No. 23–2020

IN THE
SUPREME COURT OF THE UNITED STATES

HOWARD SPRAGUE,

Petitioner,

v.

STATE OF NORTH GREENE,

Respondent.

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

BRIEF FOR THE PETITIONER

QUESTIONS PRESENTED FOR REVIEW

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

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

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CITATIONS OF THE OPINIONS AND JUDGMENTS IN COURTS BELOW

The Fourteenth Circuit's opinion affirming the district court is published in the Federal Reporter at *Sprague v. North Greene*, 2023 WL 12345 (14th Cir. 2023), but will be referenced herein as the Record on Appeal ("R"). The district court's opinion has not yet been published, but is reported at *Sprague v. North Greene*, 2022 WL 56789 (E.D.N. Greene 2022). The district court denied Plaintiff's, Petitioner here, motion for preliminary injunction and granted Defendant's, Respondent here, motion to dismiss.

CONSTITUTIONAL PROVISIONS AND POLICIES INVOLVED

The First Amendment to the United States Constitution provides 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, or of the press." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.

The relevant portion of the Uniform Disciplinary Act, N. Greene Stat. § 106(d)–(f), is reproduced in Appendix A.

STATEMENT OF THE CASE

Mr. Sprague has worked as licensed family therapist for more than twenty–five years. R. at 3. Mr. Sprague helps clients with various issue, including sexual orientation and gender identity. *Id.* Although he does not work for a religious institution, he professes to be a "deeply religious" person whose work is heavily influenced and informed by his Christian beliefs. *Id.* Mr. Sprague believes that each individual's sex assigned at birth is a "gift from God." *Id.* Further, Mr. Sprague believes that sexual relationships should only occur between married heterosexual couples. *Id.* Because of his deeply held beliefs, he holds himself out as a Christian family therapist, therefore many of his patients share his religious views. *Id.*

The Uniform Professional Disciplinary Act

In 2019, the State of North Greene amended its Uniform Professional Disciplinary Act ("the Act"). R. at 3–4. The Act updated the list of unprofessional conduct for licensed healthcare providers. R. at 4. Specifically, the Act added "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct. *Id*. Because the Act is only applicable to licensed healthcare providers, "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization" are not subject to the Act's requirements. *Id.*

In an attempt to preempt any constitutional challenges, the North Greene General Assembly claimed that it had "a compelling interest in protecting the physical and psychological well–being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." *Id.* Furthermore, the General Assembly referenced the American Psychological Association's position "encourag[ing] psychologists to use an affirming . . . approach" that includes "acceptance, support . . . and identity exploration." R. at 4–5. One bill sponsor, state Senator Floyd Lawson, stated during debate that

his "intent in sponsoring the bill was to eliminate . . . electroshock therapy and inducing vomiting." R. at 8–9. Another bill sponsor, state Senator Golmer Pyle, "denounced" those who wish to address sexuality through "worship" and "pray[er]." R. at 9.

Procedural History

Mr. Sprague bought suit against the State of North Greene in August 2022. R. at 5. Mr. Sprague sought a preliminary injunction of N. Greene Stat. § 106(d) which the State of North Greene opposed, and the state filed a motion to dismiss his complaint. *Id.* The District Court denied Mr. Sprague's motion for preliminary injunction and granted the state's motion to dismiss. *Id.* The Fourteenth Circuit Court of Appeals affirmed. R. at 11.

SUMMARY OF THE ARGUMENT

The district court and the Fourteenth Circuit Court of Appeals incorrectly applied First Amendment jurisprudence to this case. First, the Act is per se unconstitutional under the Free Speech Clause of the First Amendment because it imposes a viewpoint restriction on Christian views. Laws that seek to restrict particular views are per se unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The Act imposes a viewpoint restriction because the specific motivating ideology is the rationale for this restriction.

Second, the Act violates the Free Speech Clause under strict scrutiny because the Act makes a content–based restriction on speech and is not narrowly tailored to achieve a compelling state interest. The Act is a content–based restriction on Mr. Sprague's speech because the restriction is based on the words he is prohibited from using in his talk–therapy treatments. The Act is not narrowly tailored to achieve a compelling government interest because it is underinclusive, as it still permits unlicensed therapists working under the auspices of religion to

administer conversion therapy, meaning the harms North Greene seeks to protect minors against still occur. As such, the Act fails strict scrutiny.

Third, the Act violates the Free Speech Clause under intermediate scrutiny because the Act only regulates speech incident to regulating professional conduct and is not substantially related to achieving an important state interest. The Act regulates Mr. Sprague's professional conduct, while incidentally regulating his speech because speech is an essential part of any therapy treatment he administers. The Act is not substantially related to achieving an important state interest because allowing therapists acting under the auspices of religion to conduct conversion therapy does not substantially relate to protecting minors from the harms of conversion therapy.

Fourth, the Act violates the Free Exercise Clause under *Employment Division v. Smith*. If this Court confirms that there is no hybrid rights exception under *Smith*, then the *Smith* test applies. The Act fails the *Smith* test because the Act is neither neutral nor generally applicable. The Act is not neutral because it uses language with religious overtones, is gerrymandered to allow all types of therapy except that which is practiced by religious groups, proscribes more religious conduct than necessary to achieve its ends, and has anti–religious sentiment in its legislative history. The Act is not generally applicable because it pursues the government's interest only against conduct motivated by religious belief. Alternatively, if the Court confirms that there is a hybrid rights exception under *Smith*, or if the Court overturns *Smith*, then strict scrutiny applies and the Act fails strict scrutiny. North Greene's interests, while perhaps initially compelling, are rendered uncompelling because religiously motivated conduct bears the weight of the Act. Further, the Act is not narrowly tailored because it could have achieved its interests while burdening religion to a far lesser degree. The Act also does not achieve the government's interest because it leaves a large

swath of therapists free to continue practicing conversion therapy. Thus, with or without a hybrid rights exception, the Act fails under *Smith* and is unconstitutional.

