No. 23-2020

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2023

Howard SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

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

BRIEF FOR PETITIONER

Team 7

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

I. Whether a law that prohibits counselors from providing clients with talk therapy violates the Free Speech Clause of the First Amendment of the United States Constitution.

II. Whether a law that overwhelmingly targets religious speech lacks neutrality and general applicability, and if so, whether this Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

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CONSTITUTIONAL PROVISIONS INVOLVED

The Free Speech Clause and the Free Exercise Clause of the First Amendment to the United States Constitution are involved in this case. Also involved is the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Licensed family therapist Howard Sprague ("Sprague") has dedicated nearly three decades of his life to helping his clients succeed. R. at 3. Influenced and informed by his faith, Sprague's work is highly regarded among the Christian community. *Id.* Although his practice is not affiliated with any religious institution, many of Sprague's clients share his beliefs and "seek his assistance specifically" for his proficiency in counseling through an evangelical lens. *Id.*

Among the array of issues that Sprague addresses are struggles with gender and sexuality. *Id.* For example, when a client comes to him wishing to confront her feelings of same-sex attraction because they conflict with her religious beliefs, Sprague will offer the client guidance that corresponds to her faith. *Id.* Specifically, he will provide her with "talk therapy," a method of verbal counseling that can help the client reduce or eliminate her unwanted desires. *Id.* During their therapy session, Sprague might remind the client of their shared religious belief that a healthy sexual relationship is one that occurs within a marriage between one man and one woman. *Id.* Similarly, if a client tells Sprague that they have conflicting feelings about their

gender, Sprague will emphasize that the sex each person is assigned at birth is "a gift from God" and should not be changed. *Id.*

Sprague is now forbidden from sharing his professional opinion on gender and sexuality with youth who seek his assistance. R. at 3–4. In 2019, the State of North Greene ("North Greene") enacted a law amending its Uniform Professional Disciplinary Act ("the Act"), adding the practice of "conversion therapy" on a patient under eighteen to the list of actions considered "unprofessional conduct" for healthcare providers. *Id.* The Act defines conversion therapy as "a regime that seeks to change an individual's sexual orientation or gender identity." R. at 4; N. Greene Stat. § 106(d)(1). Therapists who violate this statute are subject to disciplinary action under the Act. R. at 4; N. Greene Stat. §§ 106, 107, 110.

The Act further specifies that conversion therapy "includes efforts to change a youth's behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." R. at 4; N. Greene Stat. § 106(d)(1). Conversely, conversion therapy does not include "counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social, support, and identity exploration and development that do not seek to change sexual orientation or gender identity." R. at 4; N. Greene Stat. § 106(d)(2). While North Greene health care providers are still able to share their personal views on gender and sexuality with clients, and even recommend they seek conversion therapy, they are unable to offer the service to youth. R. at 4.

North Greene contends that its intent for enacting Section 106(d) of the Act was its "interest in protecting the physical and psychological well-being of minors." R. at 4. While there are physical methods of conducting conversion therapy, some therapists, like Sprague, only offer talk therapy. R. at 3. Prior to enacting Section 106, North Greene was presented with evidence

that conversion therapy—and especially talk therapy—is "safe and effective." R. at 7. North Greene looked past this evidence, and instead relied on the opinion the American Psychological Association ("the APA"), an organization that "opposes conversion therapy" and has described such counseling as "a religious practice." R. at 7, 15. Consequently, Sprague's faith-based approach to helping his youth clients address their concerns about gender and sexuality is now deemed "unprofessional conduct" and subject to disciplinary action. R. at 3–4.

II. PROCEDURAL HISTORY

The District Court. Sprague sued North Greene in August 2022. R. at 5. He alleged Section 106(d) of the Act violated his and his clients' free speech and free exercise rights under the First Amendment of the United States Constitution. R. at 3, 5. Sprague sought a preliminary injunction to enjoin enforcement of Section 106(d). *Id.* North Greene filed a motion to dismiss Sprague's complaint for failure to state a claim. *Id.* The district court rejected Sprague's constitutional claims and entered judgment for North Greene. *Id.*

The Court of Appeals. Sprague appealed the district court's judgment to the United States Court of Appeals for the Fourteenth Circuit. *Id.* The court of appeals affirmed the district court's dismissal of Sprague's claims, concluding that neither his free speech nor free exercise rights were violated. R. at 3, 5, 7, 11. The court reasoned that Sprague's counseling services were considered closer to "conduct" than "speech," entitling his therapy to lesser First Amendment protection and allowing it to be regulated by North Greene. R. at 6–7. Further, the court concluded that Sprague's free exercise rights were not infringed because the Act was a neutral law of general applicability. R. at 11. Justice Knotts issued a dissenting opinion, stating that he would reverse the district court because Sprague's free speech and free exercise rights *were* violated. R. at 12. Knotts opined that Sprague's counseling was speech, which entitled it to First

Amendment protection, and that the Act was not a neutral law of general applicability, but instead one that "overwhelmingly, if not exclusively" targeted religious speech. R. at 14–15.

SUMMARY OF THE ARGUMENT

I.

When enforcing the First Amendment's Free Speech Clause, this Court has recognized that content-based regulations—laws that target speech based on its communicative content—are subject to the highest levels of scrutiny. The strict scrutiny standard upholds the constitutional guarantee that people have the right to express any thought free from government censorship.

