No. 23-2020

In the
Supreme Court of the United States

HOWARD SPRAGUE

PETITIONER,

v.

STATE OF NORTH GREENE

RESPONDENT.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

TEAM 34

QUESTION PRESENTED

I. Whether the North Greene Statute's censorship of "talk therapy," which disciplines Mr. Sprague for practicing counseling consisting solely of verbal communication, violates the Free Speech Clause of the First Amendment when the Statute, as applied to Mr. Sprague, (1) censors only his speech directly and no other separately identifiable conduct in connection with it; (2) censors his speech impermissibly based on his speech's viewpoint and content; (3) and is not narrowly tailored to serve a compelling interest?

II. Whether North Greene's Statute, which disciplines Mr. Sprague for practicing "talk therapy" in line with his Christian beliefs, violates the Free Exercise Clause of the First Amendment when (1) the Statute's co-sponsors espoused religious animus and in operation, overwhelmingly, if not exclusively, targets religious beliefs; (2) North Greene permits secular conduct which similarly endangers minors' psychological well-being; and if so, should this Court overrule *Employment Division v. Smith*, 494 U.S. 872 (1990) and reinstate strict scrutiny to protect religious Americans from government interference consistent with the Free Exercise Clause's central purpose?

TABLE OF CONTENTS

TABLE OF CITATIONS

UNITED STATES CONSTITUTION

UNITED STATES SUPREME COURT

United States Circuit Court of Appeals

Congressional Record

Treatises

Other Authorities

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution states:

"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."

[1]Section 106(d) of Chapter 45 of Title 23, North Greene's Uniform Professional Disciplinary Act lists as unprofessional conduct for licensed health care providers:

"[P]erforming conversion therapy on a patient under age eighteen."

Section 106(e)(1)-(2) of Chapter 45 of Title 23, North Greene's Uniform Professional Disciplinary Act defines conversion therapy:

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

Section 106(f)[2] of Chapter 45 of Title 23, North Greene's Uniform Professional Disciplinary Act provides that:

N. Greene. Stat. § 106(d) may not be applied to:

(1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization."

[1] The Record does not contain N. Greene. Stat. § 106(d) in its entirety, this is what is available in the Record. Record 4.

[2] The Record does not contain N. Greene. Stat. § 106(f) in its entirety, this is what is available in the Record. Record 4.

STATEMENT OF THE FACTS

Mr. Howard Sprague is a licensed family therapist practicing in North Greene over the last twenty-five years whose counsel is influenced by his Christian beliefs. Record 3. Mr. Sprague's patients seek his services in hopes of changing their gender identity and sexual orientation through purely verbal counseling ("talk therapy"). Record 3 n.3. They seek his assistance in these deeply personal matters specifically because he holds himself out as a Christian provider of family therapy services. Record 3.

North Greene's Censorship of Talk Therapy

But now, the State hinders Mr. Sprague's livelihood and his patients' access to his counsel. In 2019, North Greene enacted N. Greene. Stat. § 106(d) (the "North Greene Statute") a powerful bludgeon that empowers the state to censor conversations between minor patients and their licensed healthcare providers. Record 9. North Greene listed "performing conversion therapy on a patient under age eighteen" to its list of unprofessional conduct in the Uniform Disciplinary Act. § 106(d). "Conversion therapy" is broadly defined as any "regime that seeks to change an individual's sexual orientation or gender identity" and prohibits efforts to "change behaviors or gender expressions" or "eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Record 4. Notably, § 106(d)(2) explicitly exempts "counseling…that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity." Mr. Sprague's purely verbal counseling is not exempt. Record 4.

Legislative Record

In passing § 106(d), the legislature described Mr. Sprague's Christian faith-based viewpoint as "barbaric" and demeaned his work as efforts to "pray the gay away" despite it having

evidence on the record that talk therapy, in particular, is safe and effective. Record 9. Instead, proponents relied on the contrary opinion of the American Psychological Association ("APA") and one anecdotal story by a proponent who opposed talk therapy. Record 9. Astonishingly, the APA's opinion itself is based on mere anecdotal harm reports, *not* any empirical data. Record 7.

While §106(d) does not apply to "[r]eligious practices or counseling" and "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization," licensed counselors like Mr. Sprague face an awful choice. §106(f). Because North Greene requires healthcare providers to be licensed before they may practice, *See* N. Greene Stat. § 105(a), Mr. Sprague must either comply and betray his deeply held religious convictions, or face professional discipline and be unable to pursue his livelihood in his chosen state. Record 3. Faced with this false choice, Mr. Sprague sued to vindicate his free speech and free exercise rights and sought a preliminary injunction that would protect his rights. Record 3.

The district court denied Mr. Sprague's motion and granted North Greene's motion to dismiss. It found Mr. Sprague's purely verbal counseling was "conduct." Similarly, the district court found that § 106(d) was neutral and general applicable, thus the State only needed a *rational basis* for burdening his rights. The Fourteenth Circuit affirmed. Mr. Sprague implores this Court to vindicate his constitutional rights by reversing the Fourteenth Circuit's holding and granting his preliminary injunction.

SUMMARY OF THE ARGUMENT

Mr. Sprague renews his argument that § 106(d) violates both the Free Speech and Free Exercise Clause of the First Amendment. These Clauses work in tandem. The First Amendment's double protection for religious speech "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy v. Bremerton Sch. Dist.*,

142 S. Ct. 2407, 2421 (2022). In our nation's history, government suppression of speech was so often directed at religious speech "that a free speech clause without religion would be Hamlet without the prince." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

Generally, content-based restrictions of speech are subject to strict scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("NIFLA"). A limited exception exists for laws directly regulating professional conduct and incidentally involving speech. *Id.* Therefore, here, this Court must first determine whether § 106(d) is directly regulating "speech" or "conduct." If the former, the Statute will be invalidated unless it survives strict scrutiny.

First, this Court should not adopt the Ninth and Fourteenth Circuits' standard that solely verbal communications, without separately identifiable conduct, become conduct when functioning as "medical treatment." This Court has rejected distinctions between "speech" and "conduct" when the "conduct" at issue consisted solely of verbal or written communications. *Cohen v. California*, 403 U.S. 15, 16 (1971); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26–28 (2010). Applying Court precedent, here, § 106(d) regulates speech directly because the only activity triggering censorship consists solely of communicating a message: the advice Mr. Sprague gives patients. *See* Record 3 n.3, 4; *Humanitarian L. Project*, 561 U.S. at 26–28. Because § 106(d) regulates speech directly, the Court must determine whether it is a content-based restriction subject to strict scrutiny.

