IN THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BETHEL MINISTRIES, INC., *Plaintiffs,*	*	
v.	*	No. 1:19-cv-01853-ELH
DR. KAREN B. SALMON, *et al*., *Defendants*.	*	

* * * * * * * * * * * *

MOTION TO DISMISS

For the reasons stated in the accompanying memorandum, State Superintendent Dr. Karen B. Salmon, along with Broadening Options and Opportunities for Students Today ("BOOST") Board Chair Matthew Gallagher and BOOST Board members Marva Jo Camp, Linda Eberhart, Dr. Nancy S. Grasmick, Elizabeth Green, Beth Sandbower Harbinson, and Dr. A. Skipp Sanders (collectively "the BOOST Board"), all sued in their official capacities, move to dismiss Count I of the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and all counts for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

A proposed order is attached.

Respectfully submitted,

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September 3, 2019

CERTIFICATE OF SERVICE

I certify that, on this 3rd day of September, 2019 the foregoing was served by CM/ECF on all registered CMF users.

/s/ Sarah W. Rice
_____
Sarah W. Rice

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* * * * * * * * * * * *

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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TABLE OF CONTENTS

INTRODUCTION

Defendants State Superintendent Dr. Karen B. Salmon, along with Broadening Options and Opportunities for Students Today ("BOOST") Board Chair Matthew Gallagher and BOOST Board members Marva Jo Camp, Linda Eberhart, Dr. Nancy S. Grasmick, Elizabeth Green, Beth Sandbower Harbinson, and Dr. A. Skipp Sanders (collectively "the BOOST Board"), all sued in their official capacities, move to dismiss Count I of the complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) and all counts for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Bethel Ministries, Inc. ("Bethel") asserts six constitutional claims based in the First and Fourteenth Amendments in response to the BOOST Board's decision to disqualify Bethel from receiving BOOST student scholarship funding because Bethel's written admissions policy states that it will punish applicants based on their sexual orientation.

In Counts I and VI, Bethel alleges claims under the Free Exercise Clause and Establishment Clause. Bethel does not have standing to raise Count I because it is not an individual and the requirements for organizational standing cannot be met for a Free Exercise claim. Moreover, the BOOST nondiscrimination requirements are neutral laws of general application, and the complaint's allegations fail on their face to adequately allege any statements by BOOST that could be construed as hostile toward religion. These Counts must therefore be dismissed.

In Count II, Bethel alleges a violation of the Free Speech Clause under three different theories: that the nondiscrimination clause is an impermissible viewpoint-based regulation, a content-based regulation, and an unconstitutional condition. All three fail as a matter of law because nondiscrimination requirements do not regulate speech at all. They are instead permissible regulation of conduct—here, Bethel's adherence to an admission policy that permits exclusion of students based on sexual orientation or gender identity. Moreover, the State's desire to limit its private school scholarship program to subsidize only schools that do not discriminate is a scope-defining element of the program and is a compelling state interest. Maryland's interest in not granting the State's imprimatur to discriminatory educational admissions policies is achieved with minimal burden to Bethel through the BOOST regime, which allows Bethel to continue to express its position in the classroom and even elsewhere in its student handbook, as long as it refrains from adopting policies to exclude protected groups from admission.

In Counts III, IV, and V, Bethel alleges three Fourteenth Amendment claims that the Boost statute is void for vagueness, infringes on parental rights, and results in the unequal treatment of Bethel without rational basis. As an initial matter as to Counts III and V, Bethel has not adequately alleged a property interest. Moreover, the nondiscrimination statute gives reasonable notice about which conduct is prohibited—discriminating against people because of their sexual orientation or gender identity (as further defined in Maryland nondiscrimination law) in admissions to nonpublic schools receiving BOOST scholarship funding. And the BOOST Board had a rational basis for its administrative decisonmaking;

Bethel's written admissions policy indicated that students would be disciplined, up to and including expulsion, on the basis of conduct inconsistent with a heterosexual status. Other nonpublic schools, even those identified by Bethel as sharing Bethel's beliefs, did not have such admissions policies. Last, parents have no liberty interest in a state subsidy of their private educational choices for their children.

Bethel has failed to plead facts sufficient to establish any cause of action based in the First or Fourteenth Amendments against the BOOST Board. Bethel's complaint should therefore be dismissed in its entirety.

FACTS AS ALLEGED IN THE COMPLAINT AND STATUTORY BACKGROUND

The BOOST Program was enacted as part of the Fiscal Year 2017 Budget legislation. 2016 Md. Laws ch. 143 at 130-35. The purpose of the BOOST Program is to "provide[] scholarships for students who are eligible for the free or reduced-price lunch program to attend eligible nonpublic schools." *Id.* at 131. Eligible student applicants are ranked by need, and the BOOST Advisory Board is charged with reviewing and certifying the applicants as well as setting scholarship amounts. *Id.* at 138-9. In Fiscal Year 2017, the budget provided $5.5 million for the BOOST Program. *Id.* at 142.

The law also set forth eligibility requirements for nonpublic schools at which the scholarships can be used, including a requirement to (1) comply with Title VI of the Civil Rights Act of 1964; (2) comply with Title 20, subtitle 6 of the State Government Article, and (3) "not discriminate in student admissions on the basis of race, color, national origin,

or sexual orientation." *Id.* at 137. In the most recent legislative session, the requirements for the upcoming BOOST Program year were amended to require participating nonpublic schools "to not discriminate in student admissions, retention, or expulsion or otherwise discriminate against any student on the basis of race, color, national origin, sexual orientation, or gender identity or expression." 2019 Md. Laws ch. 565 at 151.

The nondiscrimination requirement further specifies that nonpublic schools are not required "to adopt any rule, regulation, or policy that conflicts with its religious or moral teachings." 2016 Md. Laws ch. 143 at 137. This statement is subject to a modifying clause in the next sentence, which provides "[h]owever, all participating schools must agree that they will not discriminate . . . ." *Id.* If a participating school does not "agree that they will not discriminate in student admissions on the basis of race, color, national origin, or sexual orientation," the school is required to "reimburse MSDE all scholarship funds received under the BOOST Program and may not charge the student tuition and fees instead." *Id.*

In program years 2016 and 2017, "Bethel signed the MSDE assurance that it does not discriminate in admissions based on sexual orientation." Compl. ¶ 73. In December 2017, MSDE requested handbooks from schools participating in BOOST and Bethel complied by providing its parent-student handbook. *Id.* at ¶¶ 95-96. Bethel's handbook contains a section captioned "**ADMISSIONS POLICY.**"[1] ECF 1-4, 8. Within the

[1] It is proper to consider material attached to the complaint upon a motion to dismiss when the plaintiff "attaches or incorporates a document upon which his claim is based." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167 (4th Cir. 2016).

admissions policy, Bethel specifies, in addition to its admissions criteria, that "[p]arents must understand that continued enrollment of their child(ren) is dependent on their support of the school, its staff, and its policies." *Id.* Directly following this statement, under a heading "**Statement of Nondiscrimination**," Bethel specifies that it "admits students of any race, color, and national or ethnic origin to all the rights, privileges, programs, and activities" and that "[i]t does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies . . . and other school-administered programs." *Id.* Bethel does not include sexual orientation or gender identity in its statement of nondiscrimination. *Id.* Instead, Bethel informs potential applicants that "[i]t should be noted, however, that Bethel Christian Academy supports the biblical view of marriage defined as a covenant between one man and one woman, and that God immutably bestows gender upon each person at birth as male or female to reflect His image." *Id.* Bethel goes on to caution that "faculty, staff, and student conduct is expected to align with this view," and requires faculty, staff, and students "to identify with, dress in accordance with, and use the facilities associated with their biological gender." *Id.*

Bethel enrolls students from prekindergarten through 8th grade. Compl. ¶ 36. Maryland prohibits individuals under the age of 15 years old from marrying in all circumstances, even with parental consent. Md. Code, Ann., Family Law Article, § 2-301(c) (LexisNexis 2012). No student of Bethel, therefore, could be in a same-sex marriage while enrolled at Bethel, but nevertheless, Bethel's policy requires "student

conduct" "to align with" the view that marriage is "a covenant between one man and one woman," a standard on which the student's "continued enrollment" depends. ECF 1-4, 8.

The Maryland State Department of Education (MSDE) and the BOOST Advisory Board asked Bethel for further explanation about how Bethel reconciled its assurance that it did not discriminate based on sexual orientation with its policy language which does not include sexual orientation as a category of non-discrimination and which is juxtaposed with a policy requiring student conduct to align with a "view of marriage defined as a covenant between one man and one woman," Compl. at ¶ 102, behavior on which "continued enrollment" depends. Bethel responded by affirming that its statement about marriage and gender identity applies when "a student *has been admitted*." ECF 1-6, 3. Bethel recognized that it communicated its "policy regarding *student conduct*" to potential students because Bethel "believe[s] it is important that students and parents understand . . . the requirements of BCA Students." ECF 1-7. Bethel did not and has not denied that a student could be subjected to discipline or expulsion after admission on the basis of sexual orientation status. ECF 1-6, 1-7.

The BOOST Board deliberated about whether Bethel's admissions policy met the BOOST legislation's nondiscrimination requirement in open session at its May 3, 2018 meeting. Compl. ¶ 105. In follow-up to questions from the BOOST Board, on May 29, 2018, Bethel sent a second letter further explaining its own interpretation of its policies. ECF 1-8. There Bethel asserted that "[a]ny student . . . is welcome to join our school community regardless of religious beliefs, experience of same-sex attraction, sexual self-

identification, past participation in same-sex behavior, beliefs about marriage, or beliefs about sexual morality." *Id.* Bethel also emphasized that its "behavioral standards address student actions," and that "sexual behavior of any type" was impermissible under those standards. *Id.* However, Bethel did not explain why its admission policy contained a nondiscrimination statement that omitted sexual orientation as a class, or why it specifically mentioned conduct (same-sex marriage) only entered into by non-heterosexual students in the text of its admissions policy. *Id.* Unlike the policies of several schools approved for BOOST that contained general disapproval of sexual misconduct by students, ECF 1-11 (*e.g.* Grace Academy, Highland View Academy, Spencerville Academy), Bethel's admissions policy is silent as to student conduct standards regarding "sexual behavior of any type." ECF 1-4, 8. Bethel also did not explain why its statements in the letter about who was welcome to join the school were not reflected in its admissions policy. ECF 1-8.

On June 21, 2018, the BOOST Board entered into closed session and decided Bethel was ineligible for the BOOST program. Compl. ¶ 129. At the same time, it decided that Broadfording Christian Academy and Grace Academy were eligible for the BOOST program, but that Woodstream Christian Academy was not. *Id.* at ¶¶ 131-32. On August 8, 2018, the BOOST Board sent a letter to Bethel memorializing its decision and explaining that it had proceeded to examine Bethel's admission policy on the principles that (1) a bona fide offer of admission necessarily entailed that the offer not be extended with the understanding that the school would "discipline or expel a student because of the student's sexual orientation, as this would make acceptance at the school illusory"; and (2) "[a]

discipline policy that, on its face, singles out conduct or behavior based on the sexual orientation of the student for discipline or expulsion does violate the nondiscrimination clause contained in the BOOST law." ECF 1-9. The letter further explained that discipline policies that prohibited certain conduct "without regard to sexual orientation" would not violate the nondiscrimination clause. *Id.* In examining Bethel's policy, the Board concluded that Bethel's requirement that students "align their conduct to the view of marriage as a covenant between one man and one woman (i.e., heterosexual)" meant that "[a] non-heterosexual student may reasonably view the policy as one that allows denial of admission or discipline or expulsion on the basis of his or her sexual orientation." *Id.* The Board concluded that "this policy, on its face, was in conflict with the nondiscrimination clause contained in the BOOST law." *Id.*

On December 12, 2018, the Maryland State Department of Education sent Bethel an invoice for the total scholarship amounts it received for the 2016-2017 school year and the 2017-2018 school year, $102,600. ECF 1-10. The letter indicated that "[i]f the school can demonstrate that it is financially unable to pay this indebtedness in one lump sum, payment in installments may be arranged." *Id*. Bethel's complaint is silent as to whether it requested payment in installments or any other accommodation or reconsideration of the BOOST Board's decision.

