Docket No. 23-2020

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2023

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

ON PETITION OF WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR THE PETITIONER

Team 9
Counsel for Petitioner

QUESTIONS PRESENTED

I. Under the First Amendment, does a state law regulating the content of a counselor's speech to minors based on his view of sexual orientation and gender identity violate the counselor's right to free speech when the State cites only speculative harms and unnecessarily restricts speech-only therapy?

II. Under the First Amendment, does a state law prohibiting a counselor from treating his minor patients consistent with his religious-based view of sexual orientation and gender identity violate his right to free exercise when those who possess similar views are almost exclusively religious and the underlying data relied on by the legislature recognized the prohibited practice as religious?

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MISCELLANEOUS

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourteenth Circuit is reported at *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023). R. at 2. The opinion of the District Court for the Eastern District of North Greene is reported at *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022). R. at 5.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution reads in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. Const. amend. I.

The relevant sections of Chapter 45 of Title 23 of the North Greene General Statutes ("Uniform Professional Disciplinary Act") are as follows:

§ 106(d):

> Adds, "performing conversion therapy on a patient under the age of eighteen," to the list of unprofessional conduct.

§ 106(e)(1)-(2):

> (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.

§ 106(f):

> Exempts speech by licensed heath care providers that "does not constitute performing conversion therapy," "religious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing therapy by licensed heath care providers," and

> "[n]on-licensed counselors acting under the auspices of a religious denomination, church, or organization."

§ 111:

> Exempts therapists, counselors, and social workers who "work under the auspices of a religious denomination, church or religious organization" from the Chapter's requirements.

N. Greene Stat. §§ 106(d), (e)(1)-(2), (f), 111.

STATEMENT OF THE CASE

Statement of Facts

Mr. Sprague, a Christian, is a licensed family therapist who has been practicing for over twenty-five years. R. at 3. Many of Mr. Sprague's clients share his religious beliefs and seek out his services specifically because Mr. Sprague holds himself out as a provider of Christian family therapy services. R. at 3. Mr. Sprague bases his belief in human sexuality and gender in his Christian faith—God intentionally created sexuality for married men and women and created each person with a particular gender. *See* R. at 3. Mr. Sprague's counseling services are limited to verbal counseling. R. at 3. He does not use any physical methods of treatment. R. at 3.

In 2019, the North Greene General Assembly passed section 106(d), increasing the types of prohibited conduct under Chapter 45 of Title 23—North Greene's "Uniform Professional Disciplinary Act." Section 106(d) provides that "[p]erforming conversion therapy on a patient under age eighteen" is unprofessional conduct within the meaning of the Act. The Act further defines "conversion therapy":

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

> clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity.

N. Greene Stat. § 106(e)(1)-(2).

In passing section 106(d), the General Assembly pointed to the American Psychological Association's ("APA") position. The APA opposes the practice of conversion therapy and instead encourages gender-affirming strategies that promote "acceptance, support . . . and identity exploration and development, within a culturally competent framework." R. at 4. The General Assembly relied on the opinions of the APA, "which concluded that conversion therapy has not been demonstrated to be effective and that there have been anecdotal reports of harm." R. at 7. The General Assembly's stated purpose for section 106(d) was to regulate "the professional conduct of licensed health care providers." R. at 4.

However, in addition to the APA's official position, it also described conversion therapy as "a religious practice." R. at 15. Further noting that "most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." R. at 15. Additionally, two state senators made comments regarding the purpose of section 106(d). R. at 8–9. Senator Floyd Lawson indicated his support for the bill was to "eliminate 'barbaric practices'" such as "electroshock therapy and inducing vomiting." R. at 9. Senator Golmer Pyle denounced those who try to "worship" or "pray the gay away" due to his own experience with those who practice conversion therapy. *See* R. at 9.

While Mr. Sprague is a Christian, the State does not exempt him from the North Greene Uniform Professional Disciplinary Act, which only carves out a provision for "[t]herapists, counselors, and social workers who 'work under the auspices of a religious denomination, church, or religious organization.'" R. at 4; N. Greene Stat. § 111. Believing that his rights to Free Speech and Free Exercise of religion are being infringed, Mr. Sprague brought suit against North Greene,

seeking a preliminary injunction to prohibit the enforcement of North Greene statute section 106(d). R. at 5.

Procedural History

The United States District Court for the Eastern District of North Greene rejected Mr. Sprague's constitutional claims and granted the motion to dismiss. *Sprague v. North Greene*, 2022 WL 56789 (E.D. N. Greene 2022).

A divided Court of Appeals for the Fourteenth Circuit ultimately ruled for North Greene. R. at 11. The majority held that section 106(d) regulates conduct and incidentally restricts speech; therefore, it applied rational basis review to Mr. Sprague's free speech claim and found that the speech restriction met the standard. R. at 6–7. It also held that the law was neutral and generally applicable and therefore passed rational basis scrutiny under *Employment Division v. Smith*. R. at 10–11. Judge Knotts dissented, arguing that statute 106(d), while claiming a content-neutral purpose, was easily discernable as content-based discrimination. R. at 12. Judge Knotts also argued that the law was not neutral concerning religion and failed under strict scrutiny. R. at 15.

Mr. Sprague timely filed a writ of certiorari with this Court. This Court granted the petition. 2023 WL No. 22-2020. R. at 17.

SUMMARY OF THE ARGUMENT

Opinions with which the state disagrees are not illegal. The North Greene statute restricts Mr. Sprague, a licensed counselor who engages in speech-based therapy, from communicating with his clients consistent with his views. This communication is not only important for his clients, but also for Mr. Sprague personally. Mr. Sprague challenges the statute on the basis that it unconstitutionally restricts his rights to Free Speech and Free Exercise of religion.

This Court should reverse the Fourteenth Circuit's application of rational basis review and subsequent holding that the statute does not violate Mr. Sprague's First Amendment right to free speech for two reasons. First, strict scrutiny is a more appropriate test because the statute is content-based on its face, justification, and purpose and does not fall within a professional speech exception. The statute cannot withstand strict scrutiny because the State has not demonstrated an actual harm to minor's presented by conversion therapy and a less restrictive alternative of banning only aversive therapies—therapies that use harmful physical acts to encourage behavior change—was available.