Second, all content-based speech restrictions are subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). Viewpoint-based restrictions, a more egregious form of content-based discrimination, are unconstitutional *per se*. *See Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). Here, § 106(d) is viewpoint discriminatory, and unconstitutional *per se*, because it regulates based on agreement with North Greene's position: unwanted same-sex-attractions cannot be reduced. *See* Record 4. Alternatively,

§ 106(d) is content-discriminatory and subject to strict scrutiny because authorities examine the content of the message during therapy—seeking to change sexual orientation or anything else—to identify violations. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020).

Finally, because § 106(d) is, at minimum, content discriminatory it must withstand strict scrutiny, meaning it must be narrowly tailored to achieve a compelling interest. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011). Here, § 106(d) is not narrowly tailored for two reasons. First, there is no empirical evidence on the legislative record that talk therapy, in particular, is harmful to minors. *See* Record 4, 7, 9; *Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *Sable Commc'ns of California, Inc. v. F.C.C.*, 492 U.S. 115, 130 (1989) ("Sable"). Second, the legislative record does not demonstrate North Greene seriously sought to address these supposed harms with less intrusive methods than censorship. *See* Record 3–4; *McCullen v. Coakley*, 573 U.S. 464, 479 (2014). Accordingly, this Court should hold that § 106(d) fails strict scrutiny and therefore violates the Free Speech Clause of the First Amendment.

The Free Exercise Clause of the First Amendment, applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021). This Court's controversial decision in *Employment Division v. Smith*, held that laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable. *Employment Division, Department of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990). This case falls outside of *Smith* and is subject to strict scrutiny for three reasons.

First, § 106(d) is not neutral because it lacks operational neutrality and stems from North Greene's overt animus. The Clause bars even "subtle departures from neutrality" on

religion. *Masterpiece Cakeshop, Ltd. v. Colorado Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Co-sponsors of § 106(d) made overt comments mocking and demeaning Mr. Sprague's beliefs and convictions. Record 9. Similarly, facially neutral laws violate the Clause if the law's real operational effect is to target religious conduct for distinctive treatment. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993) Here, § 106(d) "overwhelmingly, if not exclusively" targets religious speech. Record 15. Second, § 106(d) is not generally applicable. Policies that treat religious activities less favorably than secular conduct that similarly undermine the government's asserted interests lack general applicability. *Fulton*, 141 S. Ct. at 1877. § 106 treats gender-affirming care, which also arguably poses psychological harm, less favorably than Mr. Sprague's talk therapy. Record 10.

Finally, even if § 106(d) is neutral and generally applicable (which it is not), strict scrutiny applies because Mr. Sprague's claim involves two constitutional rights. *Smith*, 494 U.S. at 881. North Greene fails strict scrutiny because it relies on conjectural harm based on admittedly flawed research. Record 7. Moreover, § 106(d) is not narrowly tailored because it is underinclusive. North Greene cannot explain why conversion therapy offered by licensed counselors poses a greater risk than conversion therapy offered by exempted "[n]onlicensed counselors." N. Greene Stat. § 106(f).

Alternatively, if this Court finds *Smith* applicable, then this Court should overrule *Smith* and restore a strict scrutiny standard for all laws burdening religious exercise because all three of the *Dobbs* factors for overruling a past decision apply. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022). First, *Smith* was egregiously wrong because it was poorly justified and untethered from the Clause's text and the Court's jurisprudence. *Id.* at 2266. Next, *Smith*'s neutral and generally applicable framework is unworkable. *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). Finally, overruling *Smith* will not upset reliance interests because twenty-one states have

already enacted legislation restoring this Court's pre-*Smith* standard, and this Court's calls to overrule *Smith* have put the public on notice. *Fulton*, 141 S. Ct. at 1923–1924 (Alito, J. concurring).

ARGUMENT

THIS COURT SHOULD REVERSE THE FOURTEENTH CIRCUIT'S DECISION BECAUSE THE NORTH GREENE STATUTE VIOLATES MR. SPRAGUE'S FREE SPEECH AND FREE EXERCISE RIGHTS

This Court has warned that "a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button,* 371 U.S. 415, 438 (1963). However, in enacting § 106(d), North Greene has run afoul of that warning.

First, § 106(d) violates the Free Speech clause. With regard to Mr. Sprague, § 106(d) impermissibly regulates speech directly on the basis of viewpoint, and therefore is unconstitutional *per se*. Alternatively, at minimum, § 106(d) regulates speech directly on the basis of content, subjecting it to strict scrutiny, and fatally, North Greene cannot demonstrate censoring talk therapy is narrowly tailored to achieve a compelling interest. Second, § 106(d) violates the Free Exercise clause because it impermissibly imposes a substantial burden on Mr. Sprague's religious exercise. If § 106(d) does not violate the Free Exercise Clause under its current jurisprudence, then this Court should overrule *Employment Division v. Smith*, because *Smith*'s rational basis framework perpetuates the suffering of religious Americans at the hands of the very government the First Amendment was intended to protect them from. 494 U.S. at 877. Consequently, this Court should reverse the Fourteenth Circuit's decision and grant Mr. Sprague's Preliminary Injunction because § 106(d) violates both his Free Speech and Free Exercise rights.

I. The North Greene Statute's Censorship of Talk Therapy Violates the Free Speech Clause because it Regulates Speech Directly, is Content and Viewpoint Discriminatory, and Fails Strict Scrutiny.

The Free Speech Clause of the First Amendment prohibits censorship of speech with a definite guarantee: "Congress shall make no law . . . abridging the freedom of speech." Amend. I, U.S. Const. At the heart of that guarantee are the concepts of human dignity and self-fulfillment which contravene any notion that speech must be popular to be allowed. Here, Mr. Sprague has a right to communicate, how he sees fit, because the Free Speech Clause "presupposes that the freedom to speak one's mind is . . . an aspect of individual liberty—and thus a good unto itself." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984).

Generally, content-based regulations of speech are presumptively unconstitutional and subject to strict scrutiny. *NIFLA*, 138 S. Ct. at 2372. By contrast, laws regulating "professional conduct, even though that conduct incidentally involves speech" are subject to rational review. *Id.* Here, § 106(d) censors "talk therapy," involving only verbal counseling, yet purports to regulate "conduct." *See* Record 3 n.3, 4. Thus, this Court must first determine whether § 106(d) is directly regulating "speech" or "conduct." If the former, the statute will be invalidated unless it survives strict scrutiny, meaning North Greene must "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Bennett*, 564 U.S. at 734.