ARGUMENT

I. BETHEL HAS NOT SUFFICIENTLY ALLEGED THAT IT HAS STANDING TO BRING A FREE EXERCISE CLAIM.

Bethel has not sufficiently alleged facts to establish a plausible claim for standing under the Free Exercise Clause. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing must be established "with the manner and degree of evidence required at the successive stages of the litigation"). The Free Exercise Clause's "purpose is to secure religious liberty in the individual." *School Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). Bethel is not an individual, but rather a "non-profit religious corporation under the laws of the State of Maryland." Compl. ¶ 21. In order for Bethel to proceed under an organizational theory of standing, it must adequately allege: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). As a threshold matter, Bethel has not alleged any injury to any of its members' right to free exercise of religion. Compl. ¶ 164 (alleging injury only as to Bethel). More fundamentally, a Free Exercise claim "is one that ordinarily requires individual participation." *Harris v. McRae*, 448 U.S. 297, 321 (1980). Organizations do not have standing to press Free Exercise

Clause claims of their members.[2] *Id*; *accord Cornerstone Christian Sch. v. University Interscholastic League*, 563 F.3d 127, 134 (5th Cir. 2009) (school did not have standing to assert Free Exercise claim related to sports league membership). Therefore Bethel's Free Exercise Clause claim should be dismissed for lack of jurisdiction under 12(b)(1).

II. BETHEL MUST ALLEGE SPECIFIC FACTS SUFFICIENT TO SUPPORT ITS LEGAL CLAIMS.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to 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)). This "plausibility" standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556). That is, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). In applying this standard, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation," and "[t]hreadbare recitals of the elements of a cause of action,

[2] *Burwell v. Hobby Lobby Stores, Inc.* is not to the contrary; there, the Supreme Court held that the Religious Freedom Restoration Act's ("RFRA's") use of the word "person" extended its scope of protection to include nonprofit corporations and closely-held for profit corporations. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 708 (2014). RFRA is not applicable to the states. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

supported by mere conclusory statements, do not suffice" and "are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 678–79.

III. THE FIRST AMENDMENT PERMITS STATES TO PROTECT VULNERABLE GROUPS FROM DISCRIMINATION IN EDUCATION.

The Supreme Court recently rejected Bethel's main contention in this lawsuit when it reaffirmed that while "religious and philosophical objections are protected, it is a general rule that such objections do not allow . . . other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719 (2018); *see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 572 (1995) (nondiscrimination provisions "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

Bethel has alleged no facts that would justify departure from this general rule. Bethel's assertions that its religious beliefs exempt it from Maryland's neutral nondiscrimination provisions are at odds with decades of jurisprudence. Such nondiscrimination requirements are common. In its decision holding that programs like the BOOST program, which provide scholarships to students to attend private schools of their choice, did not violate the Establishment Clause, the Supreme Court expressly noted that a key element of the program was that "[p]articipating private schools must agree not

to discriminate." *Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002). Bethel's claim that it is somehow exempt from this neutral law of general applicability because of its religious beliefs under the First Amendment is a claim without legal foundation. "Invidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Norwood v. Harrison*, 413 U.S. 455, 470 (1973).[3]

A. The BOOST Nondiscrimination Requirements Are Neutral as to Religion and Therefore Do Not Violate the Free Exercise or Establishment Clauses.

1. Even if Bethel had Standing to Raise a Free Exercise Claim, It Failed to Allege One Under Any Theory.

Bethel contends that the BOOST nondiscrimination requirement, which constrains the receipt of state funding by entities that discriminate "on the basis of race, color, national origin, sexual orientation, or gender identity or expression," 2019 Md. Laws ch. 565 at 151, impermissibly infringes its right of free exercise of religion. But there is nothing about "the right of free exercise" that "relieve[s] an individual of the obligation to comply with a valid and neutral law of general applicability." *Employment Div., Dep't of Human Res. Of Or. v. Smith*, 494 U.S. 872, 879 (1990).

Bethel has made no factual contentions that the two statutes at issue "target[] its religious beliefs or practices." *Bethel World Outreach Ministries v. Montgomery County*

[3] Bethel has not asserted any claim on the grounds of its right to expressive association.

Council, 706 F.3d 548, 556 (4th Cir. 2013). A law does not target religious beliefs or practices merely because "the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (STEVENS, J., concurring in judgment)). Instead, a law departs from neutrality to target religious beliefs or practices only when "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). Bethel's logic, that (1) it has been sanctioned because it discriminates; (2) it discriminates because of its religious beliefs; and (3) therefore it is being sanctioned for its religious beliefs, is a "syllogism . . . [that] runs directly counter to the premise of *Smith*." *New Hope Family Servs., Inc. v. Poole*, No. 5:18-CV-1419, 2019 WL 2138355, at *11 (N.D.N.Y. May 16, 2019) (rejecting claim from foster care agency that requirement that it not discriminate against same-sex couples violated Free Exercise Clause). Factual allegations supporting that syllogistic reasoning therefore cannot support a Free Exercise claim.

The BOOST nondiscrimination provision is neutral as to religious beliefs. That is, "merely because" the sexual orientation and gender identity nondiscrimination clauses "'happen[] to coincide or harmonize with the tenets of some or all religions,'" does not mean the provision favors or disfavors religion. *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)). It is true that the nondiscrimination provisions adopted by the General Assembly coincide or harmonize with the religious beliefs of those that believe non-heterosexual people and people of

varying gender identities should be accorded civil rights, and also therefore conflict with the religious beliefs of those who do not. *E.g.*, Exhibit 1, Excerpts of Testimony of Religious Leaders from Legislative Bill File for House Bill 307 (2001), and Exhibit 2 Excerpts of Testimony of Religious Leaders from Legislative Bill File for Senate Bill 212 (2014).[4] But this coincidence is insufficient to provide the foundation for a First Amendment claim.

A comparison between the General Assembly's extension of nondiscrimination provisions to the BOOST program and the city ordinances at issue in *Hialeah* illustrates this point. The ordinances at issue in *Hialeah* were tailored in such a way that "almost the only conduct" prohibited in practical application of the ordinances was "the religious exercise of Santeria church members." *Hialeah*, 508 U.S. at 535. Here, by contrast, the statutes at issue preclude discrimination based on sexual orientation and general identity. Courts and legislatures alike have recognized that the desire to treat people differently based on sexual orientation can have religious or non-religious origins. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical

[4] This Court is "not confined to the four corners of the complaint" and "may properly take judicial notice of matters of public record." *U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). Courts may consider legislative history materials, which are "not a matter beyond the pleadings but . . . an adjunct to the [statute] which may be considered by the court as a matter of law." *Anheuser–Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995), *judgment vacated on other grounds*, 517 U.S. 1206 (1996), *readopted*, 101 F.3d 325 (4th Cir. 1996).

premises"); "Interim Report of the Special Commission to Study Sexual Orientation Discrimination in Maryland" 2 December 15, 2000, available at http://mdlaw.ptfs.com/awweb/pdfopener?md=1&did=6852 ("We recognize and respect that some have objections to certain sexual orientations, whether based on personal, religious or philosophical convictions").[5] Bethel's religious beliefs at issue here "include beliefs that there are two immutable and complementary sexes; that marriage is the consensual, lifelong, exclusive union of one man and one woman; and that sexual relations must be reserved for marriage." Compl. ¶ 165. But Bethel has made no factual allegation that the General Assembly enacted either version of the nondiscrimination provision with any purpose to infringe upon or restrict religious practice related to those sincere religious beliefs. *See* Comp., ¶¶ 60-91; 150-156. Having included no factual allegations that the General Assembly departed from neutrality in enacting the BOOST legislation, Bethel has failed to state a Free Exercise claim with regard to the statute.

The complaint also does not contain sufficient factual allegations to support a claim that the BOOST Board evinced "a clear and impermissible hostility toward the sincere religious beliefs" in the application of the nondiscrimination provision to Bethel. *See*

[5] The Special Commission to Study Sexual Orientation Discrimination was created by Governor Parris Glendening in Executive Orders 01.01.2000.19 and 01.01.2000.22. When the Maryland General Assembly passed House Bill 307 in the 2001 Regular Session, the accompanying Fiscal and Policy Note specified that the "bill embodies the findings and conclusions of the special commission." Department of Legislative Services, "Fiscal and Policy Note, Revised: HB 307," available at http://mgaleg.maryland.gov/2001rs/fnotes/bil_0007/hb0307.PDF.

Masterpiece Cakeshop, 138 S. Ct. at 1729. In support of its claim, Bethel has alleged three statements by Matthew Gallagher, Chair of the BOOST Board, "did not display appropriate neutrality as a decision-maker." Compl. ¶ 106. But all three of the statements, as alleged by Bethel, discuss only conduct that Mr. Gallagher perceived as discriminatory and do not comment on Bethel's beliefs at all. In the first statement, Mr. Gallagher expresses his opinion that Bethel signed an assurance "illegally." *Id.* at ¶ 107. The statement did not express any opinion as to the content of any belief that may or may not be held by Bethel, religious or otherwise, but does express an opinion about Bethel's conduct. The second statement identified by Bethel was Mr. Gallagher's opinion that "he did not 'think the burden should be on the Board'" to prove whether or not an admissions policy was discriminatory when the policy leaves 'the door open to discriminating." *Id.* at ¶ 108. Again, this statement says nothing about Bethel's beliefs and is an expression of Mr. Gallagher's opinion about the standard the Board should use. Last, Bethel identifies a specific discussion of Bethel's admissions policy. Mr. Gallagher read part of Bethel's Admission's Policy and expressed his opinion that the policy was discriminatory against students based on their sexual orientation. However, Mr. Gallagher stated "and here's where it becomes problematic" *after* reading Bethel's statement of religious belief—where the policy articulates that "students conduct is expected to align with this view." *Id.* at ¶ 110. Mr. Gallagher then explained that student conduct policy "language affords them the opportunity to discriminate" against "a person who identifies as a different orientation from their birth." *Id.* Whether Mr. Gallagher "treated the sexual orientation nondiscrimination

requirement as encompassing gender identity," *id.* at ¶ 112, such treatment is no expression of hostility toward religion.[6] Moreover, "[i]f all comment and action on religiously motivated conduct by those enforcing neutral, generally applicable laws against discrimination is construed as ill will against the religious belief itself, then *Smith* is a dead letter, and the nation's civil rights laws might be as well." *Fulton v. City of Philadelphia*, 922 F.3d 140, 159 (3d Cir. 2019).

The facts involved in the adjudicatory treatment of Mr. Phillips, the cake-baker in *Masterpiece Cakeshop*, stand in stark contrast to Mr. Gallagher's even-handed remarks. 138 S. Ct. 1729-30. The statements the Court found to be "susceptible of different interpretations" involved a direct discussion of Mr. Phillips' beliefs, and whether he would need to compromise or give up those beliefs in order to operate in Colorado. *Id.* at 1729 (businessman "cannot act on his religious beliefs 'if he decides to do business in the state;" businessman "needs to look at being able to compromise" in order to do business in the state). Moreover, the Court did not rely on those statements alone; instead it also considered an actively hostile statement that the Court described as comparing "Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust."

