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 6
ATTORNEYS FOR THE PETITIONER

QUESTIONS PRESENTED

I. Whether a professional licensing scheme that censors the content of talk therapy sessions violates the Free Speech Clause of the First Amendment.

II. Whether *Employment Division v. Smith* violates the Free Exercise Clause of the First Amendment by permitting a law that prohibits a primarily religious type of therapy to present itself as neutral and generally applicable.

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CONSTITUTIONAL PROVISION

The First Amendment commands that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioner, Howard Sprague, is a licensed family therapist working with the families of North Greene. R. at 3. Mr. Sprague engages solely in talk therapy or verbal counseling, and he does not subject his patients to any physical practices. R. at 3 n.3. His religious beliefs influence his practice and mold the way he views the world. R. at 3. These religious viewpoints and beliefs are deeply rooted in his practice as a "Christian provider of family therapy services." R. at 3. Many of Mr. Sprague's clients choose him for his religious viewpoints and beliefs, especially those about gender and sexuality. R. at 3. Those same clients and their parents consent to Mr. Sprague's treatment. R. at 13.

Respondent, the State of North Greene, requires "health care providers" to obtain a license before being able to practice in the state. R. at 3. North Greene regulates licensed professionals under its Uniform Professional Disciplinary Act which defines "unprofessional conduct." R. at 3–4. In 2019, North Greene amended the Act to ban licensed therapists from

performing "conversion therapy" with minor patients as "unprofessional." R. at 4. North Greene codified this ban in North Greene Statute Section 106 ("Section 106"). R. at 4. Conversion therapy is counseling that "seeks to change an individual's sexual orientation or gender identity." R. at 4. North Greene sought to regulate conversion therapy as a medical treatment. R. at 13. Justice Knotts, dissenting from the Fourteenth Circuit's opinion below, stated that talk therapy was more than a medical treatment because it consists "entirely of words." R. at 13. Section 106 does not prohibit licensed professionals from expressing their views about conversion therapy, but it does not allow them to perform it. R. at 4. However, Section 106 permits therapy that seeks to affirm rather than change a patient's gender identity. R. at 4.

North Greene's legislature claimed it passed Section 106 to protect minors and crafted several exceptions where it does not apply. R. at 4. Section 106 includes an exception for the speech of licensed health care providers and religious practices that is not "conversion therapy." R. at 4. It also does not apply to unlicensed counselors who act in accordance with a "religious denomination, church, or organization." R. at 4. Mr. Sprague does not work for a religious organization, but he uses his religion as his guide. R. at 3.

The North Greene legislature relied on the American Psychological Association ("APA") when it drafted Section 106. R. at 4. The APA opposes conversion therapy and promotes gender affirming care instead. R. at 4. It views conversion therapy as harmful to minors based on anecdotal evidence of harm. R. at 7. The APA also acknowledges that conversion therapy is primarily related to religious beliefs and "includes almost exclusively individuals who have strong religious beliefs." R. at 15. Further, the APA called conversion therapy a "religious practice." R. at 15. Despite this, the North Greene legislature posits that there are secular reasons to seek conversion therapy. R. at 9. North Greene State Senators made comments about religion

in support of Section 106. R. at 8–9. Senator Floyd Lawson stated that Section 106 intended to eliminate "barbaric practices." R. at 8–9. Senator Golmer Pyle sponsored Section 106 by denouncing those who try to "'worship' or 'pray the gay away.'" R. at 9.

The District Court granted North Greene's motion to dismiss Mr. Sprague's First Amendment complaint for failure to state a claim. R. at 3. The Fourteenth Circuit affirmed the District Court and held that Section 106 did not violate the First Amendment. R. at 11. The Fourteenth Circuit believed that the government has greater discretion regulating medical practices even if they use speech. R. at 6. It also found Section 106 to be neutral and generally applicable under current precedent. R. at 7–8. Mr. Sprague appealed and this Court granted Certiorari. R. at 17.

SUMMARY OF THE ARGUMENT

I.

The First Amendment fully protects Mr. Sprague's speech in the therapy room. The Fourteenth Circuit applied the lowest standard of review, but Mr. Sprague's speech is due the highest. North Greene's conversion therapy ban targets only speech, no matter the State's attempts to label it conduct. Moreover, Section 106 defies the constitutional command that no state may ban an idea or message simply because the majority disapproves. Section 106 is presumptively unconstitutional because it silences Mr. Sprague's speech solely because of its message. Furthermore, North Greene's law is especially egregious because it censors the religious viewpoint underlying conversion therapy. Content-based speech restrictions like Section 106 are valid only subject to the highest scrutiny. Section 106 must satisfy strict scrutiny, or it must fail.

North Greene cannot dodge strict scrutiny under the guise of a licensing requirement. This Court recognizes only well-defined and narrow categories of speech that it subjects to lesser scrutiny. It has refused to add licensed professionals to the list. The Fourteenth Circuit saw things differently and tried to revive the same "professional speech" theory that this Court plainly rejected. States do not have a free hand to regulate speech in the therapy room subject only to rational basis. Rather, professionals like Mr. Sprague must retain their free speech rights unless the government proves limiting them necessary.

Section 106 crumbles under strict scrutiny. Mr. Sprague agrees that North Greene has a compelling interest in protecting children, but its law is not narrowly tailored to this end. This Court places the burden on states to show a direct causal link between speech regulations and the harm they intend to prevent. Regulations are also suspect if they do not apply to others who are similarly situated. Further, a state cannot regulate speech beyond the scope of the harm it intends to prevent. Section 106 fails on all counts. First, North Greene relied on poorly vetted evidence to paint spoken conversion therapy as destructive. Second, Section 106 affects only a sliver of those who actually practice conversion therapy. Finally, the regulation reaches too far in banning talk therapy when it could regulate only physically harmful forms of therapy. This Court must strike down Section 106 because North Greene cannot meet its burden under the proper standard.

II.