Section 106(d) is a content-based regulation because the statute governs speech based on its message, and therefore, it is subject to strict scrutiny. However, when Sprague challenged the law as a violation of his free speech rights, North Greene evaded review under strict scrutiny by contending that Section 106(d) did not regulate speech, but instead, that it regulated professional conduct and incidentally burdened speech. The court of appeals accepted this assertion and held that talk therapy was entitled to lesser First Amendment protection.

Section 106(d) is not a regulation of professional conduct that only incidentally burdens speech. The statute is not a law that regulates basic healthcare practice procedures, merely implicating speech as an afterthought. Instead, Section 106(d) directly regulates speech by controlling the conversations that counselors can have with their clients.

Because Section 106(d) regulates speech based on its content, it is subject to strict scrutiny. Under strict scrutiny, a government may only justify enacting a conduct-based regulation by proving that its law is narrowly tailored to serve a compelling governmental interest. Section 106(d) will not survive the strict scrutiny test because North Greene does not have a compelling interest, nor is the statute narrowly tailored to meet the state's purported interest. First, North

Greene lacks evidence that talk therapy is an actual problem that must be addressed by a ban on the practice. Second, the statute is not narrowly tailored because North Greene has not proven that it used least restrictive means to address its purported interest.

In addition to being an unconstitutional content-based regulation, Section 106(d) violates the Free Speech Clause because it discriminates based on viewpoint. In enacting the law, North Greene has engaged in bias, censorship, and preference for anti-religious values.

II.

Section 106(d) also violates the First Amendment's Free Exercise Clause. In *Employment Division v. Smith*, this Court held that laws that are neutral and generally applicable need not be justified by strict scrutiny, even if a law incidentally burdens the ability to freely exercise religion. Previously, all laws that burdened religious exercise were subject to strict scrutiny. Now only after a law has failed to be neutral or generally applicable under *Smith* is a law subject to strict scrutiny.

Section 106(d) is not neutral or generally applicable because the statute is biased against religious practice. Further, it permits secular conduct that undermines North Greene's purported interest. Even though Section 106(d) is subject to strict scrutiny under *Smith*, the *Smith* standard fails to limit the government's power in conflict with the Free Exercise Clause. The *Smith* ruling was created by a mischaracterization of precedent that preserved the true meaning of free exercise. For this reason, this Court should abandon *Smith*'s neutral and generally applicable prerequisite to free exercise claims and instead require that strict scrutiny again be automatically applied to laws that burden religious practices.

ARGUMENT AND AUTHORITIES

Standard of Review. This Court reviews questions of law de novo. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

I. SECTION 106(d) VIOLATES THE FIRST AMENDMENT'S FREE SPEECH CLAUSE BECAUSE IT UNLAWFULLY REGULATES CONTENT-BASED SPEECH BETWEEN HEALTHCARE PROVIDERS AND THEIR CLIENTS.

The First Amendment, applicable to states through the Due Process Clause of the Fourteenth Amendment, declares that the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amends. I, XIV, § 1. When enforcing this prohibition, this Court has recognized that content-based regulations—laws that target speech based on its communicative content—are subject to the highest levels of scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). This is because, at the core of the First Amendment, "people are guaranteed the right to express any thought free from government censorship." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 96 (1972).

Section 106(d) is a content-based regulation. The statute is one that "applies to a particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. In enacting Section 106(d), North Greene censored certain communications of healthcare providers who, like Sprague, aim to help youth align their gender and sexuality with their religious beliefs. R. at 4. Because the law clearly regulates content, it is "presumptively unconstitutional and may be justified only if the government proves that [the law is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163.

North Greene ultimately evaded review under this strict scrutiny test by contending that Section 106(d) does not regulate speech, but instead that it regulates professional conduct. R. at 6. Under this conclusion, the court of appeals erroneously held that Sprague's talk therapy was

entitled to lesser protection under the First Amendment. *Id.* In reaching its decision, the court of appeals was guided by its sister circuit's flawed analysis in *Pickup v. Brown*. *Id.* The court's reliance on *Pickup* is misplaced because this Court rejects attempts to regulate speech by recharacterizing it as professional conduct. *See generally Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018). Once Section 106(d) is correctly reviewed, the law will not survive strict scrutiny. But even if this Court finds that the law is narrowly tailored to serve a compelling government interest, North Greene still engaged in viewpoint-based discrimination in violation of the First Amendment's Free Speech Clause.

A. North Greene Evaded Strict Scrutiny by Purporting That a Regulation of Speech Is One of Professional Conduct.

Speech does not lose its First Amendment protection "merely because it is uttered by 'professionals.'" *Becerra*, 138 S. Ct. at 2371–72. Constitutional protection for a professional's speech has only been diminished under certain circumstances. *Id.* For example, instead of applying strict scrutiny, this Court allows review under the lighter touch of intermediate scrutiny for regulations of professional conduct that incidentally burden speech. However, because Section 106(d) regulates speech based on its content, the statute does not implicate this precedent.