[6] If Bethel was concerned with the correctness of the Board decision, Bethel had a right under Maryland law to seek judicial review of the BOOST Board's decision under Maryland Rules, Title 7, subtitle 4, Administrative Mandamus, which provides for "judicial review of a quasi-judicial order or action of an administrative agency where review is not expressly authorized by law." Md. Rule 7-401(a). Bethel chose not to pursue this remedy, and its attempt to elevate their administrative law claim to one of constitutional dimensions, thereby bypassing applicable appeal deadlines, should be rejected.

Id. No such comparisons are alleged here. Moreover, the Court also found the Colorado Civil Rights Commission actually engaged in disparate treatment when it found "on at least three other occasions" that "the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text" was permissible. *Id.* at 1730.

Here, however, Bethel has alleged no instance where any other school was treated more favorably because of the secular nature or content of their beliefs—in fact, Bethel's complaint asserts just the opposite. Bethel identifies three other schools it asserts "have similar beliefs and policies on marriage and sexual conduct," Broadfording Christian Academy, Grace Academy, and Woodstream Christian Academy. Compl. ¶ 133. Bethel then complains that two of those schools, which allegedly hold similar beliefs but whose *admissions policies* did not expressly exclude or threaten sanction to prospective students based on their sexual orientation, *see* ECF 1-11, 2-3; 5, were permitted to continue in the program. Compl. ¶ 131. Woodstream Christian Academy was, according to the complaint, deemed ineligible. Compl. ¶ 132. Woodstream Christian Academy's policy stated that "homosexuality" in addition to other "deviant behavior of a sexual nature" would "be grounds for expulsion." ECF 1-11, 6. The different treatment of these four schools is justified on the face of the pleadings—those schools with discriminatory policies were excluded and those schools whose policies were expressed neutrally with respect to the covered classes were permitted to participate, regardless of their similar beliefs. The type of Free Exercise claim at issue in *Masterpiece Cakeshop* has no application to the facts of this complaint.

The Supreme Court's recent holding that a state government may not "disqualify" religious organizations "from a public benefit solely because of their religious character," *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017), also has no application to Bethel's factual allegations. Here, there is no allegation in the complaint that the BOOST Board took any action based on Bethel's "religious character." In *Comer*, the Court specified that "[t]he express discrimination against religious exercise here is not the denial of a grant, but rather the refusal to allow the Church—solely because it is a church—to compete with secular organizations for a grant." *Id.* at 2022. Bethel's complaint fails to allege it was categorically excluded from the BOOST award approval process because it is a religiously affiliated school or even because it adheres to particular religious beliefs. *E.g.*, Compl. ¶ 131.

2. Because the BOOST Nondiscrimination Provisions Are Neutral, Bethel Has Not Alleged a Violation of the Establishment Clause.

Bethel cannot state an Establishment Clause claim based on its bare allegations related only to the "excessive entanglement" prong of the three-part test set forth in *Lemon v. Kurtzman*, 403 U. S. 602 (1971). Bethel's allegations that the BOOST Board "determined that Bethel's religious beliefs about marriage and biological sex constituted discrimination based on sexual orientation in student admissions," and that BOOST Board members "substituted their own interpretation of Bethel's religious beliefs" are conclusory allegations without specific factual basis, and are alleged merely "on information and belief" and are not based on "factual information that makes the inference of culpability

plausible." *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 768 (D. Md. 2015). They therefore cannot form the sole basis for Bethel's claim.

Additionally, the isolation of the "excessive entanglement prong" from the *Lemon* test is incorrect. "If the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019) (Alito, J.). Instead, the Court applies specific precedent where available; here, *Bob Jones University* establishes that when a policy involving a government subsidy to private schools who wish to discriminate is at stake, it will be upheld if it "is founded on a neutral, secular basis." *Bob Jones Univ.*, 461 U.S. at 604 (internal quotation omitted). Moreover, the Supreme Court never mentioned the nondiscrimination requirement at issue in the program examined in *Zelman v. Simmons-Harris*, when it was considering whether scholarships given to students for use at sectarian schools could withstand the Establishment Clause. 536 U.S. at 645. Bethel has failed to allege a claim for violation of the Establishment Clause.

B. Bethel Has Failed To Adequately Allege Facts Sufficient To Establish a Violation of the Free Speech Clause Under Any Theory.

Bethel's First Amendment claims based on the Free Speech Clause fair no better. The BOOST nondiscrimination requirements do not regulate speech, they regulate conduct. Bethel's failure to allege facts showing that the nondiscrimination requirements reach beyond conduct precludes any relief under the Free Speech clause.

1. Requiring Bethel's Written Admissions Policy to Conform With the Nondiscrimination Requirement Is a Regulation of Conduct.

"[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150-51 (2017) (quoting *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"). When a government policy "aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior," it is a "reasonable and viewpoint neutral" limit that does not impinge on free-speech or expressive-association rights. *Christian Legal Soc. Chapter of the Univ. of Cal. Hastings v. Martinez*, 561 U.S. 661, 696 (2010).

The BOOST nondiscrimination requirement "neither limits what [BOOST] schools may say nor requires them to say anything." *FAIR*, 547 U.S. at 60. Bethel and any other school seeking to qualify for BOOST program eligibility remain free to "express whatever views they may have," *id.*, about groups covered by the nondiscrimination provision; the program's only requirement is that Bethel alter its conduct to cease excluding those groups from attending its school by threatening potential expulsion based on a student's status.

The conduct-only nature of the BOOST nondiscrimination provisions is evident from the allegations in Bethel's complaint. First, although Bethel alleged that it stated to the BOOST Board in written correspondence that it "does not discriminate in student admissions based on sexual orientation," ¶ 104, and "forbids all admitted students from

engaging in any sexual conduct," ¶ 103, Bethel's statements are not reflected in its admissions policy. *See* ECF 1-4, 8. Second, Bethel alleges that Grace Academy and Broadfording Christian Academy "have similar beliefs and policies on marriage and sexual conduct." ¶ 133. Bethel admits that it was given examples of admissions policies that were acceptable to the BOOST Board, ¶ 141. In those examples, the BOOST Board set out how Grace Academy altered its policy to make clear that "[s]exual immorality" could be cause for expulsion and eliminated separate mention of "homosexual orientation" as the basis for expulsion. ECF 1-11. Broadfording Christian Academy similarly was granted reconsideration because "sexual immorality," with no specific reference to orientation, was the only impermissible conduct mentioned in the policy. *Id.* No school was required to alter any statement, about religion or otherwise, outside of its admissions policy.

The BOOST Board did evaluate applicant schools by examining the language of their written admissions policies, ¶ 92, after it had received written assurances of compliance, ¶ 87.[7] A policy is "[a] standard course of action that has been officially established by an organization . . . ." POLICY, Black's Law Dictionary (11th Ed. 2019). Examining written policies to investigate an organization's "standard course of action," *id.*, is an unremarkable enforcement step, and flows directly from the same principle that because legislatures may "prohibit employers from discriminating in hiring on the basis of

[7] Bethel has not signed a written assurance that it does not discriminate on the basis of gender identity because it has not applied for the BOOST program since the gender identity criteria was added, and does not make any assertion that it does not discriminate on the basis of gender identity in its complaint.

race," they also may "require an employer to take down a sign reading 'White Applicants Only . . . .'" *FAIR*, 547 U.S. at 62. That a statute requires removal or alteration of words evincing a policy "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Id.* Just as a letter declining to admit a student based on sexual orientation or gender identity would be evidence that Bethel discriminated in admissions based on sexual orientation or gender identity, an admissions policy that states students must conform their conduct to a standard incompatible with the student's status as a member of a protected class in order to gain admission is evidence that Bethel discriminated in admissions.

2. The BOOST Nondiscrimination Requirement Is a Permissible Condition on State Funding.

Bethel voluntarily applied to be designated eligible to receive state funding in the form of student BOOST scholarship funds. If an applicant for a government grant program objects that a condition of the funding "may affect the recipient's exercise of its First Amendment rights," generally "its recourse is to decline the funds." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (*AOSI*). And, "government is not required to subsidize activities that it does not wish to promote." *Matal v. Tam*, 137 S. Ct. 1744, 1761 (2017). "[T]he Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake." *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998). It is settled precedent that even if a State has a "special interest in elevating the quality of

education in both public and private schools," it need not grant aid to schools that discriminate, because although "the Constitution may compel toleration of private discrimination in some circumstances," that Constitution does not "require[] state support for such discrimination." *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973).

The BOOST nondiscrimination provision, and the application thereof, does not fall within the narrow exception to the government's discretion when making funding decisions that the Court articulated in *AOSI*. In *AOSI*, the challenged provision "mandate[d] that the recipients of . . . funds explicitly agree with the Government's policy to oppose prostitution and sex trafficking." *AOSI*, 570 U.S. at 213. In other words, the challenged provision told "'people what they must say.'" *Id.* (quoting *FAIR*, 547 U.S. at 61). The Supreme Court's cases draw a distinction between "conditions that define" the government funding program and "those that reach outside it," finding impermissible only those conditions that reach outside the program to pose an undue burden on recipients' First Amendment expressive activity. *AOSI*, 570 U.S. at 217. But the nondiscrimination provision at issue here regulates only schools' conduct, and does not require them to say anything if their admissions policy, including in its written form, conforms to the requirement. Bethel and any other school remain free to teach, write about, speak, or take out billboards expressing any religious or other belief.

Bethel's only allegation that its expressive activity was curtailed is its conclusory statement that "the BOOST nondiscrimination requirements condition Bethel's ability to participate in the BOOST program and receive BOOST funding on Bethel changing the

language in its handbook about its religious beliefs." Compl. ¶¶ 219-222. But that statement must be reconciled with the letter sent by the BOOST Board and incorporated into Bethel's complaint, which clearly identified only the *admissions policy* language, not any other language in its handbook, including its Statement of Faith, which contains identical language. *Compare* ECF 1-9 *with* ECF 1-4 at 7, 8. The BOOST Program nondiscrimination requirements are "conditions that define" the program as one that provides funds to students to attend nonpublic schools that do not discriminate on the basis of sexual orientation, and now gender identity. These conditions leave Bethel free to express its religious beliefs in its preferred form, including on *the next page of their handbook*, as long as that speech does not amount to an actual denial of admissions, whether by outright rejection, expulsion post-admission, or deterring applications by conveying in the admissions policy that the enumerated classes are unwelcome to apply.

3. Ensuring State Funds Do Not Support Discrimination in Education Is A Compelling State Interest.

As explained above, the BOOST nondiscrimination requirements are viewpoint- and content-neutral because they only regulate conduct. Moreover, because of their focus on conduct, the requirements do not implicate the bar on unconstitutional conditions in government funding most recently set forth in *AOSI*. Therefore, there is no basis to apply any form of scrutiny to the BOOST Board's actions. The BOOST Board's actions nevertheless are based in long-recognized compelling state interests to prevent discrimination in education.

