Petitioner Howard Sprague respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fourteenth Circuit. The court of appeal's decision is *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023). The district court's opinion is unpublished and is *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022).

STATUTES INVOLVED

- Uniform Disciplinary Act, N. Greene Stat. § 106(d)
- Uniform Disciplinary Act, N. Greene Stat. § 106(e)(1)–(2) provides in relevant part:

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

- Uniform Disciplinary Act, N. Greene Stat. § 106 (f)(2)–(3) provides exceptions in relevant part to:

  > (2) Religious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers.
  >
  > (3) Nonlicensed counselors acting under the auspices of a religious denomination, church, or organization.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

I. BACKGROUND

A. Factual Background

1. North Greene amends the Uniform Professional Disciplinary Act to include practicing conversion therapy on minors under "unprofessional conduct."

To practice in North Greene, health practitioners must comply with the state requirements defined in North Greene General Statutes, Title 23, Chapter 45, referred to as the Uniform Professional Disciplinary Act. Record 3; *see* N. Greene Stat. § 105(a). As originally enacted, the Uniform Professional Disciplinary Act made no mention of conversion therapy. The Act requires health care providers to be licensed before practicing, defines unprofessional conduct, and outlines discipline associated with violating the Act. Any behavior the Act terms "unprofessional conduct" subjects the practitioner to disciplinary action. Record 3–4. The state generally exempts "therapists, counselors, and social workers who 'work under the auspices of a religious denomination, church, or religious organization.'" Record 4 (quoting N. Greene Stat. § 111).

In 2019, the North Greene legislature amended the statute to add "performing conversion therapy on a patient under age eighteen" to the list of "unprofessional conduct." Record 4; N. Greene Stat. § 106(d). Leading up to the passage of the conversion therapy amendment, State Senator Gomer Pyle, a bill sponsor, denounced practitioners who use "worship" as a means to address sexuality and denounced those who try to "pray away the gay." Record 9. He also noted the complexity of the issue for his religious colleagues and their difficulty in supporting the bill. Another bill sponsor referred to conversion therapy practices as "barbaric" though he directed his comments at physical treatment like shock therapy, not at talk therapy. *Id.*, *see also* Record 3, n. 3.

North Greene relied on the opinions of the American Psychological Association ("APA"), discounting evidence before it that "conversion therapy, and particularly talk therapy, is safe and effective." Record 7. The APA opposes conversion therapy and instead promotes the philosophy that therapists should engage in affirmation and acceptance. Record 4. The North Greene General

Assembly relied on APA statements that conversion therapy lacks demonstrated efficacy and notes what the APA terms "anecdotal reports" that those who have gone through conversion therapy suffer from some harm, including "depression, suicidal thoughts or actions, and substance abuse." Record 7. The state points to these claims to develop what it describes as a "compelling interest": protecting youth who are struggling with gender and sexuality issues from harms it believes are caused by conversion therapy. Record 4.

The amendment does not create a blanket restriction on the practice of, or communication about, conversion therapy. The amendment allows performing conversion therapy on individuals over eighteen. Record 4. Healthcare providers can express their personal beliefs on conversion therapy with the public and with their patients–including patients under the age of eighteen. *Id.* They can refer patients to health providers out of state or to nonlicensed religious counselors for conversion therapy. *Id.*

In addition to the Act's general exemptions contained in section 111, the amendment created specific exemptions from the conversion therapy prohibition. *See* N. Greene Stat. §§ 106(f), 111. North Greene included in the list "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene Stat. § 106(f)(2)–(3).

2. Howard Sprague is a "Christian provider of family therapy services."

Before anything else, Howard Sprague is a Christian. Sprague holds himself out as a "Christian provider of family therapy services." Record 3. Throughout his twenty-five-year practice, those who share Sprague's religious beliefs have sought him out, despite his practice not being attached to any religious institution. *Id.* His Christianity informs his professional beliefs: God designed human identity and gifted to each individual the sex they are born with; healthy and

beautiful human sexuality occurs between a man and woman within the confines of marriage; therefore, human belief and feeling should not supersede God's creation. *Id.*

Sprague engages exclusively in speech with his patients. Record 3, n. 3. His practice of "talk therapy" – defined as "verbal counseling" – existed before the 2019 amendment. Record 3. During his long practice, Sprague has assisted patients with sexuality and gender identity issues only through "talk therapy." *Id.*

B. Procedural Background

In August 2022, Sprague filed suit in the United States District Court for the Eastern District of North Greene, seeking to enjoin North Greene from enforcing section 106(d). Record 5. His complaint alleged that the statute violated his and his clients' rights protected by the First Amendment's Free Exercise and Free Speech clauses. *Id.* The district court denied Sprague's motion for preliminary injunction and granted North Greene's motion to dismiss for failure to state a claim. *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023).

