

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

CHRISTOPHER DOYLE, LPC, LCPC,

Plaintiff,

v.

LAWRENCE J. HOGAN, JR, *et al.* ,

Defendants.

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Civil Action No. 1:19-CV-00190-DKC

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DEFENDANTS’ MOTION TO DISMISS

The defendants, Lawrence J. Hogan, Jr., Governor, and Brian E. Frosh, Attorney General, move to dismiss the complaint filed by the plaintiff, Christopher Doyle, LPC, LCPC, for failure to state a claim. First, Mr. Doyle does not have standing to assert the claims contained in the complaint, either on his own behalf or on behalf of his minor clients. Further, the Governor and the Attorney General are immune from this suit pursuant to the Eleventh Amendment to the United States Constitution and the State of Maryland has not consented to be sued in federal court for alleged violations of the Maryland Declaration of Rights. Even if Mr. Doyle did have standing and the Governor and Attorney General were not immune, however, Mr. Doyle’s complaint should still be dismissed for failure to state a claim under either the United States Constitution or the Declaration of Rights of the Constitution of Maryland. The statute at issue in this case, section 1-212.1 of the Health Occupations Article of the Annotated Code of Maryland, regulates conduct, not speech, and in any event is constitutional under the Free Speech Clause of the First Amendment regardless of the level of scrutiny applied. In addition, the statute is neutral and generally applicable in terms of religion and is thus only subject to rational basis review

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DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

The plaintiff, Christopher Doyle, lacks standing to pursue the claims in this lawsuit on his own behalf and on behalf of his clients. Furthermore, the Eleventh Amendment bars the claims against the Governor and the Attorney General and the claims for the alleged violation of the Maryland Declaration of Rights. In any event, Mr. Doyle has not pleaded sufficient facts to state a claim for violation of either the federal or State constitutions. Accordingly, the Governor and the Attorney General move this Court to dismiss Mr. Doyle’s complaint.

I. Background

A. The Parties

The plaintiff, Christopher Doyle is a counselor licensed in Maryland as a clinical professional counselor. ECF Document 1 ¶ 13. Although he is licensed in Maryland, the complaint does not allege that he practices in Maryland. It does assert that he is the Executive Director of the Institute for Healthy Families and has a counseling practice there. *Id.* ¶ 99. His declaration attached to his motion for a preliminary injunction, ECF Document 2-1 ¶ 3, states that he also is a therapist at Patrick Henry College in Purcellville, Virginia and the founder of

Northern Virginia Christian Counseling. The Institute for Health Families is located in Manassas, Virginia, *see* Letter from Internal Revenue Service to Institute for Healthy Families (Mar. 30, 2016);¹ as is Northern Virginia Christian Counseling, *see* <https://www.novachristiancounseling.com/>.

Lawrence J. Hogan, Jr. is the Governor of Maryland and generally responsible for executing the laws of the State of Maryland. ECF Document 1 ¶ 14; *see also* Md. Const., Art. II, §§ 1, 9; Md. Code Ann., State Gov't §3-302. Brian E. Frosh is the Attorney General of Maryland, ECF Document 1 ¶ 15, and has general charge of the State's legal business, Md. Code Ann., State Gov't § 6-106.

B. Section 1-212.1 of the Health Occupations Article

In 2018, the Maryland General Assembly passed, and the Governor signed, SB 1028, which added section 1-212.1 to Maryland's Health Occupations Article. Section 1-212.1 defines conversion therapy as a practice or treatment that seeks to change an individual's sexual orientation or gender identity and prohibits certain licensed or certified health care providers from engaging in conversion therapy with minors. Any licensed or certified health care professional who violates that prohibition is subject to discipline for unprofessional conduct by the professional's licensing board. *See* Md. Code Ann., Health Occ. § 1-212.1.

Section 1-212.1 applies only to mental health or child care practitioners licensed or certified under Titles 14, 17, 18, 19, or 20 of the Health Occupations Article and any other practitioner licensed or certified under the Health Occupations Article to provide counseling.