Second, even if the Court finds that the regulation is content-neutral or that it falls within a professional speech exception, intermediate scrutiny is a more appropriate test than rational basis review because the medical field has traditionally been highly regulated. The statute cannot withstand intermediate scrutiny because the State has not demonstrated that the statute regulates the alleged harm more efficiently and has foreclosed other channels of communicating to clients the message of rejecting sexual orientation and gender identity.

Similarly, this Court should reverse the Fourteenth Circuit's additional holding that the statute does not violate the Free Exercise Clause for two reasons. First, section 106(d) fails review under *Employment Division v. Smith* because the rights at issue are both Free Speech and Free Exercise—placing his claim within the hybrid rights exception. Additionally, the law's justification and basis target religion; therefore, the statute is not neutral. Both the hybrid nature of his claim and the targeted nature of the statute entitle Mr. Sprague to strict scrutiny, which the statute fails because it is not narrowly tailored to protect against the harms cited by North Greene.

Second, in the alternative, *Employment Division v. Smith* should be overturned. Many of the factors that this court considers when deciding whether to overturn a precedent weigh in favor

of abandoning the rule in *Smith*. The Court should instead return to the rule established in *Sherbert v. Verner* and find that Mr. Sprague's rights are protected by the Constitution.

ARGUMENT

States cannot pass laws that needlessly restrict the First Amendment rights of their citizens. North Greene passed statute section 106(d) with knowing disregard for the constraints that it would place on Mr. Sprague's Free Speech and Free Exercise rights. North Greene's cited interest in passing the statute does not exempt it from complying with the demands of the Constitution.

The Fourteenth Circuit erred for two reasons. First, it held that North Greene statute section 106(d) does not unreasonably restrict Mr. Sprague's right to free speech when subjected to rational basis review. Second, it held that North Greene statute section 106(d) does not unreasonably restrict Mr. Sprague's right to free exercise by applying the test established in *Employment Division v. Smith*.

I. NORTH GREENE STATUTE SECTION 106(d) UNCONSTITUTIONALLY CENSORS MR. SPRAGUE'S RIGHT TO FREE SPEECH BECAUSE IT FAILS STRICT SCRUTINY AND, IN THE ALTERNATIVE, BECAUSE IT FAILS INTERMEDIATE SCRUTINY.

Mr. Sprague is a licensed mental health professional. As a medical professional, his ability to counsel his clients openly is crucial. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J., concurring). After all, in the medical field, "information can save lives." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). North Greene has unconstitutionally restricted Mr. Sprague's ability to communicate freely with his clients by enacting section 106(d).

The First Amendment protects the freedom of speech and promises "that each person [can] decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 641 (1994) ("*Turner I*"); *see also*

Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (applying the First Amendment to the states through the Fourteenth Amendment). The state infringes on a person's constitutional right to free speech when it hinders how citizens disperse their messages, *Sorrell*, 564 U.S. at 568, or restricts the content of messages that citizens wish to convey, *Turner I*, 512 U.S. at 641. Regrettably, North Greene statute section 106(d) proscribes ideas and messages regarding conversion therapy that the First Amendment was designed to protect.

This Court should reverse the ruling of the Fourteenth Circuit for two reasons. First, the statute fails strict scrutiny because the State cites only conjectural harms and ignores a less restrictive avenue in regulating only aversive therapies. Second, even if the Court determines that a lower level of scrutiny applies, the statute still fails intermediate scrutiny because it does not increase minors' safety and forecloses other avenues in which Mr. Sprague could communicate his message.

A. The North Greene Statute Fails Strict Scrutiny Because the State Cites Merely Conjectural Harms and Ignores Less Restrictive Means of Accomplishing Its Objective.

North Greene's statute banning conversion therapy is subject to strict scrutiny because it is a content-based regulation of speech. The Constitution restricts content-based laws because they "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal," but rather "to suppress unpopular ideas or information." *Id.* Furthermore, the statute does not regulate noncontroversial information or professional conduct incidentally involving speech, which would subject it to a lower level of scrutiny. Therefore, the statute undergoes the strictest scrutiny and cannot withstand the test.

1. *Strict Scrutiny Is Appropriate Because the Statute Is a Content-Based Regulation.*

Content-based laws are constitutionally problematic. Content regulations "target speech based on its communicative content," *Reed*, 576 U.S. at 163, and "impose differential burdens upon speech because of its content." *Turner I*, 512 U.S. at 642. "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). These regulations often present themselves in situations where the state burdens some speakers but not others, especially when the state chooses not to burden those who agree with its beliefs. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2378 (2018) [hereinafter *NIFLA*]. Statutes can be content regulatory facially, through the language of their text, or implicitly, through their justification and purpose.

a. <u>The Statute is Content Discriminatory on Its Face.</u>

Facial regulations draw distinctions "based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed*, 576 U.S. at 164. The state engages in facial regulation when "enforcement authorities" must "'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *F.C.C. v. League of Women Voters of Cal*., 468 U.S. 364, 383 (1984)). A law is also facially content-based if it restricts the viewpoint of the speaker. *See Reed*, 576 U.S. at 163 (quoting *Sorrell*, 564 U.S. at 564). Because North Greene would have to analyze Mr. Sprague's message to determine if he has violated the statute, and because the statute targets his religious viewpoint, the statute is facially content-based.

In *McCullen v. Coakley*, the act was not facially content-based because petitioners could violate the regulation simply by "standing in a buffer zone, without displaying a sign or uttering a word." 573 U.S. at 480. Contrastingly, in *Barr v. American Association of Political Consultants, Inc*., the restriction was content-based because the state had to examine the call's contents to see

if its purpose was for collecting government debt. 140 S. Ct. 2335, 2346 (2020). Additionally, in *Otto v. City of Boca Raton*, the law was content regulatory because the state had to analyze the contents of the counseling to determine whether the counselor recommended change to "a minor's sexual orientation and gender identity." 981 F.3d 854, 863 (11th Cir. 2020).

