No. 22-2020

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 Supreme Court

BRIEF FOR PETITIONER

Counsel for Petitioner

Team 4

QUESTIONS PRESENTED

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

II. Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

PARTIES TO THE PROCEEDING

Petitioner Howard Sprague

Respondent State of North Greene

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INTRODUCTION

At the heart of American liberties lies the five rights enshrined in the First Amendment of the United States Constitution. These five rights, and the jurisprudence that surrounds them, are careful balances, struck between the government and her people. Government actors have an interest in protecting some of society's most vulnerable populations, youth. On the other hand, individuals have rights to speak and worship without unjust governmental intrusion and restriction. In the present case, the Fourteenth Circuit has unjustly tipped the scales of the balance in favor of the government. In its affirmance of the trial court, the Fourteenth Circuit allowed for the state to infringe on individual's free speech and free exercise rights. We ask this Court to overrule.

STATEMENT OF THE CASE

Mr. Howard Sprague is a licensed family therapist in the state of North Greene who helps clients work through various issues regarding sexuality and gender orientation. (R p. 3). Mr. Sprague is deeply religious. (R p. 3). Although he does not work for a religious institution, his work is heavily influenced by his religious beliefs. (R p. 3). Mr. Sprague believes sexual relationships should only occur between man and woman, and the sex that an individual is assigned at birth should never be changed. (R p. 3). In fact, many of his clients come from similar religious backgrounds and hire him because of those shared beliefs. (R p. 3).

North Greene has enacted a law (N. Greene Stat. § 106(d)) that bans licensed health care providers, such as Mr. Sprague, from practicing any form of conversion therapy on minors. (R p. 3). Under the statute, conversion therapy is defined as "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." (R p. 4). The statute also explains that conversion therapy does not include counseling that "provide[s] acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration . . . that do[es] not seek to change sexual orientation or gender identity." (R p. 4). Additionally, North Greene's legislature specified that N. Greene Stat. § 106(d) may not be applied to speech that "does not constitute performing of conversion therapy . . . [or] counseling under the auspices of a religious denomination . . . that does not constitute performing conversion therapy by licensed health care providers." (R p. 4). Under the statute, health care providers are allowed to communicate with others about conversion therapy and their views on conversion therapy; they are not allowed to actually practice such therapy. (R p. 4).

North Greene's intent for enacting the statute was to regulate health care providers' "professional conduct" in an attempt to protect the "physical and psychological well-being of minors." (R p. 4). The General Assembly relied on the American Psychological Association's ("APA") general opposition to conversion therapy. (R p. 4).

Mr. Sprague brought suit to enjoin enforcement of N. Greene Stat. § 106(d) in August 2022, alleging that the statute violates both his free speech and free exercise rights under the First Amendment. (R p. 5). The state opposed Mr. Sprague's motion for a preliminary injunction and filed a motion to dismiss. (R p. 5). The district court granted North Greene's motion to dismiss, and the Fourteenth Circuit affirmed. (R pp. 5, 11). Mr. Sprague appealed, and this Court granted his Petition for Writ of Certiorari. (R p. 17).

SUMMARY OF THE ARGUMENT

First, we ask this Court to overturn the Fourteenth Circuit's holding that N. Greene Stat. § 106(d) does not violate Mr. Sprague free speech rights under the First Amendment. The statute

constitutes a regulation of speech, not conduct, because Mr. Sprague's practice consists entirely of oral communication with clients. Additionally, because the law targets only certain speech based on its communicative intent, the law is content-based and thus subject to strict scrutiny.

Second, N. Greene Stat. § 106(d) fails the neutrality prong of *Employment Division v. Smith*, which subjects 106(d) to strict scrutiny, which it cannot pass. In the alternative, this Court should overturn *Smith*, revert to previous Free Exercise jurisprudence, and subject N. Greene Stat. § 106(d) to strict scrutiny as *Smith* is inconsistent with Free Exercise jurisprudence and *stare decisis* principles do not protect *Smith*'s continuance.

ARGUMENT

I. NORTH GREENE'S STATUTE CENSORING CONSERVATIONS BETWEEN COUNSELORS AND CLIENTS VIOLATES THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT

The Fourteenth Circuit erred when it held that N. Greene Stat. § 106, banning the practice of conversion therapy on minors, was constitutional under the First Amendment. First, the statute does not regulate conduct because Mr. Sprague's practice consists entirely of oral communication. Because the statute constitutes a regulation of speech, it must be subject to First Amendment scrutiny. Additionally, N. Greene Stat. § 106(d) is not a regulation of professional conduct. The effect that this law has on Mr. Sprague's speech is much more than incidental; it is essential. Finally, the North Greene statute regulates Mr. Sprague's speech on the basis of content; therefore, it is subject to strict scrutiny. Because the law cannot survive a strict scrutiny analysis, this Court should reverse and find that N. Greene Stat. § 106(d) violates Mr. Sprague's First Amendment free speech rights.

A. A Law Restricting a Practice Consisting Entirely of Oral Communication is a Regulation of Speech, not Conduct

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits laws that unconstitutionally abridge one's freedom of speech. U.S. CONST. amend. I. The ideal sitting at the center of the First Amendment's Free Speech clause is "the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). The government cannot restrict a person's speech simply because the government disagrees with such speech.

