No. 23-2020

IN THE SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

THE STATE OF NORTH GREENE,

Respondent.

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

BRIEF FOR THE PETITIONER

Team 19

QUESTIONS PRESENTED FOR REVIEW

1. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause of the First Amendment when the law prohibits the practice of conversion therapy carried out through speech alone.
2. Whether a law that primarily burdens religious speech is neutral and generally applicable when the law bans therapy that is almost exclusively conducted by religious individuals and permits equally harmful secular conduct, and if so, whether this Court should overrule *Employment Division v. Smith.*

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CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves the First Amendment of the United States Constitution, which explicitly prohibits Congress from passing laws that hinder freedom of speech and religious exercise. Additionally, the Fourteenth Amendment of the United States Constitution asserts that no state can implement laws that restrict the rights and freedoms of American citizens. Therefore, the First Amendment applies to states through the Fourteenth Amendment.

STATEMENT OF THE CASE

I. Statement of Facts

Mr. Sprague is an experienced, Christian family therapist.

Mr. Howard Sprague has served the state of North Greene as a licensed family therapist for twenty-five years. R. at 3. During these years of service, Mr. Sprague has engaged in entirely speech-based therapy with his clients and has never used any physical methods of treatment. *Id.* While Mr. Sprague does not work for a religious institution, he is a "deeply religious person" who "grounds humanity in God's design." *Id*. Mr. Sprague "holds himself out as a Christian provider" and his Christian view of sexual relationships has inspired his work in the field of speech-based conversion therapy. *Id*. For example, Mr. Sprague believes that an individual's sex at the time of their birth should not be changed because it is a "gift from God." *Id*. These Christian values are

shared between Mr. Sprague and many of his clients. *Id*. Indeed, this commonality has encouraged clients to specifically seek his assistance for family therapy services. *Id.*

North Greene censors the speech and religious expression of its health care providers.

Recently, North Greene enacted N. GREENE. STAT. § 106(d),[1] which categorizes the practice of conversion therapy on minors by licensed healthcare providers as "unprofessional conduct." *Id.* at 3–4. Importantly, all health care providers in North Greene are required to be licensed in order to practice in the state. *Id*. at 3. Under this statute, licensed health care providers are subject to disciplinary action unless they practice "under the auspices" of religion or engage in speech that "does not constitute performing conversion therapy." *Id* at 3-4.

The text of §106(d) ambiguously defines conversion therapy as a "regime" to change the sexual orientation or gender identity of a client, "efforts" to alter expression of gender, or the elimination or reduction of same sex attraction. *Id* at 4. Under this broad definition, North Greene has prohibited their licensed health care providers from "practicing *any* form of conversion therapy on children." *Id*. at 3 (emphasis added). Alternatively, the law expressly condones providers who "provide acceptance, support, and understanding" to clients who are exploring gender identity or sexual orientation. *Id* at 4.

North Greene bases their law on speculation and opinion.

North Greene legislators assert that this regulation on the medical profession was enacted to protect the physical and psychological well-being of lesbian, gay, bisexual, and transgender youth from exposure to the serious harms of sexual orientation change efforts. *Id.* at 7. One of the sponsors of the North Greene law, Senator Floyd Lawson, stated that his intent for sponsoring the

[1] The full text of the statute is located in Chapter 45, Title 23 N. Greene "Uniform Professional Disciplinary Act."

bill was to eliminate "barbaric practices" and modes of treatment. *Id.* at 9. These "barbaric" treatments include electroshock therapy and induced vomiting. *Id.* Based upon limited personal experiences, some bill sponsors denounced those who try to "worship" or "pray the gay away" because they found conversion therapy to be ineffective and stressful on their own families. *Id.* Nevertheless, one senator openly acknowledged the law's disproportionate impact on Christian individuals by stating that his colleagues may not support the bill due to their religious convictions. *Id* at 9.

To support their assertion that conversion therapy is harmful to minors, North Greene primarily cites to the position of the American Psychological Association ("APA"). *Id*. at 4. The APA claims that therapy for minors should include "an affirming, multicultural, and evidence-based approach" that provides "acceptance, support, . . . and identity exploration and development." *Id.* However, when enacting the law, legislators were presented with and disregarded evidence that conversion therapy, and in particular "talk" therapy, is a safe and effective form of treatment. *Id*. at 7. Further, the APA itself has admitted that most conversion therapy is "directed to those holding conservative religious beliefs" and is utilized "almost exclusively [by] individuals who have strong religious beliefs." *Id*. at 15. Remarkably, the APA itself refers to conversion therapy as a "religious practice." *Id*.

II. Nature of the Proceedings

Mr. Sprague moved for a preliminary injunction seeking to enjoin the North Greene Law, alleging the law violates the Free Speech and Free Exercise clauses of the First Amendment. *Id.* at 5. The United States District Court for the Eastern District of North Greene denied Mr. Sprague's motion and granted North Greene's motion to dismiss. *Id.*

Mr. Sprague timely appealed. *Id.* The United States Court of Appeals for the Fourteenth Circuit explained that Mr. Sprague's Free Speech challenge failed because the law is rationally related to the legitimate government interest of regulating the medical profession. *Id.* at 10. The court also held that Mr. Sprague's First Amendment Free Exercise rights were not violated because the law was neutral and generally applicable. *Id.* The Fourteenth Circuit affirmed the district court's decision.

Mr. Sprague appealed the Fourteenth Circuit's decision, and the Supreme Court of the United States granted the Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

This Court should reverse the holding of the Fourteenth Circuit because North Greene's law violates the Free Speech Clause of the First Amendment. Because Mr. Sprague's practice of conversion therapy is entirely speech-based and not tied to any separate conduct, § 106(d) is a regulation upon speech alone. Further, the North Greene law regulates Mr. Sprague's speech based upon the message he conveys, rendering the law a content-based regulation upon speech. As such, the North Greene law is presumptively invalid, leaving the government to bear the burden of proof in establishing that the law is narrowly tailored to protect minors from harm. North Greene has not met their burden. While protecting children is a compelling government interest, § 106(d) fails strict scrutiny review because it is both over and underinclusive.