On appeal, a divided Fourteenth Circuit Court of Appeals affirmed. *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023); Record 3. The majority held that under rational basis review, "[t]he State of North Greene does not lose its power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through administering medications, setting bones, performing surgery, or the like." Record 6–7. The majority rejected heightened scrutiny required for content-based regulations. *Id.*

The majority maintained rational basis review for its Free Exercise analysis, holding that section 106(d) is a law of general applicability under *Smith*. Record 7–8 (quoting *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990)). Strict scrutiny does not apply, the majority found, rejecting that certain "isolated comments" from North Greene legislators contained religious hostility. Record 8–9. Because the majority found 106(d) neutral on its face, and generally applicable, it survived rational basis review.

Judge Knotts dissented. To begin, Judge Knotts rejected the majority assertion that 106(d) regulated conduct, not speech. Record 12. Because the Act impermissibly restricted speech based on content and viewpoint, Judge Knotts found that an appropriate review required strict scrutiny. Record 12–13. Judge Knotts further argued that the court should presume content-based restrictions unconstitutional. Record 13 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). Under this presumption, a compelling governmental interest alone fails to satisfy strict scrutiny if it is not narrowly tailored. Record 14. Judge Knotts recognized a "strong interest in protecting children," but rejected the state's "ambiguous proof" of narrow tailoring. *Id.* (quoting *Reed*, 576 U.S. at 799).

Regarding Free Exercise, Judge Knotts accused the majority of ignoring how 106(d) "targets overwhelming, if not exclusively, religious speech." Record 14–15. This assertion rested on the APA's acknowledgment "that most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs," which it labeled "religious practice." Record 15. Judge Knotts insisted that under Supreme Court precedent, laws burdening religious exercise as a result of hostility toward religion must be set aside for failing neutrality and general applicability. Record 15 (citing *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022)).

SUMMARY OF THE ARGUMENT

Because North Greene Statute section 106(d) burdens the right to Free Speech and Free Exercise—plus a parent's right to raise their child as they see fit—it violates the Constitution and is invalid. To answer the question of which level of scrutiny applies to evaluate section 106(d)'s restriction on speech, this Court must only look to the statute's target: speech, not professional conduct. Speech-based restrictions can only overcome the presumption of invalidity by surviving strict scrutiny.

To analyze restrictions on the Free Exercise of religion, this Court should replace Smith with a test more faithful to the First Amendment and in line with this Court's Establishment Clause and Second Amendment tests. However, if *Smith* governs, section 106(d) must be neutral and generally applicable. It is neither. Section 106(d) favors secular viewpoints on gender and sexuality over religious ones. It provides express exemptions that undermine North Greene's protectionary interest. Moreover, the statute's vague language provides an environment for individualized exemptions. It is neither neutral nor generally applicable. Regardless of whether it satisfies *Smith*, section 106(d) restricts Free Exercise in conjunction with restrictions on other constitutional protections. Strict scrutiny applies either way.

Section 106(d) does not survive strict scrutiny because it is not narrowly tailored to serve a compelling government interest. North Greene's stated interest in protecting children is less compelling than a parent's interest in their child's religious salvation and preferred means of achieving that salvation, which 106(d) restricts. Additionally, section 106(d) fails to utilize the least restrictive means available and sweeps too broadly, restricting speech under the guise of conduct.

This Court should reverse the Fourteenth Court of Appeals and invalidate North Greene Statute section 106(d). It should deny North Greene's motion to dismiss and grant Sprague's motion for preliminary injunction.

ARGUMENT

The First Amendment clauses protecting the rights of Free Speech and Free Exercise "work in tandem." *Kennedy v. Bremerton Sch. Dist.,* 142 S. Ct. 2407, 2421 (2022); *see* U.S. CONST., amend I. They overlap in effect. The Free Exercise Clause protects all religious expression—including those communicated through speech; the Free Speech Clause protects religious expression not spoken. *Id.* North Greene Statute section 106(d) offends that overlap. In response, the two clauses "work in tandem" to protect those whose religious speech North Greene tramples.

North Greene has trampled the religious speech of Howard Sprague and other therapists who root their practice in religious viewpoints. Therapy cannot occur in silence. Nor can it occur void of viewpoint, religious or secular. North Greene prefers the latter and has legislated to punish those whose religious viewpoint on gender and sexuality conflicts with its own. Under current law, the resulting restrictions on constitutionally protected rights can only persist if the state can demonstrate that it has narrowly tailored section 106(d) to produce the least restrictive effect on religious speech and that its interest in protecting minors can be described as compelling. North Greene cannot do either.

Additionally, Sprague urges this Court to reconsider its use of *Smith* to evaluate Free Exercise restrictions. *See Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872 (1990). As noted above, Free Exercise and Free Speech work in tandem. *Kennedy*, 142 S. Ct. at 2421. So too do the Free Exercise and the Establishment clauses. Of the three, only Free Exercise fails to consider history in its analysis. It is time to change that. This Court should overrule *Smith* and replace the neutral and generally applicable test with one considering history and tradition, restoring a balance to First Amendment jurisprudence where the three clauses resume their "complementary purposes." *Kennedy*, 142 S. Ct. at 2426 (cleaned up).