To show a violation of the law, North Greene would need to examine the content of what Mr. Sprague said in his counseling session, making the statute content-based. Like in *Barr*, where the state had to investigate the call's purpose to determine whether a violation occurred, the State cannot know if Mr. Sprague has violated the law without knowing the content of his speech. This case is not just about whether counseling was given or not; it is about what the counselor said during the counseling, which makes it distinguishable from *McCullen*, where the content of the speech was immaterial to a violation of the buffer zone statute. North Greene's statute is more like the ordinances in *Otto*, where the breach of the law pivoted on the content of the counseling. Thus, the North Greene statute is facially content-based and is subject to strict scrutiny.

Additionally, North Greene has engaged in impermissible viewpoint discrimination. Viewpoint discrimination "targets particular views taken by speakers on a subject" and regulates speech based on "the specific motivating ideology or the opinion or perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This form of discrimination is an "all the more blatant" First Amendment violation, *id.*, because the state cannot engage in "bias, censorship or preference regarding [another] speaker's point of view." *Messer v. City of Douglasville*, 975 F.2d 1505, 1509 (11th Cir. 1992). By enacting section 106(d), North Greene has wrongfully censored the religious viewpoint about rejecting sexual orientation and gender identity, while allowing the secular viewpoint about the benefits of accepting the same.

The First Amendment protects even disagreeable viewpoints from governmental regulation. *Otto*, 981 F.3d at 863. In *Brown v. Entertainment Merchants Association*, the statute discriminated based on the viewpoint that violent video games were acceptable for minors, regulating "the *ideas* expressed by [the] speech." *See* 564 U.S. 786, 789, 799 (2011). In *Otto*, the ordinances discriminated based on viewpoint because the violation depended on whether the counselor's viewpoint was for or against changing one's sexual orientation and gender identity. 981 F.3d at 863–64. Contrastingly, in *Brokamp v. James*, a general licensing statute requiring licenses for all mental health counseling was a content-neutral restriction because the statute did not favor one viewpoint over another. 66 F.4th 374, 393 (2d Cir. 2023).

North Greene targeted the religious viewpoint when enacting its statute. The American Psychological Association ("APA"), which the General Assembly utilized as its basis in passing the law, recognizes conversion therapy as "a religious practice." R. at 15. The APA also acknowledges that those seeking and receiving conversion therapy are "almost exclusively individuals who have strong religious beliefs." R. at 15. Because the statute is based solely on data that recognizes the religious nature of conversion therapy, the statute discriminates based on that religious viewpoint. A religious counselor like Mr. Sprague is prohibited from counseling clients based on his view that God intended each aspect of human identity—including sexual orientation and gender. R. at 3. However, someone who holds the opposite viewpoint is free to counsel clients consistent with his or her beliefs.

This is a viewpoint-based restriction on speech. Like in *Brown*, in which the state discriminated against those who viewed violent video games as acceptable for minors, North Greene discriminates against those who view conversion therapy as acceptable for minors. Similarly, in *Otto*, where the state prohibited therapists from expressing their views against

changing one's sexual orientation, North Greene's statute impermissibly threatens discipline for expressing the viewpoint of rejecting one's sexual orientation and gender identity to minors. North Greene's statute is distinguishable from the one in *Brokamp*, which required a license for mental health counseling without reference to the therapy's viewpoint. Despite Mr. Sprague's viewpoint being disagreeable to North Greene, it cannot constitutionally restrict his speech. Because the statute targets licensed therapists who counsel based on their religious views about rejecting gender identity and sexual orientation while leaving other therapist's views unrestricted, the statute facially regulates one viewpoint and is subject to the highest level of scrutiny.

b. The Statute Is Content Discriminatory in its Justification and Purpose.

However, even if the Court does not hold that the statute is facially content-based, it is also content-based in its justification and purpose because the State enacted it to ban a religiously motivated viewpoint from the counseling room—even when that viewpoint is exactly what the client wishes to hear. A law is still a content-based regulation of speech if "the purpose and justification for the law are content based." *Reed*, 576 U.S. at 156. These types of content restrictions are also subject to strict scrutiny. *Id.*

North Greene justified the statute based on its assumption that conversion therapy is harmful to minor clients, thus permitting only acceptance of sexual orientation and gender identity in the counseling room. This justification is content-based because it labels pro-change speech as harmful and pro-acceptance speech as helpful while citing nothing but anecdotal evidence. R. at 7. Further, the statute's purpose was to ban a religiously motivated viewpoint—God-ordained gender and sexuality—from the counseling room. The statements denouncing those who try to "worship" and "pray the gay away" by Senator Golmer Pyle provide further evidence of a religiously discriminatory purpose. *See* R. at 9. Since the purpose proscribes the religious viewpoint that God intended one's gender and sexuality and prevents any attempt by a licensed

religious counselor to express this view to minors, the purpose is content-based. It is even more blatant that North Greene's aim is content-based because it has prohibited conversion therapy counseling even when a client explicitly seeks it due to shared religious beliefs. Because North Greene's justification and purpose in enacting the statute were content-based, the statute is a prohibited content-based speech regulation subject to strict scrutiny.

2. *Strict Scrutiny Is Appropriate Because the Statute Does Not Fall Within a Professional Speech Exception.*

Although there are two professional speech exceptions to strict scrutiny, neither applies in the case at hand. Professional speech is pursuant to a licensing scheme based on the professional's "expert knowledge and judgment." *NIFLA*, 138 S. Ct. at 2371 (citation omitted). While professional speech is not a separate category of unprotected speech, *id.*, "factual, noncontroversial information in . . . 'commercial speech'" and "conduct incidentally involv[ing] speech" are two exceptions by which professional speech receives a lower level of scrutiny, *id*. at 2372.

a. <u>The Statute Does Not Regulate Factual, Noncontroversial Information.</u>

The first professional speech exception does not apply because the statute regulates controversial information. For example, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the restriction—a disciplinary rule for attorneys concerning advertisement methods—was a factual commercial speech restriction. 471 U.S. 626, 633, 651 (1985). Contrastingly, in *NIFLA*, the regulation concerned abortion, which was considered "anything but an 'uncontroversial' topic." 138 S. Ct. at 2372. The Eleventh Circuit has recognized that conversion therapy is inherently controversial. *See Otto*, 981 F.3d at 859.

