No. 19-2064

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients,
Plaintiff-Appellant,
v.
LAWRENCE J. HOGAN, JR., Governor of the State of Maryland,
in his official capacity;
BRIAN E. FROSH, Attorney General of the State of Maryland,
in his official capacity,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
In Case No. 1:19-cv-00190-DKC before the Honorable Deborah K. Chasanow

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BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law ("the Foundation") is a national nonprofit public-interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation is interested in this case because it believes Doyle and those he represents have a right to practice and receive conversion therapy and because it believes this Court should decide this case based on the Constitution itself and not the demands of those who seek to silence all who might not accept their lifestyle.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the Foundation hereby discloses that it is a nonprofit corporation and that it has no parent corporations. Because the Foundation is a nonprofit corporation, no corporation holds 10% or more of an ownership interest in the Foundation.

SUMMARY OF THE ARGUMENT

In the case below, the trial court ignored the impassioned pleas of a therapist, his young patients, and their parents[2] that they be allowed therapy to

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[1] All parties have consented to the filing of this brief. Rule 29, FRAP. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae* and its counsel made a monetary contribution to fund the preparation or submission of this brief.

bring their desires and urges into conformity with their religious beliefs. Instead, the court heeded the demands of LGBT activists and their allies that anything that could be construed as remotely critical of their LGBT lifestyle be censored and silence. In so doing, the court neglected the rich history of religious liberty that underlies the First Amendment and instead misapplied a discredited case that denies petitioners the free exercise protection they deserve. Overlooking a recent ruling of the U.S. Supreme Court upholding full protection for free speech, the court downgraded counseling to mere "conduct" and thereby refused to give Doyle's speech the protection it deserves.

ARGUMENT

I. Because religious freedom is the first and foremost right of the Bill of Rights, infringements upon free exercise of religion should be accorded the highest protection.

Religious liberty is the first of all human rights because rights themselves are the gift of God, and because religious liberty involves matters eternal rather than merely matters temporal.

The foundational document of the American nation, the Declaration of Independence, recognizes the "laws of nature and of nature's God" and says the

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[2] The District Court ruled that Doyle does not have standing to bring this action on behalf of his minor clients. The Foundation supports Doyle's expected appeal on this point and notes that the effect of Maryland Code § 1-212.1 is not only to deny Doyle the right to practice his chosen profession in accordance with his religious beliefs, but also to deny his minor clients the therapy they believe (usually based on religious conviction) they need.

rights of human beings are "unalienable" because they are "endowed by their Creator." Justice Douglas wrote in *Zorach v. Clauson,* 343 U.S. 306, 313 (1952) that "We are a religious people whose institutions presuppose a Supreme Being," and in *McGowan v Maryland,* 366 U.S. 420, 562 (1961) he wrote in dissent,

> The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

Freedom of religion and freedom of expression were not given to us by the government through the First Amendment; they are, as the Declaration of Independence says, "endowed by [the] Creator." Government through the Constitution only "secures" the rights that God has already granted. And the recognition of these rights predates the Constitution by centuries if not millennia.

(A) The Biblical Foundations of Religious Liberty

We cannot fully appreciate the importance of religious freedom (sometimes called liberty of conscience) to the Framers of the Constitution without recognizing the role the Bible played in their thought. On October 4, 1982, Congress passed Public Law 97-280, declaring 1983 the "Year of the Bible." The opening sentences of the statute stated:

> Whereas, Biblical teachings inspired concepts of civil government that are contained in our Declaration of Independence and the Constitution of the United States....

Professors Donald S. Lutz and Charles S. Hyneman conducted a thorough search of the writings of leading American political figures from 1760-1805 and found that 34% of all quotations in the Framers' writings came from the Bible.[3]

Liberty of conscience is a central principle the Framers derived from the Scriptures. In 1751 the Pennsylvania Assembly commissioned a bell to commemorated the 50th anniversary of the Charter of Privileges of 1701 and inscribed on the bell Leviticus 25:10: "Proclaim liberty throughout [all] the land unto all the inhabitants thereof." As they well knew, the words immediately preceding this verse are "And ye shall hallow the fiftieth year," the year of jubilee. The bell rang again in July 1776 to celebrate the Declaration of Independence and is now known as the Liberty Bell.