The free exercise of religion must remain sacrosanct. North Greene's ban on conversion therapy is an affront to sincerely held religious beliefs and violates the Free Exercise Clause of the First Amendment. A statute simply cannot be neutral or generally applicable when it burdens the free exercise of religion. Section 106 is creatively gerrymandered to restrict a sincerely held religious belief. However, that creativity does not lessen its assault on religious freedom. Section

106 fails neutrality for several reasons. A law cannot be neutral when it acts to target religion, nor when animosity towards religion permeates its enactment. Moreover, mere facial neutrality is not dispositive. A statute that skillfully omits religion cannot survive when it operates to discriminate. Targeting religion also causes Section 106 to not be generally applicable. Section 106, while seemingly broad, selectively infringes upon a very specific group of people – those with sincere religious beliefs concerning gender and sexuality. The burden Section 106 imposes ensures that it can never be neutral or generally applicable. Yet, the Fourteenth Circuit found the North Greene statute to be both.

The lower court decision in this case highlights a problem beyond the North Greene statute. *Employment Division v. Smith* must be overturned and its practice of allowing neutral and generally applicable laws to discriminate against the free exercise of religion must be halted. *Smith* is a perilous precedent to follow and represents both an egregious error on the part of the Court, and an unworkable precedent that is rife with confusion in its application. *Smith* provides governments the path to attack the Free Exercise Clause and simultaneously "pass" constitutional muster. Such an incongruous scenario cannot stand. Lower courts need a clear standard to follow, not *Smith*. A clear standard is needed and readily available: strict scrutiny. The time for *Smith* is over. It is now time for the Free Exercise Clause to revert to its proper standing – as inviolate and impenetrable.

ARGUMENT

I. North Greene's Conversion Therapy Ban Incurably Violates the First Amendment.

The Fourteenth Circuit gave North Greene the benefit of the doubt when it should have given it the highest burden of proof. North Greene's ban on conversion therapy stifles speech in blatant disregard of the First Amendment's Free Speech Clause. The First Amendment is clear

that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Fourteenth Amendment extends this prohibition to the states. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). States can neither force government-selected messages nor silence unpopular ones. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). Ideas cannot be censored at the whim of society because it finds the idea to be "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *see Snyder v. Phelps*, 562 U.S. 443, 458 (2011). Even dangerous speech cannot be silenced on that fact alone. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). The remedy for problematic speech is "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The Constitution mandates that free speech remains free and unburdened by discriminatory government action. *Johnson*, 491 U.S. at 414.

The lower court missed the mark when it upheld North Greene's ban on conversion therapy. The ban plainly regulates speech, not mere conduct. It also impermissibly targets that speech solely because of its content. The lower court applied rational basis review when Section 106's content-based restriction on pure speech demands strict scrutiny. This court must undo the lower court's error, apply the correct test, and hold that Section 106 violates the Free Speech Clause.

A. Talk Therapy Is Speech and Only Speech.

Mr. Sprague engages in a form of conversion therapy that is plainly entitled to First Amendment protections. Free speech is "powerful medicine in a society as diverse and populous as ours." *Cohen v. California*, 403 U.S. 15, 24 (1971). The Free Speech Clause protects "written or spoken words" at a minimum. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 569 (1995). The First Amendment protects speech, not conduct. *United States v.*

O'Brien, 391 U.S. 367, 375 (1968). Section 106 targets the exact kind of speech that the First Amendment protects.

Talk therapy has its roots in speech that is protected by the First Amendment. Mr. Sprague practices conversion therapy as speech through talk therapy. R. at 3. n.3. The Free Speech Clause protects spoken words. *Hurley*, 515 U.S. at 569. Conversion therapy is a medical process that Mr. Sprague accomplishes solely through verbal means. R. at 3 n.3. It is called "talk therapy" because it is speech in its entirety. R. at 13. Speech expresses the speaker's ideas and viewpoints. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023). In *303 Creative*, this Court held that creating a website was "pure speech" because it would convey the creator's ideas and beliefs. *Id.* The creator there made the website using "images, words, symbols, and other modes of expression" for the purpose of communicating their ideas about what marriage is. *Id.* The purpose of talk therapy is the same because Mr. Sprague uses words to convey his beliefs about sexual orientation and gender identity. R. at 3. Speech is the only method Mr. Sprague uses to convey those messages. R. at 3 n.3. What he does is impossible without speech. The inability to divorce spoken words from talk therapy shows it is inherently speech under the First Amendment.

Even if this Court finds that conversion therapy has elements of conduct, speech is so interwoven that this regulation significantly burdens speech. Laws may regulate speech when speech is merely incidental to conduct. *O'Brien*, 391 U.S. at 376–77. When the purpose of "conduct" is to convey a message, it is inseparable from speech and deserves First Amendment protection. *Cohen*, 403 U.S. at 18 (stating that a conviction for disturbing the peace was punishing "the fact of communication" and not separate conduct). Section 106 prohibits conversion therapy because of the underlying message it conveys and does not address any

separate conduct like writing a prescription. R. at 4. Even the APA recognizes that talk therapy is "[g]rounded in dialogue." *Understanding psychotherapy and how it works,* APA https://www.apa.org/topics/psychotherapy/understanding (last visited Sept. 22, 2023). Conduct is expressive, and thus speech, when it is meant to convey a message and it is likely the message will be understood by the recipient. *Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam). Conversion therapy conveys a deeply personal message and is not just a medical practice. All talk therapy does is convey a message about gender identity to a patient willing to participate. R. at 13. Speech is not merely incidental to talk therapy, it is essential.

Speech does not lose its essential character simply because conduct may be involved. Professional regulations that incidentally burden speech such as malpractice torts may be subject to a lesser level of scrutiny. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (hereinafter "*NIFLA*"). For example, the Fourth Circuit found that a law prohibiting corporations from practicing the law affected speech only incidentally. *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207 (4th Circ. 2019). The Fourth Circuit stated a licensing law would only affect speech in a matter incidental to the law's purpose because "the practice of law has communicative and non-communicative aspects." *Id.*; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978) (stating that a lawyer soliciting employment is a transaction where "speech is an essential but subordinate component"). Talk therapy is communicative and speech is not a mere component. If this Court were to find that talk therapy is speech incidental to conduct, it places at risk similar actions like protesting. Protesting is an action that is inherently laden with speech. *See Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Protesting cannot be separated from its accompanying speech. Likewise, talk therapy cannot be divorced from the speech involved. North Greene cannot strip talk therapy of its essential character.