This Court should also recognize that the topic of conversion therapy is controversial. Conversion therapy and its resulting benefits and harms are pertinent social discussions, like the topic of abortion in *NIFLA*. Further, considering the number of states currently wrestling over bans

on sexual orientation and gender transition therapies, conversion therapy is undoubtedly a controversial topic. *See, e.g.*, *id.* at 860; *King v. Governor of N.J.*, 767 F.3d 216, 238–39 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1235 (9th Cir. 2014). Thus, because conversion therapy is controversial rather than factual, it does not fall within this professional speech exception.

b. The Statute Does Not Regulate Professional Conduct Incidentally Involving Speech.

The second professional speech exception does not apply because the statute is not a law which regulates professional conduct and incidentally limits speech. For this exception to apply, some "separately identifiable" conduct to which the speech is incidental is required. *Cohen v. California*, 403 U.S. 15, 18 (1971). Labeling speech as conduct does not strip away the constitutional protections provided to speech by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429 (1963); *see also Tingley v. Ferguson*, 57 F.4th 1072, 1077 (9th Cir. 2023), *reh'g en banc denied*, 47 F.4th 1055 (9th Cir. 2022) ("[S]imply labeling therapeutic speech as 'treatment' cannot turn it into non-speech conduct."). Neither is communication "conduct" simply because it functions to treat mental health. *King*, 767 F.3d at 225; *see also Holder v. Humanitarian L. Project*, 561 U.S. 1, 27–28 (2010). In contrast, "malpractice, anticompetitive agreements, client solicitation, and informed consent" are all types of professional conduct involving incidentally regulated speech. *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207 (4th Cir. 2019). The state cannot simply label speech as conduct but rather, must prove that speech is conduct for the exception to apply.

In medicine, speech is often considered incidental to conduct when it is directly connected to a procedure. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the restricted speech—the informed consent requirement—was tied to the medical procedure of an abortion. 505 U.S. 833, 844 (1992); *see also EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920

F.3d 421, 424, 426 (6th Cir. 2019) (holding that the informed consent requirement was speech incidental to conduct). Contrastingly, in *NIFLA*, the statute restricted the counselors' speech by mandating they provide licensed notice about the available state-sponsored services in all interactions, including some that were "not tied to a procedure at all." 138 S. Ct. at 2373–74.

The incidental relationship of speech to conduct often hinges on how much of the "medical procedure" was speech. *Otto*, 981 F.3d at 865–66. For instance, in *Otto*, the prohibited procedure—conversion therapy—was entirely speech and, thus, more than incidentally regulated by the statute. *Id.* at 865. Contrastingly, in *Del Castillo v. Secretary, Florida Department of Health*, the licensing statute for a dietician's services regulated "occupational conduct" even though it incidentally regulated the nutritional information given. 26 F.4th 1214, 1217, 1225 (11th Cir. 2022).

North Greene is not regulating any conduct by restricting Mr. Sprague's practice—only speech. Unlike in *Casey*, where the informed consent requirement was tied to an abortion procedure, no separately identifiable conduct exists other than speech during a counseling session. In fact, the entire counseling session consists of only speech. Additionally, unlike in *Del Castillo*, where the state generally regulated a profession and incidentally restricted some speech, North Greene's statute is not a general licensing statute for counselors. It explicitly regulates what counselors can say during conversion therapy. This Court should hold, like the Eleventh Circuit in *Otto*, that the speech covered by conversion therapy is not incidental to professional conduct and, therefore, does not fall within this professional speech exception.

3. *The Statute Fails Under Strict Scrutiny Because the State Has Not Shown a Compelling Interest Furthered by Least Restrictive Means.*

Since North Greene's statute is a content-based law that regulates speech rather than conduct, it must satisfy "the most exacting scrutiny." *Turner I*, 512 U.S. at 642. Laws that regulate based on content, which do not fall within a professional speech exception, "may be justified only

if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. Strict scrutiny "'is, understandably, a hard standard to meet' and 'leads to almost certain legal condemnation.'" *City of Austin v. Reagan Nat'l Advert. of Austin, L.L.C.*, 142 S. Ct. 1464, 1471 (2022) (citation omitted). North Greene's statute fails strict scrutiny because the State has not asserted an actual harm caused by conversion therapy and could have adopted a less restrictive alternative by banning only aversive therapies.

a. North Greene Has Not Demonstrated a Compelling State Interest by Citing Only Conjectural Harms That Are Merely Correlative to Speech-based Conversion Therapy.

To restrict the dissemination of important medical counseling, the state must demonstrate a compelling interest. A compelling state interest requires that "[t]he State must specifically identify an 'actual problem' in need of solving." *Brown*, 564 U.S. at 799 (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 822 (2000)). The interest must be more than "conjectural," and it must be addressed "in a direct and material way." *Turner I*, 512 U.S. at 664. Research on the asserted harms is insufficient when it shows "at best some correlation" rather than causation between the asserted harm and the asserted interest. *Brown*, 564 U.S. at 800 ("These studies . . . do not prove that violent video games cause minors to act aggressively." (emphasis omitted)).

While the state "possesses legitimate power to protect children from harm," it does not have "a free-floating power to restrict the ideas to which children may be exposed." *Id.* at 794 (citations omitted). Without a legitimate reason to proscribe the material, speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Id*. at 795 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975)). In *Otto*, the state's blanket purpose in protecting minors was not a compelling reason to regulate conversion therapy. *See* 981 F.3d at 868.