The First Amendment regulates speech, not conduct. *See* U.S. CONST. amend. I. Statutes that regulate pure conduct, as opposed to speech or expressive conduct, are not subject to any First Amendment restrictions. Thus, if the Court determines that Mr. Sprague's practice constitutes conduct, it shall uphold the statute as constitutional under the First Amendment. However, that is not the case at hand. Mr. Sprague's practice consists solely of speech, triggering First Amendment application.

Verbal communication cannot be characterized as "conduct" purely based on the intended function the communication serves. In *Holder v. Humanitarian Law Project*, Congress passed a law prohibiting people and groups from providing material support to a foreign terrorist organization. 561 U.S. 1, 8 (2010). The plaintiffs challenged, in part, the statute's prohibition against the training of members of terrorist organizations on how to use humanitarian and international law to resolve disputes peacefully. *Id.* at 14-15. The government argued that the statute in question regulates conduct, and the impact it has on the plaintiff's speech is merely incidental. *Id.* at 26. The Court thought otherwise, as it held that the statute regulated content-based speech, not conduct. The fact that the statute might be directed at conduct does not matter if, as

applied to the plaintiff, it in fact regulates speech. *Id.* at 28 (explaining "[t]he law here may be described as directed at conduct, . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.").

Here, the state of North Greene is unconstitutionally attempting to regulate Mr. Sprague's speech by characterizing it as conduct. The Court in *Holder* concluded that the plaintiffs were providing material support to the terrorist organizations in the form of speech. *Id.* at 28. Ultimately, the statute regulated speech, thus triggering First Amendment protection. The case here is no different. Mr. Sprague is providing counseling and therapy also in the form of speech. (R p. 3). Even if the state's overarching goal is to regulate conduct, it is not doing so as it applies to Mr. Sprague. His entire therapy consists of verbal communication. Just as the government was not permitted to regulate the verbal training communicated in *Holder*, the government should not be permitted to regulate the verbal counseling communicated by Mr. Sprague in this case.

In coming to its conclusion, the Fourteenth Circuit's tunnel-visioned analysis overlooked important considerations. The Court primarily relied on *Pickup v. Brown*, where the Ninth Circuit concluded that a law prohibiting conversion talk therapy regulated conduct, and thus did not trigger First Amendment protection. 740 F.3d 1208, 1229-30 (9th Cir. 2014) (concluding that the law "regulate[d] . . . therapeutic treatment, not expressive speech"). While the Court's analysis of *Pickup* is not incorrect, it fails to mention several other circuit courts that have come to opposite conclusions on the specific issue at hand.

The Eleventh Circuit, for example, has held that such speech-based conversion therapy constitutes speech under the First Amendment. In *Otto v. City of Boca Raton*, therapists challenged a law that prohibited them from engaging in therapy aimed at altering a minor's sexual orientation, reducing a minor's sex drive towards others of the same sex, and changing a minor's gender

identity. 981 F.3d 854, 859 (11th Cir. 2020). The Court held that the law constituted a content-based regulation of speech, thus triggering a strict scrutiny analysis under the First Amendment. *Id.* The fact that the speech is controversial does not give the government an ability to regulate it. *See id.* (explaining "the First Amendment has no carveout for controversial speech.").

The same conclusion was reached by the Third Circuit in *King v. Governor of N.J.*, 767 F.3d 216 (3rd Cir. 2014). There, the state of New Jersey enacted a law prohibiting licensed counseling professionals from engaging "in sexual orientation change efforts with a person under 18 years of age." *Id.* at 221. Plaintiffs included individuals and organizations that administered such sexual orientation change efforts ("SOCE") solely through the use of verbal communication. *Id.* Relying heavily on the precedent established by the Supreme Court in *Holder*, the Court held that such verbal communication is speech, not conduct, and thus must be protected under the First Amendment. *Id.* at 224-25 ("Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are 'conduct.'"). A law that is merely aimed at regulating conduct does not automatically avoid First Amendment scrutiny; if it in fact regulates speech, the First Amendment must be applied. *Id.* at 225.

B. The Legislature Cannot Disguise Unconstitutional Regulation of Speech by Labeling it Regulation of "Professional Conduct"

The Fourteenth Circuit concluded that North Greene's law primarily regulates conduct, and any effect the law has on free speech interests is merely incidental. (R p. 7). However, that is not the case. Considering the nature of Mr. Sprague's practice, which solely consists of verbal communication with patients, the law regulates absolutely nothing other than speech. Thus, a law cannot be labeled as regulating conduct that impacts speech when there is no regulation of conduct in the first place.

States may regulate professional conduct, even if speech is incidentally impacted. *Nat'l Inst. of Family Life & Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (stating "the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech."). While drawing the line between pure speech and professional conduct incidentally impacting speech can be difficult, the Supreme Court has not shied away from drawing it. Furthermore, when applying such precedent to the case at hand, it becomes clear that Mr. Sprague's practice falls on the side of pure speech.

A law regulating the procedure of performing an abortion, for example, constitutes a law regulating professional conduct, and any impact it has on speech is merely incidental. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992), overruled on other grounds by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). There, a Pennsylvania law required physicians to inform patients of various considerations, such as the "probable gestational age of the unborn child," before performing an abortion. *Id.* at 881. The Court rejected the free-speech challenge, reasoning that the law affected free speech only as part of the *conduct* of performing an abortion. *Id.* The law's primary purpose was to regulate conduct, and any impact on speech was merely incidental.