¹ Simultaneously with filing this motion to dismiss, the Governor and Attorney General filed a memorandum in opposition to Mr. Doyle's request for preliminary injunctive relief and attached nineteen exhibits. That memorandum and its exhibits are incorporated by reference into this memorandum, and additional copies of the exhibits will not be filed. *See* Fed. R. Civ. P. 10(c). A copy of the Exhibit List is attached to this memorandum.

The provision only applies to those individuals acting in their professional capacity and does not apply to pastoral or religious counseling as long as the counselor is not acting under his or her State license. *See* Letter from Kathryn M. Rowe to the Honorable Bonnie Cullison (Apr. 3, 2018) (HB 902 Bill File at 3-4).

Section 1-212.1 also does not do any of the following:

- Prevent mental health or child care practitioners from communicating with the public about conversion therapy;
- Prevent mental health or child care practitioners from expressing their views to patients, whether children or adults, about conversion therapy, homosexuality, or any other topic;
- Prevent mental health or child care practitioners from recommending conversion therapy to patients, whether children or adults
- Prevent mental health or child care practitioners from administering conversion therapy to any person who is 18 years of age or older;
- Prevent mental health or child care practitioners from referring minors to unlicensed counselors, such as religious leaders; or
- Prevent unlicensed providers, such as religious leaders, from engaging in conversion therapy with children or adults.

Rather, it only subjects Maryland-licensed mental health and child care practitioners to discipline by their licensing board if they engage in conversion therapy with minors, *i.e.*, if they seek to change minors' sexual orientation or gender identity.

The lengthy preamble of Senate Bill 1028 first acknowledged that “being lesbian, gay, bisexual, or transgender (LGBT) . . . is not a disease, a disorder, or an illness” and then cited to the statements by ten professional organizations criticizing the practice of conversion therapy. ECF Document 1-1, at 1-4. The preamble concluded by asserting Maryland’s “compelling interest in protecting the physical and psychological well-being of minors, including LGBT youth, and in protecting minors against exposure to serious harm caused by sexual orientation

change efforts.” *Id.* at 5. The preamble also cited to the report from the American Psychological Association’s Task Force on Appropriate Therapeutic Responses to Sexual Orientation, ECF Document 1-1, and numerous other statements from major health professional organizations. The task force undertook a comprehensive review of available peer-reviewed literature regarding conversion therapy. That review concluded that no methodologically sound research demonstrated conversion therapy’s efficacy in changing adults’ sexual orientation and that, although there were no available studies on its effect on children, adults’ accounts of their experiences of conversion therapy as minors suggest that many were harmed. ECF Document 1-2 at 3.

The Abstract for the APA Task Force Report states that the APA Task Force “concluded that efforts to change sexual orientation are unlikely to be successful and involved some risk of harm, contrary to the claims of SOCE practitioners and advocates. . . . [T]he appropriate application of affirmative therapeutic interventions for those who seek SOCE involves therapist acceptance, support and understanding of clients and the facilitation of clients’ active coping, social support, and identity exploration and development, *without imposing a specific sexual orientation outcome.*” EDF Document 1-2 at v (emphasis added). The report’s summary of the APA Task Force’s literature review explained that the research conducted from 1999 to 2007 did not meet methodological standards that would permit conclusions about efficacy or safety, but that the studies conducted from 1969 to 1978 showed “that enduring change to an individual’s sexual orientation is uncommon.” *Id.* at 2. The report also noted that the Task Force “found some evidence to indicate that individuals experienced harm from SOCE.” Finally, the Task Force found no evidence “that providing SOCE to children or adolescents has an impact on adult sexual orientation” or “that teaching or reinforcing stereotyped gender-normative behavior in

childhood or adolescence can alter sexual orientation.” The Task Force did express concerns that such interventions with children and adolescents could increase self-stigma and minority distress. *Id.* at 4.

Chapter 8 of the APA Task Force Report discussed in more detail the findings of the literature review for children and adolescents. ECF Document 1-2 at 71-80. After that discussion, the report recommended that mental health practitioners provide treatments that “support children and youth in identity exploration and development *without seeking predetermined outcomes.*” *Id.* at 80 (emphasis added).