First, this Court should not adopt the Ninth and Fourteenth Circuits' holdings that talk therapy is conduct merely because it is "medical treatment." This position irreconcilable with this Court's precedent and susceptible to manipulation. Second, § 106(d) regulates speech directly because the only activity triggering censorship, with regard to Mr. Sprague, consists solely of communicating a message. Third, § 106(d) is viewpoint discriminatory, and unconstitutional *per se* because it regulates based on agreement with the State's position. Alternatively, at minimum, §

106(d) is content discriminatory, and subject strict scrutiny, because enforcement requires examining the content of the message conveyed during therapy. Finally, § 106(d) does not satisfy strict scrutiny because censoring talk therapy is not narrowly tailored to serve a compelling interest. Fatally, the legislative record is void of empirical evidence of talk therapy's supposed harm and any demonstration that the State seriously sought to address the harm with less intrusive methods. Accordingly, this Court should hold § 106(d) violates the Free Speech Clause.

A. *First, § 106(d) regulates speech directly, not conduct, and therefore is subject to the presumption against content-based restrictions of speech.*

Circuits courts are split on whether laws censoring talk therapy regulate speech directly or conduct. The Eleventh and Third Circuit courts held that such laws regulate speech directly because the activity triggering censorship, with regard to the plaintiff, consists solely of verbal communication. *See Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 866 (11th Cir. 2020) ; *King v. Governor of the State of New Jersey*, 767 F.3d 216, 225 (3d Cir. 2014), *abrogated on other grounds by NIFLA*, 138 S. Ct. 2361. By contrast, the Ninth and Fourteenth Circuits held such laws regulate conduct directly because talk therapy constitutes conduct when it functions as "medical treatment." *See Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014), *abrogated by NIFLA*, 138 S. Ct. 2361 *Tingley v. Ferguson*, 47 F.4th 1055, 1075 (9th Cir. 2022) (relying on *Pickup*); *Sprague v. North Greene*, 2023 WL 12345, at *7 (14th Cir. 2023).

1. The Ninth and Fourteenth Circuits' standard that solely verbal communications, without connection to separately identifiable conduct, become conduct when functioning as "treatment" is irreconcilable with this Court's precedent and should not be adopted.

Pickup and *Sprague* held that talk therapy transforms into conduct because it is a professional service—"medical treatment"—despite the fact it consists solely of verbal counseling and no other separately identifiable conduct. 740 F.3d at 1229; 2023 WL 12345, at *7. This Court

has never come close to adopting such a remarkable fiction, nor should it, because it is susceptible to manipulation.

First, this Court has repeatedly rejected a distinction between "speech" and "conduct" when the "conduct" at issue consists solely of verbal or written communications. In *Cohen*, the defendant violated an offensive conduct statute by publicly wearing a profanity-emblazoned jacket. 403 U.S. at 16. The statute was invalidated because the only conduct which the State sought to punish was the fact of communication, "not any separately identifiable conduct." *Id.* at 18.

Recently, in *Humanitarian L. Project*, this Court rejected another attempt to relabel speech as conduct in an analogous situation to this case: professionals—human rights advisors—prohibited by statute from providing professional services—legal training—consisting solely of verbal communication. *See* 561 U.S. at 26–28; *accord Sprague*, 2023 WL 12345, at *4, 7 (professionals—therapists—prohibited by statute from providing professional services—talk therapy—consisting solely of verbal communication). The Court reasoned while ordinarily the statute regulated certain conduct, with regard to the plaintiffs, the statute regulated only speech directly because the activity triggering coverage consisted solely of verbal communication. *See id*. It was irrelevant to the Court's analysis that the communications constituted professional services. *See* 561 U.S. at 26–28. Thus, axiomatically, *Humanitarian L. Project* rejects the fiction that professional services, consisting of only verbal communications, transform into conduct merely because the speech at issue functions as a professional service. *See id.*

By contrast, *Pickup* and *Sprague* attempt to find support by analogizing to *Planned Parenthood of Se. Pennsylvania v. Casey* which upheld a regulation of medical treatment involving speech incidentally. *See, e.g.*, 740 F.3d at 1231 (citing to 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs*, 142 S. Ct. 2228). But *Casey* is distinguishable from censorship of talk

therapy because the activity triggering penalty in *Casey* was separately identifiable conduct that did not consist solely of verbal communication: performing an abortion. *See Casey*, 505 U.S. at 884. *Cf. Pickup*, 740 F.3d at 1229 n.5; *Sprague*, 2023 WL 12345, at *3 n.3 ("Sprague only engages in verbal counseling[.]"). This distinction is critical. In *Casey*, if no abortion is to be performed, the physician's communications do not trigger penalty. *See* 505 U.S. at 884. Meaning the regulation was concerned with directly regulating wholly separately identifiable conduct. Yet, here, even in the absence of separately identifiable conduct, the activity triggering censorship is solely the therapist's communications. *See, e.g.*, *Sprague*, 2023 WL 12345, at *3 n.3. Thus, § 106(d) is concerned with directly regulating speech.

Second, the dichotomy in *Pickup* and *Sprague*, where professional speech receives less protection depending where it falls on a continuum of "speech" or "conduct," is susceptible to manipulation. *See id.*, at *6. Notably, while establishing a "continuum," neither explained exactly how a court determines whether a statute regulates utterances that are truly speech and those that are somehow treatment or conduct. *See Pickup*, 740 F.3d at 1215–16 (O'Scannlain, J., dissenting from denial of rehearing *en banc*); *accord Sprague*, 2023 WL 12345, at *5–7. Suffice to say, this is an undesirable consequence, as without a standard, States will have a green light to circumvent First Amendment protections entirely by merely defining disfavored speech as conduct.

2. § 106(d) regulates speech directly because the only activity triggering censorship is Mr. Sprague's verbal communication, not any separately identifiable conduct.

This Court should not adopt the Ninth and Fourteenth Circuit's rulings. Rather, here, the Court should be guided by its own straightforward precedent. First, if a State cannot identify separately identifiable "conduct" being regulated, with regard to the professional, other than solely verbal communications, axiomatically, the only activity triggering censorship consists solely of communicating a message. *See Cohen*, 403 U.S. at 16–18; *Humanitarian L. Project*, 561 U.S. at

26–28. In that case, the Statute regulates speech directly, not conduct. *Cohen*, 403 U.S. at 16–18; *Humanitarian L. Project*, 561 U.S. at 26–28. Second, whether the communications are professional services is irrelevant. *Humanitarian L. Project*, 561 U.S. at 26–28 (rejecting an attempt to relabel speech—legal advice—delivered by *professionals*, consisting of solely verbal communication, as conduct); *accord Cohen*, 403 U.S. at 16–18 (rejecting an attempt to relabel speech delivered by a *lay-person*, consisting of solely written communication, as conduct).