On the other hand, a law that purely regulates speech, not attached or connected to any conduct, should be protected under the First Amendment as such. In *NIFLA*, for example, various Christian-based clinics challenged an act that required clinics primarily serving pregnant women to provide them with various notices. 138 S. Ct. at 2368. The Act required licensed clinics to notify its patients that the state of California provides low-cost services, including abortions, and it required unlicensed clinics to inform its patients that there are various licensed clinics that can provide medical services. *Id.* Unlike the regulation in *Planned Parenthood*, the notice requirement

of this act is not a regulation of any conduct or tied to any sort of medical procedure. *Id.* at 2373. The regulation applied solely to the verbal communication between the clinics and their clients. *Id.* Thus, the Court held, the act "regulate[d] speech as speech," not conduct incidentally impacting speech. *Id.* at 2374.

Just as in *NIFLA*, North Greene's statute regulates Mr. Sprague's speech as speech. *See id.* Mr. Sprague's only method of therapy with his clients is verbal communication. (R p. 3). There is no physical conduct associated with his practice whatsoever. (R p. 3) (stating that Mr. Sprague "does not utilize any physical methods of counseling or treatment with his clients."). The impact that North Greene's statute has on the free speech rights of therapists such as Mr. Sprague is far from incidental. Rather, the impact is fundamental.

C. North Greene's Statute Unconstitutionally Regulates Speech on the Basis of Content

In its most foundational sense, the First Amendment prohibits the passing of laws "abridging the freedom of speech." U.S. CONST. amend. I. Free Speech jurisprudence has created a significant distinction between laws regulating speech based on its content and laws regulating speech regardless of its content. A content-based regulation is one that "target[s] speech based on its communicative intent." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (holding that an ordinance prohibiting signs conveying certain messages was an unconstitutional, content-based regulation of speech). Generally, the government does not have the power to restrict an individual's speech based on what that individual is saying. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (stating "[the] government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Such regulations "are presumptively unconstitutional," and may be upheld *only* if they survive a strict scrutiny analysis. *Id.* (emphasis added). In other words, a content-based regulation on speech will be unconstitutional under the

First Amendment unless the government proves that the regulation is narrowly tailored to serve a compelling interest. *Id.*

An effective method for determining if a regulation is content-based under the First Amendment is to ask whether the regulation risks removing certain ideas from the marketplace of ideas. Content-neutral regulations are completely unrelated to the content of the speech being regulated. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (2004). Content-based regulations on speech risk "excising certain ideas or viewpoints from the public dialogue." *Id.* Another method of determination is to decide whether the government adopted the regulation because it disagrees with a certain message. *See id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) (stating "[t]he government may not regulate [speech] based on hostility – or favoritism – towards the underlying message expressed").

Here, North Greene's regulation on Mr. Sprague's speech is content-based. Mr. Sprague engages in talk therapy with his clients, helping them with issues such as sexuality and gender identity. (R p. 3). North Greene's law prohibits such talk therapy that is considered to be "conversion therapy." (R p. 3). According to the North Greene legislature, conversion therapy includes attempts to alter an individual's sexuality or gender identity. (R p. 4). The ultimate goal is to prevent individuals from changing the gender identity they were given at birth in addition to halting any romantic attractions they may feel towards others of the same sex. (R p. 4). There is no practical way to apply the law without considering the content of the speech therapy. The law does not ban all speech therapy. Rather, it bans only speech therapy that seeks to alter a person's gender identity or sexual orientation.

Additionally, the law was likely enacted because the government disagreed with the particular messages that are conveyed during such speech therapy. There is no doubt that

conversion therapy, along with the ideals it represents, is controversial. In recent years, it has become highly polarized and the subject of much debate. However, just because speech is controversial does not, by any means, permit the government to ban it. *See Whitehill v. Elkins*, 389 U.S. 54, 57 (1967) (stating "the First Amendment . . . protects a controversial as well as a conventional dialogue"). The government, or anyone for that matter, has every right to disagree with speech therapy seeking to alter someone's sexual orientation or gender identity. The government cannot, however, ban such speech solely because of its disagreement with it.

Because North Greene's law regulates speech on the basis of its content, the regulation is unconstitutional under the First Amendment unless it satisfies strict scrutiny. *See Turner*, 512 U.S. at 624 (stating that Supreme Court precedents "apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content"). Under a strict scrutiny analysis, a content-based law may be justified under the First Amendment "only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

Undoubtedly, the protection of this nation's youth is important. Under First Amendment scrutiny, the Supreme Court has found a compelling government interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). However, this compelling interest is not without its limits. The government may not restrict children's access to the marketplace of ideas. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794-95 (2011) ("No doubt a State possesses a legitimate power to protect children from harm, . . . but that does not include a free-floating power to restrict the ideas to which children may be exposed"). Additionally, just because the government believes children should not have access to certain

information does not give the government the right to pass laws to that effect. *See Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975) ("Speech that is [not] obscene as to youths . . . cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks is unsuitable for them").

Here, the state of North Greene enacted a law to restrict children's access to ideas solely because North Greene disagreed with such ideas. Without a doubt, North Greene has a compelling interest in protecting its youth; however, simply suppressing ideals regarding sexual orientation and gender identity because the state disagrees with such ideals is far from compelling. North Greene's youth have the same right to the marketplace of ideas as do adults. *See Erznoznik*, 422 U.S. at 214 (stating "the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors"). Thus, North Greene does not have a compelling interest in enacting its ban on Mr. Sprague's speech therapy.