First, the Court should invalidate North Greene Statute section 106(d). Second, the Court should overrule *Smith* and hold that an analysis of history and tradition more properly determines violations of the Free Exercise Clause. Third, if the Court does not invalidate section 106(d), after reviewing the facts and law *de novo*, and after crediting "all of the factual allegations in the

complaint as true," the Court should reverse the Fourteenth Circuit and deny North Greene's motion to dismiss because Sprague's complaint "states a plausible claim for relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). Finally, the Court should reverse the Fourteenth Circuit and grant the preliminary injunction.[1] The district court abused its discretion in denying the preliminary injunction: Sprague demonstrates the likelihood of success regarding the First Amendment claims, the likelihood he and others would suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 24 (2008).

I. BY TARGETING THE CONTENT AND VIEWPOINT OF THERAPIST SPEECH, SECTION 106(D) TRIGGERS STRICT SCRUTINY.

This Court should apply strict scrutiny to section 106(d) because it imposes North Greene's viewpoints onto conversations between therapists and their clients, restricting therapist speech and restricting that speech's content. A statute that restricts the content of speech is "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Specifically, statutes that target viewpoints commit "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Because section 106(d) targets therapist viewpoints and restricts the content of therapist, it is subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

A. Section 106(d) requires enforcement authorities to examine the content of therapists' speech to determine potential disciplinary action.

A hallmark of a content-based regulation is that "it requires enforcement authorities to examine the content of the message conveyed to determine whether a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*,

[1] While the Court did not ask for briefing on the district court's abuse of discretion, and this brief does not include any arguments to that effect, reversing the motion to dismiss implicates the district court's denial of preliminary injunction. See Otto v. City of Boca Raton, Fla., 981 F.3d 854 (11th Cir. 2020) (holding that a similar local ordinance violated the First Amendment and holding the district court abused its discretion in denying preliminary injunction as a result).

468 U.S. 364, 383 (1984)). Content restriction occurs if those enforcing section 106(d) must "examine the content of the message that is conveyed" to determine if a violation occurred. *See Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020) (quoting *McCullen*, 573 U.S. at 479); *accord Brokamp v. James*, 66 F.4th 374, 393–94 (2d Cir. 2023) (applying the same test to a New York statute).

To determine whether a therapist should be subject to discipline under section 106(d), North Greene must examine the content of the therapist's speech. In *Otto*, the Eleventh Circuit considered a similar statute to North Greene's and found it restricted speech based on content.[2] *Id.* at 864. The question in *Otto* turned on whether the content of a therapist's speech rendered it legal or not under the ordinance. *Id.* at 863. Because section 106(d) requires examination of a therapist's speech to determine whether a violation occurred, and because section 106(d)'s functional purpose is to target religious speech, it constitutes a content-based speech restriction.

Additionally, by providing exemptions to religious organizations, North Greene demonstrated that it understood conversion therapy to be a practice engaged in by the religious. Regulations that appear neutral on their face can restrict content "by its function or purpose" if achieving the same result as if discriminatory on their face. *Reed*, 576 U.S. at 163; *see City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022) (explaining the "function or purpose" test from *Reed*). Though section 106(d) does not target speech content on its face, it restricts content "by its function or purpose." *Id.* Section 106(d) does not reference religion or speech but provides exemptions for "nonlicensed [sic] counselors" operating "under the auspices of a religious denomination, church, or organization." N. Greene Stat. § 106(f)(2), (3). North Greene tipped its hand. By demonstrating an understanding of which organizations

[2] Boca Raton's ordinance "bars covered providers from treating minors with 'any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex.'" Otto, 981 F.3d at 859 (quoting the ordinance).

practice conversion therapy in non-counseling settings, North Greene knew that despite content-neutral language, 106(d) targeted specific content—religious speech.

States do not have the ability "to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 576 U.S. at 163 (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). A law targets content when it restricts speech "based on its communicative content" by regulating "the topic discussed or the idea or message expressed." *Id.* Section 106(d) targets content by restricting therapist speech based on whether that speech's "communicative content" provides conversion therapy. *Id.* Section 106(d) regulates therapist speech by restricting "the topic discussed or the idea or message expressed." *Id.* North Greene has restricted therapist speech "because of its message, its ideas, its subject matter, or its content." *Id.*

B. Section 106(d) restricts therapists' ability to give voice to their religious viewpoint on gender identity and sexuality.

Speech regulations discriminating against viewpoint are a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). The government cannot regulate speech when the rationale for the restriction rests on the "specific motivating ideology or the opinion or perspective of the speaker." *Id.* Neither can government "favor one speaker over another." *Id.* at 828.

Section 106(d) favors secular viewpoints while placing selective limitations on religious ones. In *R.A.V. v. City of St. Paul*, this court invalidated a statute that it found to favor certain viewpoints over others. 505 U.S. 377 (1992). The Court held that because the ordinance targeted "selective limitations upon speech," regardless of whether the Court found that speech reprehensible—in that case a cross-burning—it restricted viewpoint. *Id.* at 392–396.