In 2001, Maryland revised its public accommodations, employment, state government, and housing discrimination laws to expand their ambit to prohibit discrimination against people based on their sexual orientation. 2001 Md. Laws ch. 340. In 2006, Maryland extended these requirements to commercial contracts with the State. 2006 Md. Laws ch. 283. In 2012, Maryland's General Assembly and the people of Maryland "acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood," *United States v. Windsor*, 570 U.S. 744, 764 (2013), by passing the Civil Marriage Protection Act. 2012 Md. Laws ch. 2. "When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community." *Windsor*, 570 U.S. at 768. And, in 2014, the General Assembly passed the Fairness for All Marylanders Act, 2014 Md. Laws ch. 474, adding gender identity to the list of classes covered by nondiscrimination laws and extending protection to a class of transgender people that this Court has recognized as "at least a quasi-suspect classification." *M.A.B. v. Board of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 721-22 (D. Md. 2018) (quoting *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018)).

When considering extending nondiscrimination laws to include "sexual orientation" and "gender identity," the General Assembly heard testimony from religious groups and leaders both for and against the statutes in question. Ex. 1, Ex. 2. One talking point

included with the Bill File for House Bill 307, the sexual orientation legislation, specifically argued that the General Assembly "should not establish policies to allow private schools to discriminate, especially if the school receives State funding." Exhibit 3, Excerpt of Bill File for House Bill 307 (2001). The same document reasoned that contemplated amendments that would allow a religious or conscientious objection would "gut the bill" and allow "[a]nyone who wants to discriminate . . . to use this language as a shield." *Id.* In support of the Fairness for All Marylanders Act, the Maryland PTA testified that more than 3 out of 4 transgender persons "were bullied or harassed in school, 1 in 3 were assaulted at school, and 1 in 10 were sexually assaulted at school or in the local community *because of either their outward gender expression or a perception about their gender expression*." (emphasis in original). Exhibit 4, Ray Leone, Testimony in Support of Senate Bill 212 (2014). The Maryland PTA further testified that 15% dropped out of school because of conflicts related to their gender expression. *Id.* "Stigma has 'a corrosive influence on health' and can impair a person's social relationships and self-esteem." Amicus Curiae Brief for States of Illinois *et al.* (including Maryland), *Bostock v. Clayton County, Ga.*, Nos. 17-1618, 17-1623, 18-107 (U.S. July 3, 2019) at 8; *see also Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.").

The State's goal of "eliminating discrimination and assuring its citizens equal access to publicly available goods and services," when "unrelated to the suppression of expression, plainly serves compelling state interests of the highest order." *Roberts v. U.S.*

Jaycees, 468 U.S. 609, 624 (1984). These interests are heightened in the educational context; "[u]nder *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), discriminatory treatment exerts a pervasive influence on the entire educational process." *Norwood*, 413 U.S. at 469. The impact of exclusion from an educational institution "is greater when it has the sanction of the law," because state-sanctioned exclusion from educational opportunities can impose a "sense of inferiority" that "affects the motivation of a child to learn." *Brown v. Board of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 494 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955). Discrimination in admissions to educational institutions "is not barred by the Constitution, nor does it invoke any sanction of laws, but neither can it call on the Constitution for material aid from the State." *Norwood*, 413 U.S. at 469. The "unique evils" of discrimination transcend "the point of view such conduct may transmit," *Roberts*, 468 U.S. at 628, and the State has a compelling interest in minimizing stigmatic harms to classes it has identified have need of enhanced protection, *see Windsor*, 570 U.S. at 768.

IV. BETHEL HAS NO CONSTITUTIONAL CLAIM UNDER THE FOURTEENTH AMENDMENT.

A. Bethel's Fourteenth Amendment Claims Are Barred Because It Has No Liberty or Property Interest in Receiving BOOST Funds.

Bethel has not specified any property interest related to receipt of BOOST funds from scholarship recipients to which it has a "legitimate claim of entitlement." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). BOOST scholarships are

awarded to "students who are eligible for the free or reduced-price lunch program," and who are ranked on the basis of financial need. *E.g.* 2016 Md. Laws ch. 143 at 130-35. It is then up to the student to select a BOOST-approved private educational institution to use the scholarship; such participating schools must meet testing, nondiscrimination, and reporting requirements to become eligible for funding. *Id.* The BOOST statute specified that if a school "does not comply with" the nondiscrimination requirements "it shall reimburse MSDE" for all scholarship funds received, hold any scholarship recipients harmless, and be subject to "ineligibility for participating in the BOOST program." *Id.* No process is specified in the statute; MSDE and the BOOST Board are charged with administering the grant program "in accordance with" the "guidelines" set forth in the statute. *Id.*

The BOOST Program establishes nothing like a property interest for the recipient schools—it could not; it is possible that even eligible schools never receive any funding because students do not choose them. And, "no property interest is implicated by the nonrenewal of a contract or license where there is no entitlement to the renewal." *Richardson v. Town of Eastover*, 922 F.2d 1152, 1157 (4th Cir. 1991). Here there is no entitlement granted to continued participation in the BOOST program, and therefore Bethel has failed to establish an essential element of its Fourteenth Amendment claims set forth in Counts III and V.

B. The BOOST Law Is Not Unconstitutionally Vague and Bethel Cannot Challenge Vagueness on an As-Applied Basis.

Bethel's claim that the BOOST program statute is void for vagueness is incorrect for additional reasons. As explained above, the BOOST nondiscrimination requirement does not "'interfere[] with the right of free speech or of association,'" and therefore the "'more stringent vagueness test,'" applicable to such statutes, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 19 (2010) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)), does not apply here. Moreover, Bethel has failed to identify what part of the nondiscrimination requirement language "'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (quoting *United States v. Williams*, 554 U.S. 285, 304 (2008)). Bethel's unsupported assertions that the "BOOST sexual orientation nondiscrimination requirement does not define sexual orientation or discrimination" Compl. ¶ 232, and that the "State has not defined the gender identity nondiscrimination provision," *id.* at ¶ 245, is contrary to other provisions of Maryland nondiscrimination law that provide these definitions. Md. Code, State Gov't, § 20-101(e) (LexisNexis 2014) (defining "gender identity"); (g) (defining "sexual orientation"). *See Manning v. Caldwell*

for City of Roanoke, 930 F.3d 264, 273 (4th Cir. 2019) (assessing a statute for vagueness requires examination of "[t]he integrated structure of the challenged scheme . . . .").

To the extent Bethel's vagueness claim is an as-applied challenge to the BOOST Board's decision in its specific case, ¶¶ 233-242, it is "is effectively 'subsumed' into the free exercise claim." *Hunt Valley Baptist Church, Inc. v. Baltimore County, Maryland*, No. CV ELH-17-804, 2017 WL 4801542, at *39 (D. Md. Oct. 24, 2017) (quoting *Doswell v. Smith*, 139 F.3d 888, at *6 (4th Cir. 1998) (table)). As for the gender identity nondiscrimination requirement, it applies to forbid admissions practices refusing admission, imposing discipline, or otherwise barring students based on their "gender-related identity, appearance, expression, or behavior of a person, regardless of the person's assigned sex at birth." State Gov't, § 20-101(e). Bethel's unsupported assertion that "[i]t is impossible to know what a person's gender identity or expression may be, or how it applies," Compl. ¶ 246, when *its own policy* requires "students to use the facilities set aside for their biological sex," *id.* at ¶ 249, and "to adhere to the dress code for the grade and biological sex," ¶ 250, is nonsensical. Insofar as Bethel is itself able to discern the "biological sex" of a student in order to enforce its policy by requiring adherence to a dress code, it must logically "know what a person's gender identity or expression may be." And there can be no doubt that "the State" *does* mean to "impose affirmative obligations on nonpublic schools" to admit and not expel students of all gender identities by requiring nonpublic schools not to discriminate against students on the basis of gender identity in admissions, retention, or expulsion. *C.f.* Compl. ¶ 247. That Bethel's admissions policy

violates the BOOST nondiscrimination statute does not make the statute vague. The BOOST nondiscrimination requirement provides "objectively discernable standards," *Manning*, 930 F.3d at 278, with respect to gender identity discrimination, and is therefore not void for vagueness.

C. The State Defendants Had a Rational Basis for Bethel's Exclusion from the BOOST Program.

Bethel asserts a class-of-one equal protection claim in Count V, alleging that it was treated differently than other similarly situated nonpublic sectarian schools with "similar beliefs and policies on marriage and sexual conduct." ¶ 274. Because the complaint also demonstrates that schools with like admissions policies were treated alike, Bethel fails to state a claim for violation of the Equal Protection Clause.

MSDE and the BOOST Board were granted discretion to "administer the grant program in accordance with . . . guidelines" set forth by the legislature, which included eligibility and reporting requirements for non-public schools to participate in the BOOST program. 2016 Md. Laws ch. 143 at 130-35. When "state action" involves "discretionary decisionmaking based on a vast array of subjective, individualized assessments," "treating like individuals differently is an accepted consequence of the discretion granted" and there is no available constitutional cause of action for the "arbitrary singling out of a particular" entity for different treatment. *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 603 (2008). Even if rational basis review applied, there is a rational basis that flows from Bethel's own allegations—admissions policies which a reasonable applicant could construe as

permitting rejection or expulsion based on sexual orientation or gender identity status led to exclusion from the program, whereas those schools who either never had such language or removed it were approved. *Compare* ECF 1-11, 2-3; 5 *with* ECF 1-11, 6. Even if a state actor is wrong about what its statute means or its assessment of facts applicable to a grant application, "the agency's otherwise rational decision would still pass constitutional muster." *XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 76 (D.D.C. 2015). Bethel has not alleged facts sufficient to carry its "'heavy burden of negating every conceivable basis which might reasonably support the challenged classification.'" *Pulte Home Corp. v. Montgomery County, Maryland*, 909 F.3d 685, 695 (4th Cir. 2018) (quoting *Van der Linde Housing, Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290, 293 (4th Cir. 2007)).

D. There Is No Parental Right to Government Funding of Private Educational Choices.

The Supreme Court has "held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 549 (1983). The Seventh Circuit has directly addressed the question of whether declining to provide private schools with a funded benefit, in that case transportation funding, implicated parental rights and squarely rejected that proposition. *St. Joan Antida High Sch. Inc. v. Milwaukee Pub. Sch. Dist.*, 919 F.3d 1003, 1009 (7th Cir. 2019). The Fourth Circuit has also rejected the contention that a county policy prohibiting

homeschooling parents and all other private educational entities "from using [] community centers as private educational centers" unconstitutionally restricted parents' "decisions concerning the care, custody, and control of their children." *Goulart v. Meadows*, 345 F.3d 239, 260-61 (4th Cir. 2003). Bethel has not made any allegation that parents would not be able to "choose religious schools where their children will receive a distinctly Christian education," either by choosing a school that has qualified for receipt of BOOST scholarships or by choosing to go to a school without the benefit of a BOOST scholarship. ¶¶ 254-262. Because parents do not have a right to a subsidy of their liberty interest, as long as their right to choose whichever school they prefer remains unimpeded there is no equal protection claim.

CONCLUSION

Bethel's claim under the Free Exercise Clause, Count I, should be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). Count I should additionally be dismissed and Counts II-VI should be dismissed because they fail to set forth sufficient factual allegations to support any legal cause of action under Rule 12(b)(6).

Respectfully submitted,

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Attorney General of Maryland

/s/ Sarah W. Rice
_____
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September 3, 2019

CERTIFICATE OF SERVICE

I certify that, on this 3rd day of September, 2019 the foregoing was served by CM/ECF on all registered CMF users.