Fifth, this Court should overturn *Employment Division v. Smith* and return to the pre–*Smith* standard of applying strict scrutiny to free exercise claims. *Smith* does not comport with the text, historical understanding, or spirit of the Free Exercise Clause. Additionally, *Smith* relegates the free exercise right to a second–hand right. Lastly, the *stare decisis* factors do not weigh in favor of maintaining *Smith*.

ARGUMENT

SECTION A: THE FREE SPEECH CLAIM

The First Amendment prohibits Congress from "abridging the freedom of speech." U.S. Const., amend. I. The First Amendment is "applicable to the States through the Fourteenth Amendment." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Under the Free Speech Clause of the First Amendment, a government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosely*, 408 U.S. 92, 95 (1972).

The Act violates the Free Speech Clause of the First Amendment. Regardless of the level of scrutiny applied to the Act, it fails to pass constitutional muster. First, the Act is per se unconstitutional because it makes a viewpoint restriction on Christian beliefs. Second, the Act makes a content–based restriction on speech and fails strict scrutiny under the narrow tailoring prong. Finally, the Act also fails intermediate scrutiny because the Act is not substantially related to the state's interest.

I. The Act Is Per Se Unconstitutional Under The Free Speech Clause Of The First Amendment Because It Imposes A Viewpoint Restriction On Christian Views.

The Act is per se unconstitutional because it restricts the expression of Christian viewpoints in counseling patients through issues of sexual orientation and gender identity. The First Amendment not only prohibits the excise of certain speech from public discourse, but the Government must also not "excis[e] certain ideas or viewpoints from the public dialogue." *Turner Broadcasting System Inc. v. FCC*, 512 U.S. 622, 642 (1994). In fact, because viewpoint regulations are "an egregious form of content discrimination," they are immediately treated as per se unconstitutional. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

Viewpoint restriction occurs when "the government targets . . . particular views." *Rosenberger*, 515 U.S. at 829. Further, viewpoint restriction occurs when "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* In *Rosenberger*, this Court held the University of Virginia imposed a viewpoint restriction when the university prohibited the use of Student Activity Funds for a Christian student newspaper because the newspaper promoted a "particular belief in or about a deity or an ultimate reality," while simultaneously subsidizing secular newspapers. *Id.* at 823. This Court said that since the university allowed a limited forum, newspapers, to express student ideas, it could not excise Christian views from that forum. This Court found that restriction per se unconstitutional without applying any standard of review. *Id.*

The Act's prohibition on conversion and reparative therapy is a viewpoint restriction. While conversion therapy is generally religious in nature, reparative therapy in particular is exclusive to Christians, thus prohibiting reparative therapy restricts Christian views. Marie–Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 17 Dukeminier Awards, 63, 85 (2018). North Greene labels secular viewpoints on sexual orientation and gender

identity professional, but labels Christian viewpoints "unprofessional." N. Greene Stat. § 106(d). This classification is comparable to the university in *Rosenberger* subsidizing newspapers with secular viewpoints, but refusing to subsidize a newspaper that proclaimed Christian viewpoints. Similarly, by providing therapists a professional forum through licensure, North Greene should not be allowed to excise Christian viewpoints from that forum. As such, the Act is per se unconstitutional because it imposes a viewpoint restriction on Mr. Sprague.

II. Alternatively, If The Act Does Not Impose A Viewpoint Restriction, The Act Violates The Free Speech Clause Because The Act Makes Content–Based Restrictions On Speech And Is Not Narrowly Tailored To Achieve A Compelling State Interest.

The line between speech and conduct can be a blurry one. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 457 (1978). This is especially so because "regulating the type of treatment a therapist may engage in necessarily restricts the therapist's ability to connect with a client through his or her speech." Warren Geoffrey 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, 900 (2015). Out of possible restrictions on speech, content–based restrictions are "presumptively unconstitutional." *Reed*, 576 U.S. at 162. Because content–based restrictions are presumptively unconstitutional, they are subject to the most exacting scrutiny and thus "may be justified only if the government proves that [the restrictions] are narrowly tailored to [achieve] compelling state interests." *Id.*

A. The Act restricts therapists' speech, not their professional conduct.

Speech is regulated when a law restricts communicative or expressive content. *Reed*, 576 U.S. at 163. Talk therapy constitutes speech, not conduct. A therapist does not lose the protection of the First Amendment simply because of their position as a professional or someone who engages in treatments. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371

(2018). In *National Institute of Family and Life Advocates* ("*NIFLA*"), a law required licensed clinics that treated and counseled pregnant women to notify their patients of abortion as a pregnancy option. *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. at 2368. This Court held that the law regulated speech, not professional conduct, adding that "speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* However, "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* In *NIFLA*, this Court held that the law regulated speech as speech because the notice provided no relationship to physical medical procedures, and the Act regulated all interactions between doctors and their patients by prohibiting doctors from making their personal professional decision to refuse to inform patients about abortion. *Id.* at 2371. *See also Otto v. City of Boca Raton, Florida*, 981 F.3d 854, 860 (11th Cir. 2020) (holding that a law banning conversion therapy restricted speech, not professional conduct because "professional regulations" cannot lower the bar of free speech protection for therapists); *but see Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (holding that a law requiring Planned Parenthood to inform patients about potential abortion risks regulated conduct because the act of informing patients was a prerequisite to a physical, invasive, medical procedure).