Though North Greene may disfavor the religious viewpoints at the heart of conversion therapy, it cannot place selective limitations only targeting those viewpoints. As in *R.A.V.*, North Greene restricts therapists' ability to give voice to their religious viewpoints on gender identity and sexuality. *See* Record 3. At the same time, North Greene selectively promotes the APA's

viewpoint by codifying that view in its definitions.[3] *See* N. Greene Stat. § 106(e)(2); s*ee, e.g.*, Record 4 (describing legislative intent behind the statute). But *Rosenberger* prohibits the government from favoring one viewpoint over another. 515 U.S. at 828. Because North Greene promotes therapies that support the idea of non-traditional sexual orientation and gender identities over therapies supported by religious viewpoints, it "favor[s] one speaker over another." *Id*.

The *Otto* court held that Boca Raton's conversion therapy ordinance also favored secular viewpoints over religious ones. 981 F.3d at 864. The government can hold and promote an opposing viewpoint, but it cannot mandate that viewpoint through "bias, censorship or preference" regarding any other viewpoint. *Id.* (cleaned up). Because Boca Raton mandated its preferred viewpoints, the court determined that strict scrutiny was the appropriate test.

Section 106(d) mandates one viewpoint through bias, censorship, and preference while selectively limiting another. Holding those viewpoints is one thing; legislating to promote one viewpoint while suppressing others is another entirely. By dictating to therapists and their clients which viewpoints are allowed, North Greene has legislated a "more blatant" and "egregious form of content discrimination." *Rosenberger*, 515 U.S. at 829. As in *Otto*, North Greene's viewpoint discrimination triggers strict scrutiny.

C. Because *NIFLA* abrogated the professional speech doctrine and section 106(d) targets the content and viewpoint of therapist speech, strict scrutiny applies.

Contrary to the Fourteenth Circuit majority, speech is speech regardless of its professional context. The First Amendment only permits limited speech restrictions in "historic and traditional categories long familiar to the bar": obscenity, defamation, fraud, incitement, and speech integral

[3] Compare Record 4 ("The General Assembly pointed to the position of the American Psychological Association ("APA"), noting that the APA . . . "encourages psychologists to use an affirming, multicultural, and evidence-based approach" that includes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework."), with N. Greene Stat. § 106(e)(2) ("'Conversion therapy'" does not include counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity.)"

to criminal conduct. *See United States v. Stevens*, 559 U.S. 460, 468 (2010). Speech does not lose protection "because it is uttered by professionals." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2372–72 (2018) [hereinafter *NIFLA*] (cleaned up). The category of "professional speech" is not recognized by this Court. *Id.* at 2372.

North Greene's restriction does not fall into either category where this Court permits some regulation of professional conduct that incidentally burdens speech. *Id.* at 2373 (acknowledging restrictions on attorney speech in a commercial context; requirement that medical doctors provide certain medical information prior to a medical procedure). In *Otto*, the court determined that Boca Raton's similar ordinance did not incidentally burden speech; it *directly* burdened speech. 981 F.3d at 865 ("Here, what is being regulated is not, say, an advertisement for therapy, but the therapy itself."). The ordinance could not be connected to a regulation of "separately identifiable conduct." *Id.* Similarly, section 106(d) does not target "separately identifiable conduct," it directly targets speech.

A statute that directly targets speech receives strict scrutiny, not intermediate scrutiny. The Fourteenth Circuit relies on an improper reading of *NIFLA* to support application of intermediate scrutiny. The Fourteenth Circuit wrongly suggests *NIFLA* supports that some professional speech "is afforded less protection under the First Amendment."[4] Record 6, n. 6; *see Tingley v. Ferguson*, 47 F.4th 1055, 1074 (9th Cir. 2022). Yet *Tingley* acknowledges that *NIFLA* "expressly rejected the professional speech doctrine." 47 F.4th at 1073. Further, *Tingley* acknowledges that *NIFLA* struck down the "continuum framework" the Ninth Circuit relied on in *Pickup*, rejecting application of intermediate scrutiny for speech in professional contexts. *Tingley*, 47 F.4th. at 1073–74 (citing *Pickup v. Brown*, 740 F.3d 1208, 1227–32 (9th Cir. 2014), *abrogated by NIFLA*, 138 S. Ct. at 2371). Inexplicably, the Fourteenth Circuit relies on the concept of "a continuum between

[4] The categories cited by the majority and referenced by the Ninth Circuit in *Tingley* are categories listed by *NIFLA* and contained in the preceding paragraph of this brief: obscenity, defamation, fraud, incitement, speech integral to criminal conduct. Speech is not on that list.

speech and conduct" to apply intermediate scrutiny despite this Court's explicit rejection of that concept.

Oddly, after acknowledging *Pickup's* abrogation, the Ninth Circuit points to *Otto* as support that *NIFLA* did not abrogate the "continuum framework" on which the Fourteenth Circuit relies.[5] While recognizing that *Otto* held strict scrutiny applies to statutes like 106(d), paradoxically, the Ninth Circuit suggests that *Otto* recognizes *NIFLA* as allowing restrictions on professional conduct to the same. *Tingley*, 47 F.4th at 1077 (citing *Otto*, 981 F.3d at 865, 867). However, that misreads *Otto*.