The government cannot define speech at its discretion. The First Amendment is premised on a mistrust of government regulation of speech. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). This Court looks beyond the government's labels to determine what is conduct or speech. *See NAACP v. Button*, 371 U.S. 415, 429 (1963); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26 –27 (2010). In *Button*, this Court rejected the government's claim that "solicitation" was unprotected by the First Amendment because the law targeted expression, not conduct. *Button*, 371 U.S. at 429. This Court also stated that "a State cannot foreclose the exercise of constitutional rights by mere labels." *Id.* North Greene attempts to foreclose Mr. Sprague's free speech by categorizing conversion therapy under "professional conduct." R. at 4. It further proposes that conversion therapy is a mere medical practice. R. at 13. However, because conversion therapy is speech alone, states cannot regulate it like a medical practice. The Eleventh Circuit dealt with a prohibition on conversion therapy like Section 106. *Otto v. City of Boca Raton*, 981 F.3d 854, 859–60 (11th Cir. 2020). It rejected the government's attempt to ban talk therapy as conduct because the court reasoned it was *solely* speech. *Id.* At 865–66. Conversion therapy is based entirely on speech no matter how North Greene characterizes it. Finding otherwise would erode free speech by allowing the government to arbitrarily move the line between what is and is not speech. That line does not bend at the government's beck and call. Banning conversion therapy is a regulation of speech, not conduct.

B. Silencing One Type of Therapy Because of Its Message Is Presumptively Unconstitutional.

While individuals may disagree about the content and views they support, the government must remain impartial. The First Amendment's cornerstone is that the government is strictly prohibited from restricting speech "because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95. Content-based regulations restrict speech because of its

message. *Turner Broad. Sys.*, 512 U.S. at 645 (citing *United States v. Eichman*, 496 U.S. 310, 315 (1990)). Regulations restricting speech because of its content are "presumptively unconstitutional" and are only valid if they can pass strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In determining whether a law is content-based, the controlling factor is the government's purpose. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Here, North Greene impermissibly attempted to tilt the scale in its favor on the conversion therapy debate. The belief that conversion therapy is offensive is protected just as much as the belief that conversion therapy is helpful to minors. The First Amendment exists to "invite dispute" and benefits society when it fosters unrest, dissatisfaction, or anger. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Government regulations can express the majority's beliefs when done without silencing the opposition's speech, but that is exactly the case here. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Opinions differ between the APA, which labels conversion therapy as harmful to minors, and those that believe the practice is safe and effective. R. at 7. Yet, conversion therapy has been completely prohibited due to the disapproval of some. R. at 4. The silence imposed on conversion therapy is deafening. North Greene directs the conversion therapy debate by muzzling dispute.

Section 106 censors conversion therapy by controlling the message that licensed therapists can convey. A law is content-neutral when it does not "dictate what can be said . . . ." *Nat'l Ass'n for Advancement of Psychoanalysis v. Calif. Bd. of Psych.*, 228 F.3d 1043, 1055 (9th Cir. 2000) (stating a mental health licensing law was content-neutral because it did not infringe upon what a doctor could say to a patient). Section 106 dictates what can be said in a counseling session. It prohibits licensed professionals from engaging in conversion therapy. R. at 3. Section

106 *solely* regulates what a licensed professional can say to a patient. North Greene silenced its opposition to turn its message into the status quo.

Section 106 censors opposing views despite permitting general discussion. Permitting the discussion of conversion therapy is only a nicety asserted in an attempt to mask the content-based nature of Section 106. R. at 4. Allowing the public to talk about prohibited speech is not enough to cure a prohibition of speech. *Otto*, 981 F.3d at 863. Under Section 106, conversion therapy is silenced as a justification for promoting gender affirming care. *See* R. at 4. One belief suffers under the law while the other is lauded and promoted. This showing of favoritism, and subsequent prejudice, illuminates Section 106's content-based nature. Section 106 discriminates against conversion therapy based on its content.

Section 106 strays even further from constitutionality because it also discriminates against Mr. Sprague's viewpoint. Laws that discriminate based on viewpoint are "an egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Statutes discriminate based on viewpoint when they single out particular opinions for different treatment than opposing views. *R.A.V.*, 505 U.S. at 391. The North Greene legislature views conversion therapy as harmful and instead promotes gender affirming care under Section 106. R. at 4. Conversion therapy typically means to help patients "reconcile their religious beliefs and their sexual orientation." Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 Ala. L. Rev. 793, 796 (2017). Whereas gender affirming therapy often seeks to subvert a patient's religious identity. Douglas C. Haldeman, *Gay Rights, Patient Rights: The Implications of Sexual Orientation Conversion Therapy*, 33 Pro. Psych.: Rsch. and Prac., 260, 264 (2002). A licensed therapist is forced to turn away clients who seek to explore their religious identity but is encouraged to forsake their religious beliefs in favor

of a secular practice. Licensed professionals can counsel on all matters, even those that attack a patient's religious beliefs, except for conversion therapy. Ultimately, Section 106 is content-based and viewpoint discriminatory and is only constitutional if it can pass strict scrutiny.

C. It Is Settled Law That the First Amendment Protects Professional Speech.

The lower court ignored this Court's precedent in diminishing First Amendment protections for a therapist's speech by applying an abrogated doctrine. R. at 6. This Court has only recognized "well-defined" and "narrow" cases where speech is entitled to lesser or no First Amendment protections. *New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography); *Roth v. United States*, 354 U.S. 476, 485 (1957) (obscenity); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1952) (fraud); *Brandenburg v. Ohio*, 395 U.S. 444, 447–8 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (fighting words). Professional speech is not one of the well-defined and narrow cases that justifies lesser protection under the First Amendment. *NIFLA*, 2371–72.