Here, Mr. Sprague does not engage in any physical, invasive, medical procedures. Thus, the information he shares with patients is fundamentally different than the abortion risk information shared in *Casey*. The treatment he offers is merely words, therefore the Act restricts his speech, not his professional conduct. Indeed, conversion therapy is administered exclusively through speech between patient and doctor, making the Act far more analogous to the unconstitutional law in *NIFLA* which restricted speech. Like the law regulating how doctors speak to their patients about abortion risks in *NIFLA*, this Act regulates how Mr. Sprague speaks to his

patients about his Christian beliefs concerning sexual orientation and gender identity. Just as the conversion therapy ban in *Otto* restricts speech, this Act also restricts speech, and North Greene's attempt to hide behind "professional regulations" does not change that fact. As such, the Act regulates speech, not professional conduct.

B. The Act restricts the content of therapists' speech.

This Court has consistently "stressed the danger of content–based regulations 'in the fields of medicine and public health where information can save lives.'" *National Institute of Family and Life Advocates,* 138 S. Ct. at 2374 (quoting *Sorrell v. IMS Health Inc.,* 564 U.S. 552, 566 (2011)). In medicine, "[d]octors help patients make deeply personal decisions, and their candor is crucial." *National Institute of Family and Life Advocates,* 138 S. Ct. at 2374. Prohibiting professional candor in this context "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting System*, 512 U.S. at 642. This is so especially in areas of medical uncertainty and controversy, such as here where conversion therapy is controversial. *National Institute of Family and Life Advocates,* 138 S. Ct. at 2374.

A content–based restriction restricts speech "solely on the basis of the subjects the speech addresses." *Reed,* 576 U.S. at 162. A content–based restriction is imposed when governments "impose more stringent restrictions on [some speech] than it does on [speech] conveying other messages." *Id.* at 159. In *Reed*, the Town of Gilbert required permitting for road signs, but exempted most types of signs from the requirement. *Id.* In actuality, only political, ideological, and temporary directional signs were subject to permitting requirements. *Id.* This Court held that the town's law violated the First Amendment because the permitting requirements were solely based on the words displayed on the signs, making the restriction content–based. *Id.*

Like the word–based restriction in *Reed*, this Act's restriction is also word–based. The Act restricts the words a therapist may use in conversations with patients by allowing words of "acceptance, support," and affirmation, but prohibiting words that may lead to a change in someone's sexual orientation or gender identity. N. Greene Stat. § 106(e)(2). Because the restriction is based on words, it is a content–based restriction and is presumptively unconstitutional.

C. Under strict scrutiny, the Act violates the Free Speech Clause of the First Amendment because it is not narrowly tailored to preserve the mental and physical wellbeing of minors.

Content–based restrictions on speech are presumptively unconstitutional and thus subject to the most exacting scrutiny—strict scrutiny. *Reed,* 576 U.S. at 157. Strict scrutiny places the burden on the state to prove that the law furthers a compelling state interest and that the law is narrowly tailored to achieve that interest. *Id.* Thus, North Greene has the burden to demonstrate the Act meets this standard.

North Greene's stated interest behind the act is protecting "the physical and psychological well–being of minors . . . against exposure to serious harms caused by conversion therapy." R. at 4. We agree protecting minors is a compelling interest, however, the Act fails strict scrutiny because it is not narrowly tailored to achieve the state's interest.

A law is not narrowly tailored when it is underinclusive. *National Institute of Family and Life Advocates*, 138 S. Ct. at 2375. A law is underinclusive when it covers a curiously narrow subset of speakers. *Id.* at 2374. In *NIFLA*, California mandated that clinics that provided "pregnancy related services" must notify patients of whether the facility was licensed by the state. *Id.* This Court held that the mandate was not narrowly tailored to achieve the state interest of "ensuring that pregnant women . . . know when they are getting medical care from licensed

professionals." *National Institute of Family and Life Advocates*, 138 S. Ct. at 2374. This Court said that because the mandate applied to clinics that provide "pregnancy related services," but failed to include other clinics that may have pregnant women as patients, such as contraceptive clinics, the mandate "cover[ed] a curiously narrow subset of speakers." *Id.* at 2377.

Like the mandate in *NIFLA*, the Act is underinclusive. The interest of "protecting the physical and psychological well–being of minors . . . against exposure to serious harms of conversion therapy" is wholly disconnected from the parameters of the Act. Like *NIFLA*, where the mandate covered a small subset of speakers and failed to include other potential actors, this Act only includes licensed therapists, but fails to include unlicensed therapists who work "under the auspices" of religion. N. Greene Stat. § 106(d). If unlicensed therapists working under the auspices of a religion are permitted to conduct conversion therapy, then the alleged harms would still occur. Therefore, the Act is not narrowly tailored and does not achieve the state's interest, failing strict scrutiny.

III. Alternatively, If The Act Regulates Conduct, The Act Violates The Free Speech Clause Because Allowing Therapists Acting Under The Auspices Of Religion To Conduct Conversion Therapy Does Not Substantially Relate To Preserving The Mental And Physical Well–Being Of Minors.

Laws that regulate professional conduct but incidentally burden speech are evaluated under intermediate scrutiny. *Ohralik*, 436 U.S. at 464. Under intermediate scrutiny, the government must demonstrate the law is substantially related to an important state interest. *Id.* at 458.

A. The Act regulates speech incidental to regulating professional conduct.

A law may not restrict speech solely because it is uttered by a licensed professional, but speech can be incidentally restricted through the regulation of professional conduct, subject to intermediate scrutiny. *National Institute of Family and Life Advocates*, 138 S. Ct. at 2373. Speech is incidentally swept up in the regulation of professional conduct when the ordinance is not a direct

regulation of speech, but rather regulates conduct that involves speech. *See Ohralik*, 436 U.S. at 464 (holding that a professional rule prohibiting lawyers from soliciting clients in person primarily regulated conduct and only incidentally regulated speech because the law restricted the manner in which the speech was provided rather than the content of the speech).

