Docket No. 23–2020

In The

Supreme Court of the United States

October Term, 2023

Howard Sprague,

Petitioner,

v.

State of North Greene,

Respondent.

On Writ of Certiorari to the United States

Court of Appeals for the Fourteenth Circuit

BRIEF FOR PETITIONER

Attorneys for Petitioner
September 26, 2023

Team 22

QUESTIONS PRESENTED

1. Does a law that ignores established free speech doctrine and sanctions state suppression of speech-based conversion therapy based on a political or moral judgment about the content of the communications violate the First Amendment's Free Speech Clause?

2. Is the State's prohibition of conversion therapy, which almost exclusively burdens religious speech, a neutral and generally applicable law, and if so, should the Court better safeguard religious freedoms by overruling *Smith*?

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Howard Sprague, appellee in Docket No. 22–1023 before the United States Court of Appeals for the Fourteenth Circuit, respectfully submits this brief on the merits, and asks this Court to reverse the judgment of the Fourteenth Circuit.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Eastern District of North Greene is unpublished, but is available at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). The decision of the United States Court of Appeals for the Fourteenth Circuit is unreported and set out in the record. (R. at 2–16).

CONSTITUTIONAL PROVISIONS

The First Amendment of the United States Constitution, U.S. Const. amend. I, is relevant to this case and is reprinted in Appendix A. The Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, is relevant to this case and is reprinted in Appendix A.

STATUTORY PROVISIONS

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 *et. seq.*, is relevant to this case and is reprinted in Appendix B. The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § § 2000cc *et. seq*., is relevant to this case and is reprinted in Appendix B.

STATEMENT OF THE CASE

Factual Background

The Plaintiff. Howard Sprague is a deeply religious person who has been a licensed family therapist for a quarter of a century. R. at 3. He holds himself out as a "Christian provider of family therapy services." R. at 3. Though he does not work for a religious institution, he endeavors to provide aid to his clients by incorporating his sincerely held Christian perspective and principles into his work. R. at 3. Sprague "grounds human identity in God's design" and believes that the gender of a person is "a gift from God," which should not be altered. R. at 3. Additionally, Sprague earnestly believes that sexual relationships are beautiful and healthy and that they should only occur between a married man and woman. Several of Sprague's clients share in his religious

viewpoints. R. at 3. In fact, many specifically seek out Sprague's services because of his religious convictions. R. at 3. Among other issues, he helps these clients with concerns that include sexuality and gender identity. R. at 3. When addressing issues of this nature, he employs a method known as conversion therapy. R. at 3. Sprague exclusively uses a verbal-based approach to counselling. This is often referred to as "talk therapy." R. at 3. He does not employ any physical methods of counseling. R. at 3.

General Definition of Conversion Therapy. Conversion therapy encompasses therapeutic practices and psychological interventions that seek to change a person's sexual orientation or gender identity. R. at 3. Within the field of psychology, conversion therapy is also known as "reparative therapy" or "sexual orientation and gender identity change efforts." R. at 3.

The Statute. In North Greene, healthcare providers, which includes therapists, must be licensed by the State before they may practice within its borders. R. at 3-4. In 2019, the State enacted N. Greene Stat. § 106(d) (hereafter the statute), which prohibits healthcare providers operating under a state license from practicing any form of conversion therapy on individuals under the age of eighteen. R. at 4. The statute deems the use of conversion therapy to help minors as "unprofessional conduct" subject to disciplinary action. R. at 4.

Although the statute exempts those who offer conversion therapy "under the auspices of a religious denomination, church, or religious organization" from being subject to the statute, the statute offers no relief for religious individuals who wish to practice with a license. R. at 4. Under the statute, communicating with the public about conversion therapy, expressing personal views to patients about the topic, referring minors seeking conversion therapy to religious organizations, or sending them to healthcare providers in other states is not prohibited. R. at 4. However, a licensed professional cannot provide conversion therapy. R. at 4.

North Greene's Definition of Conversion Therapy: The statute at issue describes conversion therapy as including "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." R. at 4. However, the State's definition of conversion therapy does not include efforts to facilitate and support a more secular construction of human sexuality exploration and development. R. at 4.

Motivations: The North Greene General Assembly's stated intent was to regulate "the professional conduct of licensed healthcare providers," stating that it had "a compelling interest in protecting the physical and psychological well-being of minors." R. at 4. Senator Floyd Lawson, a sponsor of the bill, stated during a debate that the bill was to eliminate "barbaric practices." R. at 8-9. Another supporter of the bill, Senator Pyle, publicly denounced individuals who seek to use faith and religion as a means of changing one's sexual orientation or gender identity. R. at 9. To substantiate their claim that conversion therapy is harmful to lesbian, gay, bisexual, and transgender youth, the General Assembly pointed to the position of the American Psychological Association ("APA"), noting that the APA opposes conversion therapy; however, there was also evidence provided to the legislature that indicated that conversion therapy, and particularly talk therapy, is safe and effective. R. at 4, 7.

Procedural History

District Court**:** Sprague filed suit against the State of North Greene ("The State") in the United States District Court for the Eastern District of Greene, challenging the constitutionality of North Greene's statute. *Sprague v. North Greene*, 2022 WL 56789 at 5 (E.D. N. Greene 2022). He sought preliminary injunctive relief on the grounds that the statute violated the Free Speech and Free Exercise Clauses of the First Amendment by censoring the content of his communication with his clients, banning speech that is almost exclusively religious in nature, and by favoring non-

religious concepts of gender and sex. *Id.* at 3-5. The State opposed and filed a motion to dismiss his complaint for failure to state a claim. *Id*. at 5. The District Court denied Sprague's motion for preliminary injunction and granted the State's motion to dismiss. *Id*. at 3.