/s/ Sarah W. Rice
_____
Sarah W. Rice

Exhibit 1

Testimony of
Rev. Richard T. Lawrence
on H.B. 307 and S.B. 205

Ladies and Gentlemen:

My name is Richard T. Lawrence, and I am pastor of St. Vincent de Paul Church in Baltimore. I am testifying this afternoon, not as a spokeperson for the Archdiocese of Baltimore, nor for the Maryland Catholic Conference, nor even as an expert theologian, but simply to put before you the cares and concerns voiced to me by some members of my congregation for the welfare of their adult children who are homosexual.

These mothers and fathers of gays and lesbians understand full well that it is the constant teaching of the Catholic Church that any uses of the sexual faculty outside of marriage, and even certain uses of that faculty within marriage, are morally disordered. They also understand that their daughters and sons are, in the words of the American bishops, "Always our children," and they are concerned for their welfare. They know that, in the words of Catechism of the Catholic Church, "The number of men and women who have deep-seated homosexual tendancies is not negligible. They do not choose their homosexual condition; for most of them it is a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided." (Para. 2358).

These parents are fearful, as are all parents, for their children's future. But they have greater reason for fear than most parents. They are afraid, for instance, not only that their children will not succeed on their jobs (a fear all parents share), but also that if their sons' or daughters' sexual orientation becomes public knowledge, they could loose their jobs, or be subject to cruel harrasment by their co-workers.

For reasons such as this, more than one parent of a gay or lesbian son or daughter has asked me for help. These are not militants or activists, they are parents. They are not asking for legal recognition of homosexual unions, nor legal protection for any sort of sexual behavior, nor affirmative action for employment of homosexuals, nor anything of that sort. All they are asking is that they have the assurance that the laws of this State will help protect their daughters and sons from being harassed on the job, run out of their neighborhood, or embarassed in public places, simply because of their sexual orientation.

I hope that the Legislature, speaking for the people of Maryland, will find a way to give them that assurance. Thank you.

BALTIMORE
THE PRESBYTERY OF BALTIMORE
PRESBYTERIAN CHURCH (USA)

INFORMATION COPY
Re: HB 307

February 28, 2001

Senator Walter Baker
310 James Senate Office Bldg.
Annapolis, MD 21401-1991

Dear Senator Baker,

I write on behalf of the Presbytery of Baltimore, Presbyterian Church (U.S.A.) to urge your vote in the Judicial Proceedings Committee to allow the Anti-Discrimination Act (SB 205) to go to the full Senate for a vote. That a matter of such importance to a significant number of Marylanders would not be voted on by the full legislature is sad, and I urge your effort to allow that vote to happen.

Gay and lesbian persons are a persecuted minority in our society. In Maryland they face little discrimination at the hands of government, but that same government looks on and allows significant discrimination against gay and lesbian persons by other private parties—discrimination in employment, housing, and public accommodations that would be illegal if directed—even by private parties—against African-Americans, Hispanics, or Jews. This is a situation that should be addressed and corrected.

Nationally, the Presbyterian Church (U.S.A.) has consistently endorsed equal protection under the law for gay and lesbian persons, since it first addressed this issue in 1978. Presbyterians here in Maryland, acting through the Presbytery of Baltimore which represents Central and Western Maryland, have endorsed this call, and have specifically called upon counties and the state to take action.

I appreciate your attention to this letter, and will appreciate your efforts to allow a full vote in the Senate.

Sincerely,

Charles P. Forbes

Charles P. Forbes
Stated Clerk

Margaret J. Ferguson
MODERATOR

Charles P. Forbes
STATED CLERK

Philip J. Sorensen
INTERIM EXECUTIVE PRESBYTER

William R. Millen
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THE DIOCESE OF MARYLAND

Testimony Prepared for the House Judiciary Committee
HB 307 – Anti-Discrimination Act of 2001

March 9, 2001 **Position: FAV**

On behalf of Bishop John L. Rabb and the 120 congregations comprising the Episcopal Diocese of Maryland, I urge your favorable response to HB 307.

In our baptismal covenant, we promise to strive for justice. It is recognized by the State of Maryland that to discriminate in housing or employment is an injustice if the cause is race, creed, sex, age, color, national origin, marital status or disability.

We have understood that because a person is perceived as "other" does not mean that their behavior is to be feared. That sexual orientation remains a cause for discrimination is shameful.

Surely we can distinguish between "orientation" and "lifestyle". There are heterosexual persons whose lifestyle is certainly not to be emulated. There are homosexual persons whose lifestyle is a model of propriety. To refer to "homosexual lifestyle" betrays shameful ignorance and backwardness on the part of the speaker.

Justice demands fair treatment of all God's children. We are talking about life's basics: employment, shelter.

The 65th General Convention of the Episcopal Church, USA, declared that "homosexual persons are children of God who have a full and equal claim with all others upon the love, acceptance, and pastoral concern of the church." Would you deny employment or shelter to a child of God?

In the name of the Episcopal Diocese of Maryland, I urge your support of HB 307.

Respectfully submitted,

Maggy Cullman

Maggy Cullman
Bishop's Deputy for Public Policy
The Episcopal Diocese of Maryland

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Lee Hudson, Director

Testimony Prepared for the
Judiciary Committee
On
House Bill 307
March 9, 2001
Position: **Favorable**

Mr. Chairman and members of the Committee, thank you for this opportunity to testify on behalf of the rights of citizens in the State of Maryland. I am Lee Hudson, director of the Lutheran Office on Public Policy in Maryland, representing more than two hundred Evangelical Lutheran Church in America congregations in its Delaware-Maryland and Metropolitan DC synods.

Our faith community has committed itself to the basic human rights of all people as a universal governing principle for society. Among these are freedom from discrimination in employment and housing.

We do not believe that sexual orientation is a valid reason for the practice of housing or job discrimination. Neither do we believe that a religious right of discrimination extends to housing, public accommodation, or employment.

We therefore support House Bill 307 and urge your Committee's favorable report.

Thank you for your attentive hearing..

Respectfully,

Lee Hudson

Freedom Of Religion Coalition – Opposed HB #'s 47; 875; 920 & 1161

Statement of Intent

This written testimony is designed for the intent purpose of stating the Freedom of Religion Coalition (and our observers) OPPOSITION to the legislation detailed below and to be an answer, on the part of The Freedom of Religion Coalition (of Maryland, a conservative, Christian group of individuals committed to promoting Freedom of Religion and Freedom of Speech in our State) to the growing problem of pro-homosexual lobbying and the growing introduction of pro-homosexual legislation in this state. It is also designed to be an answer regarding "hate crimes" legislation in general.

Our Position

First, let me clearly state that we (FORC & our observers) do not hate any person. By commandment of Jesus Christ, Whom we believe is the Savior and Lord of mankind, as well as the Divine Creator, we strive to equally love all persons without regard to their beliefs and preferences. FORC believes and holds the conviction that **all** American citizens have certain unalterable rights guaranteed by the Constitution, which itself rests upon the sovereign guarantee of rights granted by the Divine Creator. This testimony is designed to be an observation and partial answer to what FORC considers a serious problem in legislation in recent years, that of the state of Maryland seeking to take a pro-homosexual stance in state legislation & also in the stance of the executive and judiciary branches in these matters.

Matter at Hand

FORC is in opposition to any form of pro-homosexual legislation (or any legislation that is pro to deviant sexual behavior as well). We oppose this type of legislation in particular because much of it is clearly aimed to defraud the public about issues regarding homosexual or other deviant sexual expression(s) or preference(s). We also oppose the inclusion of any terms in civil rights laws that include sexual preference or terms that speak to or about the sexual preference of an individual. We submit that the term GENDER is adequate in all forms of civil rights legislation, due to the immutable characteristic of an individual's GENDER. By including terms that include sexual preference or expression, the legislation listed below opens the door to the possibility and eventual probability of the promotion of all forms of deviant sexual behavior as protected action(s) under even existing civil rights laws.

FORC is also opposed to "hate crimes" bills or legislation, as it tends to weaken or ignore current laws (and our Bill of Rights) that provide for adequate punishment for any crime that could be termed a "hate crime" in the State of Maryland.

Freedom Of Religion Coalition – Opposed HB #'s 47; 875; 920 & 1161

Problem with Definition of "Sexual Orientation"

Upon the initial reading of these bills, we find that the term "sexual orientation" is defined in this way: "THE IDENTIFICATION OF AN INDIVIDUAL AS TO MALE OR female HOMOSEXUALITY, HETEROSEXUALITY, OR BISEXUALITY.

In regards to the above definition let me state several issues:

1. The first is that this legislation and in particular the *wording* of **the legislation promotes a pro-homosexual (and possibly pro-deviant) attitude in State law.**

   In each year that a bill as been introduced (either in the MD House or MD Senate) with the same or similar wording as that of the 1999 HB 92; HB 315; HB 969; or the bills from the 2000 session, the goal of the legislators (and ultimately those who favor a pro-homosexual attitude in the laws of Maryland) has been to **redefine** the civil rights of individuals to include "sexual orientation". 1999 in particular added wording seeking to protect the "identity" of an individual especially when "...not traditionally associated with an individual's biological sex or sex at birth."

   What this does, in effect, is to establish a legal precedence that declares homosexuality, bisexuality and various other forms of sexual **expression/ preference** to be on the same level as **immutable characteristics** such as race, handicap or gender. (You may notice that I left out religion, for though it is protected under the first amendment, it is not an immutable characteristic of an individual).

   Legislators need to be reminded that the laws regarding discrimination, in particular those laws that provide and establish basic civil rights, should not include pro or con any wording that may indicate protected or special status to or for one's sexual expression or preference. If the laws are allowed to include such wording, future legal cases and ultimately the State's attitude towards these matters will ultimately shift to a pro-homosexual position.

   In regard to the matter of whether sexual preference may be included in civil rights law, let me include a quote from FORC testimony regarding 1998 HB 68. Civil rights legislation and in particular the addition of protected "classes" needs to be put to a test of immutability as determined by the Supreme Court. "Sexual Orientation" does not qualify under these requirements.

   Homosexuals would have us believe they do not enjoy the same rights as

other citizens. They claim they need minority status and special civil rights protection. The fact is that they already have and are entitled to the same civil rights as all Americans. **They are not entitled to special rights.** The United States Supreme Court ruled in the Bowers vs. Hardwick case that sodomy is not a constitutionally protected behavior. The Supreme Court has historically used a threefold test to determine if a group qualifies for special protection as a minority.

> ***Test Number One***
>
> There must be a history of discrimination through being deprived of cultural opportunities, being unable to get adequate education and being unable to obtain a reasonable economic income. Certainly homosexuals do not qualify. Their average income is nearly double that of the average American. Their educational level is considerably higher than the average. As a group they hold managerial and professional positions at a much higher rate than the average citizenry. These are not a deprived people.
>
> ***Test Number Two***
>
> There must be obvious and unchangeable characteristics of this group that distinguish them. The fact is there is no "homosexual gene." A 1992 study by the University of Minnesota Hospital and Clinics on 34,706 students found 25.9% of children are unsure of their sexual orientation at age 12. This figure declines to 5% by age 17. The NORC study also found that sexual orientation is a fluid condition. 75% of those who experience some homosexual orientation do not continue throughout their lifetime in homosexual relationships.
>
> ***Test Number Three***
>
> This class of people must be able to show that they are politically powerless. Homosexual activists donated $3.4 million dollars to President Clinton's campaign and they supplied thousands of workers for numerous campaigns. They are by no means powerless."

2. The second issue that I would like to speak to is the rather peculiar grouping and usage of the terms used to define "sexual orientation" in general. **The grouping and usage of the terms promotes homosexual(ity) and also waters down clearly defined gender characteristics** (again placing preferences above immutable characteristics).