North Greene has not demonstrated an actual harm caused by speech-based conversion therapy. Its asserted state interest is "protecting the physical and psychological well-being of minors . . . against exposure to serious harms caused by conversion therapy." R. at 4. As support for the alleged harm to minors, North Greene cites the APA position against conversion therapy. R. at 4. However, the APA provides insufficient evidence of such a harm, recording only "anecdotal reports of harm." R. at 7. Further, North Greene also references a lack of demonstrated effectiveness of conversion therapy, but there is a significant difference between not being effective and being harmful. R. at 7. Even if a harm exists, North Greene has not proved that conversion therapy is the cause of the harm. Like in *Brown*, where the court discussed the correlation between harm and violent video games, here, at most, the harm correlates with conversion therapy. These reasons show that the alleged harm cannot be tied to speech-based conversion therapy; therefore, North Greene's statute cannot alleviate them in a "direct and material way."

Fearing the effect of conversion therapy, North Greene is attempting to restrict the communication of these ideas to minors. The state cannot restrict speech in this way. In regulating counselors' speech to minors, North Greene is attempting to exercise the "free-floating power" to which the *Brown* Court referred. The North Greene General Assembly cannot regulate conversion therapy simply because it finds such therapy unsuitable for minors. The assembly must provide a legitimate reason, which it has failed to do. Like in *Otto*, in which a blanket interest in protecting minors from the harm of conversion therapy was not compelling, the same interest is also not compelling in this case. Because North Greene has proved no actual harm to minors and attempts to restrict the dissemination of ideas to minors, it has failed to demonstrate a compelling state interest and, thus, fails strict scrutiny.

b. North Greene Has Not Used Narrowly Tailored Means Because an Adequate Alternative Exists and the Statute Is Overinclusive.

After identifying an "actual problem," the state must also demonstrate that "the curtailment of free speech [was] actually necessary to the solution." *Brown*, 564 U.S. at 799. The restriction is unnecessary if there are "adequate content-neutral alternatives," *R.A.V.*, 505 U.S. at 395, and if the means used do not balance between being underinclusive and overinclusive, *Brown*, 564 U.S. at 805. A statute is underinclusive if it excludes specific categories of individuals from the restriction, *id*. at 802, and it is overinclusive when it covers more individuals than the interest warrants, *id*. at 804. In *Brown*, when the state attempted to help parents by restricting minor's access to violent video games, the law extended further than the interest by assisting parents who did not necessarily need or want the help. *Id.*

The restriction on Mr. Sprague's speech is not necessary. An adequate content-neutral alternative exists since North Greene could restrict the conversion ban to prohibit only aversive therapies. "Conversion therapy can generally be divided into two categories: aversive and non-aversive. Aversive 'therapies' can include torturous practices such as inducing nausea, vomiting, or paralysis, providing electric shocks, or having the individual snap an elastic band around their wrist when aroused by same-sex thoughts." Logan Kline, Note, *Revitalizing the Ban on Conversion Therapy: An Affirmation of the Constitutionality of Conversion Therapy Bans*, 90 U. Cin. L. Rev. 623, 625 (2021). Aversive therapies admittedly pose a greater risk of harm to minors; however, the State should not lump speech therapy in with this other practice category.

In addition to having alternative, less restrictive means, North Greene's statute is overinclusive. Like in *Brown*, where the statute helped more parents than the interest covered, the statute "helps" more minors than the interest covers. It assumes that the minors coming to these therapists do not actually want counseling to help them change. Given that North Greene had an

alternative less restrictive mean available—such as prohibiting only *involuntary* conversion therapy—and failed to tailor the statute in a way that was not overinclusive, North Greene did not meet its burden under strict scrutiny.

B. Alternatively, if the Court Determines That a Lower Level of Scrutiny Applies, Then the North Greene Statute Also Fails Intermediate Scrutiny Because the State Interest Is Not Achieved More Efficiently, and It Forecloses Other Avenues of Counseling Consistent with His Views.

Alternatively, if the Court determines that the statute is content-neutral or regulates professional conduct, then the Court should apply intermediate scrutiny. The statute does not pass constitutional muster under intermediate scrutiny because it does not more effectively regulate the conjectural harms of conversion therapy and has left open no alternative avenue for counseling consistent with his views.

1. *If the Court Determines That the Statute Is Neutral or Regulates Conduct, the Court Should Apply Intermediate Scrutiny.*

Precedent supports applying intermediate scrutiny to content-neutral regulations. In *Ward v. Rock Against Racism*, this Court applied intermediate scrutiny to a content-neutral restriction requiring all performers to use the same technician and equipment provided by the city. 491 U.S. 781, 796–99 (1989); *see also Turner I*, 512 U.S. 622, 642 (1994). The Second and Ninth Circuits have also applied intermediate scrutiny after holding a statute to be content-neutral. *See Brokamp v. James*, 66 F.4th 374, 397 (2d Cir. 2023); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1068 (9th Cir. 2020). Thus, if the Court holds that the statute is a content-neutral restriction, then it should apply intermediate scrutiny.

Precedent also supports applying intermediate scrutiny to professional speech exceptions. In *Holder v. Humanitarian Law Project*, this Court reasoned that "noncommunicative conduct" would receive intermediate scrutiny. *See* 561 U.S. 1, 28 (2010) (citations and quotations omitted).

The Fourth and Ninth Circuits have also applied intermediate scrutiny to statutes under the professional speech exceptions. *See Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207–09 (4th Cir. 2019); *Pac. Coast Horseshoeing Sch., Inc*, 961 F.3d at 1068. Intermediate scrutiny is more appropriate than rational review, because "the statute's requirements form part of a traditional, comprehensive regulatory regime." *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 586 (2011). (recognizing that the medical field has always been highly regulated). Thus, if the Court holds that the statute constitutes professional conduct incidentally burdening speech, it should apply intermediate scrutiny.

2. *The Statute Fails Under Intermediate Scrutiny Because the Means Do Not More Efficiently Address the Conjectural Harms of Speech-based Conversion Therapy and Foreclose Other Avenues of Counseling Consistent with His Views.*

North Greene's statute fails even the lower standard of intermediate scrutiny. "[T]o survive intermediate scrutiny, a restriction on speech or expression must be 'narrowly tailored to serve a significant governmental interest.'" *City of Austin v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1468 (2022) (quoting *Ward*, 491 U.S. at 791). The interest must relate to an actual harm. *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189, 195 (1997) ("*Turner II*"). A restriction unreasonably burdens an individual's speech when the means used fail to prevent the state's cited harm more efficiently than without the statute. *See id.* at 189 (emphasis added). Even if a statute is justified by an appropriate interest and uses appropriate means, it must still "leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791.