Fourteenth Circuit: Sprague timely appealed the district court's decision. R. at 5. On appeal, the United States Court of Appeals for the Fourteenth Circuit analyzed whether the First Amendment requires heightened scrutiny of North Greene's statute. R. at 6. The court concluded that because the statute regulates conduct and is a neutral law of general applicability, rational basis review is necessary. R. at 6-7. Applying this rational review, the court affirmed the district court's decision and determined that the statute is rationally related to a legitimate government interest in regulating the medical profession. R. at 11.

SUMMARY OF THE ARGUMENT

Free Speech: This Court should reverse the Fourteenth Circuit's ruling and grant Sprague's request for a preliminary injunction because the statute is a content-based regulation that clearly violates the Free Speech Clause and this Court's jurisprudence. Policies that target speech based on the message being communicated are content-based regulations. Content-based laws are presumptively unconstitutional unless they serve a compelling government interest and are narrowly tailored to serve that interest. The appellate court attempted to carve out a new category of diminished free speech protection for "professional speech;" however, the precedents set out in *NILFA*, *NAAP*, and *Conant* clearly hold that speech, especially between a medical professional and their patient, is entitled to First Amendment protections. Here, the State attempted to sensor speech by labeling it as "professional conduct." However, the effect of the statute is that it prohibits healthcare providers from communicating a certain politically unpopular message to their patients. This is the definition of a content-based regulation, thus strict scrutiny must apply. Because the

State provided minimal evidence to support their interest in protecting minors from the alleged harms of conversion therapy and that minimal evidence was opposed by contravening evidence, the State did not meet the high burden of proof necessary to substantiate a compelling interest. Further, because the law prohibits only licensed professionals from practicing conversion therapy and not other practitioners, the statue is underinclusive and not narrowly tailored to meet their asserted interest. Accordingly, this Court should reverse the circuit court's decision and grant Sprague's preliminary injunction.

Free Exercise: This Court should reverse the Fourteenth Circuit's decision and find that, because North Greene's statute is not a neutral law of general applicability, it violates the Free Exercise Clause. *Smith* and *Lukumi* have established that if a law fails to be neutral or generally applicable, then strict scrutiny must be applied. A law is not neutral if the operation of the law results in the suppression of religious beliefs or practices. A regulation fails to be generally applicable if it burdens religious conduct while not affecting secular conduct. Here, the law, in its real operation, almost exclusively burdens individuals with sincere religious beliefs; government officials displayed obvious hostility toward those sincere religious beliefs when in the process of enacting the statute; and it provides disparate treatment that disadvantages religious views on human sexuality. In sum, the statute is not a neutral law of general applicability. Because, as discussed above, the statute fails strict scrutiny, this Court should reverse the circuit court's decision and grant Sprague's preliminarily injunction.

Alternatively, if this Court finds that the State's regulation is neutral and generally applicable, then it should recognize that this Court's precedent fails to adequately safeguard religion and overturn *Smith*. This Court has recognized that *stare decisis* is not an unlimited command and may be ignored when the Court believes a past decision was so erroneously decided

that it would be an injustice to continue following it. *Stare decisis* is at its weakest when it comes to constitutional interpretation. When evaluating whether to overturn past precedent, this Court looks at various factors, including the decision's reasoning, consistency, workability, and subsequent developments. Here, *Smith's* reasoning is not grounded in precedent, constitutional text, or our nation's history. In fact, the majority did not even attempt to reconcile its holding with these concepts. The opinion merely stated that its holding was a "permissible" reading of the Clause. Further, *Smith* conflicts with this Court's precedents both before and after the decision was handed down. Moreover, it is so difficult to decipher the standards that *Smith* set out that it effectively renders its test impracticable. Lastly, there is evidence that there is widely held support for overturning *Smith*, and to do so would result in a more workable and natural reading of the First Amendment.

Accordingly, this Court should either hold that the statute is not a neutral law of general applicability and fails strict scrutiny, or that the standard set out in *Smith* fails to adequately safeguard the free exercise of religion and should be overturned. Either way, the Court's holding should be that a regulation which almost exclusively persecutes a group of religious individuals is not acceptable under this nation's constitution. Accordingly, this Court should reverse the circuit court's decision and grant Sprague's preliminary injunction.

STANDARD OF REVIEW

On appeal from the denial of a preliminary injunction, this Court applies the abuse of discretion standard while reviewing legal conclusions de novo. *See Benisek v. Lamone*, 138 S.Ct. 1942, 1943 (2018); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). Here, the district court's denial of the requested preliminary injunction turned on its interpretation of what North Greene's statute means and whether it is constitutional. Therefore, both of the issues laid out in *Sprague* are

legal questions to be reviewed de novo. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231(1991) (stating that appellate courts "should review de novo a district court's determination of state law."). Accordingly, this Court need not give any deference to the lower courts on the issue of whether North Greene's law violates the Free Speech and Free Exercise Clauses of the First Amendment.

ARGUMENT

I. This Court should reverse the appellate court's ruling because the statute, which prohibits professionals from communicating certain beliefs to their clients, is a clear violation of the First Amendment and this Court's jurisprudence.

The Free Speech Clause forbids laws that abridge the freedom of speech. U.S. Const. amend. I. The clause applies to state laws and regulations through the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, §1. When determining whether a law improperly regulates speech, the courts have distinguished between content-based and content-neutral regulations. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2371 (2018) ("*NIFLA*").

Regulations that serve purposes unrelated to the content of expression are deemed neutral, even if they have an incidental effect on some speakers or messages but not others. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47–48 (1986). Conversely, content-based policies target speech based on content of the communication. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 135 (2015). Typically, content-based laws are presumptively unconstitutional and may be justified only if the government proves they are narrowly tailored to serve compelling state interests. *Id*. This strict standard reflects the deep-seated principle that, "above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). In determining the nature of the regulation, the principal inquiry is whether the government adopted

the law because of agreement or disagreement with the message it conveys. *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1055 (9th Cir. 2000) ("*NAAP*").

