**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**

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| CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients, | ) | |
| Plaintiff, | ) | Civil Action No. 1:19-cv-00190-DKC |
| v. | ) | **INJUNCTIVE RELIEF SOUGHT** |
| LAWRENCE J. HOGAN, JR., Governor of the State of Maryland, in his official capacity, and BRIAN E. FROSH, Attorney General of the State of Maryland, in his official capacity, | ) | |
| Defendants. | ) | |

**PLAINTIFF'S MEMORANDUM IN OPPOSITION**
**TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff, CHRISTOPHER DOYLE, LPC, LCPC ("Doyle"), pursuant to Local Rule 105, files this memorandum in opposition to Defendants' Motion to Dismiss (Doc. 26, "MTD").

## INTRODUCTION

Defendants' Motion to Dismiss should be denied because Doyle has more than sufficiently alleged the violation of his and his clients' constitutional rights by Maryland's so-called "conversion therapy" ban, SB 1028. Doyle's well-pleaded allegations, which must be taken as true, demonstrate SB 1028's violation of his and his clients' First Amendment rights, and Doyle's standing to bring the claims. Defendants' Memorandum in Support of Motion to Dismiss (Doc. 26-1, "MTD Mem.") either waves arguments because they are merely cursory and perfunctory, or simply fails to overcome Doyle's allegations under settled federal pleading standards. The Court should reject Defendants' arguments and uphold Doyle's Verified Complaint (Doc. 1).

## ARGUMENT

### I. DOYLE'S WELL-PLEADED ALLEGATIONS SURVIVE DISMISSAL AND ENTITLE HIM TO RELIEF.

#### A. Doyle's Complaint Easily Satisfies the Exceedingly Low Pleading Standard of Rule 12(b)(6).

The Federal Rules require "only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (quoting Fed. R. Civ. P. 8(a)(2)). "When ruling on a motion to dismiss, courts must accept as true all of the factual allegations contained in the complaint and draw all reasonable inferences in favor of the plaintiff." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 765 (4th Cir. 2017). "The court should not grant a motion to dismiss for failure to state a claim for relief unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Lerner v. Nw. Biotherapeutics*, 273 F. Supp. 3d 573, 585 (D. Md. 2017); *see also Martin v. Duffy*, 858 F.3d 239, 248 (4th Cir. 2017) (same). Thus, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low . . . ." *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1070 (11th Cir. 2004). Doyle's Complaint easily satisfies this standard.

#### B. Doyle Has Sufficiently Demonstrated His Own Standing to Challenge SB 1028.

Defendants contend Doyle has no standing to challenge SB 1028, either on his own behalf or on behalf of his minor clients. (MTD at 1; MTD Mem. at 7–11.)[1] The Court should reject this contention because Doyle has sufficiently alleged standing in both capacities.

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[1] Although the Court's consideration of Defendants' Motion to Dismiss must be confined to the four corners of the Complaint, Doyle proffers to the Court that his sworn and unrebutted

First, Defendants' attack on Doyle's individual standing is limited to the assertion that Doyle has not alleged he has "*any* patients in Maryland" or "any connection between his alleged injury and [SB 1028]." (MTD Mem. at 8.) This assertion is easily refuted by the Complaint itself, in which Doyle alleges, *inter alia*:

- **Maryland's** counseling ban, SB 1028, violates the rights of Doyle and his clients, and is causing them irreparable harm (V.Compl. ¶¶ 2–7);
- Doyle has "five minor clients he is counseling with unwanted same-sex attractions and/or gender identity conflicts," who "will suffer significant mental health consequences if they are required to halt their counseling . . . because of [Maryland's] SB 1028, which consequences potentially include anxiety, depression, and suicidal ideation." (V.Compl. ¶¶ 105–106);
- "As a psychotherapist licensed in Maryland who engages in counseling to eliminate, reduce, or resolve unwanted same-sex attractions, behaviors, or identity, Plaintiff is subject to potential professional discipline under SB 1028." (V.Compl. ¶ 123);
- "SB 1028 prohibits Plaintiff from engaging in counseling to eliminate, reduce, or resolve unwanted same-sex attractions, behaviors, or identity with his minor clients, and requires Plaintiff to discontinue ongoing counseling despite the clients' and their parents' consent and requests to continue, or face penalties under the statute." (V.Compl. ¶ 124);

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deposition testimony elicited by Defendants in discovery details Doyle's counseling within Maryland for Maryland clients. If the Court determines additional allegations are necessary regarding Doyle's Maryland clients, Doyle stands ready to provide them in an amended complaint, for which leave to file should be freely granted. (*See infra* pt. II.)