Furthermore, this Court should reverse the holding of the Fourteenth Circuit because North Greene's law regulating licensed therapy violates the Free Exercise Clause of the First Amendment. The law is neither neutral nor generally applicable because it overwhelmingly targets religious speech while permitting similar secular discussions. Therefore, the law violates the Free

Exercise clause and is subject to the hybrid rights doctrine, placing it under strict scrutiny review. Undoubtedly, the law fails strict scrutiny review because it purposefully targets religious speech.

This Court should also overturn *Employment Div. v. Smith* because *Smith* purports to limit the plain text of the Free Exercise Clause by creating an exemption for laws that the government deems neutral and generally applicable. *Smith* was decided contrary to decades of established precedent and has since been applied inconsistently to the detriment of religious freedom. This Court should return to the *Sherbert* rule and review any governmental regulation that encroaches on religious exercise under the strictest of scrutiny.

ARGUMENT AND CITATION TO AUTHORITY

I. NORTH GREENE'S LAW VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT BECAUSE IT PROHIBITS SPEECH ON THE BASIS OF CONTENT.

A. North Greene's law is a regulation upon speech because Mr. Sprague's entirely speech-based therapy is not conduct.

Under the First Amendment of the United States Constitution, North Greene's law prohibiting the practice of conversion therapy on minors is a presumptively invalid prohibition on speech alone. While North Greene attempts to categorize Mr. Sprague's practice of speech-based therapy as conduct, "the government cannot regulate speech by relabeling it as conduct." *Otto v. City of Boca Raton, Fla*., 981 F.3d 854, 865 (11th Cir. 2020). Such mislabeling "is unprincipled and susceptible to manipulation. *Id.* at 861 (*quoting Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017)). This Court has held that when a law targets conduct, and that conduct "consists of communicating a message," a higher standard of scrutiny should be applied.[2] *Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010).

[2] This Court held that communicative conduct should be reviewed under a standard higher than the intermediate scrutiny that this Court applied in *United States v. O'Brien* 391 U.S. 367, 377 (1968).

In *Otto v. City of Boca Raton, Fla.*, the United States Court of Appeals for the Eleventh Circuit invalidated a Florida law that proscribed speech-based conversation therapy. 981 F.3d at 854. There, the court recognized that regulations on conduct which incidentally sweep up speech are afforded lesser constitutional protection. *Id*. at 865. However, the court also noted 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." *Id*. Speech-based conversion therapy "consists entirely of words" and is not tied to any "separately identifiable conduct," so the law in question was held to be a direct regulation of speech. *Id*. Because "speech is speech," the law was reviewed under strict scrutiny and was invalidated under the First Amendment. *Id*. at 866.

In *Wollschlaeger v. Governor, Fla.*, the Eleventh Circuit held that an anti-harassment provision which prevented doctors from asking patients about firearm ownership violated the First Amendment. 848 F.3d at 1319. The court recognized that "harassment" has a common meaning that can include conduct. *Id*. at 1321. However, such harassing behavior can be "further delimited in scope through context and formal definitions." *Id*. Because the anti-harassment law itself was ambiguous and did not provide any further guidance, the court looked at the context of the law.[3] Id. at 1307. The law only applied during medical examinations of a patient. *Id*. Thus, the court determined that "harassment" referred to "questions or advice to patients" regarding firearm ownership. *Id*. As such, the court held that the law was a regulation upon speech, not conduct. *Id*.

This Court invalidated a law that criminalized disturbances of the peace by offensive conduct after an individual was convicted for the message he communicated. *Cohen v. California*,

[3] The anti-harassment provision of the Florida Firearm Owner's Privacy Act stated that "practitioners 'shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient about firearm ownership during an examination.'" *Wollschlaeger*, 848 F.3d at 1319.

403 U.S. 15 (1971). In that case, the defendant publicly protested by wearing a jacket inscribed with a profane message. *Id*. at 16. This Court reasoned that the law only punished the defendant for communicating with his jacket and for the offensive message that it conveyed. *Id*. at 18. Thus, the law was a regulation upon speech, "not upon any separately identifiable conduct." *Id*.

Further, this Court has clearly declined to recognize "professional speech" as a separate category of speech. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). Despite lower courts' attempts to categorize professional speech as conduct, speech does not receive diminished constitutional protection simply because it is spoken by a professional. *Id.*; see *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *abrogated by NIFLA* (where the court upheld a law preventing the practice of conversion therapy on clients under the age of eighteen because counselors' professional speech was entitled to diminished constitutional protection).

While this Court has afforded categories of speech lesser constitutional protection in rare cases, those instances have largely been limited to "fighting words," obscenities, incitement, speech integral to criminal conduct, or defamatory statements. *United States v. Stevens*, 559 U.S. 460, 468 (2010); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383(1992). Regardless, states have no authority to establish new categories of speech to receive diminished constitutional protection. *NIFLA*, 138 S. Ct. at 2372. As such, this Court has held that professional speech should be treated like any other speech and be subject to the full protection of the First Amendment. *Id*.

In this case, North Greene's law prohibits Mr. Sprague's ability to engage in entirely speech-based conversion therapy. R. at 3. The government attempts to mischaracterize Mr. Sprague's counseling as "conduct" in an effort to regulate his speech. *Id.* at 4. As the court in *Otto* pointed out, it is this very type of mislabeling that is impermissible and leaves the law vulnerable. 981 F.3d at 861, 865. To characterize Mr. Sprague's counseling as conduct when he never utilizes

any physical methods of treatment, would render many speech-based activities susceptible to regulation. R. at 3. For example, participation in protests, teaching, or book clubs—entirely speech-based activities—could then just as easily be subjected to government regulation under the guise of mislabeling speech as "conduct." *Id*. at 13. Notably, "if speaking to clients is not speech, the world is truly upside down." *Otto*, 981 F.3d at 866.

Mr. Sprague's case is analogous to the case in *Otto*, as both the Florida and North Greene law mislabel speech-based conversion therapy as conduct. Additionally, Mr. Sprague's speech is not incidentally swept up by a regulation of conduct, as it is not tied to any "separately identifiable conduct." 981 F.3d at 865. This is because Mr. Sprague's counseling is entirely speech-based; there is no conduct of Mr. Sprague's to be identified or regulated. R. at 3. Like the counseling in *Otto*, Mr. Sprague's practice of therapy is speech, affording it the full protection of the First Amendment.