There is also no peer-reviewed literature that supports the efficacy of conversion therapy with gender minority youth, but there are concerns regarding the ethics of conversion therapy as well as its potential for harm. Substance Abuse and Mental Health Services Administration, “Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth,” HHS Publication No. (SMA) 15-4928, Rockville, MD: SAMHSA, 2015 (“SAMHSA Report”) at 26 (available at <https://store.samhsa.gov/system/files/sma15-4928.pdf>) (citing Byne, W. *et al.*, “Report of the APA Task Force on treatment of gender identity disorder,” *American Journal of Psychiatry, Supp.* 1-35 (2013); Coleman, E., *et al.*, “Standards of care for the health of transsexual, transgender, and gender nonconforming people,” *International Journal of Transgenderism* (7 ed., Vol. 13, pp. 165-232); Minter, S. “Supporting transgender children: new legal, social, and medical approaches,” *J Homosex*, 59(3), 422–433 (2012); Wallace, R., & Russell, H. “Attachment and shame in gender-nonconforming children and their families: toward a theoretical framework for evaluating clinical interventions,” *Int J Transgenderism*, 14(3), 113–126 (2013)). Accordingly, the SAMHSA Report also concludes that conversion therapy to change a youth’s gender identity or expression is inappropriate. *Id.*

C. The Complaint

In this lawsuit, Mr. Doyle challenges the constitutionality of SB 1028. According to Mr. Doyle, section 1-212.1 of the Health Occupations Article violates his free speech rights under the First Amendment to the United States Constitution because it is a prior restraint, discriminates on the basis of viewpoint and content, and is vague, overbroad, and underinclusive and violates his clients' rights to receive information. *See* Complaint Counts I and II. He also claims that section 1-212.1 violates his right to the free exercise of religion under the First Amendment, *id.* Count III, and violates Articles 10, 36, and 40 of the Maryland Declaration of Rights, *id.* Count IV and V.

II. Argument

Mr. Doyle's Complaint should be dismissed. He does not have standing to assert the claims in the complaint because he does not allege that he practices in Maryland, and he does not have third-party standing to assert any claims on behalf of his minor clients. In addition, the Governor and Attorney General, whom Mr. Doyle sued in their official capacities, have Eleventh Amendment immunity for the relief sought, and the State has not consented to suit in federal court for alleged violations of the Maryland Declaration of Rights. Furthermore, Mr. Doyle fails to state a claim under either the United States Constitution or the Declaration of Rights of the Constitution of Maryland. Section 1-212.1 regulates professional conduct, not speech, but it survives Mr. Doyle's constitutional challenge regardless of the level of scrutiny that applies, because the State of Maryland has a compelling interest in the protection of minors, and the prohibition of a particular form of treatment as harmful to minors furthers that interest. Additionally, section 1-212.1 is neutral and generally applicable in terms of religion and is

rationality related to the State's legitimate interest in protecting minors. Thus, the Court should dismiss Mr. Doyle's Complaint in full.

A. Mr. Doyle Lacks Standing to Raise These Claims on Behalf of Either Himself or His Minor Clients.

Article III of the United States Constitution gives federal courts jurisdiction over “cases” and “controversies,” and standing is “an integral component of the case or controversy requirement.” *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013) (quoting *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006)). “To meet the constitutional requirement for standing, a plaintiff must prove that: 1) he or she suffered an ‘injury in fact’ that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011) (citations omitted). And “[i]t is a long-settled principle that standing cannot be ‘inferred argumentatively from averments in the pleadings,’ but rather ‘must affirmatively appear in the record.’” *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1014 (4th Cir. 1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)).

1. Mr. Doyle Lacks Standing.

Although the injury-in-fact requirement for standing in cases involving the First Amendment is “somewhat relaxed,” Mr. Doyle still must allege both “an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute” and that “there exists a credible threat of prosecution thereunder.” *Davison v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019) (quoting *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018)). Mr. Doyle's Complaint does not do so.

Mr. Doyle fails to allege that he performs or intends to perform conversion therapy on minor clients in Maryland. Mr. Doyle alleges, correctly, that he is a licensed clinical professional counselor in Maryland. ECF Document 1 ¶ 13. In both the Complaint and his Declaration in support of his Motion for Preliminary Injunction, however, Mr. Doyle only affirmatively alleges that he practices in Virginia and in the area of the District of Columbia. *See* ECF Document 1 ¶ 99 (“Plaintiff is the Executive Director of the Institute for Healthy Families, a non-profit Judeo-Christian therapeutic organization in the Washington, D.C. area, where he also maintains a counseling practice.”); ECF Document 2-1 ¶ 3 (“I am a licensed psychotherapist and the Executive Director of the Institute for Healthy Families, a non-profit Judeo-Christian therapeutic organization in the Washington, D.C. area. I am also the founder of Northern Virginia Christian Counseling, specializing in the integration of psychology and theology in counseling. I am also employed as a mental health therapist for higher education students at Patrick Henry College in Purcellville, VA.”). Mr. Doyle does not specifically allege that he has *any* patients in Maryland, let alone any that want to pursue conversion therapy. Mr. Doyle fails to allege any connection between his alleged injury and section 1-212.1. As such, Mr. Doyle does not have standing, and his Complaint should be dismissed in full.

2. Mr. Doyle Does Not Have Third-Party Standing to Assert Claims on Behalf of his Minor Patients.

Mr. Doyle filed the Complaint “individually and on behalf of his clients;” Count II of the Complaint specifically alleges harm to Mr. Doyle’s clients, and every other Count of the Complaint uses language alleging harm to Mr. Doyle’s clients. Mr. Doyle, however, lacks standing to raise claims based on the rights of minors who are not parties to this case. An inquiry into standing “involves both constitutional limitations on federal court jurisdiction and prudential limitations on its exercise.” *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 214–15

(4th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). One such prudential limitation is that “[f]ederal courts must hesitate before resolving a controversy . . . on the basis of the rights of third persons not parties to the litigation.” *Id.* at 215 (citing *Singleton v. Wulff*, 428 U.S. 106, 113 (1976)). A plaintiff seeking third-party standing to assert the rights of people who are not party to the litigation “must demonstrate: (1) an injury-in-fact; (2) a close relationship between herself and the person whose right she seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests.” *Id.* (citing *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991)).

As set forth more fully below, Mr. Doyle has not established an injury-in-fact. The statute challenged in this case relates to conduct by licensed health professionals, not speech, and it is neutral and generally applicable. Further, regardless of the level of scrutiny that applies, section 1-212.1 survives Mr. Doyle’s constitutional challenge under the either the United States Constitution or the Maryland Declaration of Rights.

There is no dispute that Mr. Doyle and his clients have a sufficiently close relationship to satisfy the second prong of the test for third-party standing. Mr. Doyle’s minor clients, however, are not hindered in their ability to represent their own interests. Mr. Doyle alleges that his minor clients face “substantial obstacles to bringing the claims herein, including their fears of embarrassment, stigmatization, and opprobrium” ECF Document 1 ¶ 142. Although at least one court has recognized the stigma related to seeking mental health treatment as a deterrence to bringing suit, *see Pennsylvania Psychiatric Soc’y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 290 (3d Cir. 2002) (noting that patients’ fear of stigmatization “coupled with their potential incapacity to pursue legal remedies” hinders litigation), courts considering third-party standing related to legislation similar to section 1-212.1 have denied standing. *See, e.g.*,

King v. Governor of New Jersey, 767 F.3d 216, 244 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015) (“While a fear of social stigma can in some circumstances constitute a substantial obstacle to filing suit . . . Plaintiffs' evidence does not sufficiently establish the presence of such fear here.”); *Otto v. City of Boca Raton*, -- F. Supp. 3d --, 2019 WL 588645, at *7 (S.D. Fla. Feb. 13, 2019) (“Plaintiffs argue that their minor clients would not want to bring litigation for fear of stigma and exposing intimate details of their therapy. These generalized statements are not enough to confer third-party standing.”) Like the plaintiffs in both *King* and *Otto*, Mr. Doyle makes a general statement about his minor clients’ fear of stigmatization but fails to allege any specifics in his complaint to establish that fear. (As noted above, Mr. Doyle fails to specifically allege that he even has any minor clients in Maryland.)