Otto stated that "there is a real difference between laws directed at conduct sweeping up incidental speech on the one hand and laws that directly regulate speech on the other." 981 F.3d at 865. Labeling only certain speech as conduct "is unprincipled and susceptible to manipulation." *Id.* (cleaned up). Further, *Otto* relied on *NIFLA*'s direct criticism of cases applying lower scrutiny to statutes like section 106(d)—like *Pickup*. *Otto*, 981 F.3d. at 875. As a result of that criticism, the Eleventh Circuit held that it is bound under *NIFLA* to require strict scrutiny when evaluating statutes that directly impact speech. *Id.*

Section 106(d) directly impacts speech in the same way as the Boca Raton ordinance. Speech "uttered by professionals" does not lose protection under the First Amendment and is not gauged on a continuum. *NIFLA*, 138 S.Ct. at 2372–72. Because section 106(d) applies to speech uttered by professionals in the therapist setting, that speech deserves protection from the First Amendment. Strict scrutiny applies.

II. SECTION 106(D) VIOLATES THE FREE EXERCISE CLAUSE.

The Free Exercise of religion stands as a cornerstone of American democracy. The Constitution guarantees Americans "the right to believe and profess whatever religious doctrine one desires." *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). To earn

[5] *Tingley* suggest other circuits also only recognize a partial abrogation. 47 F.4th at 1076 (listing the Fourth, Fifth, and Sixth). However, the types of professional speech these circuits describe do not target viewpoint or content as the *Otto* ordinance did and section 106(d) does. *Id.* at 1076–77.

shelter under the First Amendment, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (quoting *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Violating the Free Exercise clause erodes our very foundations.

A. The *Smith* test fails to properly consider historical context and practices in evaluating Free Exercise claims and should be overruled.

Since the day *Smith* became law, it has met persistent criticism. In 2021, three justices stood ready to overrule it; Justice Gorsuch provided the box score: "No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1931 (2021) (Gorsuch, J., concurring in the judgment).

Smith's framework allows for absurd readings of "neutrality." Consider a hypothetical law that prohibits "steeples." A steeple is nothing more than an architectural design element that could appear on all buildings, religious and non-religious alike. And yet, religious buildings will bear nearly all the burden, despite neutral language in the prohibition. *See Fulton*, 141 S. Ct., at 1884 (Alito, J., concurring in the judgment) (arguing that the Volstead Act's prohibition on alcohol "would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States"). As long as the hypothetical steeple statute does not refer to religion, "no matter how severely [it] burdens religious exercise," *Smith* requires a finding of neutrality. *Fulton*, 141 S.Ct., at 1882 (Barrett, J., concurring). A test allowing such absurd results offers no real protection to religious speech.

The First Amendment provides double protection to religious speech. These twin protections should be afforded twin tests. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) ("That the First Amendment doubly protects religious speech is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent."). In *Kennedy*, this Court replaced the Establishment Clause test with a less convoluted analysis. *Id*. at 2428 ("the Establishment Clause must be interpreted by reference to historical practices and understandings" (cleaned up)). A natural reading of the First Amendment "would

seem to suggest the Clauses have 'complementary' purposes." *Id.* at 2426. Because the clauses have complementary purposes, it follows that they should be read according to the same principles, namely with "reference to historical practices and understandings." *Id.* at 2428. Clauses with complementary purposes should have complementary tests.

Pairing the Free Exercise test with the Establishment test parallels this Court's recent movement toward interpreting constitutional rights according to a "history and tradition" test. *See, e.g.*, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2129–31 (2022) (Second Amendment); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246–47 (2022) (Due Process). The *Bruen* majority specifically points to the First Amendment as justification with applying a history-based analysis—for the government to carry its burden on limiting speech it "must generally point to *historical* evidence about the reach of the First Amendment's protections." 142 S. Ct. at 2130. With a framework already in place, this Court should overrule *Smith* and rely "on text and history" with no need to "invoke any means-end test[s]."

B. If *Smith* governs, section 106(d) fails by violating neutrality and general applicability.

A law violates the First Amendment's Free Exercise protections when it fails to be neutral or generally applicable. *Smith*, 494 U.S. at 879. Section 106(d) fails both prongs. First, the statute fails neutrality by targeting speech-based practices primarily utilized by people of faith. Second, it fails general applicability by requiring government examination to create a system of de facto individualized exemptions.

1. Section 106(d) fails to be neutral by restricting religious speech and viewpoints while promoting secular ones.

Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature. *See Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1730–32 (2018). A statute can violate neutrality on its face or in its application. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422–23 (2022) (violating facial neutrality by prohibiting employees from engaging in religious conduct

specifically); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–40 (1993) (violating neutral application through the combination of multiple facially neutral ordinances). Section 106(d) appears facially neutral because it does not mention religion in its definition of conversion therapy; [6] however, it violates neutrality in its application.

a) Though facially neutral, section 106(d) demonstrates its objective by covertly targeting religion.