   In the description of the term "sexual orientation" in each bill, the first listed form of sexual orientation is "male or female homosexuality". It is clear that particular emphasis is placed upon homosexuality AND that the definition includes provision for what could only be described as "effeminate" / "butch" characteristics or even cross-dressing or other deviant sexual

expressions. When you read the definition carefully what you find is a clear predisposition towards homosexual and / or abnormal sexual **expression** in the definition of "sexual orientation". Even though heterosexuality is included in the list, it is dwarfed by the other definitions of sexual orientation. This leads us to the necessity to clearly state that this legislation is constructed to be pro-homosexual, pro-bisexual and ultimately favorable to current and future deviant **expressions** of individual sexuality.

3. The third issue involves the matter of including "sexual orientation" in any bill. **The inclusion of this term undermines the inalienable rights and immutable characteristics granted and designed (respectively) by a Divine Creator in favor of State granted or recognized "rights". (There is a definitive difference between inalienable and granted rights)**

   One of the primary strengths of our nations Declaration of Independence is that is recognizes the **God-given rights of every human being.** Though our nation has had a rather checkered past in upholding this standard, the standard Rule of Law in our Republic (in the form of the Declaration of Independence; Constitution & Bill of Rights) itself ultimately guarantees certain freedoms to all citizens.

   When states or other legislative bodies try to further define or add laws on top of (or in place of) the Constitution, the effect is not clarification, but rather constant re-interpretation (or even nullification) of the essential rule-of-law our Constitution provides. In particular, civil rights laws that include provisions for the protected status of classes peoples for other than immutable characteristics, cause degradation in the power of the Constitution as the ultimate rule (standard) of law in this nation.

   Sexual orientation is purely a term derived to HIDE pro homosexual or pro deviant sexual **expression(s)** under some form of equal or protected status in regard to the law.

4. The final issue I would like to address **is that the homosexual act and those who actively participate and / or promote the act or lifestyle are in direct violation of the standards of the Creator and Holy Scripture.** I am sure some will say, "here comes the bigoted, right-wing, hate-filled rhetoric..." I will not belabor the point, but simply state the Scriptures that were so much the standard for our Republic and the Ultimate Standard for most of our founding Fathers should not be relegate to mere "religious rhetoric" or ignored in matters of legislation. **(Holy Scriptures: Leviticus 18:22; Leviticus 20:13; Judges 19:22; Romans 1:24- 27; 1 Corinthians 6:9; 1 Timothy 1:9-10)**

Freedom Of Religion Coalition – Opposed HB #'s 47; 875; 920 & 1161

The Supreme Court and other courts (Judicial Branch), Legislative body of Congress and Executive Branches of our Government are all on record numerous times as accepting the Standards and Values of Judeo-Christian Morality as defined in the Holy Scriptures. Can modern state legislators do any less? The Bible states that homosexuality and any form of wrongful sexual expression / desire is a sin and thus wrong. It is an offense against the Creator, the family, society in general and ultimately the individual. Legislators would do well to uphold the Standard of the Holy Scriptures and Judeo-Christian values in their legislation. This legislation as worded violates those standards and is thereby unacceptable to a people who have established a form government and desire to be governed by the Standard of Holy Scripture.

About FORC

FORC particularly is concerned about legislation that erodes or seeks to destroy Freedom of Religious expression in our State. We do not use violence, so-called hate speech (God's Word is not "hate speech"!!!!!) or other disrespectful forms of expression. We do, however, openly debate and state the foundational principles of God's Word in regard to individual and institutional religious freedom. FORC also presents a clearly Christian and evangelical point of view without hypocrisy and without the normal rhetoric of the politically correct. We also mention the names of legislators and openly speak against public actions that violate the principles of God's Word.

FORC *does* advocate the usage of free speech and the public forum of debate and discussion to analyze and critique the position of any legislation that alters, destroys or prohibits the religious freedom or freedom of speech of any American. In this case in particular, we will debate the pro-homosexual position and pro-homosexual legislation that has been introduced.

Conclusion

I want to thank you for your time and consideration in this matter. May the love of my Lord Jesus shine upon you in all you do. If you have questions regarding this written testimony, please direct them to director@forcmd.org or regular mail at: FORC 7923 Allentown Road, Fort Washington, MD 20744 or call me at (240)375-6444

Respectfully Submitted by,

Rev. Matthew J. Sine – Director of FORC

HB 307 Testimony - Antidiscrimination Act of 2001

Honorable Chairman and Delegates,

My name is David Whitney and I am the Pastor of Cornerstone Evangelical Free Church in Pasadena. I am here to encourage you to vote against this bill. I attended several of the Governor's Commission as they were held around the state. What surprised me was the rules the Commission was using. They were willing, or I should say encouraging anonymous testimony be given regarding discrimination on the basis of sexual orientation in Maryland. I heard letters from anonymous read by someone else entered into the findings of the Commission. It occurred to me that this meant no one could investigate the charges of discrimination being claimed by anonymous. I'm curious, I don't know the answer to this question, did the Commission investigate any of the claims to discrimination made by those who gave testimony before the commission. Obviously those testifying have a personal bias. They want to see this piece of legislation passed. I think the most important question regarding this bill, is how can we determine if there is actual discrimination taking place?

Are gays, lesbians and bisexuals economically disenfranchised? The unbiased statistics show that they are not. According to 1996 figures from the U.S. Census they have median annual household incomes of $45,776. Nationally, the median income for a household family at that time was $35,492.[1]

Are gays, lesbians and bisexuals politically disenfranchised? The unbiased statistics show that they are not. The top eleven homosexual activist groups spent approximately $36 million in 1999 fighting for homosexual "rights," according to the Washington Blade.[2] That does not include the over $1 million budget of the homosexual legal arm of the American Civil Liberties Union. Homosexual groups across the country reported a total budget of nearly $100 million in 1999, according to a Gill Foundation study. The Human Rights Campaign, the country's largest homosexual advocacy organization, has a $21 million annual budget[3] and boasts on its website that their political action committee also spent more than $2.5 million in the 2000 election.

In addition, homosexuals enjoy support from every major news organization, whose coverage long ago crossed the line into outright advocacy of homosexual causes. More than six hundred journalists attended a conference of the National Lesbian and Gay Journalists Association in September 2000.[4]

The facts are that gays, lesbians and bisexuals are not disenfranchised, not discriminated against in the ways that other groups have been. This legislation is not necessary. I urge you to give it a well deserved burial. Thank you.

---

[1] Ronald Alsop, "Are Gay People More Affluent Than Others?" The Wall Street Journal, December 30, 1999. "South Florida Rolls Out Welcome Mat for Gay Tourists," The Orlando Sentinel, May 10, 1998, p. L2.

[2] Lou Chibbaro, Jr, "Budgets Up, Donors Down," The Washington Blade, June 11, 1999.

[3] Will O'Bryan, "Human Rights Campaign Heads into Third Decade," The Washington Blade, October 20, 2000.

[4] Peter LaBarbera, "Homosexual Reporters/Homosexual Activists," Family Research Council, CultureFacts, September 14, 2000.

Exhibit 2

THE DIOCESE OF MARYLAND

SB 212 FAIRNESS for ALL MARYLANDERS ACT OF 2014

Judicial Proceedings
February 4, 2014
Support

Chairman Frosh and members of the committee, I am the Rev. Kathy Shahinian, Public Policy Advocate for the Episcopal Diocese of Maryland.

The Diocese represents 110 community churches that are devoted to social justice programs – such as prohibiting discrimination based on gender identity.

As far back as 2000 the Episcopal Church has introduced, passed and adopted resolutions that will build a society of justice for all.

Most recently the 2009 and 2012 Episcopal General Conventions adopted resolutions speaking to the issue of fairness for all people.

The first resolution, 2009-C048 stated the" Episcopal Church supports the extension of existing federal laws that prohibit employment discrimination – to include discrimination based on sexual orientation or gender identity, along with those prohibitions based on race, gender, religion, national origin, age and disability."

The second resolution, 2012-D019 stated" the Episcopal Church supports adding gender identity and expression" to the list of protected categories under Federal law.

Our Presiding Bishop the Most Reverend Katharine Jefferts Schori, as of January 30, 2104 issued a written statement on the issue of fairness and equality for all. She has been clear about respecting and having dignity for all members of the human family.

Gender identity should not be the basis for exclusion, discrimination and harassment in any walk of life.

In closing, the US Constitution guarantees equal protection and due process for all.

We join with the sponsors of this bill and many other advocacy groups in urging that you pass this legislation.

[This statement was given in accordance with General Convention Resolutions 2009-C048 *Support for Employment Non-discrimination Act* and 2012-D019 *Amend Canon I.17.5.*]

Presiding Bishop on LGBT rights. http://www.episcopalchurch.org/notice/presiding-bishop-lgbt-rights

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SB-212 – Opposition
Testimony by Robert Nelson to the Senate Judicial Proceedings Committee
February 4, 2014

My name is Robert Nelson, Minister of Pastoral Care at Immanuel's Church in Silver Spring, a diverse congregation of over 3000 people from 65 different countries. Our red bumper stickers read, "You'll be Loved at Immanuel's Church."

In 2012 there was an intense discussion about religious liberties related to the Civil Marriage Protection Act. This act included an exemption that protected religious institutions that believe marriage is only between one man and one woman from having to conduct same-sex marriages. However, SB212 appears to have no protections for religious institutions whose beliefs conflict with the precepts of gender identity.

At Immanuel's Church we believe in the sanctity of marriage, the sanctity of human life and the sanctity of human sexuality. The sanctity of human sexuality is defined by God in the Bible in Genesis 1:27 "So God created mankind in his own image, in the image of God he created them; male and female he created them." To be true to the scriptures, we would not be able to recognize a person's gender other than what is in alignment with their genetic sex.

The Civil Marriage Protection Act exempts churches from marrying two persons of the same sex. However, SB212 allows a person to redefine their gender and the state would necessarily recognize the change. If SB212 were adopted, is it possible that two persons born as males with one having gender identity as a female might approach a church and request to be married? What religious liberty protection would we have in refusing to perform the ceremony? Would we be able to refuse to hire teachers and staff whose gender is not in alignment with their genetic sex? Would we be able to deny access to summer camp, restrooms and showers for children with a gender identity different than what God had assigned? Would expensive lawsuits ensue if this legislation were passed?

I urge you to reject this legislation that infringes on religious liberties guaranteed by the US Constitution. Please vote "NO" on SB212.

bnelson@immanuels.org

February 4, 2014

Testimony in Opposition to Senate Bill 212

Rabbi Mendel Bluming
11621 Seven Locks Road
Potomac, MD 20854

Senate Judiciary Committee
State of Maryland
Annapolis, MD

Dear Chairman Frosh and Members of the Committee:

I would like to share with you multiple objections on different levels that Torah-observant, orthodox Jews have with proposed legislation, SB 212.

The bill would redefine gender in a counter-Biblical manner. For those of all faiths rooted in the Torah, this is problematic on both a global, national and local perspective.

Sexual morality is one of seven categories of behavior that the Torah applies to all people not just Jews, in order that decent and just societies may flourish. And while God has blessed each of us, individually, with different challenges and strengths, it is our job to do the best we can to overcome the challenges we have been given. These may include: anger management, physical limitations or disease, predisposition to laziness or proclivity to improper sexual identification and behavior. In addition these challenges can be either managed or amplified and accepted, depending upon upbringing and the general cultural values of the society.