Applying that framework, here, § 106(d) unquestionably regulates speech directly. The most analogous and reconcilable case with this Court's precedent compels this conclusion. In *Otto*, therapists were prohibited from providing talk therapy to minors by ordinance that prohibited any counseling with the goal of changing an individual's sexual orientation or gender identity. 981 F.3d at 859–60; *accord* § 106(e)(1). The Eleventh Circuit held these ordinances regulated speech directly because, with regard to the therapists, the activity triggering censorship consisted solely of communicating a message: the advice they may give their patients. *Id.* at 865–66. This was evident because the City could not identify a separately identifiable activity triggering censorship, other than the therapists' verbal communications, in connection with their speech. *Id.* (*citing to Cohen*, 403 U.S. at 18).

Here, like *Otto*, there is no separately identifiable activity triggering censorship, other than Mr. Sprague's verbal communications with patients. *See id.*; *Cohen*, 403 U.S. at 16–18; Record 3 n.3, 4. Further, North Greene's attempt to label talk therapy as "conduct" because it functions as "medical treatment" is unpersuasive because "it is never enough for the government to show how speech can also be framed as conduct." *Otto*, 981 F.3d at 866. Thus, this Court should hold, like *Otto*, that § 106(d) regulates speech directly, with regard to Mr. Sprague, because the only activity triggering censorship consists solely of communicating a message: the advice he may give his

patients. *See id.*; *Humanitarian L. Project*, 561 U.S. at 26–28; Record 3 n.3, 4. Because § 106(d) regulates protected speech directly, the Court must determine whether it is content discriminatory and thus subject to strict scrutiny.

B. *Second, §106(d) is content and viewpoint discriminatory, therefore North Greene must prove it withstands strict scrutiny.*

This Court distinguishes between content-based and content-neutral restrictions of speech. *Reed*, 576 U.S. at 163. Content-based restrictions—those targeting speech "because of the topic discussed or the idea or message expressed"—are presumptively unconstitutional and subject to strict scrutiny "regardless of the government's . . . *content-neutral justification*[.]" *Id.* at 163, 165 (emphasis added). Thus, North Greene's "mere assertion of a content neutral purpose" is irrelevant to this Court's analysis of whether § 106(d) is content discriminatory. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Rather, the Court must disregard the Statute's purpose, and focus on its effect: whether it penalizes speech based on its content. *See Reed*, 576 U.S. at 166.

Additionally, the fact that § 106(d) censors conversations of therapists, rather than lay people, does not affect the level of scrutiny if it does so based on the speech's content. Record 4; *see NIFLA*, 138 S. Ct. at 2371 ("Speech is not unprotected merely because it is uttered by professionals."). This stringent standard reflects that the point of the First Amendment "is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

1. § 106(d) is a viewpoint-based restriction and thus unconstitutional *per se*.

Viewpoint-based restrictions are a more egregious form of content discrimination. *Reed*, 576 U.S. at 168. In fact, this Court's precedent implies viewpoint-based restrictions are unconstitutional *per se*. *Taxpayers for Vincent*, 466 U.S. at 804 ("[T]here are some purported interests—such as a desire . . . to exclude the expression of certain points of view from the

marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule."). A viewpoint-based restriction is one that regulates speech based on agreement with the position the State wishes to express. *See* 1 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 3:9 (2023).

Here, § 106(d) is viewpoint discriminatory. This becomes obvious when considering the Statute provides a carveout for speech that accepts minors' identity exploration which does "not seek to change sexual orientation and gender identity." § 106(e)(2). Conversely, speech that does seek to change sexual orientation and gender identity is penalized. *See* § 106(e)(1). Thus § 106(d) regulates speech based on agreement with the position the State wishes to express: unwanted same sex-attractions cannot be reduced or eliminated. *See* Record 4. While the State can hold a particular viewpoint, it cannot do so by engaging in this form of censorship and bias regarding a point of view. *See Otto*, 981 F.3d at 864 (quoting *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009)). Therefore, this Court should hold § 106(d) is a viewpoint-based restriction and "immediately invalidate" it as unconstitutional *per se*. *Taxpayers for Vincent*, 466 U.S. at 804.

2. Alternatively, at minimum, § 106(d) is a content-based restriction subject to strict scrutiny.

This Court identifies content-based restrictions by asking whether enforcement authorities must examine the content of the message that is conveyed to determine whether a violation has occurred. *McCullen*, 573 U.S. at 479. For example, in *Am. Ass'n of Pol. Consultants, Inc.*, a regulation was content discriminatory when determining whether a robocall was legal required authorities to know the content of the message conveyed during the call: collecting government debt or anything else. *See* 140 S. Ct. at 2347. Similarly, here, determining whether to discipline a therapist requires authorities to know the content of the message conveyed during the therapy session: seeking to change a person's sexual orientation or anything else. *See id.*; *accord* Record

4; *see also Otto*, 981 F.3d at 863 (holding a similar ordinance was content discriminatory because "whether therapy is prohibited depends only on the content of the words used in that therapy"); *King*, 767 F.3d at 236 (conceding similar ordinance "discriminate[d] on the basis of content").

Moreover, constitutional problems posed by content-based restrictions are not mitigated because § 106(d) allows limited alternative avenues of expression—*i.e.*, communicating with the public about talk therapy. *See* Record 4; *Otto*, 981 F.3d at 864 ("The First Amendment does not protect the right to speak about banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government) (citing to *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 97 (1977)). Accordingly, this Court should hold, like *Am. Ass'n of Pol. Consultants, Inc.*, that § 106(d) is content-discriminatory and subject to strict scrutiny. *See* 140 S. Ct. at 2347.

C. *Finally, § 106(d) fails strict scrutiny because censoring talk therapy, in particular, is not narrowly tailored to serve a compelling interest.*

Because § 106(d) is, at minimum, content discriminatory it must be struck down unless it withstands strict scrutiny, which requires the State to "prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Bennett*, 564 U.S. at 734. Particularly, when free speech interests are at stake, the State "must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018). The State "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys.*, 512 U.S. at 664. Notably, "it is the rare case" in which a State demonstrates a speech restriction is narrowly tailored to serve a compelling interest. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015).