1. Section 106(d) directly regulates speech, not professional conduct.

Precedent from this Court has drawn the line between regulations of speech and regulations of professional conduct that incidentally burden speech. Longstanding torts for professional malpractice, for example, "fall within the traditional purview of state regulation of professional conduct." *NAACP v. Button*, 371 U.S. 415, 438 (1963). But a state "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights" like free speech. *Id.* at 439.

While it can often be difficult to determine whether a professional regulation is conduct-based or speech-based, distinguishing the cases *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *National Institute of Family & Life Advocates v. Becerra* can be used to demonstrate the difference. In *Casey*, a state law required physicians to obtain informed consent from patients before they could perform abortions. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 883, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The law also required physicians to inform patients of printed materials from the state that contained information about fetus and various forms of medical assistance for childbirth. *Id.* Several abortion clinics challenged this law, alleging that requiring physicians to provide this information was unconstitutional under the Free Speech Clause. *Id.* at 845. This Court disagreed and upheld the professional conduct-based law because it regulated speech only "as part of the practice of medicine, subject to reasonable licensing regulation by the state." *Id.* at 884.

Conversely, when a professional regulation is more broadly restrictive, this Court has come to a different outcome. In *Becerra*, a state law imposed notice requirements on pregnancy centers that aimed to discourage and prevent women from seeking abortions. 138 S. Ct. at 2368. One of those notices required pregnancy centers to provide patients with a list of the state's family planning services, which included access to abortion for eligible women. *Id.* at 2369. Several pregnancy centers challenged the law under the Free Speech Clause. *Id.* at 2370. The law was held unconstitutional because it was "unduly burdensome" to the centers' protected speech. *Id.* at 2378. Unlike the informed consent requirements in *Casey*, which facilitated "informed consent to a medical procedure," the notice requirements in *Becerra* regulated speech because they "applied

to all interactions between a covered facility and its clients, regardless of whether a medical procedure [was] ever sought, offered, or performed." *Id.* at 2374.

Unlike the law in *Casey*, Section 106(d) does not regulate speech only "as part of the practice of medicine." While the *Casey* law implemented basic procedures for the regular operation of abortion clinics, such as requiring patients to give informed consent prior to undergoing treatment, Section 106(d) creates harsh restrictions on the substantive components of Sprague's practice. Instead, similar to the law in *Becerra*, Section 106(d) is unduly burdensome because it alters Sprague's speech—the entire premise of his practice. Like the *Becerra* law, which required pregnancy centers to share information that was unrelated to their work, Section 106(d) imposes a message onto Sprague that conflicts with his faith-based values. Finally, Section 106(d) is like the law in *Becerra* because its prohibition on talk therapy applies to all communications between him and his clients, regardless of whether talk therapy was ever sought or offered. Accordingly, Section 106(d) regulates speech and not professional conduct.

2. Section 106(d) regulates content-based speech and is subject to strict scrutiny.

Content-based laws apply to "particular speech because of the topic discussed or message expressed," and must satisfy strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). This Court has maintained that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preferences reflect a content preference." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994). Moreover, laws that are content based on their face are "subject to strict scrutiny regardless of the government's benign motive, content neutral justification, or lack of animus toward the ideas contained" in regulated speech." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1992).

Content neutral laws are "neutral with regard to the message presented, and leav[e] open ample alternative methods of communicating the intended message." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 289 (1984). These laws are subject to a lower level of scrutiny. *Id.* But the "mere assertion of a content-neutral purpose" is not enough to "save a law which, on its face, discriminates based on content." *Turner Broad. Sys.*, 512 U.S. at 642–43. This is because "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based." *Reed*, 576 U.S. at 166.

While it is not always clear to tell if a law restricting speech is content-based, sometimes it is. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter." *Id.* In *Reed*, a municipality's sign ordinance regulated various types of outdoor signs but placed the strictest size and zoning limitations on signs that promoted the gatherings of nonprofits. *Id.* at 159. This Court held that the ordinance was content-based because the state treated signs differently based on the types of ideas they conveyed. *Id.* at 164.

Section 106(d) is content-based on its face. Like the sign ordinance in *Reed*, Section 106(d) "singles out specific subject matter for differential treatment." Section 106(d) prohibits healthcare providers from engaging in certain conversations relating to sexual orientation and gender identity but not others. R. at 4; N. Greene Stat. § 106(d). The statute bans healthcare providers from offering therapy that seeks to "change [a minor's] sexual orientation or gender identity," but allows those same healthcare providers to encourage minors to maintain their sexual orientation or gender identity through "identity exploration and development." R. at 4.

Two circuit courts have reviewed laws like Section 106(d) and correctly held that those laws target speech because they regulated counselors' words. *See King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014) (holding that talk therapy is "speech" under the First Amendment);

Otto v. City of Boca Raton, 981 F.3d 854, 859 (11th Cir. 2020) ("[These laws] are content-based regulations of speech.") Accordingly, this Court should require Section 106(d) to withstand strict scrutiny because "speech is speech and it must be analyzed as such for purposes of the First Amendment." *Otto*, 41 F.4th at 1275.

B. North Greene's Interest in Section 106(d) Is Not Compelling or Narrowly Tailored.

Content-based laws are presumptively unconstitutional and may be justified only under strict scrutiny. *Reed*, 576 U.S. at 164. This requires a government to prove that its law "furthers a compelling governmental interest and is narrowly tailored to that end." *Id.* at 171. Content-based regulations almost never survive this demanding test, because the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95.