Diminished First Amendment protections are recognized and not concocted. Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 Cato Sup. Ct. Rev. 197, 213–14 (2018). Further, this Court has been steadfast against attempts to acknowledge new categories of speech with diminished First Amendment protections. *See United States v. Stevens*, 559 U.S. 460, 472 (2010) ("depictions of animal cruelty"); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53 (1988) (injurious speech to public figures); *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion) (false speech); *Va. State Bd. of Pharmacy*, 425 U.S. at 761 (commercial speech). The Court's reluctance to strip speech of its First Amendment protections is correct and must continue. The lower court here is trying to deprive a therapist's speech of its promised First Amendment protections.

Professional speech demands the protection promised by the Constitution. The lower court incorrectly relied on a circuit court opinion for the assertion that the government has greater discretion in regulating a medical practice even though it incorporates speech. R. at 6; *Pickup v. Brown*, 740 F.3d 1208, 1229–30 (9th Cir. 2014). The court in *Pickup* held in part that a law prohibiting conversion therapy did not require heightened scrutiny because its impact on speech was only incidental. *Id.* at 1223, 1231. The court reasoned that the First Amendment rights of professionals exist on a "continuum," and may receive diminished protections depending on the speaker's context. *Id.* at 1227. The "continuum" theory from *Pickup* is flawed and runs contrary to this Court's decision in *NIFLA* where this Court rejected demands to exclude professional speech from First Amendment protection. *NIFLA*, 138 S. Ct. at 2735. This Court reasoned that precedent has "long protected the First Amendment rights of professionals." *Id.* at 2374. This protection must continue. Practicing in a regulated profession does not on its own yield First Amendment rights. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). While states can regulate with license requirements, they do not have full discretion over what a professional says in their licensed capacity. *Thomas v. Collins*, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). Having a state license should not mean forsaking one's opinions or beliefs.

Freedom of speech is not absolute, but neither is a state's police power. States can regulate public health professions using their police power. *Watson v. Maryland*, 218 U.S. 173, 176 (1910). To this end, professional license requirements are one tool at a state's disposal. *See Hawker v. New York*, 170 U.S. 189, 194 (1898). The primary purpose of licensing requirements should be the qualifications of the professional and not the content of their speech. *See Lowe v. SEC*, 472 U.S. 181, 229–30 (1985) (White, J., concurring). Professional licenses are not a tool for the government to direct speech to fit their mold. Allowing the government to condition

speech on a professional license provides it with authority to silence speech at will by imposing a license requirement. *NIFLA*, 138 S. Ct. at 2375 (observing that the definition of a professional covers a wide variety of jobs and may even include fortune tellers). This would be an unimaginable power over professionals to dictate what messages their clients and patients hear. Also, it is not clear who qualifies as a "professional." McNamara & Sherman, *supra* at 216-17. It is wholly unreasonable to interpret First Amendment jurisprudence as allowing a category of diminished First Amendment protections that is dictated by the government. This Court has noted that "[t]he First Amendment itself reflects the judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Stevens*, 559 U.S. at 470. Professional speech is another instance where the benefits of the First Amendment vastly outweigh the cost.

History illuminates a past of protecting "professional speech" and not silencing it simply because it is a person's job. A category of speech may be unprotected if there is an identifiable history that it has been unprotected. *See id.* at 472. The enactment of the Fourteenth Amendment is the starting point for that historical analysis because it marks a fresh start for free speech. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment). When the states ratified the Fourteenth Amendment, counseling was not marked as a type of speech with diminished First Amendment protections. Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 957 (2000). There were no restrictions on who could counsel others and many practiced "medicine." Elliot A. Krause, *Death of the Guilds*, 30 (1996). Further, professional licensing requirements did not begin until decades after the states ratified the Fourteenth Amendment. *See id.* ("From the Jacksonian era, starting in 1840, through the end of the century,

states required no certification for either medicine or law"). When the Fourteenth Amendment came about, the First Amendment would have protected professional speech as it did individual speech because there was no distinction between individuals and professionals. There is no history of denying First Amendment protections to professional speech.

Mr. Sprague may speak as part of his job as a therapist, but that does not make it commercial speech. Commercial speech is speech that is purely economic or business-related. *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (1976). Commercial speech does not necessarily include counseling. *Otto*, 981 F.3d at 865. The Eleventh Circuit in *Otto* correctly found that an ordinance prohibiting licensed professionals from performing conversion therapy did not regulate commercial speech. *Id.* at 859–60, 865. The court reasoned that "what is being regulated is not, say, an advertisement for therapy, but the therapy itself." *Id.* at 865. Section 106 here mimics the ordinance in *Otto* because it bans conversion therapy itself. R. at 4. North Greene targets conversion therapy with Section 106 because it applies to conversion therapy generally and does not relate to any purely economic activities. *See* R. at 4. Also, this Court offers more protection to advertising than the lower court here did for the intimate setting of a counselor's office. This Court has stated that restrictions on commercial speech must be "narrowly drawn" and account for less restrictive alternatives that would be as effective. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 565, 571 (1980). The severity of Section 106 here is not limited to commercial speech and the level of protection *Central Hudson* offers is only the bare minimum. The true level of protection for Mr. Sprague's First Amendment rights is strict scrutiny.

D. Strict Scrutiny Stops North Greene's Statute in Its Tracks Because It Fails to Properly Address the Harm to Children It Allegedly Targets.