Mr. Sprague's case is also similar to the Eleventh Circuit's decision in *Wollschlaeger* because the text of § 106(d) does not distinguish between speech therapy and therapy that *may* include conduct. Just as the act of "harassment" could include conduct, it is conceivable that the practice of therapy could also include conduct. However, like in *Wollschlaeger*, the context of a law can signify that a statute should be applied differently. Here, North Greene's law prohibits the practice of conversion therapy, but it ambiguously defines such therapy as a "regime" or "efforts" to change an individual's sexual orientation or gender identity. *Id.* at 4. Importantly, the law does not separate "talk" therapy from the "barbaric" conduct of electroshock therapy and forced vomiting that North Greene legislators feared. *Id.* at 9.

Thus, in the application of the law to Mr. Sprague, and to all North Greene counselors who engage in only "talk" therapy, the practice of therapy means the use of words alone. The text of the law acknowledges that conversion therapy is a speech-based practice because it provides an

exception for "*speech*" that is not considered conversion therapy. R. at 4 (emphasis added). Mr. Sprague's engagement in the practice of conversion therapy realistically means having conversations with his clients. As such, § 106(d), when analyzed contextually and in application to Mr. Sprague, is a regulation on speech, not conduct.

While the opinions in *Otto* and *Wollschlaeger* are persuasive in nature, comparable precedent has also been established by this Court in *Cohen v. California*. 403 U.S. at 15. Even though *Cohen* dealt with a criminal statute, the case illustrates that this Court refused to validate a law that mislabels speech as "conduct." *Id*. Like the law in *Cohen*, the North Greene statute could theoretically regulate conduct, but in its true application it regulates only speech and communication. Because the North Greene law prohibits the speech of Mr. Sprague, and it is not connected to any separate conduct, the law should be reviewed as a regulation on speech alone.

Ultimately, North Greene attempts to justify their law as a regulation on "the professional conduct of licensed health care providers." R. at 4. While the Fourteenth Circuit found that North Greene's law could escape strict scrutiny, such a holding ignores this Court's decision in *NIFLA*. R. at 6. Mr. Sprague has not forfeited his First Amendment rights simply because he is a licensed professional. Nor does Mr. Sprague's status allow his speech to be analyzed as conduct. North Greene's attempt to regulate Mr. Sprague's professional speech is treated like all speech under the First Amendment and is subject to strict scrutiny by this Court. *NIFLA,* 138 S. Ct. at 2371. As such, this Court should reverse the Fourteenth Circuit's decision and enjoin § 106(d).

B. North Greene's law is presumptively invalid because it prohibits speech due to its content and the speaker's viewpoint.

1. Mr. Sprague's speech is targeted because of the message or idea he communicates to his clients.

North Greene's law regulates Mr. Sprague's speech based on one specific topic, idea, and message—the conversion of one's sexual orientation and gender identity. The First Amendment,

in conjunction with the Fourteenth, prohibits states from abridging an individual's freedom of speech. U.S. CONST. amend. XIV; *NIFLA*, 138 S. Ct. at 2371. To enforce the First Amendment, a distinction must be made between content-based and content-neutral regulations on speech. *NIFLA*, 138 S. Ct. at 2371.

When a regulation is content-based, it "target[s] speech based on its communicative content," or in other words, it acts on certain speech "because of the topic discussed or the idea or message expressed." *Id.*; *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (where the town's sign ordinance violated the Free Speech Clause because it restricted signs based on the type of message conveyed). As such, the court must determine whether the regulation "'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163. Such facial distinctions are made based upon subject matter or by function and purpose. *Id*.

A content-neutral regulation is one that has "not even a hint of bias or censorship" and "is silent concerning any speaker's point of view." *Messer v. City of Douglasville, Ga.*, 975 F.2d 1505, 1509 (11th Cir. 1992). However, even laws that are facially neutral can be considered content-based when they "cannot be justified without reference to the content of the regulated speech" or when they were enacted because the government disagrees with the message being conveyed. *Reed*, 576 at 164; *see also Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (where wiretapping acts violated the Free Speech Clause by punishing individuals who sought to publish a conversation that they did not illegally intercept). Regardless, this Court has held that "the mere assertion of a content-neutral purpose [is not] enough to save a law, which, on its face, discriminates based on content." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642–43 (1994).

Content-based regulations on speech are "presumptively unconstitutional" unless "the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 138

S. Ct. at 2371; *Reed*, 576 U.S. at 163. Thus, content-based speech regulations must satisfy strict scrutiny to be upheld, as the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *NIFLA*, 138 S. Ct. at 2371; *Police Dep't of City of Chicago v. Mosley,* 408 U.S. 92, 95 (1972).

In this case, North Greene's prohibition on the practice of "talk" conversion therapy is content-based on its face. This is because § 106(d) targets only therapy that assists clients under eighteen with suppressing or converting their sexual orientation or gender identity. R. at 4. Moreover, the applicability of this law on its face requires inquiry into the words uttered by each therapist during their sessions. North Greene clearly illustrates that this inquiry is required through their express statement that § 106(d) is not applied to speech that "does not constitute performing conversion therapy." N. GREENE STAT. § 106(f)(1); R. at 4. Such a distinction is clearly laced with bias and censorship, placing the law well above the content-neutral threshold. Thus, the legislators have proscribed providers from speaking based on the subject matter, or content, discussed.

While the law does permit therapists to communicate generally about conversion therapy and to refer clients to other providers for such services, specific conversations between a therapist and their client remain prohibited. It is not enough to allow a medical provider to "speak about banned speech" because the First Amendment "protects speech itself." R. at 13. To only allow health care providers to place referrals or render opinions on conversion therapy would leave clients under eighteen without the treatment they are voluntarily, consensually seeking.

2. Mr. Sprague's speech is targeted because North Greene opposes his viewpoint on conversion therapy.

The regulation of speech based on viewpoint, or rather "the specific motivating ideology or the opinion or perspective of the speaker," is a "blatant and egregious form of content discrimination." *Reed*, 576 U.S. at 168; see also *Rosenberger v. Rector & Visitors of Univ. of*

Virginia, 515 U.S. 819, 829 (1995). While the government may promote whatever viewpoint they choose, they may not favor a viewpoint by restricting "the speech of some elements of our society in order to enhance the relative voice of others." *Turner Broad. Sys.*, 512 U.S. at 657; *see Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009); *Mech v. Sch. Bd. of Palm Beach Cnty.*, Fla., 806 F.3d 1070, 1074 (11th Cir. 2015) (holding government speech is not regulated by the First Amendment). Thus, "speaker-based laws demand strict scrutiny when they reflect the Government's preference for the substance of what the favored speakers have to say." *Turner Broad. Sys.*, 512 U.S. at 658.