A. The statute inappropriately attempts to promulgate an unprecedented category of reduced First Amendment protection for "professional speech" by inappropriately labeling that speech as "conduct."

The Fourteenth Circuit heavily relied on *Pickup v. Brown* in reaching their decision to uphold the State's law. This reliance was erroneous. In *Pickup v. Bro*wn, the state of California enacted a bill which banned the use of conversion therapy on minors by licensed practitioners but made an exception for religious leaders. 740 F.3d 1208, 2368 (9th Cir. 2014) abrogated by NIFLA, 138 S.Ct. 2361 (2018). David Pickup and several other practitioners of sexual-orientation conversion therapy filed separate actions each seeking both a preliminary injunction to enjoin enforcement of the bill and declaratory judgment that the bill was unconstitutional. *Id*. at 2369-70. One district court granted the injunction, but another district court reached the opposite conclusion. *Id*. at 2370. The cases were consolidated on appeal. *Id*. The practitioners argued, among other things, that the bill violated their First Amendment right to freedom of speech. *Id*.

In reaching their decision, the Ninth Circuit improperly attempted to promulgate an unprecedented category of reduced protection for "professional speech." *Id*. at 1228. In doing so, the court proffered a continuum. *Id*. At one end of the continuum is when a professional is engaged in public dialogue and First Amendment protection is at its greatest. *Id*. The other end is when professional conduct is being regulated and the state's power of regulation is at its greatest, even if the regulation may impact speech. *Id*. *Pickup* further stated that there is a midpoint to the continuum: "within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished." *Id*. *Pickup's* holding erroneously allows a

freewheeling authority to declare new categories of speech that fall outside the protections of the First Amendment; and thus, should not be the standard applied by this Court.

In addition, to apply the standard that the Ninth Circuit set out in *Pickup* would be to blatantly ignore this Court's decision in *National Institute of Family and Life Advocates v. Becerra (NIFLA)*, which expressly declares that professional speech is not a separate category of speech. In *NIFLA*, a constitutional challenge was brought against a law requiring licensed clinics to provide certain information to patients about state-provided free or low-cost services for pregnant women, along with a phone number to call. 138 S.Ct. at 2368-69. Seeking a preliminary injunction, the plaintiffs alleged that the required notice abridged their freedom of speech by impermissibly altering the content of their speech. *Id*. at 2371. The Ninth Circuit did not apply strict scrutiny when evaluating the regulation and denied the plaintiff's request for injunction because it concluded that the notice regulates professional speech. *Id*. at 2371.

However, on appeal, the Supreme Court emphasized that the courts do "not recognize[] 'professional speech' as a separate category of speech," stating that "speech is not unprotected merely because it is uttered by 'professionals.'" *Id*. at 2371-2. In fact, the court acknowledged that its precedents have repeatedly protected the First Amendment rights of professionals. *Id*. at 2374. *See Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988) (professional fundraisers); *see also Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010) (organizations that provided advice on international law).

Further, the Supreme Court has stressed the danger of allowing content-based regulation of speech. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) (asserting that the regulation of professional's speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulator goal, but to suppress unpopular ideas or information.").

Additionally, when the government polices the content of professional speech, it can fail to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 189 (2014). Moreover, the Supreme Court has clearly warned inferior courts against promulgating "any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.'" *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010)).

Consequently, the court determined that unless the restriction on speech is firmly rooted in our nation's tradition, then the government reaches beyond its police power. *NIFLA*, 138 S.Ct. at 2372. The court found there is no such tradition for a category called "professional speech;" however:

> "This Court has afforded less protection for professional speech in two circumstances – neither of which turned on the fact that professionals were speaking. First, our precedents have applied more deferential review to some laws that required professionals to disclose factual, noncontroversial information in their 'commercial speech.' …Second, under our precedents, States may regulate professional *conduct*, even though that conduct incidentally involves speech."

Id. (emphasis added).

Using these principals, the Supreme Court held that the notice requirements unduly burden the clinics' protected speech. *Id*. at 2378. A higher level of scrutiny was deemed appropriate in determining the constitutionality of the provision, because it was neither "commercial speech" nor "content-neutral." *Id*. at 2372-74. First, the court held that the law was not commercial speech because the required notice was not limited to purely factual and uncontroversial information. *Id*. at 2372. Second, the court found that the law did not regulate conduct because the notices were required in all interactions between a facility and its clients, regardless of whether a medical procedure was ever sought, offered, or performed. *Id*. at 2374. Thus, the court applied strict

scrutiny and found in favor of the plaintiffs. *Id*. at 2375. But most significantly, the Supreme Court found the Ninth Circuit's treatment of professional speech as a unique category that is exempt from ordinary First Amendment principles was impermissible. *Id*.

B. *NAAP* and *Conant v. Walters* support the protection of speech-based conversion therapy.

1. *NAAP*

NAAP did not hold that psychotherapy administered exclusively through the spoken word constitutes wholly unprotected speech. In *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology* ("*NAAP*"), both a national association and individual psychologists sought to invalidate a law that required certain conditions and qualifications be met before becoming a state licensed psychologist. 228 F.3d at 1047-49. The qualifications consisted of requirements like having a degree or doctorate, having a certain number of years of experience, board examination, training, and more. *Id*. at 1047. The plaintiffs argued that the licensing scheme violated their First Amendment right of free speech because psychoanalysis is a "talking cure" and is "pure speech." *Id*. at 1054.

In reaching their decision, the Ninth Circuit expressed that professionals that employ speech to treat their patients are not entitled to special First Amendment protection. *Id*. However, in the same breath, the court also clarified that this does not insinuate that such "talk therapy" is afforded *no* First Amendment protection at all. *Id*. Nor does it imply that talk therapy is provided diminished protection. *Id*. In fact, the court explicitly stated that the "communication that occurs during psychoanalysis is entitled to constitutional protection" even if it is not immune from regulation. *Id*. The court then went on to affirm that the appropriate level of scrutiny to apply is determined by "distinguishing between prohibited and permitted speech on the basis of content."