Section 106 is a mismatch for the harm it claims to prevent. The Government may regulate a professional's speech so long as the correct level of scrutiny is applied. *See Pickup*, 740 F.3d at 1220. It is rare for content-based regulations to be valid and the burden of persuasion rests with the government. *United States v. Playboy Ent. Grp.*, 529 U.S. 803, 818 (2000). Strict scrutiny is the correct level of analysis because Section 106 silences speech based on its content and viewpoint. *See supra* Part I.B. Strict scrutiny requires the law at issue to be narrowly tailored to furthering a compelling government interest. *Playboy*, 529 U.S. at 813. A statute is not narrowly tailored if it is underinclusive or overinclusive. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 805 (2011). Protecting minors is a compelling government interest. *Ferber*, 458 U.S. at 756–57. However, finding a compelling government interest is just the beginning of a strict scrutiny analysis as the statute must also be narrowly tailored to furthering that interest. *NIFLA*, 138 S. Ct. at 2371. Protecting children is not a "free-floating power to restrict the ideas to which children may be exposed." *Brown*, 564 U.S. at 794. This is where the North Greene statute falls flat. Section 106 is not narrowly tailored to protecting minors because it is underinclusive and fails to adequately regulate activities that are harmful to minors.

Section 106 is underinclusive and perpetuates the harm it claims to prevent. A government's interest must have a "direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 724 (2012) (plurality opinion). The required causal link is not satisfied by claims of harm that are dependent on an indirect or unspecified action. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250, 253 (2002). In *Ashcroft*, this Court found that the connection between virtual child pornography and real child abuse was too remote. *Id.* The Court reasoned that the connection between virtual child pornography and

real child abuse was "contingent and indirect" because the government could not show a connection between thoughts invoked by virtual child pornography and actual acts of child abuse. *Id.* Similarly, Section 106 is only supported by anecdotal evidence of harm from conversion therapy. R. at 7. "Anecdotal" means that the data is based on observations and experiences rather than proven facts. "Anecdotal," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/anecdotal (last visited Sept. 2, 2023). Further, recent APA studies on conversion therapy have not been "rigorously evaluated." *Otto*, 981 F.3d at 868. The anecdotal evidence here is as insufficient as the remote connection between virtual child pornography and real child abuse in *Ashcroft*. North Greene lacks proper evidence to connect conversion therapy and harm to minors.

This disconnect is fatal for Section 106. Any minor seeking conversion therapy is now prohibited from speaking with a licensed professional and must go to an unlicensed alternative. R. at 4. Section 106 forces this choice because it only prohibits conversion therapy by licensed professionals while allowing unlicensed religious counselors to act as they please. R. at 4. Nationally, only 0.02% of licensed professionals in 2012 offered conversion therapy. Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. Rev. 793, 812 (2017). If North Greene truly saw conversion therapy as harmful to minors, it would restrict the one place it happens most: unlicensed counselors. Harm looms under Section 106 because insufficient evidence propelled North Greene to single out one instance of "harm" while allowing for others.

North Greene took an overinclusive approach instead of targeting true threats to minors. A statute is overinclusive when the scope of its restrictions reach beyond the targeted harm. *Brown*, 564 U.S. at 804. In *Brown*, this Court held that a ban on violent video games for minors

was overinclusive because it affected minors whose parents thought violent video games were "a harmless pastime." *Id.* at 805. Rather, the ban imposed the government's beliefs on what "parents ought to want" for their children. *Id.* at 804. Section 106 is similar because even consenting minors with willing parents cannot access conversion therapy. R. at 13. The government cannot silence speech that may be offensive if it is not intrusive and can easily be avoided. *Cohen v. California*, 403 U.S. 15, 21–22 (1971). Speech between consenting parties in a private counselor's office demands protection because it has little effect on others outside of that counselor-patient relationship. Instead, the true target of Section 106 should be physically harmful conversion therapy, not words. Treatments like shock therapy and psychosurgery are true threats to children's safety, while there is a lack of evidence that talk therapy harms minors. Jacob M. Victor, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 Yale L. J. 1532, 1540, 1541–42 (2014). Section 106 is overinclusive because it includes all forms of conversion therapy and not just the kinds that are known to be harmful. Ultimately, Mr. Sprague's speech deserves full First Amendment protections. This Court must remand because the lower court did not apply strict scrutiny, which Section 106 cannot satisfy.

II. Unconstitutional Religious Persecution Passes as Neutral and Generally Applicable Under Defective Precedent That Has Overstayed Its Welcome.

Section 106 is a directed ban on religious beliefs that currently stands under outdated precedent. The Free Exercise Clause of the First Amendment mandates that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Fourteenth Amendment extends this mandate to the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Past instances of religious persecution and intolerance are at the root of the Free Exercise Clause. *Bowen v. Roy*, 476 U.S. 693, 703 (1986). A religious belief "need not be

acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 714 (1981). Indeed, religious beliefs not held by the majority are exactly those the Free Exercise Clause is meant to protect. *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

However, Section 106 decides what religious beliefs the government can regulate out of existence. The lower court applied *Employment Division v. Smith*'s flawed test as stare decisis currently requires. R. at 7–8. *Smith* held that the Free Exercise Clause does not shield religious beliefs from laws that are neutral and generally applicable. *Smith*, 494 U.S. at 878–79. Laws that are neutral and generally applicable are not subject to heightened scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). *Smith* misguides lower courts, like the one here, to accept that laws attacking religious beliefs are neutral and generally applicable so long as they do not overtly mention religion. Section 106 is not neutral or generally applicable because it targets conversion therapy, a practice with deep connections to religious beliefs, while promoting its secular opposite. Such a blatant error can only be attributed to the precedent behind it all: *Smith*. This Court cannot allow *Smith* to chip away at the religious freedoms guaranteed in the Constitution. The time for change is now.

A. North Greene's Conversion Therapy Ban Persecuting Religious Beliefs Is Neither Neutral nor Generally Applicable and Is an Unacceptable Violation of the Free Exercise Clause.