1. The state lacks evidence to show that talk therapy is an actual problem.

To prove it has a compelling interest, a state must "specifically identify an 'actual problem' in need of solving." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799 (2011). Additionally, "the curtailment of free speech must be actually necessary to the solution." *R.A.V.*, 505 U.S. at 395. North Greene's purported interest in enacting Section 106(d) is to protect "the physical and psychological well-being of minors." R. at 4. It is unquestionable that a state "possesses legitimate power to protect children from harm." *Brown*, 564 U.S. at 794. But a state's authority "does not include free-floating power to restrict the ideas to which children may be exposed." *Id.*

Speech that lacks a legitimate reason to be censored "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks is unsuitable for them." *Erznoznik v. Jacksonville*, 422 U.S. 205, 213–14 (1975). In *Brown*, this Court reviewed a state law that

prohibited the sale or rental of violent video games to minors. 564 U.S. at 789. The state's interest in enacting the law was to prevent youth from being exposed to content that might cause them psychological harm, and to help parents control their children. *Id.* at 800. This interest fell short of compelling because the state failed to show a direct causal link between violent video games and harm to children. *Id.* at 799.

The state in *Brown* relied on the research of a handful of psychologists to show that violent video games caused minors to act aggressively. *Id.* at 800. This Court doubted that evidence because the research was nearly all "based on correlation, not evidence of causation," and most of the studies suffered from "significant, admitted flaws in methodology." *Id.* Similarly, North Greene enacted Section 106(d) based on questionable evidence from the APA, which concluded that conversion therapy is ineffective. R. at 7. Meanwhile, North Greene disregarded evidence that conversion therapy, and particularly talk therapy, is safe and effective. *Id.* Therefore, talk therapy is not an actual problem that needs solving because North Greene has failed to show that there is a direct causal link between talk therapy and physical or psychological trauma to minors.

2. North Greene carries the burden of proving its law uses the least restrictive means.

Even if this Court finds North Greene's interest in Section 106(d) is compelling, the state must still show that its law is "narrowly tailored to serve a significant governmental interest." *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). North Greene carries the burden of proof and, "ambiguous proof will not" satisfy the standard it must meet. *Brown*, 564 U.S. at 800.

To satisfy the narrowly tailored requirement, the government must demonstrate that "alternative measures that burden substantially less speech would fail to achieve the government's interest." *McCullen v. Coakley*, 573 U.S. 464, 467 (2014). In *McCullen*, this Court found that a law failed to be narrowly tailored because the state's interests could "readily be

addressed through existing local ordinances." *Id.* at 492. Likewise, the State should be required to prove whether a law other than Section 106(d) already addresses its interest in protecting the physical and psychological well-being of minors in the state.

Additionally, a narrowly tailored law may not be underinclusive or overinclusive. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 578 (1993) ("A state may no more create an underinclusive statute, one that fails to truly promote its purported compelling interest, than it may create an overinclusive statute, one that encompasses more protected conduct than necessary to achieve its goal."). In *Brown*, this Court held that a law prohibiting children from purchasing video games was underinclusive because it failed to restrict other types of media children consumed, such as cartoons, that contained violence. 564 U.S. at 787. This Court held the same law was overinclusive, because even though some parents have might been assisted by it, the law abridged the First Amendment rights of young people whose parents thought violent video games were harmless. *Id.* at 805.

Like the law in *Brown*, Section 106(d) is underinclusive because Section 106(d) does not restrict minors from accessing conversion therapy elsewhere in the state or in other states. Therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization" may still practice conversion therapy. R. at 4. Additionally, licensed therapists may still recommend a minor seek conversion therapy from a religious organization or in another state. *Id.* Further, like the *Brown* law, Section 106(d) is also overinclusive because it restricts the free speech rights of children who do not believe that their physical and psychological well-being are harmed by talk therapy.

C. North Greene Also Discriminates Based on Viewpoint.

Viewpoint discrimination is an "egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). When the government targets "particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* It is the government's duty to "abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

This Court has persistently rejected laws that discriminate based on viewpoint, including social, political, and religious views. *See id.*; *Boos v. Barry*, 485 U.S. 312, 319 (1988); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386 (1993). *Lamb's Chapel* offers an example of a law that discriminated against viewpoint on its face. 508 U.S. 384 (holding that it was viewpoint-based discrimination to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint).

Section 106(d) mirrors the discriminatory law in *Lamb's Chapel*. While there is a wide array of issues therapists can speak to their youth clients about, healthcare providers are forbidden from helping minors accept a religious understanding of sexuality and gender identity. Simultaneously, Section 106(d) provides that therapists may offer "acceptance" and "support" so clients can maintain their identities. R. at 4. North Greene has engaged in bias, censorship, and preference for anti-religious values. The First Amendment "forbids the government to regulate speech in ways that favor some viewpoints at the expense of others." *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

II. SECTION 106(d), LIKE MOST FREE-EXERCISE PROHIBITIONS, LACKS NEUTRALITY AND GENERAL APPLICABILITY UNDER *SMITH*. THIS COURT SHOULD OVERTURN *SMITH* AND REIMPOSE STRICT SCRUTINY.