Assuming, *arguendo*, that North Greene does have a compelling interest for enacting its regulation, it still cannot pass strict scrutiny because the ban is not narrowly tailored. Merely having a compelling interest is not sufficient to pass the strict scrutiny test. *See Reed*, 576 U.S. at 171. It is the government's burden to prove not only that it has a compelling interest, but also that the statute "is narrowly tailored to achieve that interest," *Id.* (internal quotations omitted). This constitutes an extremely high burden, one that governments often are unable to meet. *See Brown*, 564 U.S. at 799 ("It is rare that a regulation restricting speech because of its content will ever be permissible") (internal citation omitted).

In conclusion, N. Greene Stat. § 106(d) regulates the speech of Mr. Sprague in violation of the First Amendment. The statute does not regulate conduct, as Mr. Sprague's practice consists entirely of oral communication with clients, and the impact that North Greene's statute

has on his practice is much more than incidental. Not only does the statute regulate Mr. Sprague's speech, it does so on the basis of content, thus triggering a strict scrutiny analysis. Because North Greene cannot prove that its law furthers a compelling government interest that is narrowly tailored, the law is unconstitutional. Therefore, this Court should reverse.

II. NORTH GREENE'S STATUTE IS UNCONSTITUTIONAL AS IT FAILS THE NEUTRALITY PRONG OF *EMPLOYMENT DIVISION V. SMITH.* IN THE ALTERNATIVE, *SMITH* MUST BE OVERTURNED ON *STARE DECISIS* PRINCIPLES

The Free Exercise Clause of the First Amendment, incorporated to the states through the Fourteenth Amendment, *see Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), binds government to "mak[ing] no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. CONST. amend. I.

In order to avoid strict scrutiny, a law burdening religious conduct must be neutral and generally applicable. *Emp. Div., Dep't of Hum. Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990) (hereinafter "*Smith*"). If such a law fails one of the two prongs of *Smith*, then that law, under a strict scrutiny test, must advance a compelling government interest and be narrowly tailored. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah.*, 508 U.S. 520, 546 (1993). In the present case, N. Greene Stat. § 106(d) fails *Smith* as the law is not neutral. In the alternative that this Court finds N. Greene Stat § 106(d) does satisfy *Smith*, this Court should overrule *Smith* as *Smith* is no longer compatible or workable under current religious freedom jurisprudence. To overrule *Smith*, this Court should use the *stare decisis* framework provided by Justice Kavanaugh's concurrence in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

A. North Greene's Statute Fails *Smith*'s Neutrality Standard

The Fourteenth Circuit erred in finding that N. Greene Stat. § 106(d) was neutral. (R p. 8). The lower court based the neutrality of N. Green Stat § 106(d) through the law's object, text,

legislative history, and real world operation. (*See* R p. 9-10). While the plain text of the statute is indeed facially neutral, the law's legislative history and reliance on the American Psychological Association proves N. Greene Stat. § 106(d) is in fact not neutral. As N. Greene Stat. § 106(d) fails neutrality, there is no need to analyze general applicability. *See Lukumi Babalu Aye*, 508 U.S. at 531. Strict scrutiny must then apply.

i. Facial Neutrality is Not Dispositive

At a minimum, a law must not discriminate against religious conduct in the plain text, or "on its face." *Lukumi Babalu Aye*, 508 U.S. at 533. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* In the present case, the plain text of N. Greene Stat. § 106(d) is devoid of any discernible references to religious practice, clearing the bare minimum of facial neutrality. However, "[f]acial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Lukumi Babalu Aye*, 508 U.S. at 534. Thus, a deeper analysis into the law's legislative history and operation is required, upon which the statute fails. In other words, the facial neutrality of the statute is not dispositive.

ii. Legislative Commentary Reveals a Departure from Neutrality

Beyond facial neutrality, courts determine a questioned statute's neutrality by examining the context around the enactment of the statute, through direct and circumstantial evidence. *Lukumi Babalu Aye*, 508 U.S. at 540; *see also Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018) (reaffirming the relevance of administrative and legislative history in determining neutrality in Free Exercise Clause claims). Courts must be scrupulous in their analysis of the words and context surrounding the history of a governmental action as the Free Exercise Clause forbids government actions from even "subtle departures from neutrality and overt

suppression of particular religious beliefs." *Lukumi Babalu Aye.*, 508 U.S. at 534 (internal citations and quotations omitted).

Words matter, even more so in a legislative or administrative history context as those words provide insight into the intention and purpose of a governmental action. Indeed, "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892), *see also United Steelworkers of Am., AFL-CIO-CLC v. Weber,* 443 U.S. 193, 201 (1979) (discussing the necessity of legislative and historical context in determining intent of governmental action).

In the present case, the two legislator statements evidenced by Mr. Sprague are direct evidence of "subtle departures from neutrality" forbidden by Free Exercise jurisprudence. First, the statement by North Greene Senator Floyd Lawson. Senator Lawson, a sponsor of the N. Greene Stat. § 106, "stated during debate on the bill that his intent in sponsoring the bill was to eliminate '*barbaric practices*,'" (R p. 8-9) (emphasis added), in reference to gender conversion therapy. The second statement came from fellow bill sponsor and state Senator Golmer Pyle, who "denounced those who try to 'worship' or 'pray the gay away.'" (R p. 9).