- "SB 1028 will prevent Plaintiff's clients from continuing to progress in their individually-determined course of counseling, and from continuing to receive counseling in accordance with their sincerely held religious beliefs. In addition, SB 1028 will adversely affect future clients. Plaintiff periodically receives requests for therapy for both unwanted homosexual attractions and gender identity confusion, and he and other licensed professionals in Maryland will be prohibited from providing, and the clients prohibited from receiving, help they want and need." (V.Compl. ¶ 125);
- "Plaintiff must either violate SB 1028 or violate his legal ethical obligations; he cannot comply with both." (V.Compl. ¶ 126);
- Numerous instances of irreparable harm to Doyle and his minor clients, "Because of SB 1028" (V.Compl. ¶¶ 127–143).

"[A]ccept[ing] as true all of the factual allegations contained in the complaint and draw[ing] all reasonable inferences in favor of the plaintiff," *Hall*, 846 F.3d at 765, it is clear Doyle is challenging Maryland's SB 1028 because it bans his Maryland counseling with Maryland clients. The Complaint cannot reasonably be read to allege that Doyle challenges Maryland's SB 1028 because of its effect on his counseling with clients in Virginia or Washington D.C. as feigned by Defendants. (MTD Mem. at 8.) Thus, Doyle has sufficiently alleged standing to challenge SB 1028.

### C. Doyle Has Sufficiently Demonstrated Standing to Challenge SB 1028 on Behalf of His Minor Clients.

#### 1. The Supreme Court and Fourth Circuit Have Recognized the Rights of Medical Providers to Assert Third-Party Claims on Behalf of Patients.

Defendants also attack Doyle's third-party standing to challenge SB 1028 on behalf of his minor clients. (MTD Mem. at 8–11.) The Court should reject this standing challenge as well.

The Supreme Court and other federal courts have long recognized the rights of medical providers to bring constitutional challenges on behalf of their clients. *See, e.g., Singleton v. Wulff,* 428 U.S. 106 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016) ("[A] physician or other professional may raise the *constitutional* rights . . . of his or her patients."); *Penn. Psychiatric Soc'y v. Green Springs Health Serv., Inc.*, 280 F.3d 278, 289 (3d Cir. 2002) ("Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights."); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1284 (M.D. Ala. 2013) ("[F]ederal courts routinely recognize an abortion provider's standing to assert the claims of its patients.")). Doyle's assertion of his clients' constitutional rights is consistent with Article III standing requirements because his clients' "enjoyment of the right [to receive the SOCE counseling they seek] is inextricably bound up with the activity the litigant wishes to pursue." *Singleton,* 428 U.S. at 114–15. As such, "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115.

For a medical provider plaintiff to establish third-party standing on behalf of patients, the Fourth Circuit has recognized the "plaintiff 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. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002). Applying the same elements, the Middle District of Florida denied a motion to dismiss a state-licensed therapist's constitutional challenge of a "conversion therapy" ban on behalf of his minor clients in *Vazzo v. City of Tampa*, 8:17-CV-2896-T-02AAS,

2019 WL 1048294, at *4–5 (M.D. Fla. Jan. 30, 2019), *report and recommendation adopted by* 2019 WL 1040855 (M.D. Fla. Mar. 5, 2019).

Doyle's allegations in this case satisfy each of the third-party standing elements. To be sure, Defendants concede the second element (MTD Mem. at 9 ("There is no dispute that Mr. Doyle and his clients have a sufficiently close relationship . . . .").) As shown below, Doyle satisfies the other two as well.

**2. Doyle Has Alleged Concrete and Irreparable Injury.**

As shown above, Doyle has alleged concrete and irreparable injury. (*See supra* pt. I.B; V.Compl. ¶¶ 2–7, 105–106, 123–143.) Indeed, SB 1028 is prohibiting Doyle from engaging in, providing, or facilitating voluntary, speech-only SOCE counseling with minor clients and constituents who desire to receive it, and SB 1028 is unconstitutionally prohibiting such counseling on the basis of its content and viewpoint. (*Id.*; V.Compl. ¶¶ 144–49; *see also infra* pt. I.E.) Plaintiffs also are currently suffering irreparable injury under the yoke of a presumptively unconstitutional prior restraint. (V.Compl. ¶¶ 144–49.) Doyle has alleged more than sufficient concrete injury to satisfy third-party standing.