Here, § 106(d) is an unmistakable example of a viewpoint-based regulation. North Greene may be permitted to promote their belief that conversion therapy is detrimental to minors, but they may not achieve that goal by suppressing the opposing views of health care providers. The text of the statute gives clear preference to those who "provide acceptance, support, and understanding of clients" or who "do not seek to change sexual orientation or gender identity." R. at 4. Because those who affirm gender identity and sexual orientation explicitly fall outside of the statute's reach, § 106(d) only approves the viewpoint of speakers whom North Greene agrees with. Thus, § 106(d) is an unequivocable regulation on the content and viewpoint of speech and is subject to strict scrutiny review. For these reasons, this Court should reverse the Fourteenth Circuit's decision.

C. Even if Mr. Sprague's therapy is conduct, it is expressive conduct and protected under the First Amendment.

Even when a law is deemed to be a regulation on conduct, this Court has "long recognized that [First Amendment] protection does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). This Court has acknowledged that conduct can fall within the scope of the First Amendment when it is "sufficiently imbued with elements of communication." *Id*. In determining whether conduct is sufficiently communicative, or expressive, this Court has

established a two-part test. *Id*. First, the court must determine whether the conduct was intended to "convey a particularized message," and second whether "the likelihood was great that the message would be understood by those who viewed it." *Id*. Subsequently, this Court held that if a law regulates expression and government interest in that law is related to expression, the law is outside of the *O'Brien* test and strict scrutiny must be applied. *Id.* at 403; *O'Brien*, 391 U.S. at 377.

For example, in *Texas v. Johnson*, the defendant was convicted of desecrating a flag after publicly burning an American flag in an act of political protest. 491 U.S. at 399. However, this Court found that Johnson's actions were intended to convey a political message and would be understood as a message of protest by those who viewed it. *Id*. at 411. The government's interest in preserving the character of the flag was related to Johnson's expression because the regulation allowed respectful desecrations of the flag while punishing desecrations done in an act of protest. *Id*. at 416. This Court held that the Texas law fell outside of the *O'Brien* test and invalidated the law under strict scrutiny review. *Id*. at 410, 420; *see also Mosley*, 408 U.S. at 94, 99 (holding that a law prohibiting picketing in front of schools based on subject matter was a prohibition on expressive conduct that is "plainly . . . within the protection of the First Amendment").

In this case, Mr. Sprague's use of speech-based therapy should be characterized as speech alone. However, even if this Court determines Mr. Sprague's "talk" therapy to be conduct, it is expressive conduct protected by the First Amendment. The "conduct" that North Greene argues is regulated under § 106(d) is more than "sufficiently imbued with elements of communication" because it is entirely communication. Mr. Sprague's counseling satisfies *Johnson*'s two-part test, as he conveys a particular message even more clearly than the messages conveyed by Johnson and Mosley. *Johnson*, 491 U.S. at 397; *Mosley*, 408 U.S. at 92. This is because Mr. Sprague conveys

his message about gender identity and sexual orientation through explicit communication. As such, Mr. Sprague would be clearly understood by his clients to convey that message.

North Greene's interest in protecting children from the effects of conversion therapy is also clearly related to Mr. Sprague's expression. This is due to the law preventing Mr. Sprague from expressing his viewpoint on conversion therapy while allowing opposing viewpoints on gender identity and sexual orientation affirmance to be heard. Thus, if Mr. Sprague's speech is conduct, it must be expressive conduct. This places Mr. Sprague's speech outside the *O'Brien* test and subject to strict scrutiny review. As a result, this Court should reverse the holding of the Fourteenth Circuit.

D. North Greene's law should be enjoined because it is presumptively invalid and violates public policy.

1. North Greene cannot overcome the presumption because they cannot prove that the law is narrowly tailored.

Regulations that are justified based on the content of a message cannot be justified under the First Amendment. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). Such laws are presumptively invalid because they target pure speech based upon its communicative content. *Reed*, 576 U.S. at 163. To overcome this presumption, or to succeed under strict scrutiny, North Greene must prove the law is narrowly tailored to serve a compelling state interest. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531–32 (1993). Thus, the law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests.'" *Id.* at 546 (*quoting McDanial v. Paty*, 435 U.S. 435, 628 (1978).

Although North Greene has a compelling interest in protecting the "physical and psychological well-being" of children under the age of eighteen, "minors are entitled to a significant measure of First Amendment protection." R. at 4; *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). As such, strict scrutiny must still be met to ensure that any limitations on free speech are vital to serve any compelling state interest. *Reed*, 576 U.S. at 163; *New York v.*

Ferber, 458 U.S. 747, 756–57 (1982). North Greene bears this burden of proof. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011). Thus, North Greene must precisely identify the problem at hand and show that their law is "actually necessary" to the solution of that problem. *Id.* at 799. It is rare that a regulation on speech will ever be permissible under this standard. *Id.*

North Greene relies on the position of the American Psychological Association ("APA") to support their claim that conversation therapy is harmful to minors. R. at 4. Because the APA opposes conversion therapy, North Greene asserts that its youth will not be protected unless conversion therapy is stopped. *Id.* However, statements from the APA alone do not prove that curtailing Mr. Sprague's speech is a narrowly tailored solution to North Greene's interest. In fact, the state fails to acknowledge that conversion therapy actually benefits clients. *Id.* at 7. Regardless, institutional positions, like the APA's, even in good faith, cannot define the boundaries of constitutional rights. *Otto*, 981 F.3d at 869. Opinions and justifications on restrictions of speech may change with the attitudes of institutions, but the First Amendment does not change. *Id.*

North Greene's law also fails strict scrutiny because it is both over and underinclusive. The law is wildly underinclusive because it only affects licensed health care providers. Thus, unlicensed providers and those who work under the auspices of religion are allowed to continue practicing conversion therapy on minors. R. at 4. Further, licensed healthcare providers are still allowed to express personal views to their patients and refer minors to counselors who can legally practice conversion therapy. Therefore, minors are still being subjected to the purported "harm" that legislators claim their law aims to prevent. If conversion therapy is as harmful to minors as the legislators claim, then they are failing to serve their own interest by selectively limiting the ban on conversion therapy to non-religious, licensed providers.