The government "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. This principle is so well understood that this Court has only recorded a handful of violations in its opinions. *See, e.g.*, *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Lukumi*, 508 U.S. 520.

Free exercise prohibitions were subject to strict scrutiny prior to this Court's holding in *Employment Division v. Smith*. *See Sherbert v. Verner*, 374 U.S. 398 (1963). In *Smith*, this Court redefined the constitutional protection for free exercise of religion, holding that neutral and generally applicable laws need not be justified by strict scrutiny, even if a law incidentally burdens a particular religious practice. 494 U.S. at 874.

Because "neutrality and general applicability are interrelated . . . failure to satisfy one requirement is likely an indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531. Laws that are not neutral or generally applicable under *Smith* are subject to strict scrutiny. *Id.* at 523. This is the case with Section 106(d), which satisfies neither of the *Smith*'s requirements. Therefore, Section 106(d) may only be justified with proof that law is narrowly tailored to serve North Greene's compelling interest.

Section 106(d), like many free-exercise cases heard by this Court since *Smith*'s ruling, does not comport with the *Smith* test and instead is subject to strict scrutiny. Even though Section 106(d) is subject to strict scrutiny because the law lacks neutrality and general applicability under *Smith*, this Court should abandon the *Smith* precedent because the standard fails to limit the government's power in conflict with the Free Exercise Clause. The *Smith* ruling was created by a mischaracterization of precedent that preserved the true meaning of free exercise. The

consequences of *Smith* have been detrimental. For this reason, *Smith*'s neutral and generally applicable prerequisite to free exercise claims should be left behind and strict scrutiny should again be automatically applied to laws that burden religious practices.

A. The Statute Is Biased Against Religious Practice and Permits Secular Conduct That Undermines North Greene's Asserted Interest.

Smith held that a law that burdens religious speech need not be justified by strict scrutiny if the law is neutral and generally applicable. 494 U.S. at 874. However, when a law fails to meet the *Smith* standard, strict scrutiny is triggered, and the government must prove that its law is "narrowly tailored to accomplish the asserted governmental interests." *Lukumi*, 508 U.S. at 531–32.

The court of appeals held that Section 106(d) was a neutral law of general applicability, subject only to rational basis review. R. at 7. The court's opinion was misplaced. As Justice Knotts emphasized in his dissent, "the majority's decision ignores the fact that the North Greene law targets overwhelmingly, if not exclusively, religious speech." R. at 15. Because the law fails the *Smith* test, it must survive strict scrutiny.

1. Section 106(d) is not neutral because it singles out a religious practice for discriminatory treatment.

This Court provided guidance on determining a law's neutrality in *Lukumi*. 508 U.S. at 533. In *Lukumi*, a city enacted a law that prohibited animal sacrifice, except for the slaughtering of animals by licensed establishments of animals raised for food purposes. *Id.* at 527–28. This law primarily impacted members of the city who practiced Santeria, a religion that sacrifices animals during its ceremonies. *Id.* at 524. This Court analyzed the law's text, application, and circumstances surrounding its enactment to determine that the law was not neutral. *Id.* at 542.

a. Section 106(d)'s text is discriminatory on its face.

Determining the object of a law begins by looking at its text because "the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* at 533. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* Section 106(d) fails the test of facial neutrality because the term "conversion therapy" has almost exclusively religious connotations.

Merriam-Webster Dictionary defines "conversion therapy" as "the use of any various methods (such as . . . *religious counseling*) in an attempt to change a person's sexual orientation . . . or to change a person's gender identity." *Conversion Therapy*, *Merriam-Webster Dictionary* (11th ed. 2019) (emphasis added). Further, the APA, which influenced North Greene to enact Section 106(d), refers to conversion therapy as "a religious practice." R. at 15. The APA also acknowledged that "conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." *Id.*

Even if this Court finds that Section 106(d) defines the term "conversion therapy" in secular terms without referring to religious practices, "facial neutrality is not determinative." *Lukumi*, 508 U.S. at 534. The Free Exercise Clause "forbids subtle departures from neutrality," *Gillette v. United States*, 401 U.S. 437, 452 (1971), and "covert suppression of particular religious beliefs." *Bowen v. Roy*, 476 U.S. 693, 703 (1986). North Greene attempts to hide behind neutral terms in defining conversion therapy while covertly attacking the religious practice of licensed professionals. This is the exact practice that this Court has strictly forbidden in previous decisions.

b. Section 106(d) applies almost exclusively to religious licensed therapists and their like-minded clients.

The second step of the neutrality test is to review a law's impact when the law is enforced. *Lukumi*, 508 U.S. at 535. "Apart from the text, the effect of a law in its real operation is strong evidence of its object." *Id.* Like the law in *Lukumi*, which applied almost only to Santeria members, Section 106(d) virtually only applies to religious licensed therapists and their clients. While North Greene contends that the law is neutral because it prohibits conversion therapy for minors who may seek the service for secular reasons, neither North Greene nor the court of appeals could point to any "real world" examples of non-religious youth who sought conversion therapy. R. at 16. Further, a law does not pass constitutional muster merely by treating "some comparable secular" speech "as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).