**3. Doyle's clients face obstacles to litigation.**

Doyle has specifically alleged the obstacles to litigation faced by his minor clients:

> Plaintiff's minor clients face substantial obstacles to bringing the claims herein, including their fear of embarrassment, stigmatization, and opprobrium from publicly disclosing not only their needs and desires to receive mental health counseling in general, but also their needs and desires to receive specifically counseling that involves intimate details of their development, growth, and sexuality, and that the State of Maryland officially abhors.

(V.Compl. ¶ 142.) Indeed, "[f]or one thing, [they] may be chilled from such assertion by a desire to protect the very privacy of [their] decision from the publicity of a court suit." *Singleton*, 428 U.S. at 117. "[T]he psychotherapist-patient privilege is rooted in the imperative need for

confidence and trust." *Jaffree v. Redmond*, 518 U.S. 1, 10 (1996). "[D]isclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment." *Id.*

"The stigma associated with receiving mental health services presents a considerable deterrent to litigation." *Penn. Psychiatric Soc'y,* 280 F.3d at 290 (citing *Parham v. J.R.*, 442 U.S. 584 (1979) (Stewart, J., concurring)). This consideration is only increased when such counseling involves intimate details concerning a minor's development, growth, and sexuality. Indeed, even the fear of stigmatization associated with bringing claims in a public forum "operates as a powerful deterrent to bringing suit." *Id.* As the Tenth Circuit has held, "**adolescents seeking health care related to sexuality or mental health care may be chilled from asserting their own rights by a desire to protect the very privacy of the care they seek from the publicity of a court suit**." *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 1990) (emphasis added).

The desire to keep private the intimate details associated with SOCE counseling is an obvious obstacle for Doyle's clients and constituents to bring their claims in public court. The mere fact that Maryland passed SB 1028 is *ipso facto* proof that Doyle's clients are likely to be stigmatized and subjected to opprobrium for seeking the kind of counseling that officially offends Maryland's sensibilities. The status of Doyle's clients as minors makes matters worse, creating a separate set of obstacles to litigation. This was the conclusion of the Middle District of Florida in *Vazzo*: "[G]iven the sensitive nature of SOCE counseling—which the amended complaint describes in detail—the plaintiffs sufficiently demonstrate the Tampa minor's privacy interest

presents an obstacle to bringing claims on his or her own behalf." *Vazzo*, 2019 WL 1048294, at *5. This Court should reach the same conclusion.[2]

**D. Defendants Are Not Immune Under the Eleventh Amendment.**

Defendants argue they are sovereignly immune from Doyle's claims under the Eleventh Amendment. (MTD at 1; MTD Mem. at 11–12.) The Court should reject this argument, however, because Defendants—Maryland's Governor and Attorney General, in their official capacities—have sufficient connection to the enforcement of SB 1028 to be the proper defendants in Doyle's constitutional challenge.

The familiar *Ex parte Young* exception to Eleventh Amendment sovereign immunity "allows suits against state officers for prospective equitable relief from ongoing violations of federal law." *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001). To sue a state official in a constitutional challenge to state law, "it is plain that such officer must have some connection with the enforcement of the act," whether explicit in the act itself or arising out of general law pertaining to the office. *Ex parte Young*, 209 U.S. 123, 157 (1908). The Supreme Court observed, however, that while a state's governor and attorney general may be convenient defendants for suits testing the constitutionality of state statutes, they are not always proper defendants if their connection to enforcement of the challenged law is too general. *See id.* But the *Young* Court did not decide that a state governor or attorney general is never a proper defendant in an action challenging the constitutionality of a state statute. Indeed, in the case before it, the Supreme Court held the Minnesota attorney general's "power by virtue of his office sufficiently connected him with the

[2] Alternatively, if the Court determines additional allegations are necessary regarding the obstacles to litigation faced by Doyle's clients, or any other aspect of third-party standing, Doyle stands ready to provide them in an amended complaint, for which leave to file should be freely granted. (*See infra* pt. II.)

duty of enforcement to make him a proper party . . . .” *Id.* at 161. Thus, where a governor or attorney general has a sufficient connection to enforcement of a challenged law “by virtue of his office” he may be a proper defendant.