Government intrusion into religion cannot be shielded "by mere compliance with the requirement of facial neutrality." *Lukumi*, 508 U.S. at 534. Free exercise protects against covert targeting—so-called "religious gerrymanders." *Id.* at 535 (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)). "[T]he effect of a law in its real operation is strong evidence of its object." *Id.* In *Lukumi*, the city of Hialeah advanced secular reasons for a series of ordinances regulating animal slaughter unrelated to food consumption. *Id.* at 526–530. In reality, the Court held, the ordinances operated together to covertly target the Santeria religious practice of animal sacrifice. *Id.*

Despite North Greene's claims of neutrality, section 106(d) similarly targets religious practice through covert means. As evidence of neutrality, the state highlights legislative history suggesting those seeking conversion therapy do so for both religious and secular reasons. Record 9. However, the state relied heavily on the APA, which acknowledges that "most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." Record 15. Exemptions provided in sections 106(f) and 111 further evidence North Greene's awareness that conversion therapy extends primarily from religious practice. *See* N. Greene Stat. §§ 106(f), 111.

The legislative history reveals overt religious targeting, even if the statutory text does not. Why else would a bill sponsor denounce those who "pray away the gay" if state senators did not

[6] A statute lacks facial neutrality when its text refers "to a religious practice without a secular meaning discernable from the language or context." *Lukumi*, 508 U.S. at 533. Section 106(d) does not refer to any religious practice in its text.

have religion in mind as a target for 106(d)'s restrictions? Record 9. This echoes *Masterpiece Cakeshop*, where comments by Colorado's Civil Rights Commission denouncing a baker's adherence to his religious beliefs led to this Court holding that the Commission violated the First Amendment duty "not to base laws or regulations on hostility to a religion or religious viewpoint." 138 S. Ct. at 1729–31. Similarly, as demonstrated by the legislative history and the effect of its application, North Greene has based section 106(d) "on hostility to a religion or a religious viewpoint" by targeting those who treat sexuality and gender issues by engaging in religious-based conversion therapy. *Id.*

b) North Greene has adopted a secular position on human sexuality and punishes therapists and clients who share a contrary religious viewpoint.

Section 106(d) promotes a secular viewpoint by prohibiting therapists from engaging in a form of talk therapy primarily practiced by people of faith. Worse, North Greene enforces its view under threat of punishment—in essence picking "ideological winners and losers." *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017) (Pryor, J., concurring). Preventing the government "from picking ideological winners and losers is as important [here] as it is in any other context." *Id.* The First Amendment protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 450 (1988).

Therapists such as Sprague express a particular view of human sexuality when they engage in such therapies. Record 3 (describing Sprague's religious beliefs on gender and sexuality). By preventing licensed professionals from engaging in therapy rooted in religion, North Greene has adopted a contrary position on the nature of human sexuality. When the government abandons its duty—when it "is the one deciding which ideas should prevail . . . [t]he people lose." *NIFLA. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (cleaned up).

North Greene has abandoned its duty despite this Court's long precedent that government may not compel particular beliefs. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) (holding that requiring particular religious beliefs to hold public office violated the Free Exercise Clause). *Smith*

reminds us that the government may not punish religious expressions it believes to be false. 494 U.S. at 877 (citing *United States v. Ballard*, 322 U.S. 87, 86–88 (1944)). North Greene demonstrates intolerance of the beliefs of Sprague and those like him. When the results of a statute fall "almost exclusively" on counselors and patients "holding particular religious beliefs, that is some reason to suspect that the object of the law was to target those beliefs and to exclude those who maintain them . . . ." *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 169 (2d Cir. 2020). By limiting Sprague's ability to treat his clients in accordance with his religious beliefs and the religious beliefs of his clients, and by adopting a secular position in opposition, North Greene demonstrates that section 106(d) is not neutral.

2. Section 106(d) invites individualized exceptions and is underinclusive, undermining its stated interest in protecting children and rendering it not generally applicable.

A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Here, section 106(d) prevents therapists from treating people who want to "change behaviors or gender expressions." N. Greene Stat. § 106(d). Changing unwanted behaviors is a reason people seek therapy. The vague wording of the statute would leave what is considered "changing behaviors" up to the sole discretion of the enforcer. The inevitable outcome is that there will be an inquiry into the particular reasons for a person's conduct. This inquiry opens the door to individualized exemptions that preclude section 106(d) from being generally applicable.

General applicability also does not attach to statutes that "prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 542–46). In *Lukumi,* Hialeah's ordinances regarding animal carcasses did not impact secular use of animal killing: hunters, fishermen, restaurants, animal shelters, and those who raise their own food. 508 U.S. at 543–45. They only

impacted animal sacrifices as practiced by Santeria. *Id.* at 545. An authentic concern about a particular behavior would not fail by being underinclusive. *Id.* at 544–45.

Section 106(d) similarly fails by being underinclusive. North Greene provides exemptions to those in religious settings who are not licensed counselors or health care providers. N. Greene Stat. §§ 106(f)(2)–(3), 111. If North Greene genuinely believes all "conversion therapy" is harmful to minors, then exempting unlicensed religious counselors and clergy from regulation makes no sense. North Greene "undermines [its] asserted interests" in protecting minors by permitting conversion therapy outside of a licensed therapist's office. *Fulton*, 141 S. Ct. at 1877. As in *Lukumi*, failing to protect minors from conversion therapy *in all settings* belies North Greene's claim that section 106(d) is generally applicable.