Torah observant Jews have great compassion with people who have all kinds of challenges, but ultimately, acting on those challenges, we are convinced, is a choice made by the individual. And there are horrible examples which we can all point to where individuals have been coerced by relatives or society with horrible consequences. *(Please see Thomas Lobel case.)*

In terms of Torah based sources, there are many that clearly state the Jewish perspective both in the Torah (written law), Talmud (oral law) and elucidated our greatest scholars. **The Torah simply forbids men and women to dress as the other or even worse, to mutilate our bodies given to us by God.**

So the first question will be, in our somewhat insulated observant Jewish world, **what will this mean for Jewish schools and synagogues?** Will we have to hire transgender individuals as teachers in non-religious classes? What about other staff? How do we explain this to our children where we are trying to at least have some islands of holiness in an otherwise challenging world?

Please, let's work together to protect our children.

Rabbi Mendel Bluming

MARYLAND CATHOLIC CONFERENCE

ARCHDIOCESE OF BALTIMORE † ARCHDIOCESE OF WASHINGTON † DIOCESE OF WILMINGTON

Statement to the Senate Judicial Proceeding Committee

Re: Senate Bill 212
RE: Gender Identity - Antidiscrimination
Submitted February 4, 2014

OPPOSE

This statement of opposition to Senate Bill 212 is conveyed on behalf of the Maryland-serving Catholic bishops and their Baltimore, Washington, and Wilmington dioceses.

Consistent with our long-standing advocacy on behalf of society's most vulnerable and marginalized persons, the Church recognizes the intent of this legislation to uphold the dignity and value of every individual. In keeping with that principle, the Church firmly opposes undue harassment or discrimination against any person.

That principle does not, however, warrant creating a new class of protected individuals in the state's antidiscrimination statute, especially when the extension of the law would presumably apply to only a small number of individuals. The impossibility of clearly defining "gender identity" as a newly protected category in law, and the practical application of this legislation is also highly problematic.

The bill also omits any exemption for religious institutions, and is therefore inconsistent with other sections of antidiscrimination law that do contain such exemptions.

Our greatest concern regarding this legislation, however, rests in our opposition to the bill's attempt to enshrine in law a distinction between one's "gender identity" and one's "assigned sex at birth." Such a distinction manifests a fundamental violation of our society's basic understanding of the human person, and the complementarity of the sexes bestowed by nature that lies at the foundation of all human society. As Pope Benedict XVI noted, in the view of humanity promoted by this legislation, "Man and woman as created realities, as the nature of the human being, no longer exist. Man calls his nature into question. From now on he is merely spirit and will."

Regardless of its intention, SB 212 would undermine in law a recognition of the inextricable link between a person's human nature and his or her identity as a man or woman. We urge you to oppose this legislation.

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NATIONAL COALITION OF AMERICAN NUNS
FOUNDED TO STUDY AND SPEAK OUT ON ISSUES OF JUSTICE
IN CHURCH AND SOCIETY
4012 29th St. Mt. Rainier, MD 20712 301-864-3604

Testimony
Sister Jeannine Gramick, SL
In Support of SB 212: Fairness for All Marylanders Act of 2014 (FAMA)
February 4, 2014

I have been a Roman Catholic nun for more than 50 years. I reside in Prince Georges County. I taught in Baltimore in grade and high schools and at Notre Dame of Maryland University. I have worked for the poor and marginalized, and have served in a pastoral ministry of advocating for justice for LGBT persons for many decades. I serve as a National Coordinator for the board of the National Coalition of American Nuns.

I speak here today as a person of faith and on behalf of the National Coalition of American Nuns, who support the human rights of all people.

My Church, the Catholic Church, has a large body of social justice teaching. It is based on the conviction that all persons, including transgender persons, are created by God with an intrinsic human dignity, regardless of one's actions, appearance, or any circumstances in one's life. Because we all share in a common humanity, all persons must be accorded equal respect and dignity.

Catholic social teaching does not single out transgender people, but it does emphasize commitment to the poor and marginalized. In his apostolic exhortation, *The Gospel of Joy*, Pope Francis said that we must have "concern for the vulnerable" and those who are "increasingly isolated." Pope Francis noted the need to create "new forms of cultural synthesis" (par. 209-216). That is, we need to incorporate these vulnerable individuals into the fabric of our social laws and customs.

All persons, including transgender persons, need to feel welcome in our social institutions. There is no room for discrimination in securing a job or a place to live, merely because of one's gender identity. And there is no room for being harassed, or treated unfairly, in other public places, merely because of one's gender identity. In fact, an overwhelming percentage of U.S. Catholics (93%, in fact) believe that transgender people should have the same general rights and legal protections as others.*

I am here today as a Catholic nun, as a person of deep faith, to ask the state of Maryland to support SB 212, the Fairness for All Marylanders Act of 2014. Thank you.

Sister Jeannine Gramick, SL
301-864-3604
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* http://publicreligion.org/research/2011/11/american-attitudes-towards-transgender-people/

SB 212: Fairness for All Marylanders Testimony—Jennifer Cullinane, Cockeysville, Maryland

I am a mother of two and I am here to fulfill a promise I made to my children. My children are thirteen years old and eight years old. One of my two children turned out to be transgender and one is not. We taught them that all people--regardless of race, or socio-economic status, or gender or sexual orientation—are equal and deserve to be treated with respect. I promised them that if they studied they could get an education, work in whatever profession they chose, and live anywhere they like. When I was making these promises I didn't think to provide the disclaimer: "You don't qualify for this equal treatment in our state if you turn out to be transgender."

If you came to our house and spent time with our family, you'd find out that my children have a lot of similarities. They are both big-hearted, they both love animals, they are both artistic, and they both want to grow up and do something that helps other people. If the Fairness for All Marylanders bill does not come before the Senate and pass, that means my two children, who are similar in so many ways and whom I love equally, are not equal at all. In the great state where my family has chosen to live, my two children will have very different treatment under the law. I'd have to look my son in the eye and take back the vision of his future that I promised him. I'd have to say: "your sister can spend her summers working at the beach but you could be fired from your summer job because of who you are,"; "your sister can get an apartment sophomore year of college with her friends but you could be kicked out of yours,"; "your sister will never have to worry about being refused service in a restaurant but you should expect it...and, by the way, the law won't be on your side."

Think about looking your children or grandchildren in the eyes and making that distinction. Think about looking at one and saying "you deserve equal rights" and looking at the other and saying "our Maryland legislators don't think you deserve equal rights; our State qualifies you as 'less than'." I'm asking you to do your part to make sure both of my children get the equal treatment they deserve.

Thank you, Senators.

NEW WAYS MINISTRY
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Testimony of
Francis DeBernardo, Executive Director, New Ways Ministry
Annapolis, Maryland

FOR: Fairness for All Marylanders Act 2014, SB212

February 4, 2014

Good afternoon. My name is Francis DeBernardo, and I serve as Executive Director of New Ways Ministry, a national Catholic ministry that attempts to build bridges of justice and reconciliation between the lesbian, gay, bisexual, and transgender community and the Catholic Church. Our offices are in Mount Rainier, Maryland, and we represent the majority of Catholics in the U.S. who support equality for transgender people. Therefore, I am here today to support the Fairness for All Marylanders Act, SB212.

It is important to recognize that Catholics support equality for transgender people *because* of their Catholic faith, not in spite of it. Our Catholic faith compels us to promote the human dignity of all people, regardless of gender, sexual orientation, or gender identity. Our faith tells us that we must support transgender people not only because of their inherent human dignity, but because they are a vulnerable population. They experience a shocking amount of discrimination, and violence. This bill would send a powerful message that we in this state do not support such discrimination and denial of basic human rights for all.

Sometimes the transgender experience is compared to the gay and lesbian experience, and there is good reason to do so. In Catholic thought, however, while there is much official teaching on gay and lesbian issues, there is none on transgender topics. So while you may be aware of criticsm of lesbian and gay issues coming from church officials, please remember that no such body of statements exists for transgender people. It is not the same issue.

While in past decades, the Vatican and the pope have issued harsh statements on issues dealing with sexual and gender minorities, Pope Francis has ushered in a new openness and dialogue with these populations. His statements reveal that gender and sexuality should not be the defining characteristics of a human person, and that all people need to be respected.

Though he has said nothing explicitly on gender identity issues, we do have a precedent for him that we must pay attention to. At the end of December 2013, a transgender woman in Rome was beaten and killed. Her family would not claim her body for burial. Yet Pope Francis' Jesuit Catholic parish in Rome did provide funeral services for this woman who was so terribly discriminated. This example speaks volumes about the Catholic support for non-discrimination coming from the highest level of the church.

Can the state of Maryland do any less? Can't we build a community where transgender people will be respected and valued as equals in their lives so that they do not experience the terrible fate that this woman did? Though Catholics support transgender equality from a faith perspective, it is a perspective which is rooted in an idea that is basic to the American way of life: that ALL people are created equal.

I urge you to vote for the Fairness for All Marylanders Act.

Thank you.

JCRC
JEWISH COMMUNITY
RELATIONS COUNCIL
Federation 75 Years
Government Relations • Israel Advocacy • Social Justice
Maryland • Virginia • Washington, DC • JCouncil.org

Testimony in Support of SB 212: The Fairness for All Marylanders Act of 2014

Judicial Proceedings Committee

February 4, 2014

The Jewish Community Relations Council of Greater Washington serves as the public affairs and community relations arm of the Jewish Federation of Greater Washington, representing over 100 constituent agencies, organizations and synagogues throughout Maryland, Virginia and the District of Columbia. The JCRC works closely with the Legislature and coalition partners, advocating on a variety of social, cultural, religious and economic issues.

The JCRC has a strong history of supporting equality for all individuals. The Fairness for All Marylanders Act of 2014 (FAMA) prohibits the discrimination against transgender Marylanders in the areas of employment, housing, credit and public accommodations by adding "gender identity" to existing anti-discrimination laws. This bill is about securing basic civil rights, including the right to a job, a place to live, and respectful treatment in public spaces.

In Maryland, several counties including Montgomery County have local ordinances that prohibit discrimination against transgender people, but still over half of the state's counties are without these protections for their citizens. In 2011 a survey found that amongst transgender individuals, 18% had lost a job, 17% had been denied a home or apartment, and unfortunately 54% had experienced harassment in public places.

When discrimination prevents a person from employment, many other problems may develop which can lead to sustained unemployment or homelessness, and the victims more vulnerable to violence. Transgender individuals may be denied access to services like shelters or rape crisis centers, refused treatment, or denied recognition of their gender identity by health care professionals.

We applaud Senator Madaleno, and all the co-sponsors of this legislation. We fully support this much needed change and respectfully request the support of the Judicial Proceedings Committee.

Exhibit 3

POTENTIAL AMENDMENTS AND THEIR ARGUMENTS AGAINST

IN GENERAL: The basic argument against amendments is that local laws are more expansive than this legislation and there has not been a problem with application or enforcement of the local laws.

Applies to public accommodations and housing: "THE PROHIBITIONS RELATING TO SEXUAL ORIENTATION IN THIS SUBTITLE DO NOT APPLY TO A RELIGIOUS ASSOCIATION, OR SOCIETY, OR ANY NONPROFIT INSTITUTION OR ORGANIZATION OPERATED, SUPERVISED OR CONTROLLED BY A RELIGIOUS ORGANIZATION, ASSOCIATION OR SOCIETY."