SB 1028, on its face, contemplates enforcement through “discipline by the . . . practitioner’s licensing or certifying board” under Titles 14, 17, 18, 19, or 20 of the Health Occupations Article of the Maryland Code. (V.Compl. ¶¶ 21–22 (quoting V.Compl. Ex. A at 5–6).) SB 1028 also provides that the Maryland Department of Health “shall adopt regulations necessary to implement this section.” (V.Compl. Ex. A at 6.) Thus, although Defendants do not attempt to define whom they believe to be the proper defendants for Doyle’s challenge, SB 1028 itself suggests department- or board-level officials are among the class of state officials who may be proper defendants by virtue of explicit authority in SB 1028. *See Young*, 209 U.S. at 157. Maryland’s Constitution also, however, vests “[t]he executive power of the State” in the Governor, and provides that “[h]e shall take care that the Laws are faithfully executed.” Md. Const. Art. I, §§ 1, 9. The state constitution also requires the Attorney General, “whenever required by . . . the Governor” to “[g]ive his opinion in writing . . . on any legal matter or subject.” Md. Const. Art. V, § 3(a)(4). Furthermore, the Governor has statutory authority to “supervise and direct the officers and units in [the Executive] Branch,” Md. Code Ann., State Gov't § 3-302, and the Attorney General has a statutory responsibility to be “the legal adviser of . . . each officer and unit of the State government,” Md. Code Ann., State Gov't § 6-106(b). Thus, Maryland’s general laws arguably provide sufficient connection between Defendants and enforcement of SB 1028, by virtue of their respective offices, to make them proper defendants in a federal constitutional challenge to the statute. *See Young*, 209 U.S. at 157. Specifically, this Court may declare SB 1028 unconstitutional and enjoin Defendants to halt its enforcement by virtue of a legal opinion rendered to the Maryland Department of Health

and its subsidiary licensing boards. Not only have Defendants not suggested whom they believe would be better defendants, but they also have not shown this Court that such an opinion would not be binding or otherwise efficacious on the department- and board-level Executive Branch officials identified in SB 1028.

Doyle has alleged Defendants' enforcement connections to SB 1028. (V.Compl. ¶¶ 14–15.) Should the Court, however, determine these allegations insufficient, allowing amendment to name different officials is the appropriate course. *See, e.g.*, *Lytle*, 240 F.3d at 410 ("Moreover, in light of the disagreement over the naming of appropriate defendants, the district court may consider permitting amendments to the pleadings to resolve any Eleventh Amendment difficulties in this case. Such a remand would not, apparently, be unwelcome by the district court.")[3]

### E. Doyle Has Sufficiently Pleaded a Violation of the First Amendment Free Speech Clause, and Defendants Have Waived Their Argument of Failure to State a Claim.

Defendants' Motion to Dismiss includes no argument challenging Doyle's **pleading** of his First Amendment Free Speech claim (V.Compl. Count I), relying instead on the inapposite arguments of Defendants' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction (Doc. 25), wherein Defendants argue Doyle has not met the preliminary injunction prerequisites, such as likelihood of success on the merits.[4] (MTD Mem. at 13–14.) Because Defendants have only perfunctorily and cursorily referenced their defense of failure to state a claim

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[3] If necessary, Doyle stands ready to name the department- and board-level officials identified in SB 1028 as defendants in an amended complaint, for which leave to file should be freely granted. (*See infra* pt. II.)

[4] Not only are Defendants' First Amendment arguments in their preliminary injunction opposition inapposite to Defendants' Motion to Dismiss, but they also fail to overcome Doyle's First Amendment arguments in his Motion for Preliminary Injunction and Memorandum of Law in Support (Doc. 2 at 18–33), which arguments Doyle commends to the Court and incorporates by this reference.