Further, the courts in both *King* and *Otto* recognized that minor clients challenging similar laws were able to file suit pseudonymously in both *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 573 U.S. 945 (2014), and *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014). *King*, 767 F.3d at 244 (“the fact that minor clients have previously filed suit bolsters our conclusion that they are not sufficiently hindered in their ability to protect their own interests”); *Otto*, 2019 WL 588645, at *7. Among the factors in determining whether to allow a party to proceed under a pseudonym in this Circuit are “whether the justification asserted by the requesting party is . . . to preserve privacy in a matter of sensitive and highly personal nature” and “the ages of the persons whose privacy interests are sought to be protected,” factors which would suggest Mr. Doyle’s minor clients could proceed under a pseudonym in this case. *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). Because Mr. Doyle has not, and cannot, allege that his minor clients are hindered in their ability to protect their own interests, Mr. Doyle does not

have third-party standing to raise claims on behalf of his minor clients, and any and all claims raised on behalf of his minor clients should be dismissed.

B. The Eleventh Amendment Protects the Governor and the Attorney General From Suit.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI. In practice, the Eleventh Amendment has been interpreted to “bar[] suit in federal court against an unconsenting state and any governmental units that are arms of the state unless Congress has abrogated the immunity.” *Weigel v. Maryland*, 950 F. Supp. 2d 811, 830 (D. Md. 2013) (quoting *Coleman v. Md. Ct. App.*, 626 F.3d 187, 191 (4th Cir.2010) (further citation omitted). In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held, however, that the Eleventh Amendment does not “prevent private individuals from bringing suit against State officials for prospective or declaratory relief for ongoing violations of federal law.” *Weigel*, 950 F. Supp. 2d at 831. For that exception to Eleventh Amendment immunity to apply, “there must be a ‘special relation’ between the officer being sued and the challenged statute.” *Id.* (citation omitted). “This requirement of ‘proximity to and responsibility for the challenged state action’ is not met when an official merely possesses ‘[g]eneral authority to enforce the laws of the state,’” *id.* (quoting *S.C. Wildlife Fed’n v. Limehouse*, 549 F.3d 324, 332-33 (4th Cir. 2008)), and “[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute.” *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979)).

In his Complaint, Mr. Doyle alleges generally that Governor Hogan is “responsible for executing the laws of the State of Maryland” and that Attorney General Frosh is “charged with enforcement of the laws of the State of Maryland.” ECF Document 1 ¶¶ 14-15. Mr. Doyle does not, and cannot, allege a specific role that the Governor and Attorney General play in executing or enforcing the standard of practice set forth in section 1-212.1. The pleading in this case is not sufficient to meet the “special relation” requirement of the *Ex parte Young* exception to Eleventh Amendment immunity. See, e.g., *Weigel*, 950 F. Supp. 2d at 832 (“Here, although [Governor] O’Malley and [Attorney General] Gansler are generally under a duty to enforce and protect Maryland law, neither is charged with the duty to “enforce” *Tracey*. . . . Thus, Counts I through IV, VII, and VIII are barred by Eleventh Amendment immunity.”); *Gilmore*, 252 F.3d at 331 (“Here, although Governor Gilmore is under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state’s executive branch, he lacks a specific duty to enforce the challenged statutes. Thus, we vacate the judgment against him and remand with instructions that the district court dismiss him as a defendant in this action.”); *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2016 WL 4192406, at *3-4 (E.D. Cal. Aug. 8, 2016) (“Here, in contrast, Governor Brown has a general overarching duty to execute California law. The first amended complaint is devoid of any factual allegations that Governor Brown has a specific duty to enforce or implement SB 1172 in particular. . . . Accordingly, the court GRANTS the motion as to defendant Governor Brown.”). Thus, both the Governor and the Attorney General are immune from this suit and should be dismissed as defendants.