1. The legislative record lacks empirical data of talk therapy's harm.

A statute is not narrowly tailored where there is insufficient empirical evidence on the legislative record to demonstrate the harm it regulates is not merely conjectural. In *Edenfield*, for example, this Court struck down anti-solicitation regulations because the legislature had not "presented any studies" and relied on "nothing more than a series of conclusory statements that add little if anything" to the government's effort to regulate certain speech. 507 U.S. at 771; *see also Sable*, 492 U.S. at 130 (finding statute not narrowly tailored where record contained only anecdote and conclusory statements by bill proponents and lacked empirical evidence or data concerning alleged effectiveness of alternatives).

Glaringly, here, like in *Edenfield* and *Sable*, § 106(d) is not narrowly tailored because the North Greene legislature did not present any empirical evidence to support that talk therapy, in particular, is harmful to minors' well-being. *See* Record 4, 7, 9; 507 U.S. at 771; 492 U.S. at 130. This is fatal, whereas, here, a more extensive record than conclusory opinions and anecdotal reports is necessary given the legislative record had evidence that "particularly talk therapy" is "safe and effective." Record 7; *see Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 379 (2000) ("A more extensive evidentiary documentation might be necessary if respondents had made any showing of their own to cast doubt on the apparent implications of [the State's] evidence[.]").

Further, North Greene's reliance on the APA's position on conversion therapy is insufficient evidence under a narrowly tailored analysis. In *Otto*, the Eleventh Circuit was similarly presented with the issue of whether the APA's opinion on talk therapy was sufficient evidence to satisfy the State's burden in a narrowly tailored analysis. 981 F.3d at 868. It was not enough in *Otto*, nor is it here. *Id.* Here, like in *Otto*, the APA's conclusions were not based on studies analyzing empirical evidence, but mere conjecture based on anecdotal reports. *Id.* at 869;

Record 4, 7, 9. Strict scrutiny cannot be satisfied by a professional society's opinion, no matter how reputable, on disfavored speech. That would be akin to accepting that majority preference can justify content discriminatory restrictions of speech, which is unacceptable considering this Court has warned majority preferences must be expressed without silencing speech on the basis of its content. *R.A.V.*, 505 U.S. at 392.

It is easy to see why this is a dangerous precedent to accept. Indeed, the Eleventh Circuit in *Otto* recounted how the same APA. which North Greene relies on today, classified homosexuality as a paraphilia until 1987. 981 F.3d at 871. It would have been horribly wrong then to allow professional consensus against homosexuality justify censoring verbal counseling that affirmed it. Just as it would be horribly wrong today to allow a new consensus to justify restrictions on Mr. Sprague's ability to practice talk therapy. Thus, like in *Edenfield* and *Sable*, §106(d) is not narrowly tailored because the legislative record has no empirical evidence that the harms of talk therapy are not merely conjectural. *See* Record 4, 7, 9; 507 U.S. at 771; 492 U.S. at 130.

2. North Greene has not demonstrated censoring talk therapy is the least restrictive means of achieving its compelling interest.

Further, a statute is not narrowly tailored if the State fails to demonstrate it is the least restrictive means of achieving its compelling interest. *McCullen*, 573 U.S. at 478. Under this standard, the State is required to demonstrate it "seriously undertook" efforts to address the harm with less intrusive methods. *See id.* at 494–95. In *McCullen*, the State failed to undertake these efforts where it could not identify a single use of existing relevant statutes to accomplish its objective, without censoring speech, or that it considered methods employed in other jurisdictions. *See id.*; *see also Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) ("As the Court explained in *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem.").

Here, North Greene failed to demonstrate that it undertook efforts to address the supposed effects of talk therapy with less intrusive methods than censoring talk therapy. The record speaks for itself. Like *McCullen*, North Greene's legislature did not identify a single use, or failure, of its existing statutes to address the supposed harmful effects of talk therapy. 573 U.S. at 495–96; Record 3–4, 7. Also, like *McCullen*, the legislature did not bother considering other methods employed in other jurisdictions. 573 U.S. at 495–96; Record 3–4. Therefore, like *McCullen*, § 106(d) is not narrowly tailored because the State did not meet its burden to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." 573 U.S. at 495. Accordingly, this Court should hold § 106(d) fails strict scrutiny and is unconstitutional under the Free Speech Clause of the First Amendment.

II. This Court Should Reverse the Fourteenth Circuit's Decision Because § 106(d) is Not Neutral nor Generally Applicable and Fails Strict Scrutiny Under the Hybrid Rights Theory; Alternatively, *Employment Division v. Smith* Should be Overruled.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law…prohibiting the free exercise of religion. AMEND. I, U.S. CONST. It "protects not only the right to harbor religious beliefs inwardly and secretly," but "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from) physical acts.'" *Kennedy,* 142 S. Ct. at 2421 (quoting *Smith*, 494 U.S. at 877). Here, the Free Exercise Clause protects Mr. Sprague's right to practice his religion within the dictates of his conscience.

First, this Court should reverse the Fourteenth Circuit's holding because § 106(d) does not survive *Smith*'s threshold neutrality and general applicability requirements. Second, even if § 106(d) is neutral and generally applicable (which it is not), strict scrutiny applies because Mr. Sprague asserts two colorable constitutional claims. North Greene cannot satisfy strict scrutiny

because § 106(d) is underinclusive and thus not narrowly tailored to serve its compelling interest in protecting the psychological well-being of minors. Alternatively, this Court's holding in *Smith* goes against this Court's Free Exercise jurisprudence and should be overruled.

A. *§ 106(d) abridges Mr. Sprague's ability to pursue his livelihood and give counsel consistent with his faith in violation of the Free Exercise Clause.*

Under the Free Exercise Clause, a government entity must satisfy strict scrutiny, showing its restrictions on the plaintiff's protected rights serve a compelling interest and are narrowly tailored to that end. *See Lukumi*, 508 U.S. at 533. To avoid strict scrutiny, a law that burdens individuals' religious exercise must be both neutral and generally applicable. *Id.* at 546. Under *Smith*, neutral rules of general applicability are analyzed under a rational basis framework. *Smith*, 494 U.S. at 879-882. However, a "neutral, generally applicable law to religiously motivated action" may still trigger strict scrutiny if the Free Exercise Clause is violated "in conjunction with other constitutional protections." *Id.* at 881.