Section 106(d) includes two exemptions that specifically prejudice religious licensed therapists and their clients. First, while Section 106(d) bans conversion therapy that seeks to "change an individual's sexual orientation or gender identity," one of the law's exemptions allows for gender-affirming therapy. Gender-affirming therapy is often the first step for transgender youth who ultimately seek to medically transition, such as hormone replacement therapy or gender-affirming surgery. *See* E. Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, Int'l J. of Transgender Health, Sept. 15, 2022, at S116.

Exempting gender-affirming care from the prohibitions in Section 106(d) reveals that North Greene supports health care providers who help children change their gender for non-religious reasons. Conversely, North Greene does not support health care providers who aim to help children change their sexuality or gender identity under the religious context of talk therapy. This

unequal application "devalues religious reasons" by "judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537–38. Because of this, "religious practice is being singled out for discriminatory treatment." *Id.* at 538.

Section 106(d) also exempts non-licensed therapists who work "under the auspices of a religious denomination, church, or organization" from comporting with Section 106(d). R. at 4; N. Greene Stat. § 106(e)(2). While this exemption allows non-licensed therapists to practice talk therapy, Sprague, as a licensed therapist, did "not surrender his free-exercise rights through his license or through government disagreement with his views." R. at 15. This is because the Free Exercise Clause protects "the right to harbor religious beliefs inwardly and secretly" and "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022).

c. North Greene's objective was to suppress religious practice.

Another way to examine whether a law is neutral is by reviewing the "direct and circumstantial evidence" to reveal the state's objective in enacting a law. *Lukumi*, 508 U.S. at 540. Relevant evidence includes "the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers." *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254 (1977). For example, in *Masterpiece Cakeshop*, comments by members of a state's civil rights commission's enforcement of a nondiscrimination law were tainted with anti-religious animus. *Masterpiece Cakeshop Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1729 (2018). Because of these comments, this Court held that the nondiscrimination law lacked neutrality under the Free Speech Clause. *Id.* at 1730.

Like the comments made by the commissioners in *Masterpiece Cakeshop*, several North Greene senators revealed their animus toward religious talk therapy leading up to the enactment of Section 106(d). During a legislative debate on Section 106(d), Senator Floyd Lawson stated that his intent in sponsoring the bill was to eliminate "barbaric practices." R. at 9. Another bill sponsor, Senator Golmer Pyle, denounced those who try to "worship" or "pray the gay away" through the practice of conversion therapy. *Id.* The senators' statements indicated their legislative intent to target conversion therapy based on its religious motivation.

Section 106(d) lacks neutrality on its face. Further, the bias in the law's applicability and statements made by legislators prior to the law's enactment show that Section 106(d) is not a neutral law.

2. Section 106(d) is not generally applicable because it permits secular conduct that undermines North Greene's interest in protecting minors.

A law fails to be generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interest in a similar way." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). For example, in *Lukumi*, a city claimed its prohibition on animal sacrifice was necessary in part to protect public health that was "threatened by the disposal of animal carcasses in open places." 508 U.S. at 544. Despite this, the city's ordinance did not regulate the disposal of hunters' kills or the disposal of meat by restaurants, both of which created a similar hazard. *Id.* at 544–45. This Court held that law was not generally applicable because the law was underinclusive. *Id.* at 545–46.

Like the law in *Lukumi*, Section 106(d) is underinclusive. Section 106(d) prohibits religious conduct while permitting comparable secular conduct that undermines North Greene's asserted interest. North Greene contends that its ban on conversion therapy supports its interest in

protecting "the physical and psychological well-being of minors." R. at 4. However, gender-affirming therapy, which includes medical transitions, has led to some reports of regret. R. at 10. A recent study revealed that some individuals who pursued gender-affirming medical treatment expressed "regret over the permanent effects of the treatment." Christina M. Roberts et al., *Continuation of Gender-Affirming Hormone Care in Transgender Adolescents and Adults*, J. Clinical Endocrinology & Metabolism, Apr. 22, 2022, at e3937–38. Additionally, some of these individuals stopped treatment because of "psychological distress and uncertainty or fluctuation in gender identity." *Id.* at e3938.

North Greene has access to evidence that treatment approved by Section 106(d) can cause psychological trauma, which reinforces the notion that enacting the law was only ever about targeting a religious practice—not protecting the physical and psychological well-being of minors. Therefore, Section 106(d) is not generally applicable. Because Section 106(d) fails *Smith*'s neutral and generally applicable test, the law is subject to strict scrutiny.

B. This Court Should Overrule *Smith* and Restore the Free Exercise Clause to Its Original Meaning and Precedent.

Smith "pushed aside nearly 30 years of precedent" that upheld religious exemptions from generally applicable laws. *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). This Court's decision overlooked the Free Exercise Clause's plain text, origin, and precedent. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring). Rather than applying strict scrutiny, which was the historically standard for free exercise cases, *Smith* created a new test. *Smith* held that neutral and generally applicable laws did not violate the Free Exercise Clause, "no matter how severely [those laws] burden religious exercise." *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). The consequences of *Smith*, as demonstrated by the court of appeals' incorrect ruling below, reveal why this Court should overrule *Smith* and return to the intended purpose of the Free Exercise Clause.