Just as the rule in *Ohralik* restricted the manner of solicitation, rather than the content, the Act restricts the manner in which therapists administer conversion therapy, rather than the content of the treatments. Mr. Sprague is still permitted to discuss his personal views of conversion therapy, and administer such therapy in certain contexts, but is prohibited from administering it in other contexts. Additionally, soliciting clients and administering conversion therapy both inherently involve speech because both actions are conducted through words. As such, the Act regulates speech incidental to its regulation of professional conduct.

B. The Act is not substantially related to achieving an important government interest.

In order to pass constitutional muster, a state that incidentally regulates speech by regulating professional conduct must demonstrate an important interest and must show that the regulation is substantially related to serving that interest. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 596 (2011). In *Sorrell*, a healthcare privacy law prohibited sharing prescriber information with third parties for marketing purposes, but allowed the general sharing of prescriber information for any other purpose. *Id.* at 558. This Court held that the law was not substantially related to the state interest of keeping prescriber information confidential because the law allowed for the general sharing of prescriber information, rendering it underinclusive. *Id.*

Assuming North Greene has an important government interest in protecting "the physical and psychological well–being of minors . . . from harms caused by conversion therapy," the Act is not substantially related to achieve that interest because it still permits conversion therapy. Like

the prescriber information law in *Sorrell*, the Act is underinclusive. The interest of keeping prescriber information confidential in *Sorrell* was undermined by permitting the sharing of that information with entities other than advertisers. Similarly, North Greene's interest in protecting minors from conversion therapy is undermined by permitting conversion therapy by unlicensed therapists acting under the auspices of religion. Permitting this therapy to occur despite the harms the state alleges renders the law underinclusive and fails to achieve the state's important interest. Thus, the Act violates the Free Speech Clause of the First Amendment.

SECTION B: THE FREE EXERCISE CLAIM

The First Amendment to the United States Constitution reads, in part, as follows: "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Free Exercise Clause is applicable to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The Free Exercise Clause represents our "Nation's essential commitment to religious freedom," and protects not only religious belief and practices, but also conduct "undertaken for religious reasons." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 524, 532 (1993).

I. The Act Violates The Free Exercise Clause Under *Employment Division v. Smith* Because The Act Fails The *Smith* Test, Or Alternatively Because The Hybrid Rights Exception Applies And The Act Fails Strict Scrutiny.

Free Exercise claims are currently governed by the test laid out in *Employment Division v. Smith*, 494 U.S. 872, 879 (1990) (holding that a neutral and generally applicable law will pass constitutional muster). However, *Smith* "carved out several exceptions" in which the neutral–generally applicable test would not apply to free exercise claims. Margaret Smiley Chavez, Note, *Free Exercise Claims In Custody Battles: Is Heightened Scrutiny Required Post–Smith?*, 108 Colum. L. Rev. 716, 717 (2021). One exception is when the claimant brings a free exercise claim

coupled with another constitutional claim—a "hybrid situation." *Smith*, 494 U.S. at 881 ("the First Amendment bars application of a neutral, generally applicable law to religiously motivated action" in cases which "have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech"). However, the "hybrid rights exception produced unanswered questions that lower courts struggle[] to answer." David L. Hudson, Jr. & Emily H. Harvey, *Dissecting The Hybrid Rights Exception: Should It Be Expanded Or Rejected?*, 38 U. Ark. Little Rock L. Rev. 449, 455 (2016). These unanswered questions have led to the emergence of a complicated circuit split surrounding the hybrid rights exception: some circuits reject it as dicta, while other circuits accept the hybrid rights exception, but differ in how they select the level of scrutiny. Ryan S. Rummage, Comment, *In Combination: Using Hybrid Rights To Expand Religious Liberty*, 64 Emory L.J. 1175, 1190–97 (2015).

Given the confusion and controversy it has generated, *Smith* should be overturned. However, if the Court decides to maintain *Smith*, we respectfully request the Court clarify for the circuit courts how to approach the hybrid rights exception. *See also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1148 (9th Cir. 2000) (imploring the Court "to refine its approach in this area" before the issue arises again in the circuit).

A. If The Court Confirms That There Is No Hybrid Rights Exception, The *Smith* Test Applies And The Act Fails The *Smith* Test.

Several circuit courts have taken the position that the language in *Smith* related to hybrid rights is dicta and not an actual exception to the *Smith* test. *See Knight v. State Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) ("the language relating to hybrid claims is dicta and not binding on this court"); *Combs v. Homer–Center Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid–rights theory to be dicta."); *Kissinger v. Bd. of Trs. of Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993) (refusing to adopt the hybrid rights

exception until the Supreme Court confirms the exception truly exists). If the Court confirms that there is no hybrid rights exception to *Smith*, then the *Smith* test would apply.

Smith "held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring). Thus, a law that is both (1) neutral and (2) generally applicable does not violate the Free Exercise Clause.

i. The Act fails the *Smith* test because the Act is not neutral.

A law is not neutral when the object of the law is to restrict practices because of their religious motivation. *Lukumi*, 508 U.S. at 533. A law's object can be determined by its text. *Id.* A law's text is not neutral if it "refers to a religious practice without a secular meaning discernible from the language or context." *Id.* at 533–34. A law's object can also be determined by its operation. *Id.* at 538. While adverse impact alone may not be sufficient to prove religious targeting, a law's operation is not neutral when the burden of the law falls on a religious group. *Id.* at 535–36. Additionally, a law is not neutral if it proscribes more religious conduct than is necessary to achieve its ends. *Id.* at 538. Lastly, another important factor in determining a law's object is its legislative history. *Id.* at 540. *See also Masterpiece Cakeshop*, 138 S. Ct. at 1729 (a statute was not neutral when commission members compared the defense of religious freedom to defenses of slavery and the Holocaust, suggested that one cannot act on one's religious belief and do business in the state, and called exertion of the free exercise right a "despicable piece of rhetoric").