1. § 106(d) is not neutral because it is based on religious hostility and targets a religious practice.

§ 106(d) is not neutral because it lacks operational neutrality and hales from the State's overt animus. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. *Masterpiece,* 138 S. Ct. at 1731. Facial neutrality does not shield "[o]fficial action that targets religious conduct for distinctive treatment" because the Clause protects against both "masked" and "overt" hostility. *Lukumi*, 508 U.S. at 534. Government officials fail to act neutrally and ignore their independent duty to the Constitution and the rights it secures when they proceed "in a manner intolerant of religious beliefs" or restrict "practices because of their religious nature." *Fulton,* 141 S. Ct. at 1877.

Facially neutral laws violate the Free Exercise Clause if "the effect of a law in its real operation" is to target "religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 535. In *Lukumi*, practitioners of Santeria, which uses animal sacrifice, challenged city ordinances restricting animal slaughter. *Id.* at 524–25. But while one of the challenged ordinances prohibited animal sacrifice, the ordinance's definition of "sacrifice" excluded "almost all killings of animals except for religious sacrifice" and exempted kosher slaughter. *Id.* at 535–36. Consequently, "few if any killings of animals are prohibited other than Santeria sacrifice." *Id.* at 536. This Court invalidated the ordinance and admonished the legislature's impermissible attempt at targeting religious practices through careful legislative drafting. *Id.* at 535–37.

Here, North Greene's attempt at religious gerrymandering through careful legislative drafting similarly violates the Free Exercise Clause because § 106(d)'s real operation targets religious conduct. *Id.* at 535–37; Record 14-15. As the dissent acknowledged, § 106(d) "overwhelmingly, if not exclusively" targets religious speech." Record 14; *see Tingley*, 57 F.4th at 1083 (Bumatay, J., dissenting) ("[W]e also cannot ignore that conversion therapy is often grounded in religious faith."). In reality, "[r]eligious ministries promoting conversion therapy have existed since 1973" and "now form the majority of conversion therapy practices." Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy*, 16 DUKEMINIER AWARDS 63, 80 (2018).

While the Fourteenth Circuit held that § 106(d) impacted both the religious and non-religious, the American Psychological Association, which the North Greene General Assembly relied on, "acknowledged that most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." Record 15. The American Counseling Association also described

conversion therapy as a religious practice. Record 15. Consequently, § 106(d) is not operationally neutral.

A law is not neutral when the government "passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece*, 138 S. Ct. at 1731. In *Masterpiece*, state officials investigated a baker after he declined to create custom wedding cakes for same-sex couples due to his religious beliefs. *Id.* at 1724–26. In its opinion, this Court found that officials, specifically in its derogatory anti-religious comments, demonstrated "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection." *Id.* at 1729 (citing comments from officials that "[religion] is one of the most despicable pieces of rhetoric that people can use [to] use their religion to hurt others.").

§ 106(d) is similarly not neutral because its legislative sponsors passed judgment and presupposed the illegitimacy of Mr. Sprague's beliefs and practices by advocating for § 106(d) using anti-religious and hostile comments. *Id.* at 1731; Record 9. As in *Masterpiece*, where officials described the baker's religious beliefs as "despicable" and analogous to "defenses of slavery and the Holocaust" here, co-sponsoring legislators openly expressed their anti-religious animus and contempt by demeaning Mr. Sprague's counseling work as "barbaric" and as efforts to "worship" or "pray the gay away." *Masterpiece*, 138 S. Ct. at 1731; Record 9.

These comments echo the remarks this Court has consistently highlighted and condemned. *See Masterpiece*, 138 S. Ct. at 1729; *Lukumi*, 508 U.S. at 541–42 (citing comments by city officials describing Santeria as "foolishness," "an abomination," and "abhorrent"); *see also Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 2023 U.S. App LEXIS 24260, *63-64 (9th Cir. Sept. 13, 2023) (citing comments by school staff calling the plaintiffs' beliefs "bullshit" and calling members of the club "charlatans" who "conveniently forget what tolerance

means"). While the Fourteenth Circuit disregarded § 106(d)'s legislatures' comments as coming "nowhere close to the hostility contained in the comments at issue in *Masterpiece*," this Court has emphasized that courts must pause "upon even slight suspicion that" government officials act out of "animosity to religion or distrust of its practices." Record 9; *Masterpiece*, 138 S. Ct. at 1731.

2. § 106 is not generally applicable it permits secular conduct that equally undermines the State's asserted interest.

§ 106(d) also fails *Smith* because it is not generally applicable. A policy that tre religious activities less favorably than secular conduct" that similarly undermines the government's asserted interests "lacks general applicability." *Fulton*, 141 S. Ct. at 1877. Comparability does not require that the religious and secular conduct involve similar forms of activity, but instead depends on whether the secular conduct" endangers these interests in a similar or greater degree than the religious conduct does." *Lukumi,* 508 U.S. at 543. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, this Court invalidated COVID restrictions for houses of worship, because the State did not extend attendance restrictions to places like "acupuncture facilities, campgrounds, garages," and retail stores." 141 S. Ct. 63, 66–67 (2020). This Court held that the State's restrictions were not generally applicable because the State did not place attendance restrictions on those secular locations, despite those locations having similar health risks as the houses of worship. *Id.* at 67.

Here, § 106(d) lacks general applicability because it treats religious activities less favorably than secular conduct which undermines its interest in protecting minors. North Greene's General Assembly "indicated that it enacted § 106(d) to protect the physical and psychological well-being of minors" and "to protect its minors against exposure to serious harms caused by sexual orientation change efforts" such as "depression, suicidal thoughts or actions, and substance abuse." Record 7. That said, § 106(e) explicitly permits "counseling… that provide[s] acceptance, support, for "clients' coping, social support, and identity exploration and development that do not seek to

change sexual orientation or gender identity," despite Mr. Sprague's fears as a licensed therapist that "gender-affirming therapy "can lead to [similar] psychological harms." Record 4, 10. The Fourteenth Circuit disregarded Mr. Sprague's concern about psychological harm stemming from regret as dissimilar conduct because the harms were not directly the same. Record 10. But under *Cuomo*, the State's interest in protecting minor's psychological well-being would encompass both harm flowing from "regret" and harm flowing from trying to be changed. Record 10; *see Cuomo*, 141 S. Ct. at 67.

3. § 106(d) triggers strict scrutiny under *Smith*'s hybrid rights theory because it arguably infringes on two constitutional rights.