1. Strict scrutiny maintained the free exercise of religion before the *Smith* test.

Prior to the *Smith* ruling, governments were required to satisfy strict scrutiny to justify burdening free exercise. *Sherbert*, 374 U.S. 398. This Court applied the strict scrutiny rule in *Sherbert*, holding that a law burdening religion could not be enforced unless the law was narrowly tailored to serve a compelling interest. *Id.* at 403. For twenty-seven years, courts were bound by *Sherbert* and followed the strict scrutiny test. *See generally Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987); *Frazee v. Ill. Dep't of Emp. Sec.*, 489 U.S. 829 (1989).

Despite the difficulty of surviving the rigid test, strict scrutiny did not guarantee victory for those who challenged laws that burdened free exercise. For example, in *United States v. Lee*, this Court held Amish business owners were not exempt from mandatory contributions to Social Security because these contributions were "indispensable to the fiscal vitality of the social security system." 455 U.S. 252, 258 (1982); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (holding that lawful incarceration brings about necessary withdrawal or limitation of privileges).

Before *Smith*, free exercise was uncontroversial. Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. Chi. L. Rev. 1109, 1109 (1990). At the time, the issue was "government support for religion, not government support for interference with religion." *Id.* But this all changed after the *Smith* ruling. Now there is "no substantive, constitutional right to exercise religion." Blaine L. Hutchison, *Revisiting* Employment Division v. Smith, 91 U. Cin. L. Rev. 396, 401 (2022).

2. *Smith* abandoned religious liberty.

When it declined to apply strict scrutiny in *Smith*, this Court held that a person's free exercise right did not relieve their duty to "comply with a 'valid and neutral law of general applicability.'" 494 U.S. at 878–90. Four Justices disagreed with *Smith*'s interpretation of the Free Exercise Clause. Justice O'Connor wrote that the Clause's new reading departed from "well-settled First American jurisprudence" and was "incompatible with our Nation's fundamental commitment to individual liberty." *Id.* at 891 (O'Connor, J., dissenting). Justices Brennan, Marshall, and Blackmun stated that the majority reached its view by "mischaracteriz[ing] this Court's precedents." *Id.*

Smith reached this Court with underlying facts similar to those in *Sherbert*, which held that the denial of unemployment benefits that imposed a substantial burden on a religious woman's free exercise rights was unconstitutional. *Sherbert*, 374 U.S. at 410. However, unlike the plaintiff in *Sherbert*, a Seventh-day Adventist who needed unemployment benefits due to being unable to find a job that allowed her to commemorate the Sabbath, the *Smith* plaintiffs needed unemployment after being fired for participating in a Native American religious ceremony that involved ingesting peyote. *Smith*, 494 U.S. at 874.

The *Smith* plaintiffs were denied unemployment benefits because the consumption of peyote was a crime under state law. *Id.* at 875. Rather than following the *Sherbert* test, which would have likely allowed a religious exercise exemption, this Court adopted a new test under *Smith*. *Smith* declared that a "generally applicable and otherwise valid" rule did not violate the Free Exercise Clause if prohibiting the exercise of religion was "merely the incidental effect" of its operation. *Id.* at 878. The majority distinguished *Smith* from *Sherbert* by finding that a state law with an applicable criminal provision could also constitutionally deny unemployment

benefits on that basis. *Id.* at 892. Accordingly, under the *Smith* test, the law prohibiting peyote use was constitutional, despite its burden on religious exercise. *Id.*

In its *Smith* ruling, this Court's majority failed to consider the briefs written by the parties and amici, despite a unanimous agreement based on the Free Exercise Clause's framework. *Fulton*, 141 S. Ct. at 1883 (Alito, J., concurring). Rather than following the strict scrutiny rule set forth in *Sherbert*, the majority ignored the First Amendment's text, origin, and precedent.

3. *Smith* ignored the Free Exercise Clause's text, origin, and precedent.

The *Smith* majority "paid shocking little attention to the text of the Free Exercise Clause." *Id.* at 1894. The First Amendment states that a government shall "make *no law* . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I (emphasis added). Instead of applying this text literally, the majority created an exception, limiting this protection only to laws that intentionally targeted free exercise of religion. *Smith*, 494 U.S. at 878. Under this interpretation, laws that were not intentional, but "merely the incidental effect" of burdening religion were generally applicable, and therefore did not violate the Free Exercise Clause. *Id.* However, this contradicts the plain constitutional text of the First Amendment, which guarantees "unrestrained religious practices or worship." *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring). The Free Exercise Clause "certainly does not suggest a distinction between laws that are generally applicable and laws that are targeted." *Id.* Because the text is "clear and distinct, no restriction upon its plain and obvious import ought to be admitted." *Id.* at 1894.

The *Smith* ruling also conflicts with the origin of free exercise as developed by the colonies, Founders, and states. Hutchison, *supra*, at 397. Free exercise developed as a legal concept in the American colonies. *Id.* at 422. In 1648, Lord Baltimore ordered Maryland officials to not disrupt Christians in the "free exercise" of their religion. *Id.* New Jersey and North

Carolina leaders used similar language to protect religious freedom. *Id.* America's Founders upheld this principle and considered religious liberty an unalienable right. *Id.* at 419. The Founders established the Free Exercise Clause to "solv[e] the dilemma that many religious minorities face: that their faith tells them one thing, but the law requires another." *Id.* When states adopted their own constitutions, they followed the Free Exercise Clause under the same principle. *Id.* at 424–25. *Smith* contradicts the origin of free exercise, and "reverses the relationship between God and government." *Id.* at 419. *Smith* reconstructed an "unalienable right from God into an unalienable right that depends on government." *Id.* at 422.