North Greene's statute does not more efficiently regulate the conjectural harms of speech-based conversion therapy and has left open no alternative avenue for communicating this message. The State provides insufficient evidence that speech-based conversion therapy harms minors, citing only the APA's opinion and anecdotal testimonies of harm. R. at 7. Since it has not been proved that speech-based conversion therapy harmed minors in the first place, North Greene

cannot show that the statute is more efficiently preventing it from harming minors now. Moreover, Mr. Sprague has no alternative means of counseling his minor clients consistent with his views. Through his current position—a licensed counselor who is not operating under the auspices of a qualifying organization—he has no other avenue to encourage his minor clients to reject their sexual orientation or gender identity. R. at 4. North Greene has not more efficiently regulated the harm and has left Mr. Sprague with no other channel to counsel his minor clients consistent with his views; thus, the statute fails intermediate scrutiny.

North Greene violated Mr. Sprague's First Amendment right to free speech by enacting a content-based statute regulating a counselor's speech if that speech encourages clients to reject their sexual orientation and gender identity. The statute cannot withstand the heavy burden of strict scrutiny because a ban on only aversive therapies could have alleviated the anecdotal harms cited by the State. Further, the statute cannot withstand the lower standard of intermediate scrutiny because the stated interest of protecting minors is not more efficiently achieved by the ban on Mr. Sprague's speech-based therapy, and no additional avenues of counseling consistent with his beliefs exists. These violations of Mr. Sprague's First Amendment rights prevent him from having the freedom to counsel clients on deeply personal matters at a time when they need his candor.

II. NORTH GREENE STATUTE SECTION 106(d) UNCONSTITUTIONALLY INFRINGES ON MR. SPRAGUE'S RIGHT TO FREE EXERCISE OF RELIGION BECAUSE IT FAILS TO CARRY ITS BURDEN UNDER *EMPLOYMENT DIVISION V. SMITH* AND, IN THE ALTERNATIVE, FAILS A MORE APPROPRIATE TEST.

Mr. Sprague's identity as a Christian shapes his worldview and his values. Mr. Sprague challenges the North Greene statute because it violates his First Amendment right to live out those values. The Free Exercise Clause of the First Amendment guarantees that citizens can live consistent with their respective beliefs. "The Clause protects not only the right to harbor religious

beliefs inwardly and secretly," but also protects real-world action consistent with those beliefs. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (citing *Emp. Div.*, *Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) [hereinafter *Smith* or *Employment Division v. Smith*]). Unfortunately, North Greene statute section 106(d) prohibits what the First Amendment was designed to protect—Mr. Sprague's religiously motivated speech.

While protecting vulnerable minors from harm is a laudable objective, when the means used to reach that objective unreasonably infringe on the rights of others—those rights must be vindicated. Here, the statute passed by North Greene infringes on Mr. Sprague's rights because it is unreasonably broad. The law not only prevents him from counseling consistent with his beliefs but also prevents his clients from receiving the counseling they sought. This Court should reverse the ruling of the Fourteenth Circuit for three reasons. First, the law is unreasonably broad when applying the hybrid-right exception established under *Employment Division v. Smith*. Second, the law is similarly overbroad when applying the two-part test established under *Employment Division v. Smith.* Third, in the alternative, this Court should overrule *Employment Division v. Smith* because it fails to protect interests contemplated by the First Amendment.

A. The North Greene Statute Fails Under *Employment Division v. Smith* Because the Law Restricts a Hybrid Right and Is Not Neutral.

This Court's standard for determining whether the state has violated Free Exercise rights has developed significantly. In *Reynolds v. United States*, this Court held that religious beliefs were subject to the state's legislative power, regardless of the burden imposed. 98 U.S. 145, 166–67 (1878). In *Sherbert v. Verner,* this Court held that simply showing a governmental interest could not justify burdening "this highly sensitive constitutional area," but rather "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." 374 U.S. 398, 406 (1963) (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)). In *Employment Division v. Smith*,

this Court established the current test. 494 U.S. 872; *see also Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause against the states).

Under *Employment Division v. Smith*, a law that burdens religion is valid if the law is both neutral and generally applicable. 494 U.S. at 880–82. The only exception is when the claim includes more than just a Free Exercise concern—also known as a "hybrid right." *Id.* at 881.

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

Id. Mr. Sprague is asserting both his right to freedom of speech and his right to free exercise of religion. It is uncontested that Mr. Sprague's therapy is limited to speech. R. at 3. It is similarly uncontested that the views that shape his speech are rooted in his Christian beliefs. *See* R. at 3. Accordingly, Mr. Sprague is entitled to the heightened scrutiny provided by the exception noted in *Employment Division v. Smith*. 494 U.S. at 881–82; *see, e.g.*, *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (discussing *Employment Division v. Smith*'s strict scrutiny exception for hybrid right claims).

North Greene must show that it protects "interests of the highest order" and that it has narrowly tailored section 106(d) to advance those interests. *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021) (quoting *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)). The harms of conversion therapy that the legislature intended to protect against are not prevented by censoring Mr. Sprague's religious speech. Senator Floyd Lawson sponsored the bill to prevent "barbaric practices" like "electroshock therapy and inducing vomiting." R. at 9. Mr. Sprague participates in neither of these.

The APA, which the North Greene General Assembly relied on in passing section 106(d), has not tied speech-based therapies for minors directly to harm. *See* American Psychological

Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 79 (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf. Rather, the only harms to minors that the report notes are associated with "residential and outpatient programs that are involuntary and coercive and provide inaccurate scientific information about sexual orientation or are excessively fear-based." *Id.* at 75. None of these circumstances apply to Mr. Sprague's speech-based practice.