Senator Lawson's deliberate choice of the word "barbaric" is direct evidence of the bill's departure from neutrality. The word "barbaric," stemming from the root word of "barbarous," is deeply rooted in religious history and context. Originating from the Greek word βάρβαρος, barbarous was used by ancient Greeks to describe something that was "strange to Greek manners or language, foreign." HENRY G. LIDDELL, A GREEK-ENGLISH LEXICON 175, (1889). The word itself was derisive of foreigners, as it was onomatopoeia, representing what unintelligible foreign language sounds like to a Hellenic listener. MARKUS WINKLER & MARIA BOLETSI, BARBARIAN: EXPLORATIONS OF A WESTERN CONCEPT IN THEORY, LITERATURE, AND THE ARTS: VOL. I: FROM

THE ENLIGHTENMENT TO THE TURN OF THE TWENTIETH CENTURY GERMANY 2-3 (J.B. Metzler, 2023).

Rome, upon conquering Greece and assuming its culture, adopted the word into Latin as "barbărus," using it to describe anyone foreign and outside Rome and Greece. CHARLTON LEWIS ET AL., HARPER'S LATIN DICTIONARY: A NEW LATIN DICTIONARY FOUNDED ON THE TRANSLATION OF FEUND'S LATIN-GERMAN LEXICON 222 (1907). Rome's use of the word is of particular importance to the present case as Rome's cultural identity was grounded in the fact that Romans "imagined themselves as a collective group during this period as having a special, unique relationship with the gods[.]" Edwin M. Bevens, A Sacred People: Roman Identity in the Age of Augustus (2010) 7 (M.A. thesis, Georgia State University) (on file ScholarWorks Georgia State University). That is to say, Rome and its people determined who was barbarous (i.e. a barbarian) chiefly on what religion that person adhered to. Shmuel Noah Eisenstadt et al. *"The Construction of Collective Identity." European Journal of Sociology / Archives Européennes de Sociologie / Europäisches Archiv Für Soziologie,* vol. 36, no. 1, 82 (1995). This understanding of the word carried into modern English lexicon.

In English, barbarous, and its various forms, was used disparagingly to describe something as "non-Hellenic, . . . non-Roman . . . pagan [and] non-Christian." THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES VOL. 1 A-M, 181. English literature further exemplifies the religiously-tinged tribalism invoked by barbarous and its derivative words. *See e.g.* DAVID HUME, THE HISTORY OF ENGLAND FROM THE INVASION OF JULIUS CAESAR TO THE REVOLUTION OF 1668 VOL. V., 436 (London, 1848). ("Cromwell, though himself a barbarian, was not insensible to literary merit.")

This is the word chosen by state Senator Lawson. Instead of using another word to convey his thoughts on the bill or the practices at question during debate, say "cruel" or "primitive," Senator Lawson chose to use a word rooted in religious tribalism, providing direct evidence of the subtle religious object of the N. Greene Stat. § 106(d).

The lower court in its analysis of the first statement emphasized that "[n]owhere [did] Senator Lawson mention religion, and his comments d[id] not demonstrate a hostility toward religion." (R p. 9). However, the lower court's brief analysis of the issue, like the Ninth Circuit's analysis of the word "barbaric" in *Tingley v. Ferguson*, 47 F.4th 1055, 1086 (9th Cir. 2022), a strikingly similar fact pattern as the immediate case, completely overlooks the word and its implications. Barbaric is not a neutral word. The court rests its finding of neutrality on the fact that Senator Lawson did not expressly mention religion. However, limiting a neutrality analysis to whether or not "Senator Lawson mention[ed] religion," (R p. 9), functionally operates in the same manner as limiting a neutrality analysis to the text of laws at question, which has been expressly rejected by the Court. *See Lukumi Babalu Aye*, 508 U.S. at 534 ("We reject the contention advanced by the city . . . that our inquiry must end with the text of the laws at issue. Facial neutrality is not determinative. The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination.") Because the Free Exercise Clause imposes scrupulous protection from governmental infringement, so too should courts be scrupulous in their analysis of whether governmental actors departed from neutrality in cases such as the present one.

Contrary the lower court's finding that Senator Lawson's use of the word "barbaric" was neutral, the history and etymology of the word, when paired with the context in which it was used, is clear evidence of an impermissible "subtle departure[] from neutrality," *Lukumi Babalu Aye*, 508 U.S. at 534.

The second statement by fellow bill sponsor and state Senator Golmer Pyle similarly indicated a departure from neutrality by the legislator, albeit in a more overt manner. During debates on the then-proposed statute, Senator Pyle denounced practitioners of conversion therapy as "those who try to 'worship' or 'pray the gay away.'" (R p. 9).

Unlike Senator Lawson's statement, where a deeper analysis into the context and etymology of "barbaric" revealed its religious implications, Senator Pyle's statements are on their face biased against religious conduct. This is impermissible under current Free Exercise jurisprudence. "[Government actors] cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018). In *Masterpiece Cakeshop*, members of the Colorado Civil Rights Commission, in adjudicating a discrimination claim against bakery owners, equated the bakery owner's faith to "defenses of slavery and the Holocaust," and "impl[ied] that religious beliefs and person are less than full welcome in Colorado's business community." *Id.* at 1729.