Id. at 1055. Essentially, the question is whether the regulation has been adopted "because of agreement or disagreement with the message it conveys." *Id*.

Applying this standard, the circuit court held that the licensing scheme was a content-neutral regulation because it did not "dictate what can be said between psychologists and patients during treatment." *Id*. Further, "nothing in the statutes prevent[ed] licensed therapists from utilizing psychoanalytical methods." *Id*. The statutes only regulated the qualifications that a therapist needed to have to obtain a license. *Id*. at 1047. Thus, *NAAP* emphasized that mental health professionals do not lose all of their First Amendment immunities once their counseling sessions begin. *Id*. at 1055. Rather, the decision implies that when a regulation censors what can or cannot be said during treatment, it is a content-based regulation subject to strict scrutiny. *Id*.

2. *Conant v. Walters*

Conant affirms and strengthens *NAAP*'s finding that professional speech, especially in the medical profession, is protected speech. In *Conant v. Walters*, the plaintiffs argued that a federal policy that prohibited doctors from communicating with their patients about the medical use of marijuana violated their First Amendment right to free speech. 309 F.3d 629, 633 (9th Cir. 2002). The Ninth Circuit emphasized that "an integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients." *Id*. at 636. Further, the court even suggest that a physician's speech with their patients may be entitled to "the strongest protection the constitution has to offer." *Id*. at 637.

Employing these theories, the circuit court found that the policy was not permissible under the First Amendment because the regulation attempted to punish physicians for the content of doctor-patient communication. *Id*. However, the court did contrast *prescribing* controlled

substances with *recommending* medical marijuana. *Id*. at 635. Thus, the court draws a line between regulating conduct and regulating content. *Id*.

C. Under the proper reading of *NILFA*, *NAAP*, and *Conant*, North Greene's statute is a content-based regulation that fails to withstand strict scrutiny.

This court should reverse the circuit court's decision and grant Sprague's preliminary injunction, finding that, under the First Amendment, the statute is an improper restriction on his free speech rights.

1. Strict scrutiny must be applied to North Greene's statute.

First, we must determine the standard of scrutiny to apply. Professional speech is protected speech, there is no special category. *NIFLA*, 138 S.Ct. at 2372. Thus, the only way the First Amendment's protections could be diminished here is if the law regulates commercial speech or if the regulation is content-neutral. *Id*.

In the present case, the statute does not require healthcare providers to disclose factual, noncontroversial information in their commercial speech. R. at 4. In fact, rather than being compelled to provide additional speech, the statute requires the practicing physician to *withhold* certain types of speech. R. at 4. Further, the content of the speech the State intends to regulate is highly controversial and opinion based. R. at 4. Thus, the commercial speech exception does not apply here.

Further, the statute is not content-neutral. The law prohibits certain "practices," but this labeling game is illusory. R. at 4. These laws target speech. R. at 4. Simply put, the case here is this: professionals desire to communicate a message to their clients that the law does not permit. R. at 3-4. Accordingly, this statute is a content-based regulation that the court should subject to a strict level of scrutiny.

The government argues that the statute is content-neutral because the statute is concerned with *treating* patients and that any speech that is restricted as a result is "incidental." R. at 7. However, this thinly veiled misdirection does not prevail against common sense. Relabeling speech as an "activity" does not make it conduct. If that were so, then, as Justice Knotts notes in her dissent, the government could regulate anything from teaching, to debating, to protesting, to book club. R. at 13. Because this result would be nonsensical, North Greene's statute must be deemed a content-based regulation. Thus, strict scrutiny applies.

2. Under strict scrutiny, North Greene's statute does not pass constitutional muster.

Applying strict scrutiny, a content-based law is "presumptively unconstitutional." *Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996). A statute passes strict scrutiny only if it is narrowly tailored to serve a compelling state interest. *Id*. at 384. The court has recognized that while protecting the physical and psychological well-being of children may be compelling, it is not determinative. *Id*. at 386. The government carries the burden of proving a compelling interest exists and that the law is narrowly tailored to meet that interest. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011). Because the government "bears the risk of uncertainty, ambiguous proof will not" satisfy the demanding standard it must meet. *Id*.

Here, the State's interest in protecting the "the physical and psychological well-being of minors" is commendable, but not enough. R. at 4. The only evidence provided by the government was the opinion of a single professional society that opposes the speech because it deems conversion therapy, including talk therapy, to be harmful. R. at 4. However, while this society may strengthen the government's assertion that they have a compelling interest, it is not enough. Societies do not always get it right, and professional opinions and cultural attitudes may change. Further, there was just as much evidence provided to the legislature showing that conversion

therapy, particularly talk therapy, is safe and effective. R. at 7. Considering the minimal evidence presented to justify the State's position and the presence of contravening testimony, the burden of proof necessary to show a compelling state interest has not been met.

Additionally, the law is not narrowly tailored to serve the ends of protecting children. The statute is underinclusive because it only applies to licensed professionals. R. at 4. This does nothing to prevent non-licensed therapists and counselors from utilizing conversion therapy on minors. R. at 4. If the State is concerned with protecting minors from the supposed harms of conversion therapy, would it not endeavor to ban the practice outright? If the prohibition applies to one group, it should apply to all. Therefore, the law is not narrowly tailored to effectively meet the government's claimed interest in protecting minors from conversion therapy.

Because the government did not meet the high burden of proof required by showing a compelling state interest that is narrowly tailored, the statute fails strict scrutiny and must be enjoined.

II. This Court should reverse the Fourteenth Circuit's holding because a law, which almost exclusively burdens religious speech, is not neutral or generally applicable, or, in the alternative, the Court should overrule *Smith*.