In *Lukumi*, the city of Hialeah passed ordinances outlawing animal sacrifice after adherents of the Santeria religion announced their plan to open a church in the city. *Lukumi*, 508 U.S. at 526. The Santeria religion commands animal sacrifice. *Id.* at 525. This Court found that Hialeah's ordinances prohibiting animal sacrifice were not neutral because they targeted the Santeria religion

for several reasons. *Lukumi*, 508 U.S. at 542. First, the ordinances used words like "sacrifice" and "ritual," which—while not sufficient alone to prove religious targeting—had religious overtones and were therefore "consistent with the claim of facial discrimination." *Id.* at 534. Second, through "careful drafting," the ordinances permitted almost all animal killings except for Santeria sacrifice. *Id.* at 536. For example, Hialeah permitted hunting, euthanasia, poisoning of vermin, kosher slaughter, and more. *Id.* at 537. This Court stated that the "net result of the gerrymander is that few if any killings of animals are prohibited other than Santeria sacrifice." *Id.* at 536. Third, the ordinances proscribed more religious conduct than necessary to achieve the city's stated goals. *Id.* at 538. For example, "[i]f improper disposal . . . is the harm to be prevented, the city could have imposed a general regulation on the disposal of organic garbage. It did not do so." *Id.* Lastly, the legislative history revealed a deep disgust towards Santeria by lawmakers and state–associated individuals, including the city council president explicitly asking, "What can we do to prevent the Church from opening?" *Id.* at 541.

The Act is not neutral. Like the Hialeah ordinances, the Act targets religious conduct. The Act uses language "consistent with a claim of facial discrimination" by making explicit reference to "reparative therapy."[1] N. Greene Stat. § 106(e)(1). Because the term "reparative therapy" has religious overtones, its use is consistent with a claim of facial discrimination—like the words "sacrifice" or "ritual."

[1] Reparative therapy uses the theory of arrested development to explain homosexuality, and is decidedly religious in nature. Marie–Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 17 Dukeminier Awards 63, 87 (2018). Reparative therapy was popularized by Christian psychologist Joseph Nicolosi and heavily promoted by religious organizations, such as the evangelical group Focus on the Family. *Id.* at 76, n.2. Within religious circles, "[s]eeking reparative therapy is seen as . . . obedience and willingness to submit to God and Scripture." *Id.* at 86.

Second, the Act allows almost all therapeutic approaches to sexual orientation and gender identity except the one approach primarily practiced by religious groups. For example, the Act permits therapists to provide "acceptance" and "support" and points therapists to the American Psychological Association's exhortation that psychologists use an "affirming" approach. R. at 4. In short, therapists are permitted to pursue all kinds of "identity exploration"—except one. *Id.* Just as Hialeah gerrymandered its ordinances to allow all kinds of animal killing except the specific type practiced by a religious group, North Greene has gerrymandered its Act to allow all kinds of therapeutic approaches to sex and gender except the specific type practiced by religious groups.

Third, the Act proscribes more religious conduct than necessary to achieve its stated goals. Just as Hialeah "could have imposed a general regulation on the disposal of organic garbage" without outlawing Santeria sacrifice, so too could North Greene have imposed regulations that achieve its stated goal without proscribing more religiously motivated therapy than necessary. For example, because legislators were concerned with "electroshock therapy and inducing vomiting," they could have crafted the Act to prohibit such action without outlawing all forms of conversion therapy, including treatment based on mere conversations. R. at 8–9.

Lastly, there is some evidence of anti–religious sentiment in the Act's legislative history. While perhaps not as blatant as the anti–religious comments in *Lukumi* and *Masterpiece Cakeshop*, the fact that Senator Pyle "denounced" those who wish to address sex and gender questions through worship and prayer should be included in the evidentiary balance against the neutrality of the Act. R. at 9. In sum, the Act is not neutral.

ii. The Act fails the *Smith* test because the Act is not generally applicable.

The Fourteenth Circuit Court of Appeals correctly identified two ways in which a law is not generally applicable: if there is a "formal mechanism for granting exceptions," or the law

"prohibits religious conduct while permitting secular conduct" that works against the government's interest. R. at 10, (quoting *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1877 (2021)). We agree with the Court of Appeals that neither situation is applicable here. However, the Court of Appeals ignored an important rule from *Lukumi*: a law is not generally applicable when it "pursues . . . governmental interests only against conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543, 545 (ordinances prohibiting animal sacrifice were not generally applicable because they allowed so many forms of animal killing that the only truly prohibited killings were "those occasioned by religious sacrifice").

Here, North Greene has pursued its interests only against conduct motivated by religious belief. North Greene allows, and even encourages, a whole manner of therapeutic approaches that affirm, encourage, or support a young person's conception of his or her sexual orientation or gender identity. R. at 4. These approaches could be motivated by any number of beliefs. Yet, the only approach that is prohibited is the approach motivated by religious belief. Conversion therapy is "affirmatively a religious practice." George, *supra*, at 85–86. In 2012, all licensed therapists in the United States practicing conversion therapy had a "religious approach to counseling." *Id.* Furthermore, those licensed therapists represented only 0.02% of all licensed therapists. *Id.* at 82. Just as the city of Hialeah allowed a whole manner of animal killings, yet prohibited the small amount of animal killing motivated by religious practice, North Greene has allowed a whole manner of therapeutic approaches, yet prohibits the practices of only a small amount of religiously–motivated, licensed therapists. A law that targets only 0.02% of the population cannot possibly be said to be generally applicable.