The law is simultaneously overinclusive because Mr. Sprague's verbal counseling is treated the same as "shock therapy" and "inducing vomiting." *Id*. at 9. While the law might be narrowly tailored if limited to the prohibition of such "barbaric practices," that is not the case with § 106(d). *Id*. By prohibiting Mr. Sprague's speech-based counseling, North Greene is regulating therapy that does not impact their interest in protecting minors at all. Legislators were presented with evidence indicating that "talk" conversion therapy is safe but chose to ignore this information and impose a blanket ban on conversion therapy altogether. *Id*. at 7. Thus, North Greene's law extends beyond their intended reach, regulating more speech than is necessary to serve their interests.

2. The law violates public policy because it negatively impacts public health and limits treatment options.

When the government inserts itself into the realm of professional speech, it can result in the failure to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *NIFLA*, 138 S. Ct. at 2375. As a result, certain ideas and viewpoints are likely to be driven out of the marketplace. *Turner Broad. Sys., Inc.*, 512 U.S. at 643. While professionals may disagree on certain topics, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *NIFLA*, 138 S. Ct. at 2375. Because government interference with professional speech leaves the government to decide what "truth" prevails, "the people lose." *Id.*

If North Greene is allowed to regulate the speech of its licensed therapists by only allowing speech that supports or affirms a minor's gender or identity transition, it has effectively chosen the "truth" for its citizens. Instead of allowing professionals to disagree on the topic of conversion therapy, or citizens to determine the treatment they wish to undergo, North Greene aims to leave its citizens with only one option; the option the government—not its people—prefers. To uphold the North Greene law would go against the public policy of letting the "truth" prevail on its own. Additionally, it will leave individuals without their choice of therapeutic treatment, and ultimately,

without any solution that meets their needs. Such a limitation would have a profound effect upon the mental well-being and public health for not only the North Greene community, but for all communities across the United States. Wherefore, North Greene's law should be enjoined, and the holding of the Fourteenth Circuit should be reserved in favor of Mr. Sprague.

II. NORTH GREENE'S LAW OVERWHELMINGLY TARGETS RELIGIOUS SPEECH IN VIOLATION OF THE FREE EXERCISE CLAUSE, AND *EMPLOYMENT DIVISION V. SMITH* SHOULD BE OVERRULED BECAUSE IT CREATES AN EXEMPTION TO THE FIRST AMENDMENT.

The Free Exercise Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…" U.S. CONST. amend I.[4] A foundational principle of this amendment is that the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Johnson*, 491 U.S. at 414. Although sexual orientation and gender identity are focal points of controversial speech, this does not allow the government to regulate that speech because "the First Amendment has no carveout for controversial speech." *NIFLA*, 138 S. Ct. at 2372 (explaining that abortion is "anything but an 'uncontroversial' topic"); *Otto*, 981 F.3d at 859. The government exceeds its regulatory powers and violates an individual's First Amendment rights when it attempts to restrict expression based on the subject matter of that message. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006).

For a court to review a law under rational basis scrutiny in connection with the Free Exercise Clause, the law must be neutral and of general applicability. *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). Any law that fails to meet either requirement must survive strict scrutiny.

[4] The Free Exercise Clause has been incorporated onto the states through the Fourteenth Amendment. *Church of Lukumi*, 508 U.S. at 531 (*citing Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

Church of Lukumi, 508 U.S. at 531–32 (explaining that governmental regulations that are not neutral or generally applicable must meet strict scrutiny).

A. The North Greene law prohibiting lawful speech overwhelmingly targets religious exercise and cannot be deemed a neutral law of general applicability.

1. The North Greene law clearly fails the neutrality prong because it almost exclusively burdens religious individuals.

The Free Exercise Clause protects individuals from laws that regulate expression because that expression was undertaken for religious reasons. *Id.* at 532. The Clause requires that a government consider laws through a lens of "religious neutrality." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n,* 138 S. Ct. 1719, 1724 (2018). To determine whether a law is neutral, the court must first analyze the text of the statute because "the minimum requirement of neutrality is that a law not discriminate on its face." *Church of Lukumi*, 508 U.S. at 533. A statute fails the facial neutrality requirement if it references religious conduct without a secular meaning. *Id.*

That the North Greene statute has the ability to restrict counseling sought for secular reasons does not remedy its lack of neutrality. A statute that implicates "multiple concerns unrelated to religious animosity" may still fail to be neutral because the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Church of Lukumi*, 508 U.S. at 534–35 (quoting *Gillete v. United States*, 401 U.S. 437, 452 (1971); *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). Simply proceeding in a manner that is intolerant of religious beliefs is enough for a law to fail the neutrality requirement. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (*citing Masterpiece* 138 S. Ct. at 1731).

The Fourteenth Circuit erred in relying on *Stormans, Inc. v. Wiseman* in holding that a law that outlaws the same conduct for everyone establishes neutrality. R. at 9; 794 F.3d 1064, 1077 (9th Cir. 2015) (*Stormans II*) *(citing Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995). In *Stormans II*, the relevant government regulation required pharmacists with religious

objections to contraceptives to deliver those contraceptives or face penalties. 794 F.3d at 1071. However, contrary to the North Greene statute, the law in *Stormans II* made no reference to religion. In fact, the United States Court of Appeals for the Ninth Circuit explicitly based its finding of neutrality on that lack of reference to religion. *Id.* at 1064.

Here, the statute directly censors many counselors based on their religious viewpoint. The North Greene statute purports to adopt a position on a categorically religious issue. As the Fourteenth Circuit's dissent points out, the APA, who the legislators relied on in adopting § 106(d), acknowledged that most conversion therapy is almost exclusively made up of individuals with strong religious ideals. R. at 15.

Further, the APA described conversion therapy as a religious practice. *Id*. The prohibition of conversion therapy is an impact that falls "almost exclusively on" counselors and/or clients who hold "particular religious beliefs." *New Hope Family Services, Inc. v. Poole*, 966 F.3d 145, 169 (2nd Cir. 2020) (explaining that if the effect of a law "fell almost exclusively" on someone "holding particular religious beliefs, that is some reason to suspect that the object of the law was to target those beliefs); *Parents for Privacy v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020) (restriction for religious reasons not neutral).