The *Smith* decision also clashed with Free Exercise Clause precedent. In its holding, the majority claimed that it had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law." *Smith*, 494 U.S. at 878–79. However, several cases have excused individuals from otherwise valid laws based on religion. For example, *Yoder*, which followed the *Sherbert* test, showed that the protection of the Free Exercise Clause did just this. 406 U.S. at 220. In that case, this Court held that a state law requiring all students under the age of 16 to attend school violated the free-exercise rights of Amish parents whose religion required children to leave school after the eighth grade. *Id.* at 236. The Court stated that 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." *Id.*

Rather than applying the precedent set forth in *Sherbert*, *Smith* relied on the cases *Minersville School District v. Gobitis* and *Reynolds v. United States* as its chief precedents. *Smith*, 494 U.S. at 879. In *Gobitis*, the government was allowed to prosecute children who refused to recite the pledge of allegiance for religious reasons. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940). *Gobitis* was overruled three years later in *West Virginia State Board of*

Education v. Barnette. 319 U.S. 624 (1943). In *Barnette*, this Court held that "obedience to a general law is not aimed at the promotion or restriction of religious beliefs." *Id.* at 655. In *Reynolds*, a Mormon's polygamy conviction was upheld under the Free Exercise Clause on the premise that the Clause protected "religious belief and opinions" but not "religious practices." *Reynolds v. United States*, 98 U.S. 145, 166 (1878). But this Court "recognized [*Reynold*'s] errors for nearly fifty years—until *Smith*." Hutchison, *supra*, at 406.

4. *Smith*'s ruling created consequences, which will continue until the case is overruled.

The impact of *Smith*'s ruling was "quickly felt, and Congress was inundated with reports of the decision's consequences." *Fulton*, 141 S. Ct. at 1893. In response, Congress attempted to restore the *Sherbert* test in 1993 by passing the Religious Freedom Restoration Act (RFRA), a law that made a version of the test applicable to all actions taken by the federal government or the states. *Id.* In *City of Boerne v. Flores*, this Court held that Congress lacked the power under the Fourteenth Amendment to impose these rules on states. 521 U.S. 507, 529 (1997). While the RFRA restored part of the protection that *Smith* withdrew on the federal level, it is "no substitute for a proper interpretation of the Free Exercise Clause." *Fulton*, 141 S. Ct. at 1894.

One of the major repercussions of *Smith* is that it has created division in its application by the lower courts. In *Fulton*, a city ended its contract with a Catholic foster care agency because the agency refused to certify same-sex couples as foster parents. *Id.* at 1875. The agency's refusal to certify same-sex couples violated a non-discrimination provision in its contract with the city, as well as the city's nondiscrimination policy. *Id.* The foster agency sued the city, arguing that its right to free exercise entitled it to reject certifying same-sex couples due to religious beliefs. *Id.* at 1876. The district court denied the agency's motion for preliminary injunction, and the Third Circuit affirmed, finding that the non-discrimination policy was a

neutral and generally applicable law under *Smith*. The foster agency appealed, asking this Court to reconsider *Smith*'s precedent. *Id.* This Court did not overrule *Smith*, but instead found that the nondiscrimination policy was outside of *Smith*'s scope. *Id.* at 1873. This Court found that the city's contract was not neutral or generally applicable under *Smith* because it allowed for exceptions to the anti-discrimination requirement at the sole discretion of the city's commissioner. *Id.* This triggered strict scrutiny, which revealed that the city did not have a compelling interest to refuse contracting with the foster agency. *Id.* This Court reversed the lower courts' decisions. *Id.* at 1882.

Because the *Fulton* ruling did not impact *Smith*'s precedent, lower courts are still bound by it, and the inconsistency in its application remains a major issue today. As Justice Alito noted in his concurrence, the *Fulton* decision "provides no guidance regarding similar controversies in other jurisdictions." *Id.* at 1888. Other cities that require foster care agencies serve same-sex couples, such as Boston, San Francisco, Washington D.C., were not bound by the *Fulton* decision unless their relevant nondiscrimination policies contained the same contractual provision on which the *Fulton* majority's decision hangs. *Id.* The decision was "even less significant" to other important religious liberty cases. As Justice Alito expected, religious cases, like this one, regarding the freedom to exercise through talk therapy, are being inconsistently decided by the lower courts. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014); *Otto*, 41 F.4th at 859.

Smith was incorrectly decided. Its rejection of the Free Exercise Clause's original meaning, history, and judicial precedent has led to severe consequences. For these reasons, this Court should overrule *Smith* as a prerequisite to strict scrutiny and instead restore that strict scrutiny

automatically be applied to all laws that burden religious freedom under the Free Exercise Clause.

CONCLUSION

This Court should REVERSE the court of appeals' judgment in all respects and OVERRULE *Smith* to restore the full protections guaranteed by the Free Exercise Clause.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER