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 PETITIONER

Team 8
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a law that stifles a licensed therapist's spoken words during talk therapy by relabeling them as "unprofessional conduct" violates the Free Speech Clause of the First Amendment.

2. Whether a law that prohibits a licensed therapist from providing religiously motivated talk therapy is neutral and generally applicable, 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 First Amendment to the United States Constitution, applicable to the States under the Fourteenth Amendment, declares:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

1. Mr. Sprague helps patients in North Greene

For more than two decades, Howard Sprague ("Mr. Sprague") has worked as a state-licensed therapist in North Greene. R. 3. During that time, Mr. Sprague has dedicated his life to helping patients of varying backgrounds, beliefs, and ages. R. 3. Although not professionally affiliated with a religious institution, Mr. Sprague is outwardly Christian and incorporates his religious values into his therapy. R. 3. This approach has allowed him to fulfill a vital role in North Greene. *See* R. 3. Indeed, many patients seek out Mr. Sprague's counsel because he is state-licensed and maintains a Christ-centered approach to therapy. *See* R. 3.

2. Patients seek out Mr. Sprague's counseling on sexuality and gender

Mr. Sprague's practice is no different when it comes to the issues of sexuality and gender. *See* R. 3. As a Christian, Mr. Sprague holds traditional views on these topics. R. 3. He believes sexual relationships are beautiful and healthy when grounded in God's design for heterosexual marriage. R. 3. Many of Mr. Sprague's patients share these beliefs and seek out his

therapy because they desire counsel grounded in this Christian perspective. R. 3. Mr. Sprague serves these patients by engaging in talk therapy. R. 3. At no point has Mr. Sprague attempted to veil his beliefs from his patients. *See* R. 3.

3. The North Greene General Assembly rushes to ban so-called conversion therapy

Despite the fact that Mr. Sprague has safely counseled patients on the issues of sexuality and gender for years, the North Greene General Assembly took abrupt action in 2019 to curb religiously informed therapy. R. 4. During that year's session, the General Assembly determined so-called conversion therapy was an immediate threat to the health and well-being of minors. R. 4. After making this determination, members of the General Assembly proposed an addendum to North Greene's Uniform Professional Disciplinary Act. R. 4. This addendum, § 106(d)-(e), would prohibit licensed therapists from providing so-called "conversion therapy" to minors in any form. R. 4.

Fierce opponents of so-called "conversion therapy" attacked the practice head-on. R. 9. For instance, one sponsoring senator stated it was his intention to eliminate "barbaric practice[s]" with the addendum. R. 9. Another sponsor, expressing his family's experience with so-called conversion therapy, denounced those who try to "worship" or "pray the gay away." R. 9. And although that same senator acknowledged "it would be difficult for some of his colleagues to support [§ 106(d)] because of their religious convictions," no other members voiced dissent on record. *See* R. 9.

4. Through § 106(d), the North Greene General Assembly outlaws Mr. Sprague's Christian approach to talk therapy

Despite evidence that some forms of so-called conversion therapy—like Mr. Sprague's talk therapy—are safe and effective, the General Assembly ultimately passed § 106(d)-(e). R. 4. In so doing, the General Assembly relied exclusively on anecdotal reports from the American

Psychological Association ("APA") purportedly showing the harm so-called conversion therapy causes minors. R. 7. The statute defines conversion therapy as follows:

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

R. 4. Additionally, § 106(e) makes clear the statute covers all licensed therapists regardless of their religious affiliations or convictions. R. 7. Section 106(f) provides a carveout for therapy provided by unlicensed therapists who "work under the auspices of a religious denomination, church, or religious organization." R. 7. Furthermore, the statute does not prevent licensed therapists from:

> Communicating with the public about conversion therapy; expressing their personal views to patients (including minors) about conversion therapy, sexual orientation, or gender identity; practicing conversion therapy on patients over 18 years old; or referring minors seeking conversion therapy to counselors practicing "under the auspices of a religious organization" or health providers in other states.

R. 4. Still, any form of licensed therapy for minors regarding sexuality and gender identity is controlled by the State of North Greene ("the State"). *See* R. 7.

5. Mr. Sprague challenges the State for First Amendment violations

Mr. Sprague recognized his faith-based talk therapy violates § 106(d). R. 5. Fearing for his ability to honor his religious convictions while working as a state-licensed therapist, Mr. Sprague filed suit against the State in August 2022, seeking to enjoin enforcement of § 106(d). R. 5. His complaint alleged the State violated the Free Speech Clause and the Free Exercise Clause of the First Amendment by suppressing his religiously motivated speech. R. 5. After

determining Mr. Sprague had standing to pursue his claims, the district court nonetheless granted the State's motion to dismiss for failure to state a claim. R. 5. The Fourteenth Circuit affirmed. R. 5.

In affirming dismissal, the Fourteenth Circuit reasoned that Mr. Sprague could not bring a colorable free speech claim because § 106(d) regulates conduct and not speech. R. 6. Relying on unbinding precedent, the court reasoned that Mr. Sprague's talk therapy fell on a "continuum" between speech and conduct and more closely resembled conduct. R. 6. Thus, according to the court, § 106(d) need only pass rational basis review. R. 7. The court found that it did so. R. 7.

The court went on to dismiss Mr. Sprague's free exercise claim by finding § 106(d) neutral and generally applicable under *Employment Division v. Smith.* R. 7. According to the court, § 106(d) is neutral because its object is merely to "regulate health care providers only to the extent they act in a licensed and non-religious capacity." R. 8. Further, the court reasoned § 106(d) is generally applicable because the law prohibits conversion therapy by all licensed therapists. R. 8. After finding § 106(d) satisfied *Smith's* requirements, the court once again applied rational basis review and dismissed Mr. Sprague's claim. R. 10. Judge Knotts entered a dissenting opinion. R. 12-16.

SUMMARY OF THE ARGUMENT

"That the First Amendment doubly protects religious speech is no accident." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). Weary of government overreach, the Framers created the First Amendment to provide overlapping protection for religious expression—no matter the context in which that expression arises. In this case, the State seeks to pierce this overlapping protection under the guise of a state licensing regime. By relabeling a licensed therapist's spoken words during talk therapy as "unprofessional conduct," the State tosses aside the Free Speech Clause's protection for an entire profession. Worse still, the State does so knowing the

stifled speech is a "religious practice." R. 15. Consistent with this Court's First Amendment principles, Mr. Sprague's religiously informed talk therapy is constitutionally protected. To ensure the Framers' worst fear is not realized, this Court should reverse the judgment of the Fourteenth Circuit.

I. The Free Speech Clause prohibits the State from censoring a licensed therapist's spoken words during talk therapy. Yet § 106(d) does just that. **I.A.** This Court has consistently recognized that professionals do not surrender their free speech rights as a condition of employment. Instead, it has created a narrow exception for speech "incidental to conduct." But this Court's line between speech and conduct is clear—and a therapist's spoken words during talk therapy fall firmly on the side of speech. Any ruling upholding § 106(d) would run counter to this Court's precedents and decimate the free speech rights of licensed professionals.

I.B. Moreover, § 106(d) regulates a licensed therapist's speech based on content and viewpoint. First, § 106(d) regulates based on content because it suppresses so-called conversion therapy and compels government-approved talk therapy in its place. Second, § 106(d) regulates based on viewpoint because it drastically limits the expression of faith-based perspectives on sexuality and gender. **I.C.** Consistent with this Court's precedents, § 106(d) warrants strict scrutiny. Under this analysis, the State's interest in protecting the health and welfare of minor constituents is outweighed by a licensed therapist's right to free speech. But even if it was not, the State's failure to pinpoint precise instances of harm and consider less repressive alternatives proves fatal to its statute. Section 106(d) fails strict scrutiny and violates the Free Speech Clause of the First Amendment.

II. Under *Employment Division v. Smith*, a law that burdens religious exercise must be neutral and generally applicable to escape strict scrutiny. Section 106(d) is neither. **II.A.** First, §

106(d) fails neutrality because its "real operation" eliminates faith-based perspectives in the field of psychotherapy. Both the statute's hostile legislative history and inevitable "religious gerrymander" support this conclusion. Second, § 106(d) fails general applicability because it bans a religious practice while simultaneously promoting secular conduct that can perpetuate a similar harm. While failure to satisfy either neutrality or general applicability is sufficient to trigger strict scrutiny, § 106(d) fails both.

II.B. Even if this Court finds § 106(d) neutral and generally applicable, *Smith* should be overturned. Indeed, *Smith* checks every box of an "egregiously wrong" precedent. *Smith* jettisoned the plain, historically understood language of the Free Exercise Clause in exchange for a "clear-cut rule" that has proven impossible to apply. Moreover, state governments have failed to rely on *Smith*, and many have even gone so far as to repeal its effect through legislation. This Court should overturn *Smith* and return to its previous rule that requires any law burdening religious exercise to provide individual exemptions or overcome strict scrutiny. **II.C.** No matter the approach taken by this Court, § 106(d) fails strict scrutiny because it is not narrowly tailored to serve the State's interest.

ARGUMENT

I. Section 106(d) of North Greene's Uniform Professional Disciplinary Act violates the Free Speech Clause of the First Amendment.

"The Framers designed the Free Speech Clause of the First Amendment to protect the 'freedom to think as you will and to speak as you think,'" and state-licensed professionals do not surrender this protection at the doorstep of their workplace. *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2310 (2023); *see also Natl. Inst. of Fam. and Life Advocates ("NIFLA") v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018). In *NIFLA*, this Court refused to apply relaxed scrutiny to laws targeting "professional speech." 138 S. Ct. at 2371-72. Instead, this Court reaffirmed the bedrock

principle that content-based laws "are presumptively unconstitutional" and warrant strict scrutiny—even when they target speech uttered by professionals. *See id.* at 2371.

This case presents an attack on that bedrock principle. In an attempt to sidestep this Court's abrogation of the "professional speech" doctrine, the State has "engaged in a dubious constitutional enterprise" by relabeling the words uttered by a licensed therapist during talk therapy as "unprofessional conduct." *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017); R. 4. This relabeling is an attempt to distort the only thing the State seeks to regulate—speech.

Strict scrutiny applies to § 106(d) because the law targets and censors Mr. Sprague's speech. This Court's precedents make a clear distinction between speech and conduct, and talk therapy is *entirely* speech. *Infra* Part I.A. Moreover, § 106(d) is a content-based regulation because it restricts the message Mr. Sprague counsels and penalizes him for his perspective. *Infra* Part I.B. And since § 106(d) is a content-based regulation, the State's failure to narrowly tailor it proves fatal. *Infra* Part I.C. The State's censorship of Mr. Sprague fails strict scrutiny and violates the Free Speech Clause of the First Amendment.

A. Section 106(d) stifles the speech—not conduct—of licensed therapists.

The government cannot strip licensed therapists of their free speech rights by relabeling talk therapy as conduct. The Constitution protects spoken words, even if those words act as a conduit for professional services. *Holder v. Humanitarian L. Project*, 561 U.S. 1, 10 (2010). Acknowledging this protection, this Court has refused to recognize professional speech as a "separate category of speech" unworthy of heightened scrutiny. *NIFLA*, 138 S. Ct. at 2372. The State attempts to sidestep this Court's free speech doctrine by relabeling a licensed therapist's speech as "unprofessional conduct." R. 4. But this relabeling misses the constitutional mark. A licensed therapist's speech during talk therapy is speech and should be afforded heightened

constitutional protections. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020).

1. Speech is speech regardless of the function of the message communicated.

Speech used by licensed therapists in talk therapy is quintessential speech. Verbal communication is protected even if the communication functions as a vehicle for delivering professional services. *Holder*, 561 U.S. at 10. Indeed, this Court has already recognized that "speech is not unprotected merely because it is uttered by professionals." *NIFLA*, 138 S. Ct. at 2371-72 (abrogating the "professional speech" doctrine developed by the Ninth Circuit in *Pickup v. Brown*). In *NIFLA*, a group of plaintiffs challenged a law that required all state-licensed clinics to provide notices about abortion services. *Id.* at 2368-69. The Ninth Circuit initially upheld the law under rational basis review because the notice requirement only regulated the "professional speech" of the clinics. *Id.* at 2371. According to the court, a state could regulate a professional's speech since they provided personalized services to clients and received licensing from the government. *See id.*

On review, this Court rejected that contention, noting it has never "recognized 'professional speech' as a separate category of speech." *Id.* at 2372. This Court reasoned "professional speech" is a "difficult category to define with precision" and attempting to do so would allow a state to eradicate the free speech rights of any profession that involves personalized services and requires a state license. *Id.* This Court understood that granting such power to the States would lead to "invidious discrimination of disfavored subjects" and decimate the "uninhibited marketplace of ideas." *Id.* The takeaway is clear. Words uttered by professionals are speech and warrant the highest constitutional protections.

2. Talk therapy is speech because it consists entirely of words and no other separately identifiable conduct.

Recognizing that professional speech is not exempt from First Amendment protections,

the State seeks refuge for its censorship in this Court's precedents that permit the government to regulate conduct "incidentally involving speech." *NIFLA*, 138 S. Ct. at 2372. True, this Court has long drawn a line between speech and conduct based on what the government regulates. *See Id.* at 2373. But the line between speech and conduct is clear—and talk therapy falls on the side of speech. *See Otto*, 981 F.3d at 865.

If a regulation targets the "fact of communication," and no separately identifiable conduct, then it regulates speech. *Id.* at 866; *see also Cohen v. California*, 403 U.S. 15, 16 (1971). In *Cohen*, this Court reviewed a defendant's conviction under a statute that prohibited individuals from disturbing the peace. *Cohen*, 403 U.S. at 16. The state convicted the defendant because he wore a profanity-emblazoned jacket in front of local residents. *Id.* This Court determined the statute regulated speech because the only underlying conduct the government sought to punish was "the fact of communication," that is, the message the defendant communicated by wearing the jacket. *Id.* at 18. This Court reversed the conviction as "resting solely upon speech and not upon any separately identifiable conduct." *Id.*

Another way to tell if a law regulates speech rather than conduct is to look at what underlying activity triggers the law's coverage. A law implicates speech rather than conduct if its coverage is triggered by the communication of a message. *Holder*, 561 U.S. at 10-11. For example, in *Holder*, a group of plaintiffs challenged a law that prohibited the provision of "material support" to terrorist groups. *Id.* The plaintiffs argued the restriction inhibited their speech because it prevented them from providing the groups "expert advice" in the form of words. *Id.* at 21-22. This Court agreed, opining that since the only "conduct triggering coverage under the statute consist[ed] of communicating a message," the statute regulated speech and not conduct. *Id.*

On the other hand, if a regulation is tied to some separately identifiable conduct and only "incidentally involves speech," then it regulates conduct and not speech. *See NIFLA*, 138 S. Ct. at 2373. For instance, in *Planned Parenthood v. Casey*, this Court rejected a free speech challenge to an informed consent requirement for abortion because it regulated conduct. 505 U.S. 833, 884 (1992). This Court explained the law was "no different from a requirement that a doctor give certain specific information about any medical procedure." *Id*. True, the law "incidentally involve[ed] speech" because it required doctors to speak certain words to their patients. *Casey*, 505 U.S. at 884. However, the state tied the regulation to underlying conduct—the performance of an abortion. *Id.* Thus, the statute regulated "separately identifiable conduct" that only "incidentally involved speech." *Id.*; *NIFLA*, 138 S. Ct. at 2373.

Under *Cohen*'s or *Holder*'s reasoning, § 106(d) regulates speech and not conduct. Like the law in *Cohen*, § 106(d) targets only the "fact of communication" because Mr. Sprague uses only words during talk therapy. *Otto*, 981 F.3d at 865; R. 3. Unlike in *Casey*, where the state tied its informed consent requirement to an underlying procedure, the State here ties § 106(d) to talk therapy, which consists entirely of words. R. 3. Moreover, like in *Holder*, the conduct triggering § 106(d)'s coverage is speech. Indeed, Mr. Sprague can only violate § 106(d)'s provisions by speaking words the State construes as so-called conversion therapy. R. 4.

Recognizing the proper distinction between conduct and speech, the Eleventh Circuit correctly applied *Holder's* and *Cohen's* analysis to a similar ordinance banning so-called conversion therapy. *Otto*, 981 F.3d at 854. In that case, the court found the ordinance regulated speech because it was not "connected to any regulation of separately identifiable conduct." *Id.* at 865. The court noted that talk therapy "is not just carried out in part through speech … [it] is entirely speech." Thus, the court reasoned, the ordinance directly targeted a message, "the advice

that therapists may give their clients." *Id.* at 865-66. Moreover, the court found the government's attempt to tie its ordinance to an underlying medical treatment was mere "relabeling." *Id.*

Without mentioning *Holder, Cohen*, or *Otto*, the Fourteenth Circuit dove headfirst into an unprincipled conduct versus speech analysis originally provided by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 2108 (9th Cir. 2014)[1] and *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022). R. 6. According to the Fourteenth and Ninth Circuits, talk therapy falls on a "continuum between speech and conduct" and slides toward conduct. R. 6. Additionally, these circuits reason that laws regulating talk therapy are "primarily concerned with the conduct of treating patients with certain health conditions." R. 6. The Fourteenth Circuit, for its part, opined that § 106(d) is a mere "health and welfare law" that applies to healthcare professionals. R. 6.

This reasoning is meritless. First, this Court has never recognized any kind of "continuum between speech and conduct." *See NIFLA*, 138 S. Ct. 2373. A "continuum" paints the picture of a blurry middle ground where an element "changes in character gradually … without any clear dividing points." *Continuum*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/continuum. But in *NIFLA*, this Court expressly stated its precedents have long drawn *a line between* speech and conduct. 138 S. Ct. at 2373. So, a law must fall on either side based on the underlying conduct the government seeks to regulate. *See id.* Here, § 106(d) regulates words and no other separately identifiable conduct. Thus, 106(d) falls on the side of speech.

Second, § 106(d) is not a "health and welfare law" that applies to professionals and

[1] To be sure, this Court abrogated *Pickup* in *NIFLA*. *See* 138 S. Ct. at 2371. In an attempt to salvage *Pickup's* underlying holding, the Ninth Circuit in *Tingley* opined *Pickup's* discussion of speech versus conduct remained good law. *See* 47 F.4th at 1073.

"incidentally involves" their speech. R. 6. As previously noted, this Court has fashioned a clear rule that the government must tie a law to separately identifiable conduct when regulating conduct that incidentally involves speech. *Cohen*, 403 U.S. at 16. Specifically, in the context of health and welfare laws that incidentally involve speech, the government must tie a regulation to some separately identifiable medical conduct. *See Casey*, 505 U.S. at 884 (tying an informed consent requirement to an abortion procedure). The State did not attempt to tie § 106(d) to some separately identifiable conduct other than speech, nor could it. Section 106(d) targets and censors the spoken words of licensed therapists. Any argument to the contrary is "mere relabeling" and should be rejected. *Otto*, 981 F.3d at 865. Under this Court's precedents regarding speech and conduct, § 106(d) regulates speech.

In a last-ditch effort to blur the line between speech used in talk therapy and conduct that underlies medical procedures, the Fourteenth Circuit opined—without support—that talk therapy is "not different from the practice of other forms of medicine simply because it uses words to treat ailments." R. 7. But of course it is different. A surgeon cannot interpose his values into a scalpel. Nor can a physical therapist design a rehabilitation plan inspired by his religious convictions. Talk therapy is a unique category of treatment precisely because it uses words—words that are informed by the personal thoughts and beliefs of the therapist who speaks them. Talk therapy is speech and warrants heightened constitutional protections.

3. This Court's precedents concerning "professional speech" support the conclusion that talk therapy is speech.

Aside from this Court's distinction between speech and conduct, other precedents support the conclusion that talk therapy is protected speech. For starters, this Court has long recognized the dangers of regulating the speech of medical professionals because such regulations "pose the inherent risk that the government seeks not to advance a legitimate

regulatory goal, but to suppress unpopular ideas or information." *See NIFLA*, 138 S. Ct. at 2374. Indeed, medical professionals "help patients make deeply personal decisions, and their candor is crucial." *Id.* (quoting *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J. concurring)). But this candor would be lost in the field of psychotherapy if this Court determined talk therapy is conduct "incidental to speech." Such a ruling would allow the government to censor—and compel—every word uttered by a licensed therapist during therapy. *See* Warren G. Tucker, *It's Not Called Conduct Therapy; Talk Therapy as a Protected Form of Speech Under the First Amendment*, 23 WM. & MARY BILL RTS. J. 885, 891 (2015).

This Court's abrogation of the "professional speech" doctrine also counsels against deeming talk therapy as conduct. *See NIFLA*, 138 S. Ct. at 2375. As previously noted, this Court refused to recognize the "professional speech" doctrine because doing so would give the States "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* at 2375. But the same holds true here. If the States are permitted to regulate conduct that directly implicates, and indeed is composed entirely of speech, then the States can regulate a profession's speech "by simply imposing a licensing requirement." *See id.* at 2375. This Court declined to afford the States that power in *NIFLA*, and it should decline to afford them that power here.

B. Section 106(d) prohibits an entire category of speech based on content and viewpoint.

Not only does § 106(d) regulate the speech of licensed therapists—it does so on the basis of content and viewpoint. This Court has repeatedly recognized the government has "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). But that is exactly what the State attempts to do here. Section 106(d) restricts speech on the basis of content because it applies to certain types

of talk therapy and not others. And § 106(d) restricts speech on the basis of viewpoint because it targets therapists with traditional views about sex and gender.

1. Section 106(d) regulates on the basis of content because it bans one type of talk therapy and compels another.

Here, § 106(d) is content-based because it distinguishes on the basis of messaging. So-called conversion talk therapy is prohibited while affirming talk therapy is compelled.

A law regulates based on content when it applies to speech because of the topic discussed or message expressed. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, (2015). In *Reed*, this Court examined a town code that restricted the display of outdoor signs but subjected ideological signs to varying levels of regulation. *Id.* at 159-60. This Court concluded the code was facially content-based because it "regulated speech by particular subject matter." *Id.* at 163-64. Indeed, signs with certain messages were allowed while others were not. *Id.* Similarly, in *United States v. Stevens*, this Court invalidated a statute that prohibited videos of animal cruelty because it simultaneously allowed videos depicting animals in other respects. *See* 559 U.S. 460, 468-69 (2010). As was the case in *Reed*, the challenged law in *Stevens* discriminated based on content because it applied to one message and not another. *See id.*

Like the regulations in *Reed* and *Stevens*, § 106(d) is content-based because it draws distinctions based on messaging. Section 106(d) plainly prohibits a licensed therapist from engaging in any talk therapy the State construes as so-called conversion therapy but allows him to engage in talk therapy "that provide[s] acceptance, support, … and identity exploration … that do[es] not seek to change sexual orientation and gender identity." R. 4. This distinction is clearly based on messaging because "some words about sexuality and gender are allowed and others are not." *Otto*, 981 F.3d at 873. Like the signs in *Reed* and the videos in *Stevens*, certain types of therapy are allowed solely based on their message.

Worse still, § 106(d) compels licensed therapists to adopt a government-approved message, thereby altering the content of their speech. *NIFLA*, 138 S. Ct. at 2365. A licensed therapist in North Greene is free to broach any topic with their clients but comes at an impasse when sexuality and gender are the focus. R. 4. At that juncture, § 106(d) is triggered and a licensed therapist can no longer craft his own message. *See* R. 4. A therapist may wish to counsel a patient on the issues of sexuality and gender but may only do so when that counseling affirms. *See* R. 4. Consequently, therapy in North Greene is no longer a two-person enterprise. Instead, § 106(d) allows the State to alter the content of a licensed therapist's speech and invade the sacred space between a therapist and patient.

2. Section 106(d) regulates on the basis of viewpoint because it targets therapists with traditional views about sex and gender.

So too does § 106(d) regulate on the basis of viewpoint. A law regulates based on viewpoint when it targets "the specific motivating ideology or opinion or perspective of the speaker." *Reed*, 576 U.S. at 168-69 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). In *Rosenberger*, a plaintiff challenged a university's decision to subsidize secular student journals while refusing to fund a religious journal. 515 U.S. at 831. This Court determined the university's decision was viewpoint discrimination because it targeted the journal's religious perspective. *Id.* Drawing a distinction between content and viewpoint discrimination, this Court noted viewpoint discrimination occurs when the government censors speech based on "the prohibited perspective, not the general subject matter." *Id*. at 831.

Like the university in *Rosenberger*, the State here engages in viewpoint discrimination by suppressing certain perspectives. True, the State does not ban all conversations about sexuality and gender. *See* R. 4. But the State does outlaw counseling about sexuality and gender that is rooted in traditional values. R. 3. This is textbook viewpoint discrimination. Section 106(d)

targets and penalizes licensed therapists because of the perspectives they express when counseling.

The State's viewpoint discrimination becomes more obvious when analyzing the exception carved out in § 106(e). Indeed, the State goes even further than the university in *Rosenberger* because it codifies a single accepted perspective—counseling that seeks to affirm a patient's sexual or gender identity. *See* R. 4. And while the State has the right to promote a particular viewpoint, *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009), it cannot censor licensed therapists who wish to ground their counseling in an opposing perspective. Otherwise, a therapist's state license hinges on his willingness to serve as a government mouthpiece.

C. Section 106(d) fails strict scrutiny because it is not narrowly tailored to serve a compelling government interest.

Recognizing that § 106(d) discriminates based on content and viewpoint, this Court's precedents require the application of strict scrutiny. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This Court has held that content-based speech restrictions are "presumptively invalid." *R.A.V. v. City of St. Paul*, *Minn.*, 505 U.S. 377, 382, (1992); *Brown v. Entertainment Mechants Ass'n*, 564 U.S. 786, 799 (2011). To overcome strict scrutiny, the State must demonstrate that § 106(d) is narrowly tailored to serve a compelling interest. *Reed*, 576 U.S. at 163. It cannot do so.

Strict scrutiny requires the State to show that its interest is accomplished directly by its speech regulation. *Id.* at 163. In this case, the State has a legitimate interest in safeguarding the welfare of minors, as it suggests. *Brown,* 564 U.S. at 794-95; R. 4. And the State may very well believe that infringing upon a licensed therapist's constitutional rights is the best way further this interest. But this Court's precedents make clear the government may not suppress speech "solely to protect the young from ideas … that a legislative body thinks is unsuitable for them." *Id*. at

795. Thus, Mr. Sprague's free speech cannot be cast aside for the State's proffered interest.

Even if the State's interest overcomes Mr. Sprague's right to free speech, the State cannot prove § 106(d) is narrowly tailored. When First Amendment rights are at stake, the government must demonstrate "the recited harms are real, not merely conjectural." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994). Strict scrutiny "demand[s] a close fit between ends and means" but the State provides no evidence that suppressing the speech of licensed therapists protects minors. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The State's cited authority on the issue, the APA, has not identified a single instance where so-called conversion therapy caused harm. R. 7. In fact, the State had evidence that some forms of so-called conversion therapy, particularly talk therapy, are "safe and effective." R. 7. Through § 106(d), the State attempts to redefine the boundaries of licensed therapists' constitutional rights. But with scant evidence, the State fails to show how the ends justify the mean.

Finally, the State must demonstrate that § 106(d) is the least restrictive means of furthering its proffered interest. *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."). The State did not make any effort to address its concern "with less intrusive tools." *McCullen,* 573 U.S. at 492. Indeed, the State recognized talk therapy is "safe and effective" and still banned the practice. R. 7. Anything more than a perfunctory review would have revealed alternative methods to protect the State's interest. For example, a ban on physical methods of so-called conversion therapy would likely have sufficed. The State's failure to consider meaningful alternatives proves fatal for § 106(d).

Any attempt by the State to save § 106(d) by pointing out the free speech rights it leaves intact is meritless. True, § 106(d) permits licensed therapists to communicate with the public

about so-called conversion therapy, express their personal views regarding so-called conversion therapy, and refer minors to counselors practicing so-called conversion therapy "under the auspices of a religious organization." R. 4. But "the law plainly prohibits therapists from having certain conversations with clients, who, along with their parents, have consented to such therapy." R. 13. The State's allowance for conversations about so-called conversion therapy is no cure for its violation of First Amendment rights. *Otto*, 981 F.3d at 863 ("The First Amendment does not protect the right to speak about banned speech; it protects speech itself.").

The First Amendment embodies this nation's belief that "the benefits of its restrictions on the Government outweigh the costs." *Stevens*, 559 U.S. at 470. While the State may genuinely believe § 106(d) is an effective way to protect the health of its constituents, the Free Speech Clause does not allow it to stifle the speech of licensed professionals. This Court should reverse the Fourteenth Circuit's judgment dismissing Mr. Sprague's free speech claim.

II. Section 106(d) of North Greene's Uniform Professional Disciplinary Act violates the Free Exercise Clause of the First Amendment.

The Free Exercise Clause of the First Amendment protects not only "the right to harbor religious beliefs inwardly and secretly" but also the right to "live out [one's] faith in daily life." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). This protection requires the government to afford religious observers both neutral and respectful considerations when crafting our nation's laws. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729 (2018). In an attempt to solidify this requirement, this Court in *Emp. Div., Dep't of Hum. Res. of Or. v. Smith* created a two-prong test to determine whether a law that burdens religious exercise escapes strict scrutiny. 494 U.S. 872, 879 (1990). Under this test, a law must be both "neutral" and "generally applicable." *Id.*

Section 106(d) fails *Smith's* requirements. First, § 106(d) fails neutrality because its

underlying object is to eliminate faith-based counseling from the State's licensing regime. *Infra* Part II.A. Second, § 106(d) fails general applicability because it bans a "religious practice" while permitting comparable secular conduct. *Infra* Part II.B. Even under *Smith's* requirements, § 106(d) is an affront to free exercise and warrants strict scrutiny.

While § 106(d) ultimately fails neutrality and general applicability, the Fourteenth Circuit's decision below highlights *Smith's* fatal flaws. Under *Smith*, courts can—and often have—found laws constitutional even when they have "a devastating effect on religious freedom." *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring). Indeed, members of this Court have pointed out *Smith's* shortcomings for decades. *See id.*, 141 S. Ct. at 1889 (Alito, J., concurring) (listing examples of *Smith's* interpretation conflicting with the First Amendment's ordinary meaning); *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636-37 (2019) (Alito, J., joined by Thomas, Gorsuch, and Kavanaugh, JJ. concurring in denial of certiorari) (denying cert. in part because the Court was not asked to revisit *Smith*). This case presents the perfect vehicle to address those concerns and reconsider *Smith*.

Constitutional interpretation looks to "original meaning and history." *Kennedy*, 142 S. Ct. at 2428. *Smith* ignored both in a rush to fashion a "clear-cut rule" that has proven impossible to apply. *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring). *Smith's* ignorance of text and history and its subsequent unworkability are clear indications that it was "egregiously wrong" from the start, and stare decisis does not require this Court to uphold such a precedent. *Infra* Part II.B. This Court should overrule *Smith* and restore the affirmative right to free exercise.

Under either approach this Court elects to take, the end result is the same. Section § 106(d) warrants and fails strict scrutiny. *Infra* Part II.C.

A. Under *Smith*, § 106(d) warrants strict scrutiny because it fails neutrality and general applicability.

The Free Exercise Clause protects religious observers from government hostility "which is masked, as well as overt." *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 534 (1993). Despite this longstanding protection, the Fourteenth Circuit brushed aside numerous indications the State targeted religiously informed therapists when codifying § 106(d) into law. Although facially neutral, § 106(d) fails *Smith's* requirements because its "real operation" creates a religious gerrymander and burdens religiously informed speech while permitting comparable secular conduct. *See Lukumi*, 508 U.S. at 535.

1. Section 106(d) fails neutrality because its object is to eliminate faith-based therapists from the State's licensing regime.

A law fails neutrality if its object is to "restrict practices because of their religious nature." *See Fulton,* 141 S. Ct. at 1877. This Court evaluates a law's neutrality by assessing its text, circumstances of enactment, and real operation. *See Lukumi*, 508 U.S. at 534-54. Importantly, the Free Exercise Clause "forbids subtle departures from neutrality," and here, § 106(d)'s circumstances of enactment and real operation demonstrate its lack of neutrality. *Id.* at 534.

First, a state action violates neutrality when the circumstances of its enactment or enforcement indicate hostility towards religiously motivated conduct. *See Masterpiece*, 138 S. Ct. 1729. In *Masterpiece Cakeshop, Ltd.. v. Colo. Civil Rights Comm'n*, this Court reviewed the decision of a state commission that enforced a public accommodation law against a religious baker. *Id.* at 1724. In that case, the baker refused to design a custom wedding cake for a gay couple, citing his religious objections. *Id.* In reversing the decision below, this Court noted the hostile public comments made by commission members during testimony. *Id.* at 1729-130. These comments included remarks describing the baker's religious objections as "despicable …

rhetoric." *Id.* at 1729. Moreover, some commission members analogized the baker's religious objections to archaic and horrific practices. *Id.* These statements revealed the commission's underlying antagonism towards the plaintiff's religiously motivated conduct and undermined the neutrality of the law's enforcement. *See id.* at 1732.

Second, a law fails neutrality when its real operation accomplishes a "religious gerrymander." *Lukumi*, 508 U.S. at 535. In *Lukumi*, a city council passed an ordinance targeting a religious community's ritual-based animal slaughter. *Id.* at 525-28. Upon review, this Court determined the ordinance failed *Smith's* neutrality requirement because it allowed for animal killings in other contexts. *See id.* at 537. This Court reasoned the ordinance's real operation ensured the targeted community could no longer honor their religious mandates, and thus it failed *Smith's* neutrality requirement. *Id.* at 535, 539.

Given these standards, § 106(d) violates neutrality. To start, § 106(d)'s precipitating circumstances undermine its facial neutrality. Prior to enacting § 106(d), the State was presented with information from the APA describing so-called conversion therapy as a "religious practice." R. 15. Indeed, the State was fully aware most licensed therapists practicing so-called conversion therapy root their practice in religious beliefs. R. 15; *see also* American Psychological Association, *Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf. With the knowledge that religion and so-called conversion therapy go hand-in-hand, State senators mirrored the ad hominem attacks observed in *Masterpiece*. There, state commissioners disparaged the baker's religious objections as "despicable … rhetoric" that was historically used to justify horrific events. Here, one senator painted a similar archaic picture, condemning religiously motivated conversion therapy as a "barbaric practice." R. 9. Even more revealing, § 106(d)'s sponsoring senator

denounced those who try to “worship” or “pray the gay away” when speaking about his family’s experience. R. 9. Like in *Masterpiece*, these statements highlight the religious prejudice motivating the passage of § 106(d).

Moreover, § 106(d)’s real operation taints its neutrality. Section 106(d) creates a religious gerrymander by purging religious therapists from the State’s licensing regime. Like in *Lukumi*, § 106(d)’s real operation prohibits religious observers from honoring their spiritual mandates. To be sure, the ordinance in *Lukumi* wholly prevented the religious community from fulfilling their faith’s directive. But here, § 106 achieves a similar result because it propels religious therapists like Mr. Sprague into an untenable choice—surrender their state license or fulfill their faith’s directive. Because of this choice, religiously informed, state-licensed therapy like Mr. Sprague’s will struggle to exist in North Greene. Despite its full awareness that so-called conversion therapy is a “religious practice,” the State implemented a law that sequesters religious therapists out of its licensing regime. R. 15. The end result is a religious gerrymander in the field of psychotherapy.[2]

2. Section 106(d) fails general applicability because it bans a “religious practice” while permitting a comparable secular practice that can cause similar harm.

Recognizing “neutrality and general applicability are interrelated,” a law’s failure to satisfy one likely indicates its failure to satisfy the other. *Lukumi*, 508 U.S. at 531. A law fails general applicability if it imposes a burden only on conduct motivated by religious belief while

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[2] In finding § 106(d) neutral, the Fourteenth Circuit misconstrued its application. The majority opined the State “intended to regulate health care providers only to the extent they act in a licensed *and* non-religious capacity.” R. 8. But that is wrong. A faithful reading of the statute makes clear the State intended to regulate health care providers to the extent they act in a licensed capacity—full stop. R. 4. Whether a health care provider acts in a non-religious capacity is inconsequential because the State forbids all licensed health care providers from practicing so-called conversion therapy. R. 4.

"permitting secular conduct that undermines the government's asserted interest in a similar way." *Fulton*, 141 S. Ct. at 1877 (citing *Lukumi*, 508 U.S. at 542-46). In *Lukumi*, a city justified a targeted ban on animal sacrifices by claiming it addressed public health concerns. *Lukumi*, 508 U.S. at 529. This Court determined the law violated general applicability because it prohibited the activities of a minority faith but exempted comparable secular activity that endangered public health concerns. *Id.* at 543-44. This Court found the underlying motivation asserted in defense of the law was "pursued only with respect to conduct motivated by religious beliefs." *Id.* at 524.