C. The Eleventh Amendment Bars Counts IV and V.

The Eleventh Amendment bars suits in federal court against State officials for violations of State law unless the State has consented. The State of Maryland has not consented to be sued

in federal court for violations of Maryland's Declaration of Rights. *See* Md. Code Ann., State Gov't § 12-104(a). *See also* *Mills v. State Highway Admin.*, 2015 WL 72270, at *2 (D. Md. Jan. 5, 2015) (collecting cases). The Governor and the Attorney General are sued in this case in their official capacity. *See* EDF Document 1 ¶¶ 14-15. Thus, they are entitled to the State's Eleventh Amendment immunity from suit in federal court, *see Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989), and Counts IV and V must be dismissed.

D. The Complaint Does Not State a Claim.

To survive a motion to dismiss, a plaintiff must allege "sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Complaints have facial plausibility if they contain factual allegations "that allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, "a complaint must contain 'more than labels and conclusions . . .'" *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). This complaint does not meet that standard.

1. Mr. Doyle Fails to State a Claim Based on the Free Speech Clause of the First Amendment.

For all the reasons included in the defendants' memorandum opposing Mr. Doyle's request for a preliminary injunction, incorporated by reference into this memorandum, Mr. Doyle has not state a claim for violation of his free speech rights as a matter of law.

2. Mr. Doyle Also Has Not Stated a Claim for Violation of His Clients' Right to Receive Information.

The First Amendment right to receive information is reciprocal to the speaker's First Amendment right to free speech. Thus, it follows that there is no violation of a right to receive information if there is a failure to establish a violation of free speech rights. *Doe v. Governor of*

New Jersey, 783 F.3d 150, 155 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1155 (2016). Accordingly, because Mr. Doyle cannot demonstrate any unconstitutional infringement of his right to speak, to the extent that he has standing to assert this claim, his clients' right to receive information has not been violated, and Count II should be dismissed.

3. Mr. Doyle Fails to State a Claim Based on the Free Exercise Clause of the First Amendment.

The First Amendment to the U.S. Constitution prohibits the government from imposing regulations that prohibit the free exercise of religion. U.S. CONST. amend. I. “The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1721–22 (2018). The right to the free exercise of one’s religion, however, is not absolute. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). In *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), the Supreme Court concluded that a generally applicable criminal law did not raise Free Exercise issues, narrowing the grounds upon which someone could claim religious-based exemptions from a criminal or civil law. This case limited the balancing test of *Sherbert v. Verner*, 374 U.S. 398 (1963), which asked “whether the law at issue substantially burdens a religious practice and, if so, whether the burden is justified by a compelling government interest.”

The Court further articulated this narrowing in *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). In this case, the Court made clear, “a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” *Lukumi*, 508 U.S. at 531. A neutral law is defined as one where the object of the law is not “to infringe upon or restrict

practices because of their religious motivation.” *Id.* at 533. To resolve Free Exercise challenges to neutral laws, the Supreme Court applies rational basis review, which requires that the law at issue be “rationally related to a legitimate governmental interest.” *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 561 (4th Cir. 2013).

Mr. Doyle claims that section 1-212.1 of the Health Occupations Article violates his and his clients’ First Amendment right to the free exercise of religion. He argues that he and his clients have sincerely held religious beliefs with which same-sex sexual behaviors are in conflict; section 1-212.1 has “impermissibly” burdened these beliefs; the state’s interest in protecting minors from the harm of counseling is not “compelling, legitimate, significant, or even rational;” and, even if it were, section 1-212.1 is “not the least restrictive means” to accomplish that interest. Mr. Doyle’s argument is unavailing.