Even if § 106(d) were found to be neutral and generally applicable (which it is not), strict scrutiny would still apply because § 106(d) not only burdens Mr. Sprague's Free Exercise rights but also infringes his free speech rights, as described above. The hybrid rights doctrine derives from a paragraph in *Smith* in which the Court explained why its decision was reconcilable with its earlier applications of strict scrutiny to general laws that incidentally impeded the free exercise of religion. *Smith*, 494 U.S. at 881. North Greene now must show that § 106(d) survives strict scrutiny, "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The State must demonstrate that § 106(d) is (1) narrowly tailored and (2) serves a compelling state interest. *Fulton*, 141 S. Ct. at 1881. North Greene can do neither.

Strict scrutiny requires that the State establish real harm that is not merely conjectural and that its regulation will alleviate those harms in a direct and material way. *Turner Broad. Sys.*, 512 U.S. at 664. While North Greene's "interest in safeguarding the physical and psychological well-being" of minors is compelling, *New York v. Ferber*, 458 U.S. 747, 756–57 (1982), even when a state is protecting children "the constitutional limits on governmental action apply." *Brown v. Ent. Merchs. Ass'n*, 564 786, 805 (2011). North Greene relies on a report from the American

Psychological Association, but even the Fourteenth Circuit conceded that there was contradictory "evidence that conversion therapy, and particularly talk therapy, is safe and effective." Record 7. Consequently, North Greene cannot rely on conjectural allegations of harm based on admittedly inadequate research.

Underinclusive laws are not narrowly tailored. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). § 106(d) is underinclusive with respect to its purported purpose of "protecting minors from psychological harm" because it bans licensed counselors from using conversion therapy while permitting the same conduct by "[r]eligious practices or counseling" and "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization" N. Greene Stat. § 106(f). North Greene articulates no reason why conversion therapy offered by "nonlicensed counselors" would not have the same allegedly harmful effect as therapy from licensed counselors, nor can it. Because North Greene cannot satisfy strict scrutiny, this Court should remand with instructions to enter a preliminary injunction against § 106(d).

3. This Court should overrule Smith because it (1) was egregiously wrong the moment it was decided; (2) created an unworkable doctrine for future cases; and (3) lacks any legitimate reliance interest.

"This Court has not hesitated to overrule decisions offensive to the First Amendment, a fixed star in our constitutional constellation if there is one." *Janus*, 138 S. Ct. at 2478 (internal quotations removed) (overruling *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)); *see also Citizens United v. Fed. Elect. Comm'n*, 558 U.S. 310, 363 (2010) (overruling *Austin v. Michigan Chamber of Com.*, 494 U.S. 652 (1990)); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (overruling *Minersville Sch. Dist. v. Gobitas*, 310 U.S. 586 (1940)). While *stare decisis* plays an "important role" in our nation's jurisprudence, this Court has long recognized "that *stare decisis* is not an inexorable command and it is at its weakest when [the Court] interpret[s] the

Constitution." *Dobbs*, 142 S. Ct. at 2262. Crucially, "*stare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Janus,* 138 S. Ct. at 2478.

The Court uses multiple factors when deciding whether to overrule precedent. *See Dobbs*, 142 S. Ct. at 265. Traditionally this Court considers whether the prior decisions (1) was egregiously wrong; (2) caused negative jurisdictional or real-world consequences; and (3) would upset reliance interests if reversed. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). Here, each factor warrants overruling *Smith*. *See Fulton*, 141 S. Ct. at 1913 (opinion of Alito, J.) ("No relevant factor, including reliance, weighs in *Smith*'s favor."). *Smith* wrongly permits governmental burdens on religion without requiring that officials show their compelling interest. This is poorly justified and unsupported by the Clause's text. Post-*Smith* caselaw, scholarship, and legislative action reveal how unworkable and unpalatable *Smith*'s jurisprudential and real-world consequences are. Lastly, *Smith* does not possess any legislative, doctrinal, or societal reliance interests.

1. *Smith*'s transformation of the Free Exercise Clause into a less strenuous equal protection mandate is egregiously wrong.

Smith is egregiously wrong because it allows the government to establish laws burdening individuals' religious exercise without demonstrating a compelling interest, and the nature of this reasoning violates the core of the Free Exercise Clause. A case may be egregiously wrong when decided, or after later legal and factual understandings or developments unmask the error. *See Ramos*, 140 S. Ct. at 1415 (internal citations omitted).

"[T]he quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." *Dobbs*, 142 S. Ct. at 2266. In *Dobbs*, this Court justified overruling *Roe* and *Casey* by emphasizing that it stood on "exceptionally weak" constitutional grounds. *Id.* Roe held that "the Constitution implicitly conferred a right to an abortion, but it failed to ground its decision in text, history, or precedent." *Id.* Similarly, *Smith*'s poor reasoning highlights why it should be

reconsidered. *Smith* "paid shockingly little attention to the text of the Free Exercise Clause." *Fulton*, 141 S. Ct. at 1894 (Alito, J. concurring). *Smith* did not consider briefs from the parties or amicus about the subject, and no party questioned the Free Exercise Clause's meaning. *Id.* at 1891–92. Although *Smith* called its interpretation of the Clause "permissible," like *Dobbs*, its interpretation was not grounded in the decision's text, history, or precedent.

Smith is contrary to the text, original understanding, and historical interpretation of the Free Exercise Clause. *See Lukumi*, 508 U.S. at 559–560, 564 (Souter, J., concurring). The Clause is expressed in absolute terms and "does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Accordingly, the plain text's most natural reading is that the Clause "prevents the government from making a religious practice illegal," regardless of a law's neutrality or general applicability. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1115 (1990).

Smith also contradicts the Clause's historical interpretation and understanding. *City of Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting) (recognizing the importance of interpreting the Religion Clauses history). Free exercise appeared in American legal documents as early as 1648 and in religious protective provisions in early state charters. *Id.* at 551. Historical documents show that the Colonies acknowledged an individual's right to "pursue one's chosen religion as an essential liberty" and that "government should interfere in religious matters only when ... important state interests militated otherwise." *Id.* at 552. This history "supports the view that impositions on religious conscience may be enforced only if they serve the fundamental interests of the state." Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A*

Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores, 39 WM. & MARY L. REV. 819, 832 (1998).