Section 106(d) fails general applicability. Like the city in *Lukumi*, here the State cites public health concerns as the motivating influence behind § 106(d)'s enactment. The State attempts to protect minors' mental health by prohibiting so-called conversion therapy. While less obvious than the ordinance in *Lukumi*, § 106(d) expressly permits comparable secular practices that subvert the State's proffered interest. Indeed, recent studies show conflicting evidence on whether sexual and gender affirmation can cause harm to minors in some cases. *See* Jennifer Block, *Gender Dysphoria in Young People is Rising—and so is Professional Disagreement*, BMJ, Feb. 23, 2023, https://www.bmj.com/content/380/bmj.p382 (highlighting a growing phenomenon of "detransitioning."). Despite the conflict amongst researchers about the long-term effects of gender-affirming care, the State greenlights the practice while banning religious talk therapy evidence shows is "safe and effective." R. 7.

Under *Smith*, a law's failure to satisfy either neutrality or general applicability triggers strict scrutiny. *Fulton*, 141 S. Ct. at 1879. Section 106(d) fails both.

B. Even if § 106(d) is neutral and generally applicable, this Court should overturn *Smith* because it undermines the fundamental right to free exercise.

Even though § 106(d) fails to clear the low bar for neutrality and general applicability, this case demonstrates the need to revisit *Smith*. Like its sister circuits, the Fourteenth Circuit

struggled to apply *Smith* to a law that "overwhelmingly, if not exclusively" targets religious activity. R. 14. But this is the reality for free exercise under *Smith*.

This Court is not wedded to stare decisis that is "egregiously wrong." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2280 (2021). And *Smith* is exactly that. Indeed, "*Smith* failed to respect the Court's precedents, was mistaken as a matter of the Constitution's original public meaning, and has proven unworkable in practice." *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring). Moreover, *stare decisis* "is at its weakest when interpret[ing] the Constitution" and applies with perhaps the "least force of all to decisions that wrongly den[y] First Amendment rights." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). And this Court has a self-imposed duty to correct "deeply damaging" precedents by realigning its interpretation with "the text and history" of constitutional rights. *See Dobbs*, 142 S. Ct. at 2265 (Due Process precedent); *see also New York Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2129-31 (2022) (Second Amendment precedent); *Kennedy*, 142 S. Ct. at 2427-28 (Establishment Clause precedent).

Because *Smith* demonstrates an abrupt departure from this Court's free exercise doctrine, a disconnect between the text and history of the Free Exercise Clause, and an unworkable framework, it should be overturned. *Fulton*, 141 S. Ct. at 1926 (Gorsuch, J., concurring); *see Dobbs*, 142 S. Ct. at 2265 (identifying this Court's factors for overturning precedent).

1. ***Smith* is irreconcilable with the Free Exercise Clause's plain language and historical purpose.**

To start, *Smith* is incompatible with the Free Exercise Clause's plain language and historical purpose. The Free Exercise Clause is more than a religious nondiscrimination clause—it is an affirmative freedom from government interference. *See* U.S. Const. amend. I; Douglas Laycock, *Religious Liberty as Liberty*, 7 J. Contemp. Legal Issues 313, 337 (1996). The text and

historical purpose support this conclusion, yet *Smith* ignored both. *Fulton*, 141 S. Ct. at 1894 (Alito, J., concurring).

The Free Exercise Clause defends against government action "prohibiting the free exercise [of religion]." U.S. Const. amend. I. The word "prohibit" meant the same in 1791 as it does today, "to forbid or to bar." *Fulton*, 141 S. Ct. at 1896 (Alito, J., concurring) (citing Samuel Johnson, *A Dictionary of the English Language* (2d ed. 1755)). The word "exercise," as understood in 1791 meant "practice or "outward performance." *Id.* And as applied here, "free" meant "unrestrained." *Id.* So, put together, any law that "forbids" or "bars" an individual from the "unrestrain[ed]" "practice" of her religion violates the Free Exercise Clause. *See id.* In this way, the Clause creates an affirmative freedom to free exercise. Laycock, *supra*, at 337.

The history of the Free Exercise Clause confirms this textual interpretation. By 1776, all but one of the States' charters included free exercise provisions. *Fulton*, 141 S. Ct. at 1902 (Alito, J. concurring). These provisions provided "broad protection for the free exercise of religion except where public peace or safety would be endangered." *Id.* at 1901-02 (observing that laws under these charters warranted a form of heightened scrutiny). Using these charters as a model, the Founders codified the right to free exercise—subject only to limited peace and safety exceptions. *Id.* Notably, the Founders rejected language found in state charters mandating religious neutrality and equal treatment. *See* S. C. Const., Art. VIII, § 1 (1790) ("The free exercise and enjoyment of religious profession and worship, without discrimination"). Thus making clear, the Free Exercise Clause is an affirmative freedom.

Despite the text and history, *Smith* whittled the Free Exercise Clause down to a mere anti-discrimination provision. *See Fulton*, 141 S. Ct. at 1897 (Alito, J., concurring). According to *Smith*, if a law is neutral and generally applicable, then it abides with the Free Exercise Clause—

even if its effects are felt exclusively by the religious. *See id.* But the terms "neutral" and "generally applicable" are found nowhere in the Clause's text. *See Smith*, 494 U.S. at 894 (O'Connor, J. concurring). Moreover, all the history surrounding the Clause's enactment supports the opposite conclusion; the Free Exercise Clause protects an affirmative freedom to practice one's faith.

Tellingly, the *Smith* Court never really disputed the plain language or historical purpose of the Free Exercise Clause. *See* 494 U.S. at 877-78. It merely did not "think the words must be given that meaning" and found its own interpretation "permissible." *Id.* But this Court has never recognized such an approach to constitutional interpretation. *See Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring). On the contrary, this Court has consistently recognized that constitutional rights are "enshrined with the scope they were understood to have when the people adopted them." *District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008). *Smith* ignored this maxim and instead adopted a "permissible" interpretation that undermines the affirmative freedom to practice one's faith.