Section 1-201.1 is “neutral” and “generally applicable.” It does not explicitly reference any religion or religious beliefs, therefore making it neutral on its face. *See Lukumi*, 508 U.S. at 533–34. Furthermore, the complaint does not demonstrate that section 1-212.1 targets religiously motivated conduct. Consequently, because the statute is neutral and generally applicable, it triggers only rational basis review.

There can be no doubt that the State of Maryland has a legitimate interest in protecting minors from harmful conduct. *E.g., Sable Communications of California, Inc. v. FCC*, 494 U.S. 115, 126 (1989). There also can be no dispute that the legislature determined, in passing SB 1028, that conversion therapy harmed minors. *See Preamble, SB 1028* (ECF Document 1-1). And, a review of the documents cited in the Preamble as well as those discussed in the testimony establishes a consensus among major health professional organizations that there is a risk of harm to minors from conversion therapy. No more is required to uphold the constitutionality of

the facially neutral section 1-212.1 of the Health Occupations Article and to reject Mr. Doyle's claim that section 1-212.1 violates his and his client's free exercise rights. *See also Pickup*, 740 F.3d at 1232; *King*, 767 F.3d at 243. Thus, Count III should be dismissed.

4. Mr. Doyle Does Not Have a Claim for Violation of the Maryland Declaration of Rights.

In Counts IV and V, Mr. Doyle attempts to state a claim for violation of three articles of the Maryland Declaration of Rights. Even if the Eleventh Amendment does not bar these claims, Mr. Doyle has not stated a claim for their violation.

Article 10 of the Maryland Declaration of Rights protects only members of the Maryland General Assembly. *State v. Holton*, 997 A.2d 828, 837 (Md. Ct. Spec. App. 2010), *aff'd*, 24 A.3d 678 (Md. 2011). Mr. Doyle does not allege that he is a member of the Maryland legislature; therefore Article 10 does not give him a claim for an alleged violation of his right to free speech.

Article 40 of the Maryland Declaration of Rights has consistently been construed by the Court of Appeals of Maryland to be co-extensive with the free speech rights protected by the First Amendment. *See Jakanna Woodworks, Inc. v. Montgomery County*, 689 A.2d 65, 70 (Md. 1997). Thus, Mr. Doyle has no claim under Article 40 for the same reasons that he failed to state a claim for violation of the First Amendment.

Article 36 of the Maryland Declaration of Rights protects religious liberty, and the Maryland appellate courts have consistently assumed that it too is co-extensive with the protections for the free exercise of religion under the First Amendment. *Supermarket General Corp. v. State*, 409 A.2d 250, 258 (Md. 1979); *Stover v. Prince George's County*, 752 A.2d 686, 695 (Md. Ct. Spec. App. 2000). Thus, Mr. Doyle has no claim for violation of Article 40 for the

same reasons that he failed to state a claim for violation of his free exercise rights under the First Amendment.

III. Conclusion

For all these reasons, Mr. Doyle's complaint should be dismissed.

Respectfully Submitted:

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Exhibit List

1. Substance Abuse and Mental Health Services Administration, “Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth,” HHS Publication No. (SMA) 15-4928, Rockville, MD: SAMHSA, 2015
2. Ch. 685, 2018 Md. Laws
3. HB0902 History (Apr. 10, 2018)
4. HB 902 Bill File
5. SB1028 (CH0685) History (May 15, 2018)
6. SB 1028 Bill File
7. SB 1028 Fiscal and Policy Note
8. Christy Mallory, Taylor N.T. Brown, and Keith J. Conron, “Conversion Therapy and LGBT Youth,” The Williams Institute UCLA School of Law (Jan. 2018)
9. 1993 American Academy of Pediatrics Position Statement
10. 2000 American Psychiatric Association Position Statement
11. 2012 American Psychoanalytic Association Position Statment
12. Pan American Health Organization Statement
13. 2012 American Academy of Child and Adolescent Psychiatry Practice Parameter
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15. 2014 American School Counselor Association Position Statement
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18. Letter from Internal Revenue Service to Institute for Healthy Families (Mar. 30, 2016)
19. NPI Profile for Christopher Doyle