C. Section 106(d) violates multiple constitutional protections, so even if it is neutral and generally applicable, the First Amendment still bars its application.

Neutral, generally applicable laws that involve the Free Exercise Clause "in conjunction with other constitutional protections" can violate the First Amendment. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 881 (1990). The majority in *Smith* noted that the circumstances in that case did not present "such a hybrid claim;" therefore, the Court did not apply the hybrid logic. *Id.* at 881–82. Instead, the Court provided a roadmap for how to identify when statutes such as section 106(d)—which might be in line with the *Smith* requirements—still fall afoul of the Constitution. *Id.*[7]

Statutes that restrict both Free Exercise and Free Speech violate the First Amendment regardless of satisfying neutrality and general applicability. *Smith* identifies *Cantwell v. Connecticut* as a case where Free Speech and Free Exercise violations led to Constitutional violations. 494 U.S. at 881. In *Cantwell*, the Court invalidated a statute providing solicitation licenses because licensing for nonprofit organizations, some of which were religious, rested on a

[7] Because *Smith* only illustrates that such hybrid Free Exercise violations exist and does not create a hybrid test in its holding, should this Court overrule *Smith*, the hybrid test would remain applicable regarding section 106(d).

licensing officer's potentially arbitrary decision. 310 U.S. 296, 304–07 (1940). Though the Court recognized the state's right to provide time, place, and manner restrictions on speech and the state's interest in protecting the public from fraud perpetrated "under the cloak of religion," the licensing scheme went too far. *Id.* at 304–05.

Similarly, North Greene infringes on the rights of parents. In both *Yoder* and *Society of Sisters*, the Court invalidated state compulsory education laws because they conflicted with the right of parents to educate their children how they see fit. *Smith*, 494. U.S. at 881; *see Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925). Both cases contained Free Exercise elements. In *Yoder,* Amish parents refused to send their children to high school out of concern for their and their children's religious salvation. 406 U.S. at 209. In *Society of Sisters*, the Court argued that parents should have the ability to send their children to religious schools like the one operated by Appellee. 268 U.S. at 531–32.

Section 106(d) violates the Free Exercise clause in conjunction with other constitutional protections. As argued *supra*, the statute violates the Free Speech clause by directly infringing on the speech of religious therapists like Sprague. It violates parental rights by prohibiting religious parents from seeking out talk therapy treatment from therapists who share their same religious values and viewpoints on sexuality and gender. Under the hybrid approach identified in *Smith*, section 106(d) violates the First Amendment regardless of whether it is neutral and generally applicable.

Ultimately, strict scrutiny applies. If section 106(d) is not neutral or generally applicable, strict scrutiny applies. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021) (citing *Smith*, 494 U.S. at 878–82) (acknowledging *Smith* held that laws found not to be neutral or generally applicable require strict scrutiny). If it is neutral and generally applicable, under the hybrid approach, strict scrutiny applies. *Smith*, 494 U.S. at 881.

III. BECAUSE IT IS NOT NARROWLY TAILORED AND DOES NOT SERVE A COMPELLING GOVERNMENT INTEREST, SECTION 106(D) VIOLATES THE FIRST AMENDMENT.

Under the analysis above, section 106(d) triggers the application of strict scrutiny for burdening the First Amendment guarantees to Free Speech and Free Exercise. North Greene claims a compelling government interest to "protect[] the physical and psychological well-being of minors;" however, in its attempt to effect that interest, North Greene cannot trample a parent's *more compelling* right to raise their child in accordance with their religion. Record 4; *see Wisconsin v. Yoder*, 406 U.S. 205, 207–08 (1972). Neither can North Greene pursue its stated interest at the expense of Free Speech and Free Exercise. By targeting an action that can entirely consist of "talk therapy" and which has roots in religious viewpoints, North Greene failed to narrowly tailor section 106(d). Record 3; *see Otto v. City of Boca Raton,* 41 F.4th 1271, 1274 (11th Cir. 2022) (holding that a therapy which "consists entirely of words" fails strict scrutiny). Because section 106(d) is not narrowly tailored to achieve a compelling government interest, *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015), this Court should invalidate it and reverse the Fourteenth Court of Appeal's judgment.

A. Restricting a parent's access to therapeutic means aligned with their religion is not a compelling governmental interest.

A state's interest cannot suppress speech solely because a legislative body disfavors it. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975). It does not matter if the state has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756–57 (1982). Further, a state's interest cannot coopt the position of a parent. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). A parent retains the authority to raise their children how they see fit. *Id.*

Parental authority includes adhering to certain religious beliefs. In *Yoder*, this Court recognized that a parent's religious belief requiring that their child not attend high school to preserve the child's salvation outweighed the state's interest in compelling school attendance. *Wisconsin v. Yoder*, 406 U.S. 205, 207–08(1972). Similarly, a parent's religious belief that issues

of sexuality and gender may impact their child's salvation outweighs any interest the state has in restricting access to that parent's preferred care.