Argument: The four local jurisdictions that have laws banning discrimination in sexual orientation do not exempt religious institutions from the public accommodations and housing statutes and this has not been a problem. This amendment could have far-reaching implications and would allow a religious association that operates a homeless shelter or a domestic violence shelter to deny service to an individual based on sexual orientation. If the religious association is concerned with improper conduct, the law does not prohibit it from denying service to an individual for failing to conform to the usual and regular requirements, standards and regulations for the establishment. NOTE: One argument raised by the opponents is that a religious group could not cancel an otherwise legal contract for the rental of a church hall in which a gay group that had not previously identified itself holds a dance or rally. The argument against this scenario is that religious groups that are engaged in commercial businesses should not be excluded from the legislation and be allowed to discriminate. If they are competing with other businesses (i.e., other rental halls), they should be required to abide by the same standards.

"NOTHING IN THIS ARTICLE SHALL PROHIBIT A RELIGIOUS OR PRIVATE SCHOOL FROM ACTING ON THE BASIS OF SEXUAL ORIENTATION IN A MANNER THAT WOULD OTHERWISE BE PROHIBITED BY THIS ARTICLE."

Argument: The legislation already contains an exemption for religious educational institutions in employment. The legislature should not establish policies to allow private schools to discriminate, especially if the school receives State funding. Also, this type of amendment is only meant to undermine the purpose of the legislation. It also lends credibility to the inflammatory and false position that homosexuals are a danger to children.

"NOTHING IN THIS ARTICLE SHALL PROHIBIT AN INDIVIDUAL WHO IS SUBSTANTIALLY MOTIVATED BY RELIGIOUS BELIEF OR CONSCIENTIOUS OBJECTION, OR A RELIGIOUS ORGANIZATION, ASSOCIATION, OR SOCIETY, OR ANY NONPROFIT INSTITUTION OR ORGANIZATION OPERATED, SUPERVISED, OR CONTROLLED BY OR IN CONJUNCTION WITH A RELIGIOUS ORGANIZATION, ASSOCIATION, OR SOCIETY FROM ACTING ON THE BASIS OF SEXUAL ORIENTATION IN A MANNER THAT WOULD OTHERWISE BE PROHIBITED BY THIS ARTICLE."

OR

"NOTHING IN THIS SECTION SHALL BE CONSTRUED OR INTERPRETED TO REQUIRE ANY INDIVIDUAL WHO HAS A CONSCIENTIOUS OBJECTION BASED ON A BONA FIDE RELIGIOUS BELIEF TO COMPLY WITH THIS SECTION."

Argument: This amendment will gut the bill. Anyone who wants to discriminate would be able to use this language as a shield. It is impossible to decide who would qualify as being "substantially motivated" by religious belief or having a "conscientious objection." Again, religious organizations are exempted from the employment provisions of this Act.

"AN INDIVIDUAL IS IMMUNE FROM LIABILITY IN AN ADMINISTRATIVE PROCEEDING OR CIVIL ACTION UNDER THIS ARTICLE IF THE INDIVIDUAL BELIEVES OR HAS REASON TO BELIEVE THAT THE COMPLAINANT HAS VIOLATED ARTICLE 27, SECTIONS 553 AND 554 OF THE CODE."

Argument: Sections 553 and 554 relate to the sodomy and unnatural sexual acts ("oral sex") prohibitions in the Code. While this amendment is intended to apply to homosexuals, it could also extend to heterosexuals in any protected class. The amendment is an attempt to gut the bill and to allow individuals who want to discriminate to use this language as a legitimate defense. An order issued on January 20, 1999 stated that sections 553 and 554 do not apply to consensual, non-commercial private sexual conduct (either homosexual or heterosexual) and the State is enjoined from enforcing these statutes. Prohibitions still apply to sexual activity in the context of prostitution, sexual acts committed by force or otherwise without the consent of one of the parties and sexual activities performed in public.

Changes the title of the bill to "Special Legal Rights for Transgendered, Bisexual, Gay, and Lesbian People in Maryland"

Argument: This bill is not about "special legal rights." It is about the prohibition against discrimination and doing what is fair and reasonable. Also, the language is incorrect.

Transgendered protection is not included in the bill.

"SECTION 2. AND BE IT FURTHER ENACTED, That this Act may not be construed to confer any civil rights based on sexual orientation."

Argument: This amendment is unnecessary.

"NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE, HOMOSEXUAL, BISEXUAL, OR TRANSGENDER LIFESTYLES MAY NOT BE TAUGHT IN THE PUBLIC SCHOOLS."

Argument: The State has always taken the position that school curriculum is a local issue and the State should not deviate from that position. The Senate JPR Committee did adopt an amendment that states that the Act does not mandate any public or private educational institution to promote any form of sexuality or sexual orientation or to include such matters in its curriculum.

"NOTWITHSTANDING ANY OTHER PROVISION OF THIS SUBTITLE, AN OPENLY GAY, LESBIAN, BISEXUAL, OR TRANSGENDERED INDIVIDUAL MAY NOT BE EMPLOYED BY A PUBLIC SCHOOL."

Argument: Public schools are funded with State money and the State could not be a participant in discrimination. The experience in the four local jurisdictions do not indicate that there has been a problem in the school systems. The same arguments for not accepting the amendment for private schools apply here as well.

"THE PROVISIONS OF THIS ARTICLE PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION DO NOT APPLY IN FREDERICK AND WASHINGTON COUNTIES."

Argument: All Marylanders deserve this protection. Protection from discrimination should not be an accident of geography. Individuals should not be limited to where they work or live based on their sexual orientation and fear of possible discrimination.

"THE PROVISIONS OF THIS ARTICLE PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION DO NOT APPLY TO A BUSINESS THAT HAS 50 OR FEWER EMPLOYEES."

Argument: Current law only applies to businesses with 15 or more employees. The

General Assembly should not bifurcate the protections that are available. This will be confusing for employees and employers. Individuals should not be denied protection just for choosing an employer with 16 employees as opposed to an employer with 51 employees.

"THE PROVISIONS OF THIS ARTICLE PROHIBITING DISCRIMINATION BASED ON SEXUAL ORIENTATION DO NOT APPLY TO A PERSON WHO HAS REASON TO BELIEVE THAT THE PERSON'S BUSINESS WOULD BE ADVERSELY AFFECTED BY COMPLIANCE WITH THE LAW."

Argument: How will a business determine that it will be adversely affected? This amendment is just another way to allow an individual to discriminate and be given a defense. Also, the current law does allow an employer to establish proper dress and grooming standards for employees. So, if the employer is concerned over someone's appearance, this bill does not change that.

Exhibit 4

Maryland PTA
everychild. onevoice.

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Written Testimony Submitted for the Record to the
Maryland Senate
Judicial Proceedings Committee
For the Hearing on SB 212
Fairness for All Marylanders Act

February 4, 2014

SUPPORT

Maryland PTA represents nearly 200,000 volunteer members in over 970 public schools, with the mission of advocating on behalf of children and youth in the schools, in the community, and before governmental bodies and other organizations that make decisions impacting children. Maryland PTA is comprised of families, students, teachers, administrators, and business and community leaders devoted to the educational success of children in Maryland. As the state's oldest and largest child advocacy organization, PTA is a powerful voice for all children, a relevant resource for families, schools and communities and a strong advocate for public education. In our Legislative Agenda we support public policy, legislation, and regulations which address ensuring a safe learning environment for all children and youth, as well as issues that support equal rights and dignity for all persons.

Maryland PTA submits this testimony in support of SB212 for two main reasons. The first main reason has to do with the benefit enacting this legislation will have on school performance of children born with a gender identity different from the gender with which they were labelled at birth (because of their physical characteristics). What has been found to be particularly true in the United States (and many other parts of the world), is that persons whose gender identities differ from their physiological sex are often treated as "disordered" and subject to an immense amount of social stigma, isolation, and discrimination. This is particularly true for children who are coming to a non-conforming gender identity of themselves, often during late elementary and middle school years. As Committee members may be aware, recent retrospective research gathered by the National Center for Transgender Equality (i.e. interviews of self-identified non-gender conforming people about their personal experiences and histories)[1] has revealed that more than two in five transgender persons attempt suicide early in life, slightly more than 3 out of 4 were bullied or harassed in school, 1 in 3 were assaulted at school, and 1 in 10 were sexually assaulted at school or in the local community *because of either their outward gender expression or a perception about their gender expression.* Among respondents, 15% reported they dropped out of school because of conflicts around their gender identity expression and, another 6% reported being expelled from school because of such conflicts. Further, 57% reported

[1] Grant, Jaime, et al, *Injustice at Every Turn* (2011, National Center for Transgender Equality, Washington, DC). Available for viewing at: http://transequality.org/PDFs/Executive_Summary.pdf.

experiencing significant family isolation or rejection during childhood because of their non-conforming gender identity, and 26% reported becoming homeless because of family conflicts. Depending on the issue being examined, disproportionate numbers of interviewees reported subsequent high rates of substance abuse, involvement in the criminal justice system, mental illness, and/or engaging in high risk sexual activity for money, housing, food, and/or clothing as a result of school and/or family conflict.

Enacting legal protections on the basis of gender identity would go a long way toward rectifying these situations. It would set a tone for how our society should respond to transgender persons and their families, and, in particular, how our public school system should handle them. Currently, transgender issues are addressed in MD State Department of Education (MSDE) policies and resources related to anti-bullying and intimidation. However, gender identity is not addressed in the MSDE's overall non-discrimination policy. Historically, MSDE and the Maryland Board of Education sets non-discrimination policy based upon what appears in the state Human Relations Code, which SB212 amends.

Secondly, Maryland PTA supports SB212 based upon PTA's overall historic commitment for human rights and dignity for all persons, and commitment to ensuring that every child (with the support of his or her family) has the opportunity to grow to her or his full potential. PTA's current Position Statement on Citizenship and Equality[2], calls for "prohibiting discrimination on the basis of race, gender, socioeconomic status, ethnicity, national origin, language, religion, age, physical and academic ability, and sexual orientation," and that civil rights based upon these items "be defended whenever threatened". While the statement does not yet address gender identity, per se, National PTA resources are beginning a dialogue within PTA on these issues, and there is growing support in our movement for addressing this issue more directly. This dialogue grows out of data emerging on the health and welfare of transgender children, previously cited, as well as growing awareness in our movement of families with transgender children (who often are very challenged in knowing how to respond to their situations) and transgender persons in the teaching profession (who are often subject to discrimination in employment).

In submitting this statement in support of SB212, Maryland PTA recognizes that this is an issue that makes many people uncomfortable. We are still coming to better understandings of transgender persons and their families, and there is much we have to learn. There is diversity of opinion within our movement about the degree to which PTA should be speaking on this issue. However, as we have considered this, we are impelled to support legislation like SB212 because of the benefit it would lend to enhancing school performance of transgender children, the support it would lend to families with transgender children (who often struggle mightily with an issue they have never considered), and because it enhances overall human dignity.

For the reasons stated above, Maryland PTA encourages your support of SB 212, and recommends a favorable report.

Testimony submitted on behalf of MD PTA
By **Ray Leone, President,** February 4, 2014

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[2] National PTA Position Statement, *Citizenship and Equality*, available at: http://www.pta.org/1751.htm.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BETHEL MINISTRIES, INC.	*	
Plaintiffs,	*	
v.	*	No. 1:19-cv-01853-ELH
DR. KAREN B. SALMON, *et al.*	*	
Defendants.	*	

* * * * * * * * * * * * *

ORDER

Upon consideration of the Defendants motion to dismiss under Rules 12(b)(1) and (b)(6), it is, this _____ day of _____ 2019, by the United States District Court for the District of Maryland,

ORDERED that the motion is GRANTED; and

ORDERED that judgment be ENTERED in favor of the Defendants.

_____
Judge Ellen L. Hollander
United States District Judge