The Free Exercise Clause of the First Amendment, which has been applied to the States by the Fourteenth Amendment, states that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*…" U.S. Const. amend. I; U.S. Const. amend. XIV, § 1. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). ("*Smith*"). This grants individuals the right to "live out their faiths in daily life 'through the performance of (or abstention from) physical acts." *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2421 (2022) (quoting *Smith*, 494 U.S. at 872, 877). To safeguard this privilege,

the Free Exercise Clause works in tandem with the Free Speech Clause, making religious speech doubly protected. *Id*. "The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike." *Id*. at 2416.

A. The State's statute is not neutral or generally applicable because it solely burdens religion, it was enacted by legislators that expressed hostility toward religious practices, and it provides disparate treatment between conversion therapy and gender-affirming therapy.

The right to free exercise does not allow people to avoid complying with laws that are neutral and generally applicable. *Smith*, 494 U.S. at 879. However, if a law fails to be neutral or generally applicable, the First Amendment requires the application of strict scrutiny. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 546 (1993).

Whether a law fails neutrality is established first by determining if the law's text is discriminatory on its face. *Id*. at 534. However, even if a law is facially neutral, it may be discriminatory in effect if the operation of the law results in the suppression of religious beliefs or practices. *Id*. To satisfy neutrality, the government may not impose regulations that are hostile to religious beliefs and cannot pass judgment upon the legitimacy of religious beliefs and practices. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S.Ct. 1719, 1731 (2018). The Constitution prohibits even "subtle departures from neutrality" *Lukumi*, 508 U.S. at 534. Factors relevant to the assessment of governmental neutrality include, "among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body" *Id*. at 540.

General applicability is closely linked to neutrality. *Id*. at 521. This requirement ensures the government is not attempting to advance a legitimate interest by burdening only religious conduct. *Id*. at 543. While all laws are somewhat selective, they are more suspect when their effect

is to burden religious practice. *Id*. at 542. 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." *Smith*, 494 U.S. at 884. A law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. *Lukumi*, 508 U.S. at 546.

If a law fails to be neutral or generally applicable, the Free Exercise Clause requires the application of strict scrutiny. *Id*. Strict scrutiny is the most demanding standard of judicial review. *Id*. at 547. The rigorous standard requires that the law support a compelling governmental interest, that it be narrowly tailored to achieve that interest, and that it does so by the least restrictive means available. *Id*. at 546. "A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id*.

1. A statute is not neutral when it is persecutory in effect, was enacted in the presence of government hostility, and provides disparate treatment.

Whether a statute is facially neutral is not determinative. *Id*. at 534. Separate from the text of a law, the effect of the law in its real operation is demonstrative of its true purpose. *Id*. at 535. For example, in *Lukumi*, practitioners of the Santeria religion, which performs ritual animal sacrifices as a principal form of devotion, challenged city ordinances restricting the "sacrifice" of animals. *Id*. at 524-28. While the ordinance on its face did not expressly state that the practice of Santeria is prohibited, the ordinance defined the term "sacrifice" so selectively that it excluded "almost all killings of animals except for *religious* sacrifice." *Id*. at 536. It also included a specific exception for kosher slaughter. *Id*. The court held that the net result of the ordinance was that "few if any killings of animals are prohibited other than Santeria sacrifice." *Id*. The court held that while

on its face the text of the law may be neutral, the careful drafting resulted in an impermissible "religious gerrymander" that in practice was state suppression of free exercise. *Id*. at 535-37.

In addition to operational neutrality, governmental entities owe a duty of neutrality toward religion. *Masterpiece Cakeshop*, 138 S.Ct. at 1731. In *Masterpiece Cakeshop*, for example, an owner of a cakeshop was asked to create a cake celebrating a couple's same-sex wedding. *Id*. at 1724. The owner refused, stating that baking the cake would offend his sincere religious objections to same-sex marriage. *Id*. The couple filed a complaint with the Colorado Civil Rights Commission, which ruled against the baker. *Id*. at 1725. In reaching their decision, the Commission made several remarks that implied that religious beliefs could not be accommodated in commerce and that religious individuals were not welcome in the business community. *Id*. at 1729. Further, the Commission compared the baker's sincere religious objections to making a cake in *support* of same-sex marriage to human atrocities, stating that "Freedom of religion and religion has been used to justify all kinds of discrimination… whether it be slavery, whether it be the holocaust..." *Id*. at 1729-30. In addition, the Commission contemporaneously allowed three other bakers to refuse to make a cake expressing *opposition* to same-sex marriage. *Id*. at 1730-31. The Supreme Court held the Commission's hostile comments, coupled with their disparate treatment of conscience-based objections showed that the governmental entity was inappropriately sitting in judgment of religious beliefs. *Id*. at 1730. Thus, the Commission violated their duty of neutrality. *Id*. at 1731-32.

2. A statute that almost exclusively burdens one group is not generally applicable.

A law of general applicability that incidentally burdens religion does not violate the Free Exercise Clause. *Smith*, 494 U.S. at 878. In *Smith*, a law prohibiting the use of a controlled substance was challenged by two plaintiffs who were fired from their jobs after they ingested

peyote for sacramental purposes at a Native American Church service. *Id* at 874. The plaintiffs argued that the state violated the Free Exercise Clause by refusing to allow an exception from its generally applicable criminal laws for religious practices. *Id*. at 874-75. The Supreme Court found that the only decisions in which the First Amendment bars application of a neutral, generally applicable law to religiously motivated practices have involved not just the Free Exercise Clause alone, but in conjunction with other constitutional provisions (such as the freedom of speech). *Id*. at 881. Otherwise, generally applicable, religion-neutral laws that have an incidental effect of burdening particular religious practices are permitted. *Id*. at 878. Because the law prohibiting the use of drugs is equally germane to every single individual, whether they hold religious beliefs or not, the court determined that the law was a neutral law of general applicability. *Id*. at 883-89.

3. The statute is not a neutral law of general applicability and does not pass constitutional muster under strict scrutiny analysis; and thus, violates the First Amendment.