B. If The Court Confirms That There Is A Hybrid Rights Exception, The *Smith* Test Does Not Apply Because Mr. Sprague Is Bringing A Hybrid Claim.

Alternatively, the Court could confirm that there is a hybrid rights exception, as many circuit courts already recognize and is evident from the text of *Smith*. *See Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 539 (1st Cir. 1995) (recognizing the existence of the hybrid rights exception); *Miller v. Reed*, 176 F.3d 1202, 1207 (9th Cir. 1999) (same); *Swanson by & Through Swanson v. Guthrie Indep. Sch. Dist. No. I–L*, 135 F.3d 694, 700 (10th Cir. 1998) (same); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (same); *Smith*, 494 U.S. at 881. In such case, the circuit courts need clarification as to which approach to hybrid rights is appropriate: the independent viability approach or the colorable claim approach. While both approaches recognize the hybrid rights exception, they determine the level of scrutiny differently: the independent viability approach applies the same level of scrutiny as the companion claim, and the colorable claim approach automatically applies strict scrutiny. Hudson, *supra*, at 460, 464.

In Mr. Sprague's case, either approach leads to strict scrutiny. If this Court adopts the independent viability approach, strict scrutiny is the appropriate level of scrutiny here because, for reasons explained in Section A, Mr. Sprague's companion free speech claim also merits strict scrutiny. If this Court adopts the colorable claim approach, strict scrutiny is automatically applied.

C. Whether The Act Fails The *Smith* Test, Or The *Smith* Test Does Not Apply Because Of The Hybrid Rights Exception, Or *Smith* Is Overturned, Strict Scrutiny Is The Correct Level Of Scrutiny. The Act Fails Strict Scrutiny.

If this Court maintains *Smith* but repudiates the hybrid rights exception, the Act fails the *Smith* test because it is not neutral and not generally applicable. Strict scrutiny is therefore appropriate. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (failing only one prong of the *Smith* test triggers strict scrutiny). If this Court maintains *Smith* and adopts either the independent viability approach or the colorable claim approach, strict scrutiny is appropriate for

reasons just explained. If this Court overturns *Smith*, the longstanding pre–*Smith* precedent was to apply strict scrutiny. *See Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (applying strict scrutiny to a free exercise claim because "no showing merely of a rational relationship . . . would suffice; in this highly sensitive constitutional area"). Thus, no matter the path this Court chooses, the Act must be analyzed under strict scrutiny.

To pass strict scrutiny, a law must (1) address a compelling government interest and (2) be narrowly tailored to achieve that interest. *Fulton*, 141 S. Ct. at 1881. The Act fails both prongs.

i. The government interest is not compelling because religiously motivated conduct bears the weight of the Act.

In the First Amendment context, the governmental interest behind a law must be more than compelling: "a law restrictive of religious practice must advance *interests of the highest order*." *Lukumi*, 508 U.S. at 546 (emphasis added). That is why, when "conduct motivated by religious conviction [] bears the weight of the governmental restrictions," there is "no serious claim that those interests" are compelling. *Lukumi*, 508 U.S. at 543, 547 (holding the government's stated interests of public health and preventing animal cruelty were no longer compelling because the ordinances prohibiting animal slaughter only restricted conduct motivated by the religious conviction of Santeria adherents).

Here, the compelling interest behind the Act is "protecting the physical and psychological well–being of minors" and "protecting [] minors against exposure to serious harms caused by conversion therapy." R. at 4. While we agree with North Greene that protecting minors is a compelling government interest, the problem for North Greene lies not in its interest, but in the fact that conduct motivated by religious conviction bears the weight of the state's restrictions, rendering its interests uncompelling. There is no doubt that Mr. Sprague's work as a family therapist is motivated by his religious convictions. As he explains, his "work is influenced and

informed by his Christian beliefs and viewpoint." [2] R. at 3. Not only Mr. Sprague, but all "licensed professionals who offer conversion therapy have a decidedly religious approach to counseling." George, *supra*, at 82. Just as Hialeah's interests were no longer compelling because religiously motivated conduct bore the weight of those ordinances, North Greene's interest is also no longer compelling because religiously motivated conduct bears the weight of the Act. Thus, the state's interest is not compelling.

ii. The Act is not narrowly tailored and it does not achieve the government's interest.

The Act not only fails the compelling interest prong, but also the narrowly tailored prong. Narrow tailoring is absent when the government's "interests could be achieved by narrower ordinances that burden[] religion to a far lesser degree." *Lukumi*, 508 U.S. at 546 (holding that the city could have protected public welfare and prevented animal cruelty without a blanket ban on Santeria sacrifice). In fact, "so long as the government can achieve its interests in a manner that does not burden religion, it must do so." *Fulton*, 141 S. Ct. at 1881.

North Greene could have achieved its interests in a manner that does not burden religion, but it chose not to do so. Mr. Sprague is aware of some extreme cases of "conversion therapy" which have no doubt left clients harmed. For example, there are instances of therapists "pairing electric shocks or nausea–inducing drugs with homoerotic images" or telling patients to "snap a rubber band worn around the wrist whenever they feel sexual attraction for members of the same sex." George, *supra*, at 89. In fact, North Greene state Senator Floyd Lawson, the bill's sponsor,

[2] Regarding sexuality, he believes that sexuality is appropriately expressed "between a man and a woman committed to one another through marriage." R. at 3. Regarding gender identity, he believes that each person's maleness or femaleness is "a gift from God" and "should not be changed." *Id.* His views stem from his belief that human identity is grounded in "God's design." *Id.*

specifically mentioned eliminating "electroshock therapy and inducing vomiting" as his motivation behind the bill. R. at 9. North Greene could have narrowly tailored the Act to address those harms. For example, the Act could have prohibited the application of pain by therapists. The Act could have also prohibited the encouragement of the self–infliction of pain. Such prohibitions would protect minor patients, address the state's concerns, and allow licensed therapists and patients to explore a patient's sexual or gender identity through a religious prism. In other words, North Greene could have pursued its interests while burdening religion "to a far lesser degree." Because it did not do so, the Act is not narrowly tailored.