Section 106(d) prevents parents with these types of religious concerns from seeking their preferred therapeutic means from therapists like Sprague. Many of Sprague's clients share his viewpoint that sex is assigned at birth, is "a gift from God," and should not be altered. Record 3. Parents with similar beliefs seek out Sprague to provide family therapy services from a Christian perspective precisely because Sprague makes his beliefs known. *Id.* Under *Yoder*, a state's interest in the well-being of children is not sufficiently compelling to supersede that of a parent—especially when the parent's interest is rooted in the religious salvation of their children.

B. Even if North Greene's interest outweighs that of parents, section 106(d) lacks narrow tailoring by restricting protected speech and failing to apply the least restrictive means possible.

North Greene cannot claim that it did not consider the religious origin of conversion therapy practice when crafting 106(d). First, comments made by bill-sponsor State Senator Golmer Pyle give the lie to any viewpoint-neutral claims. Pyle "denounced those who try to 'worship' or 'pray the gay away.'" Record 9. He also expressed an understanding that religious convictions would prevent other members of the legislature from supporting the bill. *Id.* Second, the exceptions contained within the statute demonstrate a concern for burdening religious speech. *See* N. Greene Stat. §§ 106(f), 111. While the North Greene Assembly structured the statute to avoid restricting conversion therapy practice in non-licensed therapy settings, the burden remains for licensed therapists who model their practices on their protected religious beliefs.

Sprague's practice of conversion therapy originates from his protected religious beliefs. Record 3. He believes that "the sex each person is assigned at birth is 'a gift from God' that should not be changed." Record 3. Under section 106(d), while working with a minor struggling with issues of sexuality and gender, Sprague can no longer express his professional viewpoint, which originates in his identity as "a deeply religious person whose work is influenced and informed by

his Christian beliefs and viewpoints." Record 3. Section 106(d) restricts the speech Sprague can use in the talk therapy he engages in with his clients.

Further, section 106(d) directly targets Sprague's speech. Sprague only engages in "talk therapy," a method entirely relying on verbal counseling and forgoing physical methods. Record 3, n. 3. Talk therapy has been shown by the APA to be "safe and effective." Record 7. It is not the "barbaric practice[] . . . using electroshock therapy and inducing vomiting" that concerned State Senator Floyd Lawson, another sponsor of the bill. Record 8–9. In targeting all manner of conversion therapy practice, North Greene has swept overbroad and directly restricted speech.

Even if this Court determines that section 106(d) regulates conduct and does not directly restrict speech, it sweeps impermissibly broad, capturing speech anyway. In *R.A.V. v. City of St. Paul*, this court invalidated a conduct-based statute that it found to discriminate against racist viewpoints. 505 U.S. 377 (1992). After a group of teenagers burned a cross in a black family's yard in violation of a local ordinance, the Court held that because the ordinance targeted the viewpoint that provoked the conduct, regardless of whether the Court found that viewpoint reprehensible, it impermissibly restricted speech by failing to be narrowly tailored. *Id.* at 392–396. North Greene may find the religious inspiration behind conversion therapy reprehensible, but it cannot discriminate against that viewpoint by attempting to regulate conduct.

Finally, North Greened erred by not using the *least restrictive means* to achieve its interest. *See Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (holding that the city's interests "could be achieved by narrower ordinances that burdened religion to a far lesser degree").

North Greene had at least three options in the medical treatment context from this Court's jurisprudence that would prove less restrictive on religion. First, North Green could have required parental notice before any therapist engaged in conversion therapy on a minor younger than eighteen. *See Hodgson v. Minnesota*, 497 U.S. 417, 450 (1990) (acknowledging that a notice

requirement applying to one parent before an abortion procedure does not overburden the patient's right). Second, North Greene could require a mandatory waiting period before initiation of any conversion therapy treatment. *See id.* at 449 (holding that a "48-hour delay imposes only a minimal burden" on a minor seeking an abortion). Third, North Greene could institute an informed consent requirement where therapists must inform individuals of any alleged harm caused by conversion therapy. *See Planned Parenthood v. Casey*, 505 U.S. 833, 882–83 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Any combination of these would support North Greene's stated interest without placing restrictions on religion.

North Greene attempts to explain away restrictions on speech by claiming the statute only restricts conduct. As in *R.A.V.,* by targeting conduct that ties so closely to a particular religious viewpoint, North Greene has strayed into targeting speech. Because it restricts religious speech, and speech in general, section 106(d) lacks narrow tailoring, and like the ordinance in *R.A.V.,* section 106(d) should be struck down.

CONCLUSION

For the reasons discussed herein, Howard Sprague respectfully requests this Court invalidate North Greene Statute section 106(d) and overrule *Smith.* In the alternative, Sprague respectfully requests the Court reverse the judgment of the Fourteenth Circuit Court of Appeals granting North Greene's motion to dismiss and denying Sprague's motion from preliminary injunction.

Dated this 26 day of September 2023.

Respectfully submitted,

Team 16
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