The statute is not neutral in effect. Like *Lukumi*, while North Greene's statute may seem facially neutral, in practice, the statute disproportionately burdens religious practitioners. *Id*. at 536. In *Sprague,* the statute prohibits conversion therapy, which is a remedy almost exclusively sought out by religious patients and provided by religious professionals. R. at 15. Therefore, the burdens of the law will almost entirely fall onto the shoulders of religious practitioners. R. at 15. Further, the State's careful drafting to allow for therapy in encouragement of patient's pursuit of a more non-traditional and secular view of sexual orientation and gender identity exemplifies a religious gerrymander, which actively targets a particular religious view. *Id*. at 534. R. at 4. Thus, the statute, in its real operation, is not neutral.

Moreover, the statute was enacted in the presence of government hostility and disparate treatment. Parallel to *Masterpiece Cakeshop* when the Commission likened the baker's beliefs to

human atrocities, State Senator Lawson characterized conversion therapy as a barbaric practice. *Id*. at 1729-30. R. at 8-9. This description summarily lacks respect for the sincere religious beliefs of those who practice conversion therapy. Further, State Senator Pyle publicly criticized those who try to use faith and religion as a means of changing one's sexual orientation or gender identity. R. at 9. The respondents argue that Senator Pyle's comments, when taken in the context that he himself is a religious man, are not hostile toward religion. R. at 9. However, a religious individual can be hostile and discriminatory toward other interpretations and applications of that religion.

In addition to hostile comments by state actors, *Sprague* is comparable to *Masterpiece Cakeshop* because the statute provides disparate treatment to those expressing disapproval of non-traditional sex and gender lifestyles versus those expressing support for the same. *Id*. at 1730-31. R. at 4. Prohibiting therapy that encourages a more religious and traditional expression of sexual orientation and gender identity while allowing therapy which encourages LGBTQ lifestyles is a blatant violation of the lawmakers' duty of neutrality toward religion. R. at 4. Thus, the statute was legislated under non-neutral treatment.

Furthermore, North Greene's statute is not a law of general applicability. *Sprague,* unlike in *Smith,* involves a law that is not equally germane to every individual. Because conversion therapy is utilized by religious individuals nearly exclusively, the statute only applies to a targeted group of religious professionals. R. at 15. The Fourteenth Circuit's majority attempts to characterize the statute as evenhanded because it could prevent a hypothetical therapist from providing conversion therapy for "secular reasons" rather than religious ones. R. at 9-10. This argument is not compelling. The State has produced no real-world examples of a counselor providing conversion therapy for secular reasons. R. at 9. Thus, because a law that silences

professionals of faith on their religious beliefs about sexuality is not germane, it is not generally applicable.

Because North Greene's statue is not a neutral law of general applicability, strict scrutiny applies. As discussed above, this regulation does not serve a compelling state interest, nor is it narrowly tailored. Therefore, the statute must be enjoined. *See supra* Section I.C.3.

B. Alternatively, the Court should overrule *Smith* because the standard it set out is not in accordance with our nation's text or history, is unworkable, inconsistent, and haphazardly sanctions the government to place burdens on an individual's right to freely exercise religion.

The Supreme Court "will not overturn a past decision unless there are strong grounds for doing so," but at the same time, *stare decisis* is not an inexorable command. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S.Ct. 2448, 2478 (2018). *Stare decisis* "is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). It applies with "perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus*, 138 S.Ct. at 2478. In weighing whether to overrule a past decision, the Supreme Court must consider a variety of factors, four of which are in favor of overturning *Smith*: (1) its reasoning; (2) its consistency with other decisions; (3) the workability of the rule that it established; and (4) developments since the decision was handed down. *Id*. at 2478–79.

1. *Smith's* reasoning is not grounded in precedent, constitutional text, or our nation's history.

Precedent. Before *Smith* was decided, this Court's seminal decision on the question of religious exemptions from generally applicable laws was *Sherbert v. Verner*, which had been in place for nearly three decades when *Smith* was decided. 374 U.S. 398 (1963). In *Sherbert,* a woman was fired because she refused to work on Saturday, her Sabbath Day. *Id*. at 399. Unable to find

employment that did not require her to work on a Saturday, she applied for unemployment compensation. *Id*. at 400. Her application was rejected because state law disqualified claimants who failed "to accept available suitable work" without good cause. *Id*. at 401. This Court held the denial of benefits violated *Sherbert's* free exercise right because it forced her "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id*. at 404. As a result, the Court reasoned that the decision below could be sustained only if it was justified by a compelling state interest. *Id*. at 403, 406. The State argued that its law was necessary to prevent fraudulent claims by individuals faking religious objections, but the Court found this justification insufficient because the State failed to show that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id*. at 407.

The test extracted from Sherbert—that a law that imposes a substantial burden on the exercise of religion must be narrowly tailored to serve a compelling interest—was the governing rule for the next twenty-seven years. *Id*. at 403, 406. *See Thomas v. Review Bd. of Ind. Employment Security Div.*, 450 U.S. 707, 720 (1981) (holding that a State could not withhold unemployment benefits from a Jehovah's Witness who quit his job because he refused to do work that he viewed as contributing to the production of military weapons.).

The *Sherbert* test was the leading authority on how to treat religious exemptions for generally applicable laws when *Smith* reached the Court. *Smith*, 494 U.S. at 883-84. Comparable to *Sherbert,* in *Smith*, the plaintiffs were denied unemployment benefits because of a religious practice (using peyote as part of a Native American Church ritual). *Id*. at 874. Applying the *Sherbert* test, the Oregon Supreme Court held that this denial of benefits violated the defendants' free exercise rights. *Id*. at 875. Upon appeal, the State defended the denial of benefits under the

Sherbert test, arguing that it had a compelling interest in preventing the use of dangerous drugs. Brief for Petitioners at 5–7, 12, 16, *Emp. Div., Dept. of Hum. Res. v. Smith*, 494 U.S. 872 (1990) (No. 88-1213), 1989 WL 1126846. The state never suggested that *Sherbert* should be overruled. *Id*. at 11.