Section 106 unduly burdens the free exercise of religion. According to *Smith*, the Free Exercise Clause does not apply to laws that are neutral and generally applicable. *Smith*, 494 U.S. at 879. A law must be both neutral and generally applicable to fall under *Smith*. *Lukumi*, 508 U.S. at 531. Courts must examine neutrality and general applicability individually to properly

evaluate a law's "real operation." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (quoting *Lukumi*, 508 U.S. at 535). However, a law that fails to be either neutral or generally applicable likely fails to be the other as well. *Lukumi*, 508 U.S. at 531. Laws that are not neutral or generally applicable are only valid if they pass strict scrutiny. *Id.* at 533. Section 106 is neither neutral nor generally applicable. Its targeted burden on religion is borne of hostility and judgment. While it may apply to everyone, it only truly impacts those with religious beliefs. Section 106 is an affront to religious freedom masquerading as a valid law under *Smith*.

1. Animosity towards religion eliminates any sense of neutrality.

Section 106 appears neutral on its face, but it is entrenched in animosity towards a primarily religious practice. Whether a law is neutral is "amorphous" but simply demands that the government not promote or impede religion. *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 669 (1970). A law is neutral when it does not target and restrict activities simply because they are religious. *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1730–32 (2018). Laws that expressly discriminate against religion are never neutral. *Lukumi*, 508 U.S. at 533 (citing *McDaniel v. Paty*, 435 U.S. 618, 626 (1978)). Section 106 will never be neutral because it is hostile towards religious beliefs.

Section 106 lacks facial neutrality because it knowingly targets a religious belief. When the object of a law is to discriminate against religion, it is not neutral. *Lukumi*, 508 U.S. at 533. A law's object can be discerned from its text. *Id.* This Court held in *Lukumi* that a law banning animal sacrifices violated constitutional guarantees of religious freedom. *Lukumi*, 508 U.S. at 547. The ordinances there "had as their object the suppression of religion." *Id.* at 542. The ordinances targeted religious exercise while being "gerrymandered" to exclude secular activities. *Id.* Religious gerrymanders cannot stand. *Walz*, 397 U.S. at 696. Similarly, Section 106's object

is the suppression of religion. Section 106 differentiates between conversion therapy, like Mr. Sprague practices, and gender affirming care. R. at 4. Conversion therapy is banned while gender affirming care is sanctioned. R. at 3-4. The APA, on which the legislature relied when enacting Section 106, admits that conversion therapy participants primarily "include[] almost exclusively individuals who have strong religious beliefs." R. at 15. The North Greene legislature precisely crafted Section 106 to "gerrymander" its ban on conversion therapy. Conversely, gender affirming care is legitimized because it has no direct relation to religion or religious beliefs. A law like Section 106 that singles-out religious beliefs for negative treatment is not neutral.

Neutrality is not analyzed in a vacuum. Laws burdening religious exercise are not neutral when accompanied by hostility toward religion. *Masterpiece Cakeshop*, 138 S. Ct. at 1732. Hostility can be shown through comments made by the decision-making body. *Id.* at 1729. In *Masterpiece Cakeshop,* this Court found that the commission evinced hostility to religion in violation of the Free Exercise Clause when a commissioner referred to religion as "one of the most despicable pieces of rhetoric . . . ." *Id.* at 1729, 1731. The level of hostility from *Masterpiece Cakeshop* is paralleled in the instant case where State Senator Floyd Lawson generalized conversion therapy as "barbaric practices." R. at 8–9. Further, State Senator Golmer Pyle denounced conversion therapy as an attempt to "'worship' or 'pray the gay away.'" R. at 9. Condemnation of a religious belief cannot be seen as anything short of treating it as a despicable piece of rhetoric. Attempting to mask animus as legislative comment and context falls short of neutrality. With hostility as its base, Section 106 can never truly be neutral.

Neutrality goes beyond one's first impression of a law to uncover its true purpose. The Free Exercise Clause prohibits religious persecution regardless of whether it is covert or express. *Lukumi*, 508 U.S. at 534. Importantly, "[f]acial neutrality is not determinative." *Id*. The lower

court here ignored this Court's statement from *Lukumi* and treated facial neutrality as dispositive. Focusing solely on the four corners of Section 106 ignores the true meaning of "neutrality." While Section 106 may maintain facial neutrality, religion is the backbone of conversion therapy. Justice O'Connor highlighted this concern in *Smith*, warning that "few States would be so naïve as to enact a law directly prohibiting or burdening a religious practice as such." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). Justice O'Connor's concurrence rings true as North Greene competently veiled its religious persecution. However, such a veil does not obscure the real operation of Section 106. A law cannot simply be masked with facial neutrality when it operates to silence religion. This Court must not allow masked persecution to demolish the constitutional guarantee of religious freedom.

2. A law may apply to all but is not generally applicable when it only affects a select few.

Section 106 claims to cast a wide net but only catches religious beliefs. A law is not generally applicable when it specifically burdens "conduct motivated by religious belief." *Stormans*, 794 F.3d at 1077, 1084 (quoting *Lukumi*, 520 U.S. at 543). Further, generally applicable laws cannot selectively "impose burdens only on conduct motivated by religious belief[s] . . . ." *Lukumi*, 508 U.S. at 543. Section 106 claims to be broad but applies precisely to North Greene's religious community.

Section 106 is not generally applicable because it has no effect on anyone except those with specific religious beliefs. A law does not evade strict scrutiny simply because it subjects a secular activity to the same or worse treatment as it does a religious activity. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296–97 (2021) (per curiam) (order granting injunctive relief) (stating that COVID restrictions limiting religious gatherings while allowing commercial activities violated the Free Exercise Clause). Many individuals seek conversion therapy for religious reasons.

Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 Ala. L. Rev. 793, 813 (2017). North Greene meets conversion therapy with total prohibition while expressly allowing gender affirming care. R. at 4. As methods of therapy, both have an inherently psychological effect on minors, but the North Greene legislature decides which is acceptable. While it is true that Section 106 does not specify that it only applies to religious conversion therapy, that is its function. R. at 4. Even if someone sought secular conversion therapy as the lower court suggests, the practice is admittedly "overwhelmingly, if exclusively, religious." R. at 9, 15. It is unreasonable to claim the law is generally applicable because it infringes on secular activities as well as religious when comparable secular activities are few and far between.