The North Greene statute fails the neutrality requirement because it burdens religious practitioners in their exercise of lawful counseling. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). It is no defense that North Greene has treated comparable secular activity "as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 141 S. Ct. 194, 1296 (2021). Here, criminalizing lawful counseling for all practitioners, regardless of their religious convictions, does satisfy neutrality.

2. The North Greene law is not generally applicable because it permits secular exemptions.

A law fails the general applicability requirement if it "'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions.'" *Fulton*, 141 S. Ct. at 1877 (quoting *Smith*, 494 U.S. at 884). "A law also lacks general applicability if it prohibits religious [exercise] while permitting secular [exercise] 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). North Greene's statute, as evidenced by its plain text and legislative history, primarily focuses on restricting practices associated with conservative religious beliefs.

Statements made during the introduction of the bill underscore the government's bias in regulating religious practice. One sponsor of the bill specifically referenced opposing assemblymens' religious ideals when putting forth the bill. The sponsor equivocally denounced individual's whose religious beliefs would require them to "worship" or "pray the gay away" when performing this counseling.[5] R. at 9. These comments are similar to those in *Masterpiece*. 138 S. Ct. at 1729. There, a commissioner stated that individuals should not be able to exercise their religious beliefs when "do[ing] business in the state. *Id.*

Here, the sponsor further acknowledged that it would be difficult for his colleagues with religious convictions to support the bill. R. at 9. These openly shared viewpoints "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece*, 138 S. Ct. at 1731. This unmistakable targeting of religious exercise places the statute in violation of the general applicably requirement.

[5] The Fourteenth Circuit relies on *United States v. O'Brien* for the proposition that legislative motives are viewed with disfavor. R. at 9; 391 U.S. 367, 383 (1968). This court has since stated, however, that legislative history is relevant to determining government neutrality. *Masterpiece*, 138 S. Ct. at 1732; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2131 (2022) (deference to legislative interest)

The law also fails the general applicability requirement because the plain text of the law allows the government to make individualized exemptions for secular therapists and counselors whose conduct the state deems appropriate. § 106(e)(2) permits counseling that facilitates "identity exploration and development" while § 106(e)(1) punishes speech that "seeks to change an individual's sexual orientation or gender identity." R. at 4. In lawfully exploring and developing a minor's gender identity or sexual orientation, it is inevitable that at least one minor will "change" their identity or orientation. Where this line exists, between exploration and development and change, is at the sole discretion of the government—a mechanism not permitted. *Fulton*, 141 S. Ct. at 1879; *Smith*, 494 U.S. at 884.

3. The North Greene law cannot survive strict scrutiny review.

Any law encroaching on religious exercise that fails to be either neutral or generally applicable must "undergo the strictest of scrutiny." *Church of Lukumi*, 508 U.S. at 546. The government bears the burden of proof in satisfying strict scrutiny. *Tandon*, 141 S. Ct. at 1296. The law "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests'" in order to survive this strictest scrutiny. *Church of Lukumi*, 508 U.S. at 546 (quoting *McDanial*, 435 U.S. at 628). A law that seeks to burden religious practice independent of secular conduct "will survive strict scrutiny only in rare cases."[6] *Church of Lukumi*, 508 U.S. at 546.

The text and history of North Greene's statute confirm that their primary interest was to limit religious exercise. While the government is free to promote their viewpoint, the law may not "interfere with speech for no better reason than promoting an approved message or discouraging

[6] This Court has previously explained that "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Florida*, 521 U.S. 507, 534 (1997).

a disfavored one, however enlightened either purpose may strike the government." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995). Regardless of North Greene's views on what motivates a client to seek counselling for their unwanted gender identity or sexual orientation, "the [client's] freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the 'conventional wisdom,' may not be abridged." *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring).

This Court should also analyze the North Greene statute under strict scrutiny because it implicates two constitutional rights: the Free Exercise Clause and the Free Speech Clause. This "hybrid-rights" claim must be analyzed under strict scrutiny if two separate constitutional protections are asserted.[7] *See Smith*, 494 U.S. at 881–82; *Fulton*, 141 S. Ct. at 1915 (Alito, J., concurring); *Miller v. Reid*, 176 F.3d 1202 (9th Cir. 1999); *Parents for Privacy*, 949 F.3d at 1237. Here, both claims are constitutionally cognizable. The North Greene law must be analyzed under strict scrutiny because both the Free Exercise and Free Speech claims have a "likelihood" of success on their merits. *Parents for Privacy*, 949 F.3d at 1237.

While North Greene may have an interest in protecting minors, this law prohibiting religious based counseling is not narrowly tailored to suit that interest. The North Greene legislature's intent in enacting this overreaching law was to protect the well-being of minors that undergo this counseling. R. at 4. However, this "broadly formulated interest" does not bestow North Greene the unchecked power to suppress lawful religious exercise. *Fulton*, 141 S. Ct. at 1881; *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (explaining that there is no

[7] "[U]nder this Court's precedents, even neutral and generally applicable laws are subject to strict scrutiny where (as here) plaintiff presents a 'hybrid' claim—meaning involving the violation of the right to free exercise and another right, such [as freedom of speech].'" *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527, 529 (2020) (Gorsuch, J., dissenting) (citing *Smith*, 494 U.S. at 881).

compelling government interest to prevent the general public from making decisions the government disapproves of). North Greene's law is underinclusive, as it permits similar secular forms of expression. Thus, the North Greene statute banning the lawful exercise of primarily religious based counseling fails strict scrutiny review and should be enjoined.

B. This Court should overturn Smith because it limits the plain text of the Free Exercise Clause without regard to established precedent.

This Court's decision in *Smith* should be overturned because the Free Exercise Clause of the First Amendment firmly establishes that states, through the Fourteenth Amendment, may not enact any law prohibiting the free exercise of religion. U.S. CONST. amend. I; U.S. CONST. amend. XIV; *Cantwell*, 310 U.S. at 303. *Smith* thought to limit the plain text of the Free Exercise Clause by creating an exemption for laws that the government deems are neutral and generally applicable. *Smith*, 494 U.S. at 879. This decision ignored decades of concrete precedent.[8] *Smith*, 494 U.S. at 907 n.1 (Blackmun, J., dissenting). Rather than providing a clear, easily applicable rule, the outcome has been one of inconsistent interpretation.