Disregarding the *Sherbert* argument, the *Smith* majority, without discussion on why *Sherbert* should be cast aside, adopted a new test: A generally applicable law does not violate the Free Exercise Clause if burdening religion is not the law's purpose but merely the incidental effect of its operation. *Smith*, 494 U.S. at 876. In addition, again without discussion as to why, the Court held that the *Sherbert* test would only apply to two narrow categories of cases: (1) those involving the award of unemployment benefits or other schemes allowing individualized exemptions and (2) "hybrid rights" cases. *Id*. at 881–884. Not only did this distinction lack support in prior case law, the issue in *Smith* itself could easily be viewed as falling into this special category. After all, it involved claims for unemployment benefits and was arguably a combination of both free expression and free speech rights. None of these obstacles stopped the *Smith* majority from adopting its new rule and displacing decades of precedent.

Constitutional Text. To ascertain the proper reading of the Free Exercise Clause, we must first look to the constitutional text. *Martin v. Hunter's Lessee*, 14 U.S. 304, 338-39 (1816). "If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible." *Id*.

Smith did not do this. In fact, the majority paid almost no attention to the text of the First Amendment. *Smith*, 494 U.S. at 878. Instead of considering the normal and ordinary meaning of the text of the Free Exercise Clause, the opinion merely proclaimed that the text was ambiguous and it was "permissible" to read the text to have the meaning that the majority favored. *Id*. The

Court did not deny that *requiring* exemptions would also be a "permissible" reading of the Free Exercise Clause. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1115 (1990). After summarily asserting that the court's "neutral law of general applicability" test was a "permissible" reading of the text, the majority did not offer an explanation as to *why* it was permissible. *Id*. The opinion made no effort to ascertain the original understanding of the free exercise right. *Id*.

The Free Exercise Clause states that "Congress shall make no law ... prohibiting the free exercise of religion." U.S. Const. amend. I. The ordinary meaning of "prohibiting the free exercise of religion" was (and still should be) forbidding or hindering unrestrained religious practices or worship. *Fulton v. City of Phila.*, 141 S.Ct. 1868, 1896 (2021) (ALITO, J., joined by THOMAS and GORSUCH, JJ., concurring). That straightforward understanding is a vast divergence from the interpretation adopted in *Smith*. *Id*. It certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted. *Id*. According to *Smith*, the Free Exercise Clause means that the government cannot restrict conduct that constitutes a religious practice for some people unless it imposes the same restriction on everyone else who engages in the same conduct. *Smith*, 494 U.S. at 876. *Smith* made no real attempt to square that interpretation with the ordinary meaning of the clause's language. *Id*.

National History. Further, *Smith's* treatment of the free exercise right is contradictory to how our nation has historically thought about liberties guaranteed by the Bill of Rights. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to… freedom of worship… and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W.*

Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943). In contrast, *Smith* held that protection of religious liberty was better left to the political process. *Smith*, 494 U.S. at 890. Further, *Smith's* opinion takes the position that the Nation simply could not "afford the luxury" of protecting the free exercise of religion from generally applicable laws. *Id.* at 888. In sum, based on precedent set out in *Sherbert*, the text of the Free Exercise Clause, and evidence concerning the original understanding of the free exercise right, *Smith* fails to overcome the more natural reading of the text.

2. *Smith* is inconsistent with this Court's free exercise jurisprudence.

Smith also conflicts with other precedents. *Smith* did not overrule *Sherbert* or any of the other cases that built on *Sherbert* from 1963 to 1990 and is difficult to harmonize with those precedents. *Smith*, 494 U.S. at 881–884. For example, in *Wisconsin v. Yoder*, the Court was asked to decide if a law requiring all students to remain in school until the age of sixteen violated the free exercise rights of Amish parents whose religion required that children leave school after the eighth grade. 406 U.S. 205, 207, (1972). The Court held that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id*. at 220. Moreover, the Court called a neutral law of general applicability, "precisely the kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent." *Id*. at 218. Thus, in contrast to *Smith*, which states that a law equally germane to both secular and religious activity is not subject to strict scrutiny, even if it significantly affects religious activity, *Yoder* states that individuals with sincerely held religious beliefs should be shielded from laws that inhibit their ability to practice their religion, even if the rule is equally as applicable to secular activity as it is to religious activity. As a result, *Smith* is irreconcilable with *Yoder*.

The same is true about more recent decisions. In *Masterpiece Cakeshop*, the court held that "[w]hen it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion." *Masterpiece Cakeshop*, 138 S.Ct. at 1727. Thus, the court held that a member of the clergy would be entitled to a religious exemption from a neutral law of general applicability. *Id*. *Masterpiece Cakeshop* directly conflicts with *Smith's* holding that individual exceptions for religious individuals cannot be allowed when it comes to laws of general applicability. These cases are indicative that the standard set out in *Smith* is not the correct interpretation of the Free Exercise Clause.

3. *Smith's* test is not practicable.