Not only is the Act not narrowly tailored, but it does not actually *achieve* the government's interest. The Act does not apply to "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." N. Greene Stat. § 106(f). The Act thus leaves a wide swath of therapists free to continue practicing what the state claims is so harmful—thus leaving a wide swath of minors exposed to that very harm. North Greene could have written a statute that applied to all therapists in the state, licensed or not. However, North Greene chose to address conversion therapy by updating the Uniform Professional Disciplinary Act in the business and professions title of its code. R. at 3–4. As such, the Act is more symbolic than an actual prohibition on conversion therapy. But "symbolism, even symbolism for so worthy a cause . . . cannot suffice to abrogate the constitutional rights of individuals." *Smith*, 494 U.S. at 911 (Blackmun, J., dissenting) (quoting *Treasury Employees v. Von Raab*, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting)). *See also* George, *supra*, at 95–96 (LGBT activists pursue conversion therapy bans because of their value as "symbolic statutes" in shaping norms). Therefore, the Act is not narrowly tailored and it does not achieve the government's interest.

II. *Employment Division v. Smith* Should Be Overturned Because It Does Not Comport With The Text, Historical Understanding, Or Spirit Of The Free Exercise Clause, It Relegates The Free Exercise Right To A Second–Hand Right, And *Stare Decisis* Does Not Weigh In Favor Of Maintaining *Smith*.

Employment Division v. Smith has been a source of disagreement and controversy since it was released. Hudson & Harvey, *supra*, at 453–55. Justice O'Connor wrote that the holding in *Smith* "dramatically departs from well–settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Smith*, 494 U.S. at 891 (O'Connor, J., concurring in the judgment). Justice Blackmun, joined by Justices Brennan and Marshall, dissented from the majority's "distorted view" of precedent that transformed First Amendment protection into a mere "luxury." *Smith*, 494 U.S. at 908 (Blackmun, J., dissenting). Society at large shared the Justices alarm, and in the ensuing backlash, Congress passed the Religious Freedom Restoration Act ("RFRA") in an attempt to return to strict scrutiny. Rummage, *supra*, at 1187–89. This Court struck down RFRA as applied to the states, however, so Congress passed the much narrower Religious Land Use and Institutionalized Persons Act mandating strict scrutiny in the land use and prison contexts. *Id.* Not only did Congress reject *Smith*'s incredibly low bar for laws that burden the free exercise of religion, but thirty–three states subsequently interpreted their state constitutions to require heightened judicial scrutiny for free exercise claims. Jonathan J. Kim & Eugene Temchenko, *Constitutional Intolerance to Religious Gerrymandering*, 18 Conn. Pub. Int. L.J. 1, 5–6 (2018). Furthermore, Justices Souter, Breyer, Alito, Thomas, and Gorsuch have all called for *Smith* to be reexamined, if not outright overturned. *See Lukumi*, 508 U.S. at 559 (Souter, J. concurring in part and concurring in the judgment); *Fulton*, 141 S. Ct. at 1883 (Alito, J., joined by Thomas and Gorsuch, JJ., concurring in the judgment); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting). The rare showing of

agreement between thirty–three states, Congress, Justices from across the political spectrum, and society at large is enough to make this Court seriously reconsider *Smith*.

A. *Smith* does not comport with the text, historical understanding, or spirit of the Free Exercise Clause.

Smith does not comport with the text of the Free Exercise Clause. The Free Exercise Clause clearly states that the government may not prohibit the free exercise of religion. U.S. Const. amend. I. Justice O'Connor put it most succinctly: "The First Amendment . . . does not distinguish between laws that are generally applicable and laws that target particular religious practices." *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). Additionally, *Smith* does not comport with the understanding of the Free Exercise Clause at the time the First Amendment was written. At the time the Bill of Rights was passed, twelve of thirteen state constitutions had free exercise clauses with carveout exceptions allowing the government to prohibit religious conduct that endangered peace and safety. *Fulton*, 141 S. Ct. at 1904 (Alito, J., concurring in the judgment). At that time, "offences against the public peace" meant crimes such as riotous assembling, destruction of floodgates, public fighting, forcible entry, spreading false prophecies, and going armed with dangerous and unusual weapons. *Id.* (citing 4, William Blackstone, *Commentaries on the Laws of England*, 142–153 (1769)). Thus, when the First Amendment was written, the Free Exercise Clause was understood to guarantee broad protection to religious conduct, with exceptions only for the most extreme and riotous cases. Lastly and most egregiously, *Smith* does not comport with the spirit of the Free Exercise Clause. *Smith* self–admittedly puts smaller religions "at a relative disadvantage" to larger religions. *Smith*, 494 U.S. at 890. By putting the right to free exercise in the hands of legislatures, then mandating extreme judicial deference, *Smith* has now subjected a fundamental constitutional right to the whims—and prejudices—of local legislatures. Such a result is abhorrent to spirit of the Free Exercise Clause which protects *all* religious exercise, not just that

which is smiled upon by the members of a state legislature or that which has a sufficient number of adherents. The Founding Fathers "drafted the Religion Clauses precisely in order to avoid that intolerance." *Smith*, 494 U.S. at 909 (Blackmun, J., dissenting).