Stare decisis does not require adherence to *Smith*'s errors because that doctrine is weakest for constitutional interpretations. *Agastoni v. Felton*, 521 U.S. 203, 235 (1997). Further, it "applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus v. American Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). In revisiting precedent, this Court has considered five factors: (1) the nature of the Court's error, (2) quality of the reasoning, (3) workability, (4) "disruptive effect on other areas of the law," and (5)

[8] *See generally Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden.").

absence of reliance on the decision. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022). Here, all five factors favor overruling *Smith* because *Smith* diverted from the original meaning of the Free Exercise Clause, has been severely limited, and has been applied inconsistently since its inception.

1. *Smith* erred by departing from clear precedent.

Smith should be overruled because it departed from existing law. *Smith* erred in allowing the government to infringe upon a fundamental right more easily. At its inception, the right to free exercise was understood to enjoy broad protection because it was an unalienable right. *Fulton*, 141 S. Ct. at 1900. A religious exercise analysis that focuses on the history of the right, rather than judicially created exceptions, is the proper framework. *Kennedy*, 142 S. Ct. at 2428. Instead of focusing on the history and original meaning of the Free Exercise Clause, *Smith* attempted to carve out exceptions and distinguish established precedent. *Smith*, 494 U.S. at 883 (explaining *Sherbert* is limited to unemployment); *see Sherbert v. Verner*, 374 U.S. 398 (1963).

2. *Smith*'s reasoning was flawed.

A proper interpretation of the Free Exercise Clause must begin with its constitutional text. *Kennedy*, 142 S. Ct. at 2428. *Smith* failed to adhere to the original meaning of the text because the opinion allowed for a permissible interpretation of the Clause rather than adherence to the actual meaning. *Fulton*, 141 S. Ct. at 1894 (citing *Smith*, 494 U.S. at 878); *see generally District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (constitutional interpretation using ordinary meaning). Following the original meaning of the Clause, this Court struck down state action that substantially interfered with individuals' rights to religious exercise. *Sherbert*, 374 U.S. at 408–09; *Yoder*, 406 U.S. at 207.

In *Sherbert v. Verner*, the plaintiff was fired for refusing to work on her Sabbath. 374 U.S. at 399. The state denied her benefits after finding she failed to work without good cause. *Id.* at 399. This Court concluded that denying the unemployment benefits imposed a substantial burden on her right to free exercise. *Id.* at 404. The test resulting from *Sherbert*—"that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest"—governed for nearly thirty years. *Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring).

In *Wisconsin v. Yoder*, this Court held that a law which required all students to stay in school until the age of sixteen violated the free exercise rights of the Amish whose religion objects to formal education after the eighth grade. 406 U.S. at 207, 210. In a holding that expressly rejected the interpretation later adopted in *Smith*, this Court explained that religious exercise can be protected by the clause and is beyond the government's power to control, even when the law or regulation may be generally applicable. *Id.* at 220. *Yoder* further rejected a "neutrality" application when it explained that religious rights are violated whenever a regulation is unduly burdensome, even if the law was neutral. *Id.*

Under *Sherbert* and *Yoder*, an individual's constitutional right to free exercise required a compelling government interest to justify interference with such an unalienable right. *Sherbert*, 374 U.S. at 406; *Yoder*, 406 U.S. at 213. The Court in *Smith* distinguished these precedents when it adopted a murky test of neutrality and general applicability. *Smith*, 494 U.S. at 878. *Smith*'s decision was based, in part, on the Court's prior reasoning in *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940). There, this Court explained conscience scruples do not relieve an individual from a general law not aimed at restricting religious exercise. *Minersville*, 310 U.S. at 594–95. Not only has this Court, post-*Smith*, stated that the *Minersville* decision was erroneous, but this Court "corrected the error" fifty years before *Smith* was decided. *Federal Election Com'n v. Wisconsin*

Right to Life, Inc., 551 U.S. 449, 500–01 (2007); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Minersville*).

Smith sought to pigeonhole *Sherbert* by stating that the *Sherbert* test only applied when attempting to invalidate governmental action in an unemployment compensation claim. *Smith*, 494 U.S. at 883. To overcome *Yoder*, the *Smith* court was forced to invent the "hybrid-rights" doctrine—the idea that two independent constitutional claims may be joined so as to trigger strict scrutiny review. *Id.* at 881–82. The creation of this doctrine, however, largely swallows up *Smith*'s general rule because most suits alleging Free Exercise violations may also incorporate a Free Speech claim. *Fulton*, 141 S. Ct. at 1915 (Alito, J., concurring).

3. *Smith* is unworkable.

Smith fails the workability prong because it is not easily or consistently applied. First, the "hybrid-rights" doctrine that was created to distinguish *Yoder* has resulted in a circuit split regarding its applicability. *Combs v. Homer-Center School Dist.*, 540 F.3d 231, 244–47 (3rd Cir. 2008). While proponents of the doctrine will apply it so long as there are at least two independently viable claims, several courts have flat-out refused to follow it. *See, e.g., Kissinger v. Board of Trustees of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (illogical hybrid rights doctrine); *Leebaert v. Harrington*, 332 F.3d 134, 144 (2nd Cir. 2003); *see Archdiocese of Washington v. WMATA*, 897 F.3d 314, 331 (D.C. Cir. 2018).

Second, subsequent cases have grappled with determining whether an allegedly neutral law "targets" religious exercise or whether it unintentionally affects religious exercise as a consequence of pursuing other legitimate objectives. *Fulton*, 141 S. Ct. at 1918–19 (Alito, J., concurring). The major question plaguing courts is whether this is a subjective or objective inquiry. *Id*. In *Church of Lukumi*, Justices that were in the *Smith* majority had differing views. Justices

Scalia and Rehnquist believed that objectivity was the appropriate interpretation, whereas Justices Kennedy and Stevens believed that the subjective motivations of the legislators are paramount to determining the "object" of a law. *Church of Lukumi*, 508 U.S. at 557–59, 540–42.