Smith contradicts the rest of this Court's Free Exercise jurisprudence. *See, e..g., Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Rev. Bd. of Indiana Emp. Sec. Div.*, 450 U.S. 707, 719 (1981). In *Yoder*, Wisconsin established a compulsory school-attendance law, requiring families to send their children to school until age 16. *Yoder*, 406 U.S. at 207. Members of the Old Order Amish religion were fined for refusing to send their children to school. *Id.* at 209-10. Although Wisconsin's requirement…applie[d] uniformly to all citizens of the State" and was "motivated by legitimate secular concerns" this Court still found that the regulation offended "the constitutional requirement for governmental neutrality" because it "unduly burden[ed] the free exercise of religion." *Id.* at 220. While this Court acknowledged Wisconsin's important interest, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id.* at 215.

Here, the *Smith*'s holding contradicts this Court's jurisprudence. *See, e.g., Yoder*, 406 U.S. 205; *Thomas*, 450 U.S. at 719. *Smith* holds that "generally applicable" and "neutral" laws that burden a particular religious practice "need not be justified…by a compelling governmental interest." *Smith*, 494 U.S. at 886 n.3. This offends this Court's previous jurisprudence, which emphasized that "in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). In *Smith* itself, four Justices lambasted the majority's opinion as "dramatically depart[ing] from well-settled First Amendment jurisprudence." *Smith*, 494 U.S. at 891 (O'Connor, J., concurring). Justice Blackman admonished the majority opinion's "wholesale overturning of settled law." *Id.* at 908. (Blackmun, J., dissenting).

Finally, *Smith*'s error has been unmasked through later understanding of the Free Exercise Clause and subsequent legal developments. *Smith*'s underlying premise was that our pluralistic society "would be courting anarchy" by trying to apply strict scrutiny. *Id.* at 888. Yet that cynical prediction has been debunked. For the last thirty years, this Court, the political branches, and states have tried to mitigate *Smith*'s undesirable consequences.

Shortly after *Smith* was decided, Congress was flooded with reports of *Smith*'s negative consequences. *See* 139 Cong. Rec. 9685 (1993) (remarks of Rep. Hoyer). Congressional rebellion against *Smith* motivated the Religious Freedom Restoration Act ("RFRA"), and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Both acts restored the pre-*Smith* compelling interest test. Twenty-one states have since passed their own versions of these laws. *See* Douglas Laycock, *Religious Liberty and the Culture Wars*, 2014 U. ILL. L. REV. 839, 845 (2014) (collecting state RFRAs). Over two decades of application of these laws have highlighted that the compelling interest test is capable of principled, sensible application.

Although *Smith* promised to free courts from difficult and arbitrary real-world balancing, applying *Smith* has proven equally as challenging for courts as traditional strict scrutiny. *See Tandon*, 141 S. Ct. at 1297 ("This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise."); *Cuomo*, 141 S. Ct. 63 (reversing the Second Circuit); *Robinson v. Murphy*, 141 S. Ct. 972 (2020) (reversing the Third Circuit); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (reversing the Tenth Circuit).

2. The unworkability of the "neutral" and "generally applicable" doctrine in *Smith* has created jurisprudential and real-world consequences.

Courts, when contemplating overruling precedent, examine its jurisprudential consequences and real-world effects. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in

part). A doctrine's jurisprudential consequences depend on its workability. *Dobbs*, 142 S. Ct. at 2272. Workability means how easily understood and applicable a doctrine is. *Id.* at 2272.

A doctrine is unworkable if any interpretation leads to different Justices reaching different conclusions. *Janus*, 138 S. Ct. at 2481–82. *Janus*, a case about a non-union worker who challenged a state law requiring him to subsidize industry fees but did not define what fees were chargeable, overruled *Abood,* in part, because of its unworkability. *Abood*, 431 U.S. at 209. *Abood*'s doctrine was unworkable because its framework led the Justices to differing conclusions, potentially perpetuating drastic differences across districts. *See Janus*, 138 S. Ct. at 2482.

Here, *Smith*'s doctrine is just as unworkable because different Justices reach differing conclusions about the meaning of "neutral" and "generally applicable." In this Court's recent COVID-19 epidemic attendance restriction cases, the Justices consistently disagreed about how to identify secular activities for comparators, which are essential to the Court's "neutral" analysis. *South Bay United Pentecostal Church v. Newson*, 140 S. Ct. 1613 (2020) (Robert, J.'s concurrence analogized religious services to lectures, concerts, movies, sports events, and performances; Dissenters analogized religious services to supermarkets, restaurants, factories, and offices); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (2020) (same).

3. Overruling *Smith* would not upset any legitimate reliance interests.

This Court may overrule precedent when overruling would not upset legitimate reliance interests. *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., dissenting). When analyzing reliance interests, the Court examines the precedents' effect on other areas of the law, age, and the reliance of citizens. *Dobbs*, 142 S. Ct. at 2276–77. *Stare decisis* is particularly strong where both the legislature and courts rely on a previous decision. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991).

Here, neither the state legislatures nor subsequent jurisprudence adequately rely on *Smith*. Twenty-one states have implemented their own version of RFRA out of defiance for *Smith*. *See* Douglas Laycock, *supra*, at 845. Similarly, "*Smith*'s dubious standing" weighs against reliance, particularly where *Smith* has been heavily contested since it was decided, and many cases have urged its reexamination. *Fulton*, 141 S. Ct. at 1923–1924 (Alito, J. concurring) (collecting cases).

In conclusion, *Smith* is egregiously wrong because it allows the government burden individuals' religious exercise without demonstrating a compelling interest–neutering the Free Exercise Clause. *Id.* at 1894. Furthermore, *Smith*'s framework is unworkable, and over two decades of RFRA and RLUIPA application prove that the compelling interest test is capable of principled, sensible application. *Tandon*, 141 S. Ct. at 1297. Finally, overruling *Smith* would not upset any legitimate reliance interests. *Fulton*, 141 S. Ct. at 1923–1924 (Alito, J. concurring).

CONCLUSION

This Court should reverse the Fourteenth Circuit's decision and grant Mr. Sprague's preliminary injunction. Here, § 106(d) violates the Free Speech clause because it directly censors Mr. Sprague's speech based on viewpoint and is therefore unconstitutional *per* se. Alternatively, § 106(d) censors Mr. Sprague's speech directly based on content and fails strict scrutiny because § 106(d) is not narrowly tailored to achieve a compelling interest. §106(d) also violates the Free Exercise clause because it fails *Smith*'s threshold neutrality and general applicability requirements. Alternatively, this Court should overrule *Smith* because it is egregiously wrong and perpetuates the same governmental interference and suppression the First Amendment was committed to protect.