B. Smith relegates the Free Exercise right to a second–hand right.

By significantly lowering the level of scrutiny and by creating the hybrid rights exception, *Smith* has effectively rendered the right to the free exercise of religion a second–class constitutional right. Such a low level of scrutiny for laws that burden the free exercise of religion signals that this right is less worthy of judicial protection. The only way to reach strict scrutiny under *Smith* is to bring another constitutional claim, meaning the success of a free exercise claim is essentially reliant on another constitutional right. Fundamental constitutional rights receive heightened judicial protection on their own—except the right to free exercise. The irony is that, if one brings a successful companion claim, one no longer needs to litigate the free exercise claim because the case is already won. *See Axson–Flynn v. Johnson*, 356 F.3d 1277, 1296–97 (10th Cir. 2004) ("it makes no sense to" require a companion constitutional claim "because such a test would make the free exercise claim unnecessary"). *Smith* thus renders the free exercise right both dependent upon another constitutional right for judicial protection, and entirely superfluous.

Additionally, *Smith* theoretically allows the most egregious trampling upon the free exercise right by a neutral and generally applicable law. There is no shortage of hypotheticals to prove this point: "Suppose that the Volstead Act, which implemented the Prohibition Amendment, had not contained an exception for sacramental wine. The Act would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States . . . Or suppose that a jurisdiction in this country . . . 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. Or suppose that this Court . . . enforced a rigid rule prohibiting attorneys from wearing any form of head covering in court. The rule would satisfy *Smith* even though it would prevent Orthodox Jewish men, Sikh men, and many Muslim women from appearing." *Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring in the judgment). For a law to actually be struck down as unconstitutional under *Smith*, one must imagine the "extreme" situation in which a state directly targets a religious practice or group—yet "few States would be so naïve" to actually do so. *Smith*, 494 U.S. at 894 (O'Connor, J., concurring in the judgment). By mandating judicial deference, treating other constitutional rights as superior, rendering free exercise claims superfluous, and theoretically allowing the most egregious restrictions on religious expression, *Smith* has subjugated a precious constitutional right to second–class status.

C. *Stare decisis* does not weigh in favor of maintaining *Smith*.

Adherence to prior cases is not "an inexorable command," and the doctrine of *stare decisis* applies with "least force of all to decisions that wrongly denied First Amendment rights." *Kimble v. Marvel Entertainment, LLC*, 576 U. S. 446, 455 (2015); *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018). Factors to consider when deciding whether to overrule a past decision include: (1) the quality of the decision's reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision. *Id.* at 2478–79. Each of these factors weighs against maintaining *Smith*.

First, the reasoning in *Smith* was poor. *Smith* did not analyze the normal and ordinary meaning of the constitutional text, instead simply noting that its reading of the Free Exercise Clause was "permissible." *Smith*, 494 U.S. at 878. *Smith* also did not attempt to understand the historical meaning of free exercise. And most shockingly, *Smith* dramatically overturned

longstanding precedent "with no briefing on the issue from the parties or amici." *Fulton*, 141 S. Ct. at 1912 (Alito, J., concurring in the judgment). Second, the *Smith* rule is clearly not workable given the complex circuit split that has developed in its wake. *See also* Hudson & Harvey, *supra*, 455 (*Smith* "left many unanswered questions" such as, what types of companion claims can combine with a free exercise claim to form a hybrid; how strong must the companion claim be; and if the court finds a hybrid right, should it apply strict scrutiny?). Third, *Smith* is inconsistent with other related decisions. As Justice Alito points out, the "underlying situation in *Smith* was very similar to that in *Sherbert*"—denial of employment benefits—yet the *Smith* majority decided to depart from the *Sherbert* methodology and create a completely new constitutional doctrine. *See generally Fulton*, 141 S. Ct. at 1912–15 (Alito, J., concurring in the judgment) (discussing all the ways in which *Smith* differed from previous related decisions). Fourth, since *Smith* has been handed down, it has been roundly rejected by Congress and a majority of states. Additionally, significant research has been done on the history of the Free Exercise Clause since—and because—*Smith* was decided, contributing to our better understanding of the true meaning of free exercise. *Fulton*, 141 S. Ct. at 1923 (Alito, J., concurring in the judgment). Lastly, given the confusion surrounding *Smith*'s application, and the large number of Justices who wish to revisit *Smith*, one cannot say that the lower courts rely in any solid way upon *Smith*. For the foregoing reasons, this Court should overturn *Smith* and return the right to the free exercise of religion to its rightful place as an independent, judicially–protected fundamental constitutional right.

CONCLUSION

For the foregoing reasons, the Uniform Professional Disciplinary Act violates both the Free Speech Clause and Free Exercise Clause of the First Amendment, and thus is unconstitutional.

Petitioner Howard Sprague respectfully requests this Court reverse the Fourteenth Circuit Court of Appeals, overturning *Employment Division v. Smith* in the process.

APPENDIX A

Relevant Portions of The Uniform Disciplinary Act

N. Greene Stat. § 106(d)

Performing conversion therapy on a patient under age eighteen is unprofessional conduct for licensed health care providers under the Uniform Disciplinary Act.

N. Greene Stat. § 106(e)

(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(f)

N. Greene Stat. § 106(d) may not be applied to:

(1) Speech by licensed health care providers that does not constitute performing conversion therapy,

(2) Religious practices or counseling under the auspices of a religious denomination, church, or organization that does not constitute performing conversion therapy by licensed health care providers, and

(3) Nonlicensed counselors acting under the auspices of a religious denomination, church, or organization.