"Hybrid-rights." The "hybrid rights" exception, which was an attempt to distinguish *Yoder*, has baffled the lower courts. *Smith* stated that the only cases prior to its decision in which the Free Exercise Clause barred the application of a neutral and generally applicable law involved the Clause in conjunction with other constitutional protections. *Smith*, 494 U.S. at 881–884. The circuit courts are divided on how to apply this vague declaration. *See Combs v. Homer-Ctr. School Dist*., 540 F.3d 231, 244–247 (3d Cir. 2008) (describing Circuit split). "Some characterize the theory as dicta and others use different standards to decide whether a plaintiff has asserted a cognizable hybrid-rights claim." *Id*. The circuit courts are split into at least three ideologies. *Id*. Some courts have openly refused to follow the hybrid rights portion of *Smith's* interpretation. *See Kissinger v. Bd. of Trustees of Ohio State Univ., Coll. of Veterinary Med.*, 5 F.3d 177 (6th Cir. 1993) (holding that a legal standard requiring a free exercise claim to be coupled with other constitutional rights "is completely illogical."). Other courts hold that the hybrid-rights exception applies only when a free exercise claim is joined with some other independently viable

constitutional claim. *See Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, 897 F.3d 314, 331 (D.C. Cir. 2018). Some courts require a companion claim be "colorable," a standard that requires "a fair probability or a likelihood, but not a certitude, of success on the merits," to raise a hybrid-rights claim. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1032 (9th Cir. 2004). It is clear by this circuit split that the hybrid-rights exemption set out in *Smith* is so vague and illogical that it is rendered unworkable.

"Targeting" religion. Courts have also struggled with deciphering whether a purportedly neutral rule "targets" religious exercise or has the restriction of religious exercise as its "object." *Lukumi*, 508 U.S. at 534; *Smith*, 494 U.S. at 878. What is the standard to prove "targeting?" Is it subjective or objective? *Smith's* holding originated this issue when it stated that a rule is not neutral "if prohibiting the exercise of religion" is its "object." 494 U.S. at 878. *Smith* did not elaborate on what that meant. *Id*. Confusion and disagreement about "targeting" have surfaced in other cases. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 66, 76, 80 (2020).

4. Developments since *Smith* suggest a need for a better interpretation.

"Smith has been criticized since the day it was decided. No fewer than ten Justices—including six sitting Justices—have questioned its fidelity to the Constitution." *Fulton*, 141 S.Ct. at 1931 (ALITO, J., concurring). Four of the sitting justices at the time categorically condemned *Smith's* interpretation of the Free Exercise Clause. *Smith,* at 494 U.S. at 891 (opinion concurring in judgment); *Smith*, at 907–908 (BLACKMUN, J., joined by BRENNAN and MARSHALL, JJ., dissenting).

However, the *Smith* majority believed that *Sherbert's* test would result in "anarchy" and required a course correction. 494 U.S. at 888. But developments since the decision have shown that this fear is baseless. In response to *Smith*, Congress nearly unanimously opposed the

decision and attempted to reestablish *Sherbert* by passing two different bills. *Fulton*, 141 S.Ct. at 1893-94. The first bill was the Religious Freedom Restoration Act (RFRA), which made a version of the *Sherbert* test applicable to all actions taken by the federal government. 42 U.S.C. § 2000bb-1 *et seq*. (1993). However, this law was rendered ineffective when this Court later held in *City of Boerne v. Flores*, that Congress lacked the power under the 14th Amendment to impose the law on the states. 521 U.S. 507, 519 (1997). Congress countered by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA), which imposed the same rules as RFRA on land use and prison regulations. 42 U.S.C. § 2000cc *et seq*. (2000).

Both RFRA and RLUIPA impose essentially the same requirements as *Sherbert*, and the courts have shown that they are more than capable of applying that test. *See Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (holding that there is "no cause to believe" the test could not be "applied in an appropriately balanced way"). However, while RFRA and RLUIPA have restored part of the protection that *Smith* withdrew, they are limited in scope and can be weakened or repealed by Congress at any time. They are no substitute for a proper interpretation of the Free Exercise Clause.

CONCLUSION

A regulation that sensors the content of speech is impermissible under the First Amendment. Professional speech is protected speech, there is no special category. Thus, the only way the First Amendment's protections could be diminished here is if the law regulates commercial speech or if the regulation is content-neutral. North Greene's statute is neither. The statute regulates highly controversial and opinion-based speech. Further, the statute prohibits professionals from *communicating* a particular message to their clients, it does not prohibit *conduct*. Relabeling speech as an "activity" does not make it conduct. Accordingly, this statute is a content-based

regulation that should be subjected to a strict level of scrutiny. Because the government did not meet the high burden of proof required by showing a compelling state interest that is narrowly tailored, the State's statute fails strict scrutiny and should be enjoined.

In addition, *Smith* and *Lukumi* have established that a regulation that is not neutral and generally applicable must be subjected to strict scrutiny. Because North Greene's statute, in its real operation, almost exclusively burdens individuals with sincere religious beliefs, was enacted by government officials displaying obvious hostility toward those sincere religious beliefs, and provides disparate treatment, the regulation is not neutral. Further, because the statute is not equally germane to both religious and secular activity, it is not generally applicable. Thus, strict scrutiny should apply, resulting in injunction of the statute.

Alternatively, if this Court finds that the State's regulation is neutral and generally applicable, then it should decide that this Court's precedent fails to adequately safeguard religion and overturn *Smith*. This Court has recognized that *stare decisis* is not an inexorable decree and may be ignored when the Court believes a past decision was so erroneously decided that it would be an injustice to continue following it. Here, *Smith's* reasoning is not grounded in precedent, constitutional text, or our nation's history. Further, the opinion conflicts with other case precedent, is not practicable, there is evidence of widely held support for overturning *Smith*, and to do so would result in a more workable and natural reading of the First Amendment. Accordingly, this Court should either hold that the statute is not a neutral law of general applicability and fails strict scrutiny, or that the standard set out in *Smith* is unsatisfactory.

It is for these reasons this Court should reverse the holding of the United States Court of Appeals for the Fourteenth Circuit and grant the motion for preliminary injunction.

Respectfully submitted,

/s/_____
Attorneys for Respondent

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon Respondent, State of North Greene, through the counsel of record by certified U.S. mail return receipt requested, on this, the 26th day of September 2023.

/s/_____
Attorneys for Respondent

APPENDIX A

Constitutional Provisions

U.S. Const. amend. I

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.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

Statutory Provisions

42 U.S.C § 2000bb-1

(a) In general
Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception
Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and
(B) is the least restrictive means of furthering that compelling governmental interest.