The Hebrews observe the Passover to commemorate Moses leading the people out of bondage in Egypt into liberty in the Promised Land. Christians likewise cite these passages as well as New Testament passages such as "If the Son, therefore, shall make you free, ye shall be free indeed" (John 8:36), and "Stand fast, therefore, in the liberty with which Christ hath made us free, and be not entangled again with the yoke of bondage" (Galatians 5:1).

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[3] Donald S. Lutz, "The Relative influence of European Writers on Late Eighteenth Century American Political Thought," *American Political Science Review* 189 (1984), 189-97; see also, Charles S. Hyneman and Donald S. Lutz, *American Political Writing during the Founding Era,* Vols. I & II (Liberty Press 1983); Eran Shalev, *American Zion: The Old Testament as a Political Text from the Revolution to the Civil War* (Yale University Press 2013).

The Bible values liberty of conscience so highly that duty to obey God is placed above duty to obey civil government, and sometimes disobedience to tyrants is obedience to God. Jesus told the Pharisees to "Render to Caesar the things that are Caesar's, and to God the things that are God's" (Mark 12:17). When the apostles were prohibited from preaching the Gospel, they answered, "We must obey God rather than men" (Acts 5:29). In Exodus 1:17 we read that the Hebrew midwives "feared God, and did not as the king of Egypt commanded them [to kill the male Hebrew babies]." Daniel faced execution in a den of lions because he prayed to God in violation of King Darius's command (Daniel 6), and his companions Shadrach, Meshach, and Abednego faced execution in a fiery furnace rather than worship a graven image as commanded by King Nebuchadnezzar (Daniel 3). The early Christians, and Christians throughout the centuries into the present, have faced "dungeon, fire, and sword" rather than compromise their consciences.

(B) The Reformation Foundations of Religious Liberty

Medieval Catholic theologians and statesmen gave some recognition to liberty of conscience and religious liberty, sometimes as a barrier to tyranny and sometimes as protection for the Church as it stood against the power of the State.[4]

[4] See generally, Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans

Martin Luther (1483-1546), as he stood before the Diet of Worms and refused to recant his writings, stood firm on liberty of conscience:

> My conscience is captive to the Word of God. I cannot and I will not recant anything, for to go against conscience is neither right nor safe. Here I stand, I cannot do otherwise, God help me. Amen.[5]

In his letter "Temporal Authority: To What Extent It Should Be Obeyed" he declared, "The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul."[6]

Calvinists (who constituted a strong majority of America's early settlers and the founding generation[7]) likewise believed in liberty of conscience. The Westminster Confession of Faith, drafted by the Westminster Assembly in 1643 at the call of the Long Parliament, declares in Chapter XX, Section 2:

> II. God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men, which are, in anything, contrary to his Word; or beside it, if matters of faith, or worship. So that, to believe such doctrines, or to obey such commands, out of conscience, is to betray true liberty of conscience:

1999); James J. Walsh, *The Thirteenth, Greatest of Centuries* 2nd ed., Catholic Summer School Press 1909), 338-91.

[5] Martin Luther, 1521;

[6] Martin Luther, "Temporal Authority: To What Extent It Should Be Obeyed," reprinted in Oliver O'Donovan and Joan Lockwood O'Donovan, *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* (Eerdmans 1999) 591.

[7] Dr. Loraine Boettner, *The Reformed Doctrine of Predestination* (Presbyterian and Reformed 1972) 382.

> and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also.[8]

The following year (1644) John Milton, the Puritan author of *Paradise Lost* and a member of Oliver Cromwell's cabinet, strongly opposed Roman Catholics, Anglicans, and Royalists, but he defended freedom of conscience, and he declared in a speech for Parliament:

> What should ye do then, should ye suppress all this flowery crop of knowledge and new light sprung up and yet springing daily in this city? Should ye set an oligarchy of twenty engrossers over it, to bring a famine upon our minds again, when we shall know nothing but what is measured to us by their bushel? ... Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.[9]

John Bunyan (1628-1688), the Puritan author of *Pilgrim's Progress,* convicted in 1660 of unauthorized preaching and failure to attend the Church of England, declared before the court:

> ...a man's religious views -- or lack of them -- are matters between his conscience and his God, and are not the business of the Crown, the Parliament, or even, with all due respect, M'lord, of this court. However much I may be in disagreement with another man's sincerely held religious beliefs, neither I nor any other may disallow his right to hold those beliefs. No man's rights in these affairs are secure if every other man's rights are not equally secure.[10]