as to Doyle's Free Speech claim, without citation of any authority dealing with the low pleading requirements of Rule 8 (*see supra* pt. I.A), Defendants have waived their defense. *See, e.g.*, *Sales v. Grant*, 224 F.3d 293, 296 (4th Cir. 2000) (holding waiver of defense that "defendant only cursorily references" and "fails to . . . seriously press" in potentially dispositive motion); *Rice v. Comm'r of Soc. Sec.*, 169 Fed. Appx. 452, 454 (6th Cir. 2006) ("It is well-established that 'issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'"); *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived . . . ."); *Williams v. Astrue*, 2012 WL 2865479, at *7 (M.D. Fla. July 11, 2012) (deeming argument waived where mentioned in passing without citation to record, pertinent facts, and governing legal standard). Accordingly, Defendants' Motion to Dismiss must be denied as to Count I.[5]

Even if the Court considers Defendants' inapposite preliminary injunction arguments as supportive of Defendants' Motion to Dismiss, the standards applicable to dismissal are fundamentally different, requiring only that Doyle's allegations meet an "exceedingly low" threshold (*see supra* pt. I.A), which Doyle easily satisfies. First, Doyle has sufficiently alleged that SB 1028 is a viewpoint- and content-based restriction on speech. (V.Compl. ¶¶ 147–49.) Doyle has sufficiently alleged that SB 1028 chills expression. (V.Compl. ¶¶ 155–56.) Doyle has alleged that SB 1028 cannot withstand the requisite constitutional scrutiny. (V.Compl. ¶¶ 150–54.) Even in the absence of Defendants' waiver, these allegations on their own suffice to plead a First

[5] Defendants' entire argument for dismissal of Doyle's Count II is tied to Defendants' waived argument for dismissal of Count I. (MTD Mem. at 13–14.) Accordingly, Defendants' Motion to Dismiss must be denied as to Count II as well.

Amendment challenge. Thus, there can be little doubt that Doyle has stated a First Amendment claim under federal pleading standards.

Even Defendants' cursorily asserted (and therefore waived) Free Speech argument, that SB 1028 regulates "conduct" and not speech (MTD Mem. at 6), is spurious in light of binding Supreme Court precedent. The government cannot simply relabel the speech of health professionals as "conduct" in order to restrain it with less scrutiny. *See, e.g., Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) (hereinafter, "*NIFLA*") ("[T]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals."); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2229 (2015) (same); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding government may not apply alternative label to protected speech to evade First Amendment review, when only "conduct" at issue is speech); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (same); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

The *NIFLA* Court admonished that allowing the government to lessen First Amendment protections for professionals by reclassifying their speech would eviscerate the protections afforded to doctors, lawyers, nurses, mental health professionals, and many others: "[T]hat gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. **States cannot choose the protection that speech receives under the First Amendment**, as that would give them a powerful tool to impose invidious discrimination on disfavored subjects." 138 S. Ct. at 2372. To be sure, *NIFLA* **abrogated by name** the principal authority Defendants rely on in their preliminary injunction opposition to make their "conduct"

argument, *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). (Defs.' Mem. Opp'n Mot. Prelim. Inj. at 14–15.) *See NIFLA*, 138 S. Ct. at 2371.

Even before *NIFLA*, the Eleventh Circuit's en banc decision in *Wollschlaeger v. Florida* had already rejected the Defendants' "conduct" argument because "**characterizing speech as conduct is a dubious constitutional enterprise**." 848 F.3d 1293, 1309 (11th Cir. 2017) (emphasis added). "Speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 1307 (citation and internal quotation marks omitted).

Lastly, and perhaps most importantly, Doyle has plainly and clearly alleged his counseling is accomplished through speech. (V.Compl. ¶ 111 ("Plaintiff helps clients with their unwanted same-sex attractions, behaviors, and identity by talking with them . . . ."); ¶ 112 ("Speech is the primary tool that Plaintiff uses in his counseling with minors seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity."); ¶ 113 ("Plaintiff employs speech and standard psychological instruments and practices to help clients understand and identify their anxiety, distress, and/or confusion regarding their attractions, behaviors, or identity and then to help each client formulate the method of counseling that will most benefit that particular client."). These allegations must be accepted as true on a motion to dismiss. (*See supra* pt. I.A.)[6]

[6] To the extent Article 40 of the Maryland Declaration of Rights is deemed to be co-extensive with Free Speech rights under the First Amendment (MTD Mem. at 16), Defendants' Motion to Dismiss must be denied as to Count IV of Doyle's Complaint on the same grounds as denial as to Count I.