Mr. Sprague's religious beliefs are inseparable from his therapy. The Free Exercise Clause presumptively covers "conduct motivated by sincere religious belief[s]" because the Constitution makes no distinction between conduct and belief. *Smith*, 494 U.S. at 893 (O'Connor, J., concurring). In fact, this Court in *Yoder* stated that "our decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause." *Wisconsin v. Yoder*, 406 U.S. 205, 219 –20 (1972). It can be difficult to compartmentalize a religious belief and its accompanying action. *Id.* at 220. Moreover, the Free Exercise Clause protects religious beliefs and conduct in line with that belief. *Smith*, 494 U.S. at 877. Conversion therapy is such a practice. Mr. Sprague stated that his work as a family therapist is "influenced and informed by his Christian beliefs and viewpoint." R. at 3. He even holds himself out as a "Christian provider of family therapy services." R. at 3. Even the APA, which guided the North Greene legislature, conceded that conversion therapy is a "religious practice." R. at 15. Conversion therapy is religious conduct that flows from religious belief. Religious

beliefs are inseparable from conversion therapy and finding otherwise allows for a targeted burden on religious exercise. Section 106 is not generally applicable and Mr. Sprague's religious beliefs deserve constitutional protection.

B. Covert Religious Oppression Thrives Under Precedent Allowing Neutral and Generally Applicable Laws to Ignore the Free Exercise Clause.

It is time for this Court to raze the Free Exercise Clause exception that *Smith* created. Allowing religious persecution, no matter how understated, will never truly withstand the demands of the Constitution. "*Stare Decisis* is not an inexorable command." *Janus v. Am. Fed'n of State, Cnty., and Mun. Emp., Council 31*, 138 S. Ct. 2448, 2478 (2018). Precedent is not absolute, and this Court has upheld the Constitution by overturning faulty decisions before. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (overruling *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (overruling *Baker v. Nelson*, 409 U.S. 810 (1972)); *Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). Overturning precedent is not an "insurmountable" objective. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (2020) (Kavanaugh, J., concurring in part).

Smith has no precedential value and was "egregiously wrong" from the start. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) (quoting *Ramos*, 140 S. Ct. at 1414 (Kavanaugh, J., concurring in part)). This Court uses several factors to overrule unconstitutional precedent. *Dobbs*, 142 S. Ct. at 2264. The relevant *Dobbs* factors here include the nature of the decision's error and the workability of its rule. *Id.* at 2265. These factors show that the time for *Smith* has passed. *Plessy* needed *Brown* in the same way that *Smith* needs *Sprague* to bring Free Exercise Clause jurisprudence back in line with the Constitution. This Court must overturn *Employment Division v. Smith*.

1. Precedent that skates around the Free Exercise Clause is egregious and has been on a collision course with the Constitution since the start.

Smith controverts the Free Exercise Clause. Courts have too much discretion interpreting the Free Exercise Clause by declaring burdens on religion neutral and generally applicable. Laws that are neutral and generally applicable do not undergo heightened scrutiny but are instead presumed valid under rational basis review. *See Smith*, 494 U.S. at 887-89. This runs counter to prior precedent that passionately defended religious exercise. *See Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963) (overruled by *Smith*, 494 U.S. at 884–85); *Yoder*, 406 U.S. at 215; *Thomas*, 450 U.S. at 718. *Smith*'s error in interpreting the constitution is dangerous. *See Dobbs*, 142 S. Ct. at 2265 ("An erroneous interpretation of the Constitution is always important, but some are more damaging than others"). Laws burdening religious freedom are subject to the Free Exercise Clause even if they may be neutral and generally applicable. The Constitution is clear.

Religious beliefs deserve protection from imaginative statutes. The language of the Free Exercise Clause includes nothing that limits its protections. *See* U.S. Const. amend. I. Religions rely on Constitutional protections regardless of their popularity. Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 Geo. Wash. L. Rev. 782, 787 (1992). The Constitution does not discriminate based on popularity or acceptability. In fact, the Free Exercise Clause does not require a protected belief to be mainstream or logical. *Thomas*, 450 U.S. at 714. An exception for neutral and generally applicable laws allows creatively crafted statutes to infringe upon the rights of religious constituents. A law that expressly prohibits Catholics from having Mass on Sundays would violate the Free Exercise Clause. However, a law that prohibits in-person gatherings on Sundays can pass as neutral and generally applicable

despite the fact it is meant to prevent Catholics from attending Mass. *Smith* is unable to match the nuances of religious freedom in society and perpetuates religious persecution.

The Constitution deserves deference, but *Smith* gives the government the benefit of the doubt. The Free Exercise Clause demands the government to stay out of religion. Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issue 313, 314 (1996). Ignoring this demand would "[render] all constitutional rights vulnerable to repudiation if they go out of favor." *Id.* The First Amendment has an "absolute character" that yields only to necessity. Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109, 1116 (1990). *Smith*'s focus on whether a law is neutral or generally applicable ignores the "absolute character" of the Free Exercise Clause and instead favors government legislation. No review of necessity is involved in determining whether a law is neutral and generally applicable. The Free Exercise Clause is ultimately tossed to the wayside and laws burdening religion forgo proper scrutiny. *Smith* robs the Constitution of the deference it deserves.

Courts under *Smith* are focused on the trees—the minute details—and not the forest: the rights of observant Americans to practice as they please. *Smith* upended free exercise jurisprudence and lowered the standard from strict scrutiny to whether a law was neutral and generally applicable. *Minnesota v. Hershberger*, 462 N.W.2d 393, 396 (Minn. 1990). One outcome in a district court was so unjust that the judge expressly regretted having to apply *Smith*. *You Vang Yang v. Sturner*, 750 F. Supp. 558, 558 (D.R.I. 1990). While the autopsy law in *You Vang Yang* violated a Hmong belief, it was ultimately constitutional despite the judge acknowledging it had a significant impact on Hmong religious freedom. *Id.* at 560. Injustice at the hands of *Smith* also came about when a Jehovah's Witness died due to refusing a blood transfusion for religious reasons. *Munn v. Algee*, 924 F.2d 568, 571 (5th Cir. 1991). The Fifth

Circuit deemed the issue of religious objections and damage mitigation settled by *Smith* because the law was neutral and generally applicable. *Id.* at 574. Thus, *Smith* acts to injure twice by foreclosing both religious freedom and damage recovery. The Fourteenth Circuit here deemed that Section 106 did not violate the First Amendment. R. at 11. Its holding mirrors the results in *You Vang Yang* and *Munn* where a distinct impact on sincere religious beliefs is upheld as a merely incidental burden. Injustice abounds under the *Smith*.