Senator Pyle's condemnation is precisely a passing of judgment upon religious beliefs and practices that the Court found impermissible in *Masterpiece Cakeshop*. The ball stops here. Understanding the eventuality of applying *Masterpiece Cakeshop* to the facts of the immediate case, the lower court took several steps to distinguish Senator Pyle's comments from the comments in *Masterpiece Cakeshop*.

First, the lower court contextualized Senator Pyle's comments, stating the comments were not an expression of hostility or animosity towards religious practice but rather an expression of "the Senator's contrasting his own experience having a daughter who is gay, with those of a friend who told him he had thought he could 'pray the gay away' but instead found the conversion therapy

to be ineffective and stressful on his child and the parents." (R p. 9). Furthermore, the court pointed to Senator Pyle's references to his own religious faith and noting that the bill would be difficult to support for "some of his colleagues. . . due to their religious convictions." (R p. 9). With that context, the court found Senator Pyle's comments were neutral. (R p. 9).

Second, the court noted that Senator Pyle's comments, and Senator Lawson's comments, were distinguishable from *Masterpiece Cakeshop* as the comments in the present case "come nowhere close to the hostility contained in the comments at issue in *Masterpiece Cakeshop*." (R p. 9). Additionally, the court emphasized that "these comments were made not during the adjudication of a specific case involving Sprague, as was the case in *Masterpiece Cakeshop*." (R p. 9).

Finally, the court placed importance on this Court's reluctance to use legislative intent in analysis of governmental action. "The Supreme Court has 'long disfavored arguments based on alleged legislative motives' because such inquiries are a "hazardous matter." (R p. 9). (quoting *Dobbs v. Jackson Women's Health Org.*,142 S. Ct. 2228, 2255–56 (2022)). There are several issues with the lower court's attempt to distinguish this case from *Masterpiece Cakeshop*.

As to the contextual approach**,** the lower court appears to be searching for a way to make right Senator Pyle's obvious lack of religious neutrality. First, in its contextualization, the court dives *deeper* into the legislative intent of government actors, the very practice it cautioned against using. *See infra.* If the court opted for a facial reading of Senator Pyle's comments, as it did with Senator Lawson's statement, phrases like "pray the gay" and "worship" clearly demonstrate a distinct lack of neutrality towards religious conduct. Such "'official expressions of hostility' [are grounds enough for a law to be] 'be set aside' . . . without further inquiry." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 n.1 (2022) (quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1732.)

Courts should not selectively choose when to apply rules and analysis. *See e.g. Payne v. Tennessee,* 501 U.S. 808, 827 (1991) (discussing the goal of courts to be "evenhanded, predictable, and consistent [in] development of legal principles[.]") No matter which way the court sliced it, under an even application of the court's own analytical framework, one of the senator's statements was impermissible.

In the alternative, putting Senator Pyle's statements in context shows a departure from neutrality. Contextualizing Senator Pyle's statements, the court found "the Senator[] [was] contrasting his own experience having a daughter who is gay, with those of a friend who told him he had thought he could 'pray the gay away' but instead found the conversion therapy to be ineffective and stressful on his child and the parents." (R p. 9). This means that Senator Pyle was using his own experiences with the religious conduct prohibited by the statute as a rhetorical device in support of his position, which would limit and curtail such religious conduct. That is a departure from neutrality.

As to the adjudicative versus legislative history, the lower court is correct that *Masterpiece Cakeshop* involved an adjudicative proceeding and the immediate case involved the statements made during legislative debate. However, this is not dispositive into completely disfavoring legislative history and distinguishing *Masterpiece Cakeshop*. The lower court's reluctance to consider legislative history stems from *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). "Inquiries into congressional motives or purposes are a hazardous matter. . . It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it." *Id.* In *O'Brien,* the appellant argued that it was the purpose of Congress to "suppress freedom of speech" when it passed an amendment to a federal statute criminalizing intentional destruction of draft cards. *Id.* at

382. The Court based its caution in looking to legislative intent as "[the] Court will not strike down an *otherwise constitutional statute* on the basis of an alleged illicit legislative motive." *Id.* (emphasis added). This is not the case here. As N. Green Stat. § 106(d) violates Mr. Sprague's Free Speech right, *see supra* I, and violates Mr. Sprague's Free Exercise right under *Smith*, the use of legislative intent here far exceeds the attempted use of legislative intent in *O'Brien*. Finally, while the Court in *Masterpiece Cakeshop* reaffirmed that legislative history has its issues, *see Masterpiece Cakeshop*, 138 S. Ct. at 1730, the Court expressly did not disavow the use of legislative history, stating instead that legislative history is a factor "relevant to the assessment of governmental neutrality," in religious freedom cases. *Id.* at 1731.

iii. The State's Reliance on American Psychological Association Imbues Bias

In addition to legislative history, this Court has stated that another factor relevant to determining the neutrality of a government action in a Free Exercise claim is the "historical background of the decision under challenge[.]" *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *see also Lukumi Babalu Aye*, 508 U.S. at 534. This means that beyond facial neutrality, the Court may look to the context in which a government action took place, so as to "protect against governmental hostility which [may] be masked." *Lukumi Babalu Aye*, 508 U.S. at 534.

In the present case, surrounding the enactment of N. Green Stat. § 106(d) was the North Greene legislative body's reliance on the American Psychological Association ("APA") opinions, decisions, and positions on conversion therapy. (R p. 4, 7). This is problematic for several reasons.