### F. Doyle Has Sufficiently Pleaded a Violation of the First Amendment Free Exercise Clause.

#### 1. The Well-Pleaded Allegations of Doyle's Free Exercise Claim Must Be Taken as True on a Motion to Dismiss.

Defendants contend that Doyle's Count III fails to state a claim because SB 1028 is neutral and generally applicable, does not target religiously motivated conduct, and serves a legitimate interest. (MTD Mem. at 15.). These contentions, however, do not overcome the well-pleaded allegations of Doyle's Complaint, which are presumed true on a motion to dismiss. (*See supra* pt. I.A.)

It is axiomatic that hostility toward religious beliefs is unconstitutional. "The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Doyle plainly has alleged, and is entitled to adduce evidence at trial to prove, that SB 1028 was motivated by animus and displays hostility towards the religious convictions of Doyle and his clients. "Although a law targeting religious beliefs as such is never permissible . . . if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 533 (citations omitted). Although neutral laws of general applicability receive deferential treatment, *see Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990), "[a] law failing to satisfy these requirements must be justified by a compelling government interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32. SB 1028, therefore, "must undergo the most rigorous of scrutiny." *Id.* at 546. A law "will survive strict scrutiny **only in rare cases**." *Id.* (emphasis added). As *Lukumi* made abundantly clear, "[t]he Free Exercise Clause . . . extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' [and] 'covert suppression of particular religious beliefs.'" *Id.* at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)); *Bowen v. Roy*,

476 U.S. 693 (1986)). "The Free Exercise Clause protects against government hostility which is masked, as well as overt." *Id.* Doyle's well-pleaded allegations are sufficient.

**2. Doyle's Allegations Demonstrate Sincerely Held Religious Beliefs.**

Doyle plainly has alleged that he and his clients have sincerely held religious beliefs concerning human sexuality and same-sex attractions, behaviors, and identity. (V.Compl. ¶ 107 (alleging many of Doyle's clients "profess to be Christians, Mormons, Jews, or Muslims with sincerely held religious beliefs . . . and therefore seek counseling in order to live a lifestyle that is in congruence with their faith and to conform their identities, concepts of self, attractions, and behaviors to their sincerely held religious beliefs"); ¶175 (alleging many of Doyle's clients "have sincerely held religious beliefs that same-sex sexual attractions, behaviors, or identity are wrong, and they seek to resolve these conflicts between their religious beliefs and their attractions in favor of their religious beliefs"); ¶ 176 (alleging Doyle "also has sincerely held religious beliefs motivating him to provide spiritual counsel and assistance to his clients who seek such counsel," and that Doyle "sincerely holds religious beliefs that he should counsel clients on the subject matter of same-sex attractions, behaviors, or identity from a religious viewpoint that aligns with his religious beliefs and those of his clients when requested by his clients").)

**3. Doyle's Allegations Demonstrate That SB 1028 Violates His Sincerely Held Religious Beliefs, and Those of His Clients.**

Doyle's well-pleaded allegations also demonstrate that SB 1028 violates his and his clients' sincerely held religious beliefs. (V.Compl. ¶ 177 (alleging SB 1028 causes "direct and immediate conflict with their religious beliefs by prohibiting them from offering, referring, and receiving counseling that is consistent with their religious beliefs"); ¶ 178 (alleging SB 1028 impermissibly burdens their "sincerely held religious beliefs and compels them either to change those religious

beliefs or to act in contradiction to them"); ¶ 179 (alleging SB 1028 "places Plaintiff and his clients in an irresolvable conflict between compliance with their sincerely held religious beliefs and compliance with SB 1028"); ¶ 180 (alleging SB 1028 "puts substantial pressure on Plaintiff and his clients to violate their sincerely held religious beliefs by ignoring the fundamental tenets of their faith concerning same-sex attractions, behaviors, and identity").)

**4. Doyle's Allegations Demonstrate Hostility Towards Religious Beliefs.**

Doyle's allegations also demonstrate that SB 1028 explicitly targets and shows hostility towards his and his clients' religious beliefs. (V.Compl. ¶ 181 (alleging SB 1028 "specifically and discriminatorily targets the religious speech, beliefs, and viewpoint of those individuals who believe change is possible"); ¶ 185 (alleging SB 1028 "evidences Maryland's failure and refusal to accommodate Plaintiff's sincerely held religious beliefs"); ¶ 186 (alleging SB 1028 "specifically targets religion for disparate treatment").)