North Greene could have passed a law that prohibited the harms identified in the report, i.e., electroshock therapy, inducing vomiting, or involuntary programs—without infringing on Mr. Sprague's Free Exercise rights. The Constitution requires that the state narrowly tailor its laws to protect its interests in the least restrictive way possible. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). North Greene statute section 106(d) fails to do this. Accordingly, the statute is not narrowly tailored and fails strict scrutiny.

B. THE NORTH GREENE STATUTE FAILS UNDER *EMPLOYMENT DIVISION V. SMITH* BECAUSE THE LAW TARGETS RELIGION AND IS NOT NARROWLY TAILORED.

Smith's requirement that a law be "neutral" is informed by this Court's decision in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). While the North Greene statute makes no overt references to religion—and is therefore facially neutral concerning religion—"[f]acial neutrality is not determinative." *Id.* at 534. "The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination. The Clause forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Id.* (internal quotation marks and citations omitted). Even if a legislature passes a facially neutral law, if the animus behind it is to prohibit religious individuals from conforming to their views, the law is unconstitutional. *See, e.g.*, *id.* at 547; *see also Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719,

1732 (2018) (applying *Lukumi* to the context of enforcement of a law, rather than creation of a law). If Mr. Sprague can show that the North Greene statute is not neutral concerning religion, "this Court [should] find a First Amendment violation unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Kennedy*, 142 S. Ct. at 2422 (citing *Lukumi*, 508 U.S. at 546).

When determining if a state designed a law to target religion rather than a secular purpose, this Court has looked to "both direct and circumstantial evidence." *Lukumi*, 508 U.S. at 540 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). In *Lukumi*, the city passed a local ordinance intended to suppress the practices of the Santeria religion. 508 U.S. at 534. The Court both looked to the actions of the legislators as well as to "the effect of [the] law in its real operation" to determine if the ordinance targeted the Santeria religion. *Id.* at 535. Ultimately, the Court determined that the ordinances discriminated against Santeria when "the ordinances' operation [was] considered." *Id.*

Suppressing religion is at the heart of statute 106(d). The data that the North Greene General Assembly relied on described conversion therapy—the object of section 106(d)—"as a *religious* practice." R. at 15 (emphasis added). In addition, two legislators made comments in the record that reflect their animosity towards religion. Senator Floyd Lawson indicated that his intent in sponsoring the bill was to end these "barbaric practices." R. at 9. Senator Golmer Pyle denounced those who "try to 'worship' or 'pray the gay away.'" R. at 9. Individually, these comments might not rise to the level of hostility found in either *Lukumi* or in *Masterpiece*

Cakeshop; however, when taken in light of the data relied on by the General Assembly, these statements provide evidence that the statute is not as neutral as it seems at first blush.

The effect of the law "in its real operation" is to censor religion. The Fourteenth Circuit failed to acknowledge that "the North Greene law targets overwhelmingly, if not exclusively, religious speech." R. at 14–15. Many of Mr. Sprague's clients share his religious convictions and seek him out specifically because of the viewpoint he provides. *See* R. at 3. The APA, which the General Assembly relied on in passing section 106(d), noted that "most conversion therapy and counseling is currently directed to those holding conservative religious beliefs and includes almost exclusively individuals who have strong religious beliefs." R. at 15. Almost every impact that the law has is on a religious individual. *See Am. Fam. Ass'n v. F.C.C.,* 365 F.3d 1156, 1170 (D.C. Cir. 2004) ("The unconstitutional gerrymander occurs when the bounds of legislation, like those of a gerrymandered political district, are artfully drawn to exclude the disfavored category-in this case, religious institutions." (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 341–42 (1960))).

The circumstances surrounding the passage of North Greene statute section 106(d), and its practical effect make it clear that the statute is not neutral. While on its face, the statute does not discriminate against religion, its inception and its effect compel the conclusion that North Greene overtly targeted religion when it passed the statute. Because the statute is not neutral, it is subject to strict scrutiny which it subsequently fails because the statute is not narrowly tailored. *See* discussion *supra* Section II.A.

C. *EMPLOYMENT DIVISION V. SMITH* SHOULD BE OVERTURNED BECAUSE IT FAILS TO PROTECT FREE EXERCISE RIGHTS.

Alternatively, if the Court finds that North Greene statute section 106(d) is constitutional under *Employment Division v. Smith*, the Court should instead overrule that precedent. The test in *Smith* has been widely criticized since its inception. *See, e.g.*, *Emp. Div. v. Smith*, 494 U.S. 872,

908 (1990) (Blackmun, J., dissenting) ("In short, [*Smith*] effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 563–77 (Souter, J., concurring) (making the case for reconsidering the test in *Smith*); *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., Thomas, J., Gorsuch, J., concurring) (arguing that *Smith* had no historical support and should be revisited). The Court should use this opportunity to rectify the mistakes made in *Smith* and restore a deteriorated Free Exercise Clause.

Although stare decisis is one factor the Court considers when overturning precedent, *stare decisis* not inexorable, and it is at its weakest when the Court interprets the Constitution. *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018). Moreover, "stare decisis applies with perhaps least force of all to decisions that wrongly denied First Amendment rights." *Id.* Most other factors that this Court has identified previously weigh in favor of overturning *Smith*. Namely, those factors are the strength of reasoning in the decision, the workability of the test, the implications of the decision, and the historical precedent for restricting this type of religious speech.

1. The Decision in Smith *Was Contradictory to Immediately Preceding Reasoning and Was Reached Without Any Briefing or Input from the Parties.*

The reasoning of *Smith* was flawed. In *Texas Monthly, Inc. v. Bullock,* Justice Scalia wrote in dissent, "In such cases as *Sherbert v. Verner* . . . we held that the Free Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original). However, Justice Scalia, just one year later, writing for the majority in *Smith*, abruptly reversed his position: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free

to regulate." 494 U.S. at 878–79. The landmark decision in *Smith* was not only contrary to the argument previously fronted by Justice Scalia but it was reached without argument or briefing on whether *Sherbet v. Verner* should have been overruled. *Lukumi*, 508 U.S. at 571–79 (Souter, J., concurring) (presenting a detailed case for the reexamination of the ruling in *Smith*). Because the Court's reasoning conflicted with precedent and was reached without party input, *Smith*'s decision was faulty.