First, the APA has taken the legal position that gender conversion therapy is primarily targeted and engaged in by religious groups, going so far as to file multiple *amici* briefs stating that position. *See e.g.* Brief of American Psychological Association as Amicus Curiae in Support of Defendants-Appellees and Affirmance, Tingley v. Ferguson, 47 F.4th 1055 (2022) (No. 21-

35815, 21-35856), 2022 WL 258827 ("[I]n the 1990s, a counter-movement led primarily by mental health providers practicing within religious communities began to assert [conversion therapy] were safe and effective for people whose religious beliefs were in conflict with their sexual orientation. This led mental health organizations—including . . . the American Psychiatric Association. . . —to adopt resolutions opposed to [conversion therapy.]") Because of the North Greene legislature's reliance on APA, North Greene assumed the bias and departed from neutrality as the APA clearly acts with religious animosity in attempting to ban conversion therapy it itself acknowledges is primarily engaged in by religious entities.

Second, the APA's own research reveals the APA's position on gender conversion therapy is intertwined with religion. AM. PSYCH. ASS'N, *Report of the American Psychological Association Task Force on Appropriate Affirmative Responses to Sexual Orientation*, 3 (2009). "In the research conducted over the last 10 years, the population was mostly well-educated individuals, predominantly men, who consider religion to be an extremely important part of their lives and participate in traditional or conservative faiths." *Id.* at 3. The APA has gone far enough to label conversion therapy and counseling as "religious practice." (R p. 15). While on its face, the North Greene legislature may have kept its hands clean on religious animosity and departures from neutrality, when the legislature relied and incorporated the APA into its reasoning behind supporting N. Greene Stat. § 106(d), it adopted and incorporated the radical departures from neutrality that the APA had clearly evidenced towards conversion therapy and counseling. That isn't to say that the APA cannot espouse such views, that is its right to do so and advocate for those rights. However, the legislature cannot engage in conduct, relying on the APA, and still be neutral, as it must be scrupulous to guard against even "subtle departures from neutrality." *Lukumi Babalu Aye*, 508 U.S. at 534.

iv. The Statute Cannot Pass Strict Scrutiny

As N. Green Stat. § 106(d) fails the neutrality prong of *Smith*, it then must be subjected to strict scrutiny. *See Lukumi Babalu Aye*, 508 U.S. at 546. This standard "means what it says." *Smith*, 494 U.S. at 888. Here, North Greene cannot demonstrate that it has a compelling interest in silencing counselors from discussing gender and sexuality with clients in a manner that infringes upon those counselors' religious beliefs. As such, the statute is unconstitutional and void.

B. In the Alternative, *Smith* Should Be Overturned

In the alternative, if this Court were to find N. Greene Stat. § 106(d) is indeed neutral and generally applicable under *Smith*, the Court should use this case as a vehicle to overturn *Smith* as *Smith*'s framework permits bad law to survive judicial review. (*See* R p. 15-16 (Knotts, J., dissenting)).

The logic in overturning *Smith* can be divided into the *why* and the *how*. Why? At its core, *Smith*, while attempting to balance the scales between the necessity of some government regulation with one's individual freedom of religion, *see City of Boerne v. Flores,* 521 U.S. 507, 514 (1997), unduly tipped that balance in the favor of the government at the expense of the individual. As a result of this imbalance, Free Exercise rights suffered as "lower courts applying *Smith* no longer find necessary a searching judicial inquiry into the possibility of reasonably accommodating religious practice." *City of Boerne*, 521 U.S. at 547 (O'Connor, J., dissenting). This allows for bad laws like the immediate statute to skirt by judicial review under *Smith* while burdening the guarantees of the Free Exercise clause. The recognition of the danger of *Smith* is carried by former members of this Court. *See e.g. City of Boerne*, 521 U.S. at 544-45 (O'Connor, J., dissenting) ("I remain of the view that *Smith* was wrongly decided . . . If the Court were to correct the

misinterpretation of the Free Exercise Clause set forth in *Smith,* it would . . . put our First Amendment jurisprudence back on course[.]")

As to the *how* to overturn *Smith*, this Court should consider *Smith* under a *stare decisis* analysis.

As a starter, *stare decisis* protection is inherently weaker in First Amendment cases such as *Smith*. "*[S]tare decisis* applies with perhaps least force of all to decisions that wrongly denied First Amendment rights[.]" *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). This is because the Court is the only practical recourse to right a constitutional wrong, like *Smith*. *See id*.

Under the principle of *stare decisis*, reviewing courts consider whether to leave the questioned case and its precedence un disturbed or overturn the precedence. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring). In considering whether to afford *stare decisis* protection, the Court has identified several relevant factors. *See Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478-79 (2018) (discussing the factors of quality of reasoning, workability of the rule established by the case at question, the case's consistency with other cases, developments in relevant case law since the case, and reliance on the case.) Justice Kavanaugh, concurring in *Ramos*, identified "three broad *stare decisis* considerations," in which all factors can be grouped. *See Ramos*, 140 S. Ct. at 1416 (Kavanaugh, J., concurring). These three considerations weigh heavily against affording *Smith stare decisis* protection.

i. Smith *was Egregiously Wrong*

"*First*, is the prior decision not just wrong, but grievously or egregiously wrong?" *Id.* at 1414 (Kavanaugh, J., concurring). As the Court explained in *Dobbs v. Jackson Women's Health*

Org., "the quality of the reasoning in a prior case has an important bearing on whether it should be reconsidered." 142 S. Ct. at 2265.