Finally, this Court recently suggested in *Kennedy* that the *Smith* framework has been distorted in four significant ways. First, the government may violate an individual's right to free exercise if the law expresses hostility toward religion. *Kennedy*, 148 S. Ct. at 2422 n.1 (citing *Masterpiece*, 138 S. Ct. at 1732.) (explaining that when a law is openly hostile to religion, the law is deemed a Free Exercise Clause violation without further inquiry). Next, the law may violate the Free Exercise Clause if it targets or discriminates against religion. *Church of Lukumi*, 508 U.S. at 533. Third, if the law "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way," there may be a violation. *Kennedy*, 142 S. Ct. at 2422 (quoting *Fulton*, 141 S. Ct. at 1868). Fourth, there may be a violation if the law provides a "mechanism for individualized exemptions." *Id.*

Critically, each of these four circumstances triggers, at the very least, strict scrutiny. These alternate approaches, along with *Smith*'s own exceptions, make *Smith* increasingly irrelevant because more and more cases are swallowed up by *Smith*'s progeny.

4. *Smith* disrupts constitutional analyses.

Allowing government interference to thrive under rational basis review would have devasting effects on other areas involving religious exercise. In fact, most of this Court's major free exercise decisions have been decided contrary to a *Smith* analysis. For example, this Court in *Trinity Lutheran Church v. Comer* upheld the free exercise rights of a church to apply for a grant

to resurface playgrounds. 582 U.S. 449 (2017). Along with an Establishment Clause[9] analysis, this Court held that there was express discrimination against religious exercise. *Trinity Lutheran*, 582 U.S. at 463. This express discrimination triggered the "most exacting scrutiny," an outcome that would be different had this Court analyzed the government encroachment under *Smith*. *Id.* at 462.

5. *Smith* is unreliable because courts routinely disregard its holding.

"Traditional reliance interests arise 'where advance planning of great precision is most obviously a necessity.'" *Dobbs*, 142 S. Ct. at 2276 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992)). This factor is often the strongest factor in favor of upholding challenged precedent, however, respondent has failed to point to any strong reliance interests at hand which favor the retention of *Smith*. *See, e.g.*, *Fulton*, 141 S. Ct. at 1923 (Alito, J., concurring). Rather, this Court has altered the framework of *Smith* so that the neutral and general applicability test competes with multiple exceptions and other approaches.

Smith's progeny has shown that there are alternate avenues of analyzing a free exercise claim, and the dubious standing of *Smith* underscores the pressing need for its abandonment. The critical question then is: if not *Smith*, then what? The most logical conclusion would be to reimplement the *Sherbert* test. Any law that substantially burdens religious exercise must be narrowly tailored to serve a compelling government interest. *Sherbert*, 374 U.S. at 403. This approach has already been adopted in *Church of Lukumi*, *Fulton*, and *Kennedy*. 508 U.S. at 546; 141 S. Ct. at 1881; 142 S. Ct. at 2422.

Further, Congress has already expressed its desire to restore the *Sherbert* test. Immediately following this Court's decision in *Smith*, Congress passed the Religious Freedom Restoration Act

[9] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

(RFRA). 42 U.S.C. § 2000bb (1993). The act's purpose was to restore the strict scrutiny analysis set forth in *Sherbert* and *Yoder*. § 2000bb(b)(1). When this Court in *City of Boerne v. Florida* held that Congress lacked the power to impose the RFRA on the states, Congress once again showed its desire to restore religious exercise. *City of Boerne*, 521 U.S. 507, 511 (1997); 42 U.S.C. § 2000cc (2000). The Religious Land Use and Institutionalized Persons Act unanimously passed Congress and has restored part of the protections that *Smith* revoked. § 2000cc.

Along with a lack of reliance on *Smith* and congressional approval of *Sherbert*, public policy supports strict scrutiny review for three reasons: (1) free exercise is a fundamental right, (2) a rational-basis test inadequately protects individual liberty, and (3) strict scrutiny analysis protects minority religions. Generally, this Court applies strict scrutiny to laws that infringe upon fundamental rights, and *Sherbert* declined to make an exception. *Sherbert*, 374 U.S. at 406 (citing *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). *Smith* never argued that religious exercise was not a fundamental right, but rather that the difficulty of strict scrutiny analysis in a free exercise context supported the supposed need for rational basis analysis. *Smith*, 494 U.S. at 885–90.

There is no relevant justification as to why the convenience of a rational basis review should diminish an individual's right to free exercise. Rational basis review is simply an insufficient protection. The *Sherbert* test, on the other hand, is sufficient because it requires that a law be narrowly tailored to achieve a compelling governmental interest and that the law is the least restrictive means of achieving that interest. *See, e.g.*, *Yoder*, 406 U.S. at 215 ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.").

Application of strict scrutiny has been fundamental in protecting minority religions. Strict scrutiny review has protected groups such as the Amish, Jehovah's Witnesses, Santeria, and

Seventh-day Adventists from governmental interference. *See Yoder*, 406 U.S. at 234–36; *Cantwell*, 310 U.S. at 311; *Church of Lukumi*, 508 U.S. at 547; *Sherbert*, 374 U.S. at 409–10. Without this Court having required a compelling governmental interest, it is very likely that these groups would have been subjected to a diminished fundamental right. It is the bare minimum that government must uphold religious freedom. Any approach that allows government action to proceed absent a narrowly tailored and compelling governmental interest infringes upon this fundamental right.

CONCLUSION

This Court should reverse the Fourteenth Circuit's opinion, and hold that North Greene's law, which prohibits licensed therapists from practicing conversion therapy on clients under the age of eighteen, violates the Free Speech and Free Exercise clauses of the First Amendment. To hold otherwise would limit access to public health resources, diminish religious ideals, and subject countless speech-based and religious-centered activities to potential government regulation.

First, this Court should hold that North Greene's law violates the Free Speech Clause because it prohibits Mr. Sprague's entirely speech-based therapy. The law discriminates against Mr. Sprague's speech because of the particular message and viewpoint he wishes to convey. As such, the law is a presumptively invalid content-based regulation on speech.

Second, this Court should hold that North Greene's statute violates the Free Exercise Clause because the law is neither neutral nor generally applicable. The law overwhelmingly targets religious speech while permitting similar secular discussions. As such, this Court should overrule *Employment Div. v. Smith* because *Smith* has been applied inconsistently, has proven to be unworkable, and limits the plain text of the Free Exercise Clause.

For the foregoing reasons, Mr. Sprague respectfully requests that this Court REVERSE the ruling of the United States Court of Appeals for the Fourteenth Circuit.