2. Lower Courts Have Experienced Difficulty in Applying the Entire Smith *Test.*

While the blanket rule established by *Smith* is easy to apply, the exception it carved out for "hybrid rights" has been the source of much confusion and debate. Justice Souter explains well the paradoxical nature of the hybrid right claim:

> [T]he distinction *Smith* draws strikes me as ultimately untenable. If a hybrid claim is simply one in which another constitutional right is implicated, then the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . . But if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all.

Id. at 567 (Souter, J., concurring). The exception is either so broad as to make the rule useless or is so narrow that it will never be utilized.

At the federal appellate level, the exception to the rule has been confusing at best and—at worst—unworkable. *E.g.*, *Swanson v. Guthrie Indep. Sch. Dist. No. I-L,* 135 F.3d 694, 699 (10th Cir. 1998) ("It is difficult to delineate the exact contours of the hybrid-rights theory discussed in *Smith*."); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (opining that the hybrid right exception would produce "an outcome [that] is completely illogical."). If the rule developed by *Smith* cannot be applied in its entirety, it should be revisited to ensure that the rights guaranteed by the First Amendment are protected.

3. *The Laws That Would Be Permissible Under* Smith *Illustrate Why It Fails to Protect First Amendment Rights.*

One of the most crucial factors that should influence this Court to overturn its decision in *Smith* are the possible ramifications of the rule that was created. While the rule itself was developed to create a balance between governmental interests and religious belief, it unfortunately does not protect the rights contemplated by the First Amendment. Justice Alito noted some of the startling outcomes of the rule in *Smith*:

> [S]uppose that a State, following the example of several European countries, made it unlawful to slaughter an animal that had not first been rendered unconscious. That law would be fine under *Smith* even though it would outlaw kosher and halal slaughter. Or suppose that a jurisdiction in this country, following the recommendations of medical associations in Europe, banned the circumcision of infants. . . . A categorical ban would be allowed by *Smith* even though it would prohibit an ancient and important Jewish and Muslim practice.

Fulton, 141 S. Ct. at 1884 (Alito, J., concurring). *Smith* does not protect individuals' right to free expression of religion. Instead, it serves as a convenient avenue for those who wish to target religion under the guise of "neutral" and "generally applicable." As long as legislators do not "slip-up" and reveal their true intentions, *e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729–30 (2018), *Smith* is a blank check to those who would discriminate against religion.

4. *History Favors Returning to the Rule Established in* Sherbert v. Verner.

The guarantees of the First Amendment are grounded in history. *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (indicating that pre-existing rights are entitled to a historical review). History gives context to the rights that the Free Exercise Clause was designed to protect. *See id. Smith* turned the entire jurisprudence of Free Exercise on its head, emphasizing the government's action rather than the impact on the individual's rights. Wesley J. Campbell, *A Survey of Religious Freedom for Individuals and Faith-Based Institutions*, 24 Regent U.L. Rev.

311, 313 (2011). But, as originally understood, "[t]he Free Exercise Clause guaranteed a natural, unalienable right of religious freedom—not a right to governmental neutrality." *Id.* at 316.

Obviously, these rights are not unlimited. "No one has ever seriously argued that the Free Exercise Clause protects every conceivable religious practice or even every conceivable form of worship, including such things as human sacrifice." *Fulton*, 141 S. Ct. at 1895 n.28 (Alito, J., concurring). The Free Exercise Clause is not unlimited but was understood at its enactment to have boundaries. *Id.* Those boundaries were marked by "conduct that would endanger 'the public peace' or 'safety.'" *Id.* at 1901; Nathan S. Chapman, *The Case for the Current Free Exercise Regime*, 108 Iowa L. Rev. 2115, 2135 (2023).

The test created in *Smith* ignores these boundaries. Instead of determining if a law restricts religion as a necessary consequence of protecting public peace or safety, it simply ensures the law is neutral and generally applicable. This objective is not what the Free Exercise Clause was designed to protect. The Court should rectify this mistake and overturn *Smith*, returning to the test in *Sherbert v. Verner.* The *Sherbert* Test is two-part. First, the law must restrict an individual's Free Exercise rights. 374 U.S. 398, 403–04 (1963). Second, if Free Exercise rights are restricted, the government must justify the restriction with a compelling state interest and demonstrate that "no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Id.* at 407. The test established in *Sherbert v. Verner* "was consistent with the language of the First Amendment." Curtis Schube, *A New Era in the Battle Between Religious Liberty and* Smith, 64 Drake L. Rev. 883, 885 (2016). Returning to the test in *Sherbert v. Verner* would allow for religious rights to be protected as intended by the constitution, but still allow for governments to protect their interests. *See, e.g.*, *United States v. Lee*, 455 U.S. 252 (1982).

Because the law implicates a hybrid right and is not neutral under *Smith*, or, in the alternative, because *Sherbert v. Verner* is a more appropriate test, the law unreasonably restricts Mr. Sprague's First Amendment right to exercise his religion. Whether this Court applies *Employment Division v. Smith* or *Sherbert v. Verner*, the North Greene statute fails, and the Fourteenth Circuit should be overruled.

CONCLUSION

Mr. Sprague is a licensed mental health professional whose Christian identity influences his counseling practice. In the medical field, he must be able to communicate information openly and honestly with his clients. North Greene statute section 106(d) infringes on this ability by restricting the dissemination of conversion therapy speech to minor clients, even those specifically seeking it. Since the statute collapses under strict scrutiny, the Court should strike it down as a violation of Mr. Sprague's rights. Moreover, the statute prohibits Mr. Sprague from living out his worldview and values. Although the test established in *Smith* is flawed, the Court should use it to vindicate Mr. Sprague's rights. If *Smith* provides insufficient protection for Mr. Sprague's rights, the Court should overturn *Employment Division v. Smith* and restore the deteriorated Free Exercise Clause. Mr. Sprague respectfully requests this Court reverse the Fourteenth Circuit's decisions on both issues.

Dated September 26, 2023.

Respectfully submitted,

/s/ Team 9
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