Turning to *Smith*, it is apparent that *Smith* missed the mark, drastically. For starters, *Smith* rejected years of Free Exercise precedence without overturning such precedence. "*Smith* refrained from overruling prior free-exercise cases that contain a free-exercise rule fundamentally at odds with the rule *Smith* declared." *Lukumi Babalu Aye*, 508 U.S. at 574 (Souter, J., concurring.) This failure to overturn precedence circumvented the high bar that is *stare decisis* protection while creating a new rule in constant tension with its predecessors.

Additionally, *Smith* misstated the precedence which it diverted from. For example, "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878–79. This is clearly contrary to the Court's early pronouncement in *Wisconsin v. Yoder*. "A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

Further indicative of *Smith* being wrongly decided is the case law cited favorably by *Smith* in support of the rule it put forth. *Reynolds v. United States,* 98 U.S. 145 (1879) and *Minersville School Dist. v. Gobitis,* 310 U.S. 586 (1940), both cited favorably by *Smith* and in support of the rule it created, have been either significantly restricted (*Reynolds*) or completely overturned (*Gobitis*). *See Lukumi Babalu Aye*, 508 U.S. at 569, (Souter, J., concurring) ([*Gobitis* and *Reynolds*'] subsequent treatment by the Court would seem to require rejection of the *Smith* rule.")

ii. Smith *has Caused Significant Jurisprudential Consequences*

"In conducting [this] inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors." *Ramos*, 140 S. Ct. at 1415, (Kavanaugh, J., concurring.) Many of these factors are also relevant in the first part of Justice Kavanaugh's *stare decisis* framework. *Id.* ("[S]ome of which are also relevant to the first inquiry.")

Turning to the immediate case, *Smith* is clearly alone in Free Exercise precedence. *Smith*, as discussed *supra* II.B.*i*, "is gravely at odds with [] earlier free exercise precedents." *City of Boerne*, 521 U.S. at 548, (1997) (O'Connor, J., dissenting.) It misconstrued without overturning years of Free Exercise precedence. *See Lukumi Babalu Aye*, 508 U.S. at 574 (Souter, J., concurring.) Instead, it simply "repudiated the method of analysis used in prior free exercise cases[.]" *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). *Smith*'s rule would find the Court misapplied the Free Exercise Clause in "more than a dozen cases over the several decades." *Lukiumi Babalu Aye,* 508 U.S. at 570 (Souter, J., concurring.) In sum, *Smith* completely disrupted decades of carefully crafted Free Exercise jurisprudence without the courtesy of overturning previous precedent.

Furthermore, overturning *Smith* would not throw Free Exercise jurisprudence into disrepair and chaos. Rather, overturning *Smith* would simply return precedence to the rules that *Smith* failed to overturn. "In its place, I would return to a rule that requires the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impose that burden only by means narrowly tailored to achieve that interest." *City of Boerne*, 521 U.S. at 548 (O'Connor, J., dissenting); *see Sherbert v. Verner*, 374 U.S. 398 (1963); *see also Wisconsin v. Yoder*, 406 U.S. 205 (1972).

iii. Overruling Smith *Would not Unduly Upset Reliance Interests*

"This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring.)

In terms of constitutional standards, *Smith* is younger, having been pronounced in 1990. This Court has overturned older precedence than *Smith*. The right to an abortion proclaimed by *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) was forty-nine years old when it was overturned by *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). *Plessy v. Ferguson*, 163 U.S. 537 (1896) with its separate but equal standard was effectively overturned fifty-eight years later in *Brown v. Board of Education*, 347 U.S. 483 (1954). The age of *Smith* weighs little in reliance interest compelling *stare decisis* protection.

Furthermore, there is a decided lack of reliance interests due to legislative actions in the wake of *Smith*. For example, in 1993, following *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA"), legislatively "restor[ing] the compelling interest test of [*Sherbert* and *Yoder*.]" 42 U.S.C.A. § 2000bb(b)(1). While the RFRA was restricted by the Court in *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997), RFRA still applies to federal government actors. This means federal actors have little to no reliance in *Smith* as RFRA already eclipses *Smith* in federal actions.

Taking note from Congress, thirty-two states have enacted some form of heightened scrutiny for Free Exercise claims such as the present one, choosing to expand an individual's First Amendment right beyond that given by *Smith*. Douglas Laycock, Religious Liberty for Politically

Active Minority Groups: A Response to NeJaime and Siegel, 125 Yale L.J. F. 369, 372-73 & n. 27 (2016). That is to say, the minority of state government actors would even have the opportunity to claim a reliance in *Smith* as the majority of states have chosen to exceed the protections of *Smith*.

In sum, when a case, such as *Smith*, is roundly criticized by members of this Court, undercut by Congressional action, *see* 42 U.S.C.A. § 2000bb(a)(4), and fails to find shelter under *stare decisis*, then that case is ripe for overturning.

CONCLUSION

For the foregoing reasons, the Court should REVERSE and REMAND the Court of Appeals for the Fourteenth Circuit's upholding of the District Court's dismissal of Mr. Sprague's free speech claim. Furthermore, the Court should REVERSE and REMAND the Court of Appeals for the Fourteenth Circuit's upholding of the Districts Court's dismissal of Mr. Sprague's free exercise claim.

Respectfully Submitted,

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