After this Court decided *Smith*, Congress attempted to revive the Free Exercise Clause. Concern over *Smith* prompted Congress to pass the Religious Freedom Restoration Act ("RFRA"). 42 U.S.C.A. § 2000bb. The RFRA sought to undo the damage *Smith* caused by reinstating strict scrutiny in cases of religious burdens. *Id.* However, this Court has held that the RFRA is unconstitutional as applied to states. *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997). Congress recognized *Smith*'s error. It is time for this Court to do the same.

2. The Free Exercise Clause is under threat when precedent forces lower courts to use an unworkable standard.

Unconstitutional results abound when lower courts do not have a standard that they can consistently apply. A rule is only workable when it "can be understood and applied in a consistent and predictable manner." *Dobbs*, 142 S. Ct. at 2272 (citations omitted). To understand and apply *Smith*, courts must find the line between laws that are neutral and generally applicable and those that are not. Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi, and the General Applicability Requirement*, 3 U. Pa. J. Const. L. 850, 851 (2001). This line is blurred. *Smith* is unworkable without a clear standard that courts can consistently apply across the board.

Free Exercise Clause jurisprudence under *Smith* is confused. Courts "struggle to understand and apply *Smith*'s test even thirty years after it was announced." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1930 (2021) (Gorsuch, J., concurring). For example, this Court reasoned that COVID restrictions were neither neutral nor generally applicable when they allowed for greater access to businesses than to religious services. *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 66–67 (2020) (per curiam) (order granting injunctive relief). Yet, the Ninth Circuit held in *Stormans* that a law mandating pharmacies to dispense contraceptives despite religious objections *was* neutral and generally applicable. *Stormans*, 794 F.3d at 1077, 1084. The different results in *Roman Catholic Diocese* and *Stormans* highlight the issue with applying *Smith*. Courts rarely get it right. While favoring commercial activity over religious activity is correctly held to be neither neutral nor generally applicable, the imposition of contraceptives receives the opposite finding. The court in *Stormans* used *Smith* to replace religious beliefs with secular ones. Outcomes like this run contrary to the Court's reasoning in *Roman Catholic Diocese* and abridge constitutional protections. Lower courts misunderstand *Smith* and create inconsistent interpretations at odds with this Court's reasoning.

It is unworkable to determine which laws are truly neutral and generally applicable. The Supreme Court of Minnesota refused to apply *Smith* in *Hershberger* because of its "uncertain meaning" and elected to rely on the Minnesota State Constitution. *Hershberger*, 462 N.W.2d at 397. The Minnesota Supreme Court is not alone in not fully comprehending *Smith*. Justice Alito has expressed discontent with *Smith*'s standard by imagining its application to other constitutional rights. *See Fulton*, 141 S. Ct. at 1897 (Alito, J., concurring). Justice Alito states that denying the right to counsel in both civil and criminal cases would clearly violate a criminal defendant's Sixth Amendment right to counsel. *Id.* However, Justice Alito's reasoning suggests

that *Smith* would lead to a contrary holding because the *Smith* standard ties the treatment of religious beliefs to secular ideals. *See id.* Justice Alito outlines *Smith*'s issue. *Smith* allows the Constitution to be ignored by turning around and ignoring the relevant parties. This conflict between *Smith* and the Free Exercise Clause demands that this Court realign precedent with the Constitution. It is time to undo the confusion *Smith* creates and move to a clear standard.

Strict scrutiny is the only workable standard for laws burdening constitutionally protected freedoms. Justices Gorsuch and Blackmun suggest that laws burdening religion should have to satisfy strict scrutiny. *See Fulton*, 141 S. Ct. at 1929–30 (Gorsuch, J., concurring); *Smith*, 494 U.S. at 908–09 (Blackmun, J., dissenting). Divorcing free exercise jurisprudence from *Smith* and pairing it with strict scrutiny would protect the constitutional rights and values at the heart of Free Exercise Clause cases. The heightened standard of strict scrutiny matches the importance of the Free Exercise Clause. *Smith*, 494 U.S. at 908–09 (Blackmun, J., dissenting). Justice Barret's concern about replacing *Smith* categorically with strict scrutiny because it lacks nuance is unfounded. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). Strict scrutiny has the nuance to look at each case and determine the individual interests involved and the validity of a specific law. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229–30 (1995). Strict scrutiny ensures that a specific law burdening religious freedom passes constitutional muster. Applying *Smith* is a pointless exercise that has led to the erosion of constitutionally guaranteed religious freedoms. It is time to overturn *Smith* and revive the Free Exercise Clause.

CONCLUSION

The Constitution is paramount and must not be whittled away by states overreaching their powers to intrude on its guarantees to the citizens of the United States. Section 106 places an unconstitutional limit on First Amendment rights. First Amendment free speech is decimated if a

state government is allowed to dictate the messages and views expressed by its citizens simply because they hold a state-issued license. This Court must also prevent state governments from bypassing the Free Exercise Clause by masking their religious persecution as neutral and generally applicable laws. *Employment Division v. Smith* is erroneous and must be overruled. This Court does not have to do anything novel in this case. It simply must do as it has done in the past and uphold this nation's constitutional guarantees. *Smith* must be overturned and all of Mr. Sprague's claims demand strict scrutiny. This Court must reverse and remand this case to the Fourteenth Circuit.