**5. Doyle's Allegations Demonstrate That SB 1028 Contains Individualized Exemptions and Religious Gerrymanders.**

A system of individualized or categorical exemptions from the general prohibitions of a statute demonstrate that it is not neutral or generally applicable. *See Lukumi*, 508 U.S. at 536–38. A law that targets substantially similar conduct but unevenly proscribes the conduct purporting to cause the harm constitutes an impermissible "religious gerrymander." *Id.* Defendants contend that SB 1028 is neutral and generally applicable, and that it does not target religiously motivated conduct. (MTD Mem. at 15.) Defendants' argument fails for two reasons: (1) it is premature and improper to determine motives or the government's purpose for enacting a law on a motion to dismiss, and (2) Defendants' contentions are contradicted by the well-pleaded allegations of Doyle's Complaint.

Whether or not Maryland intended to target religious beliefs, to suppress the religious exercise of counselors and individuals who seek SOCE counseling to align their attractions, behaviors, and identity to their sincerely held religious beliefs, to target specific religious speech, or to exhibit hostility towards religion, are all questions of fact, inappropriate for resolution on a motion to dismiss. Indeed, questions of intent are pure factual questions. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982) (holding intent to discriminate is pure question of fact). Thus, resolving the factual question of Maryland's intent is premature and improper at this stage.

In addition to being impermissibly premature, Defendants' contentions are also belied by the well-pleaded allegations of Doyle's Complaint, which must be accepted as true. Doyle alleges that SB 1028 sets up a system of individualized exemptions and unconstitutionally imposes a gerrymander on Doyle's free exercise rights. (V.Compl. ¶¶ 92–96, 186–87.) Thus, Doyle has sufficiently alleged a violation of his free exercise rights.[7]

## II. IF THIS COURT FINDS PLAINTIFFS' ALLEGATIONS LACKING IN ANY RESPECT, IT MUST GRANT THEM LEAVE TO AMEND.

Should the Court determine that Doyle's Complaint is lacking in any respect, which Doyle does not concede, Doyle should be given the opportunity to amend his Complaint to address any deficiency. Rule 15 permits a party to amend his pleading and instructs that "[t]he court should **freely give leave** when justice so requires." Fed. R. Civ. P. 15(a)(2) (emphasis added). "This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). Thus, Doyle's

[7] To the extent Article 36 of the Maryland Declaration of Rights is deemed to be co-extensive with Free Exercise rights under the First Amendment (MTD Mem. at 16), Defendants' Motion to Dismiss must be denied as to Count V of Doyle's Complaint on the same grounds as denial as to Count III.

Complaint should not be dismissed without allowing him the opportunity to amend. *See Ostrzenski v. Seigel*, 177 F.3d 245, 252 (4th Cir. 1999) ("[T]he district court should not have dismissed the complaint with prejudice without permitting [plaintiff] an opportunity to amend.")

Even if, for example, the Court were to dismiss the named Defendants on Eleventh Amendment grounds (which Doyle does not concede would be proper), permitting Doyle to amend his Complaint to name different state officials must be allowed under Rule 15 and Fourth Circuit precedent. The Fourth Circuit has "interpreted Rule 15(a) to provide that 'leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile.'" *Id.* Futility does not apply because Doyle's well-pleaded allegations (as shown above) must be allowed against **some** state official(s), even if not the Governor and Attorney General. Moreover, there are no grounds to assert bad faith in Doyle's prosecution of this action against the Governor and Attorney General in their official capacities, and no prejudice to them or any substitute state official would result from amendment. To be sure, any state official named in an amendment could continue with the same counsel from the Attorney General's office, all discovery and other proceedings to date would continue to apply, and the preliminary injunction hearing could proceed as currently scheduled.[8] Thus, should the Court find any deficiency in Doyle's Complaint, Doyle respectfully request leave to address it by amendment.

## CONCLUSION

For all of the foregoing reasons, Defendants' Motion to Dismiss should be denied. Alternatively, any dismissal order should be without prejudice, and grant Doyle leave to amend.

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[8] "Delay alone, however, is an insufficient reason to deny the plaintiff's motion to amend." *Laber*, 438 F.3d at 27.

/s/ John R. Garza
(signed by Roger K. Gannam
with permission of John R. Garza)
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been filed this April 22, 2019, through the Court's ECF system, which will send a notice of electronic filing to all parties and counsel of record, including the following:

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