2. ***Smith*** **fractured this Court's free exercise precedent, has proven unworkable, and has not generated concrete reliance interests.**

Beyond *Smith's* departure from the Free Exercise Clause's plain meaning and historical purpose, *Smith* is inconsistent with this Court's precedent, has proven unworkable for lower courts, and has not generated reliance interests that merit protection.

To start, *Smith* upended this Court's free exercise precedent. Prior to *Smith*, this Court determined *any* law that imposes a significant burden on religious practice must be "narrowly tailored to serve a compelling interest." *Fulton*, 141 S. Ct. at 1890 (Alito, J., concurring) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)); *see Hobbie v. Unemployment Appeals Com'n.*, 480 U.S. 136 (1987). In *Sherbert*, the plaintiff was fired by her employer for refusing to work on the

Sabbath. 374 U.S. at 399. Later, when the plaintiff filed for unemployment benefits, the state denied her claim and cited her refusal to work on the Sabbath as a failure to accept "suitable employment." *Id.* at 400. Even though the state's actions were likely neutral and generally applicable, this Court applied the Free Exercise Clause's plain meaning and determined the state violated the plaintiff's free exercise right by inhibiting her ability to observe the Sabbath in accordance with her religion. *See id.* at 402-03. According to the *Sherbert* Court, the state's infringement on the plaintiff's religious observance could only be justified by a "compelling state interest," and because the state lacked this interest, its actions violated the plaintiff's right to free exercise. *Id.* at 406-07.

This Court applied the same principle in *Wisconsin v. Yoder*. 406 U.S. 205 (1972). There, the Free Exercise Clause barred the state from imposing a compulsory education law on a group of plaintiffs who believed children should remain at home with their parents in accordance with their faith. *Id.* at 234. Although the law was "neutral on its face" and "generally applicable," this Court nonetheless held it unduly burdened the parents' religious exercise and warranted strict scrutiny *Id.* at 221.

Ignoring these decisions, *Smith* refused to apply strict scrutiny to a statute that burdened a minority religious practice because it was neutral and generally applicable. 494 U.S. at 885. *Smith* recognized its departure from precedent and cobbled inconvenient cases together to limit their application. *Id.* at 881. According to *Smith*, *Sherbert* and *Hobbie* could be cabined to a category of cases concerning unemployment benefits. *Id.* And since *Yoder* involved free exercise and parental rights, it could be relegated to cases involving "hybrid rights claims." *Id.* Never mind these "distinction[s] lack[ed] support in prior case law," *Smith* was content to break away from precedent to establish a "clear-cut rule." *Fulton*, 141 S. Ct. at 1892-93 (Alito, J.,

concurring).

Smith further justified its departure from precedent by noting the "anarchy" that would ensue if litigants were allowed to request religious exemptions from neutral and generally applicable laws. *Id.* at 1888. According to *Smith*, its hard and fast rule was necessary to ensure future workability. *See id.* But *Smith* itself is unworkable. For example, as noted by Justice Alito, *Smith's* "hybrid rights exception, which was essential to distinguish *Yoder*, has baffled the lower courts." *Id.* at 1918. Indeed, the Second, Third, and Sixth Circuits openly refuse to exempt cases involving hybrid rights from *Smith's* reach. *Id.* Other circuits require litigants to bring a free exercise claim in tandem with another "independently viable" constitutional claim to trigger exemption from *Smith*. *Id.* While others still only require the tandem claim to be "colorable." *Id.*

Mr. Sprague's claims demonstrate *Smith's* unworkability. In its attempt to apply *Smith*, the Fourteenth Circuit never stopped to consider whether Mr. Sprague's dual free exercise and free speech claims exempted this case from *Smith* altogether. *See* R. 7-10. To be sure, the Fourteenth Circuit may view *Smith's* language on hybrid rights as dicta. But its failure to even grapple with the issue only further shows the inconsistency *Smith* has created.

In addition to its unworkability, *Smith* has failed to generate reliance interests that merit protection. Since *Smith* moves neutral and generally applicable laws that burden religion from the reach of strict scrutiny, one would expect state and local governments to rely on its holding when crafting legislation. But this is not the reality. Far from relying on *Smith*, twenty-three states have codified some form of a religious freedom restoration act ("RFRA") and subject laws burdening religious exercise to strict scrutiny. *Religious Freedom Restoration Act Information Central*, Becket, https://www.becketlaw.org/research-central/rfra-info-central/. Moreover, even the federal government has enacted a RFRA to counteract *Smith*. *Id.* So, in sum, twenty-three

RFRA states and the federal government do not rely on *Smith* at all. Any reliance interests held by the remaining twenty-seven states are undermined by their sister states' ability to navigate free exercise claims without *Smith*. And even if this were not true, these states have long been "on notice" of *Smith's* "uncertain status." *Janus*, 138 S. Ct. at 2485.

Since there are no concrete reliance interests, reinstating this Court's pre-*Smith* free exercise precedent is straightforward. For twenty-three states and the federal government, nothing changes. For the remaining twenty-seven states, laws burdening religious exercise will simply need to provide individual exemptions or pass strict scrutiny. This was the standard before *Smith*, and the RFRA states have shown it can work in its wake.

Smith checks every box of an "egregiously wrong" precedent. Recently, this Court has corrected such precedent by realigning constitutional protections with text and history. *See, e.g., Kennedy*, 142 S. Ct. at 2427-28; *Dobbs*, 142 S. Ct. at 2228; *Bruen*, 142 S. Ct. at 2129-31. This Court should do so once again and overturn *Smith*.

C. No matter if *Smith* is applied or overturned, § 106(d) fails strict scrutiny.

Under either approach taken by this Court, § 106(d) warrants strict scrutiny. For the reasons stated above, § 106(d) does not serve a compelling government interest. *Supra* Part I.C. And for the reasons stated above, § 106(d) fails to show how its restriction on free exercise serves its proffered interest. *Id.* Section 106(d) fails strict scrutiny. This Court should reverse the Fourteenth Circuit's dismissal of Mr. Sprague's free exercise claim.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court reverse the judgment of the Fourteenth Circuit

Respectfully submitted,

Dated: September 26, 2023

Team 8
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on September 26th, 2023, a true and correct copy of the foregoing document was filed with the Clerk of the Court for the United States Supreme Court. Service was also provided to counsel for Respondent, The State of North Greene, on September 26, 2023.

s/ Team 8
Team 8

Counsel for Petitioner