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[8] Westminster Confession of Faith (1643), Chapter XX, Section II; reprinted in *Trinity Hymnal* (Great Commission Publications 1990, 1999) 860.
[9] John Milton, *Areopagitica* (1644); reprinted in The Online Library of Liberty; https://oll.libertyfund.org/quotes/51
[10] John Bunyan, October 3, 1660; Transcript of Trial before Judge Wingate; reprinted in *John Bunyan on Individual Soul Liberty,* www.pastorjack.org/?tag=individual-soul-liberty

Cambridge Puritan theologian William Perkins (1558-1602) declared that "God hath now in the New Testament given a liberty of conscience."[11] Perkins said further that God sometimes requires us to disobey, because sometimes "men are bound in conscience not to obey."[12]

Bishop Joseph Hall (1574-1656) insisted that "Princes and churches may make laws for the outward man, but they can no more bind the heart than they can make it."[13] Bishop George Downame (1560-1634) explained that "The conscience of a Christian is exempted from human power, and cannot be bound but where God doth bind it."[14]

John Locke (1632-1704), a major influence on the American founding generation,[15] wrote that "religion is the highest obligation that lies upon mankind,"[16] that "there is nothing in the world that is of any consideration in comparison with eternity,"[17] that "the care of each man's salvation belongs only to

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[11] 1 William Perkins, *Works* 529 (London, 1612-1618); quoted by L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea* (Presbyterian and Reformed Publishing 1992) 4, 21.
[12] Perkins, *Works* I:530; quoted by Van Til 23.
[13] Bishop Joseph Hall, *Works* (London 1863) VI:649; quoted by Van Til 41.
[14] Bishop George Downame, *The Christian's Freedom* (London 1635) pp. 102, 104ff; quoted by Van Til 41.
[15] See Lutz and Hyneman, n. 2. Lutz and Hyneman concluded that the founding generation quoted Locke more than any other source except the Bible, Montesquieu, and Blackstone.
[16] John Locke, *A Letter Concerning Toleration* (1688-89), Patrick Romanell, ed. (1955) p. 46.
[17] Locke, p. 46.

himself,"[18] and that no life lived "against the dictates of his conscience will ever bring him to the mansions of the blessed."[19] The son of a Puritan lawyer, Locke was very much influenced by the Puritan tradition.

(C) The Colonial Foundations of Religious Liberty

While much of the groundwork for liberty of conscience was laid by the Puritans of England, Van Til says "Liberty of conscience triumphed in America, while it failed in England."[20] And the colonial charters and constitutions at the time of the American War for Independence clearly recognize and protect liberty of conscience, although some do so within the bounds of Christian orthodoxy:

Pennsylvania:

> II. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.[21]

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[18] Locke, p. 46.
[19] Locke, p. 34.
[20] Van Til 128.
[21] Pennsylvania Constitution of 1776, Declaration of Rights, Sec. II, avalon.law.yale.edu/18th_century/pa08.asp

Maryland:

> XXXIII. That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights....[22]

New Jersey:

> XVIII. That no person shall ever, within this Colony, be deprived of the inestimable privilege of worshipping Almighty God in a manner, agreeable to the dictates of his own conscience; nor, under any presence whatever, be compelled to attend any place of worship, contrary to his own faith and judgment; nor shall any person, within this colony, ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform.[23]

North Carolina:

> XIX. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences.[24]

Georgia:

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[22] Maryland Constitution of 1776, Article XXXIII.
avalon.law.yale.edu/17th_century/ma02.asp
[23] New Jersey Constitution of 1776, Art. XVIII.
avalon.law.yale.edu/18th_century/nj15.asp
[24] North Carolina Constitution and Declaration of Rights of 1776, Article XIX.
avalon.law.yale.edu/18th_century/nc07.asp

> Art. LVI. All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession.[25]

South Carolina:

> XXXVII. That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.[26]

Massachusetts:

> Part the First, Declaration of Rights:
>
> Article II. It is the right as well as the duty of all men in society, publicly and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiments, provided he doth not disturb the public peace or obstruct others in their religious worship.[27]

New York:

> XXXVIII. And whereas we are required, by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard

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[25] Georgia Constitution of 1777, Article LVI. avalon.law.yale.edu/18th_century/ga02.asp

[26] South Carolina Constitution of 1778, Article XXXVIII. avalon.law.yale.ed/18th_century/sc02.asp. Article XXXVIII continues with provisions as to what constitutes orthodoxy.

[27] Massachusetts Constitution of 1780, Declaration of Rights, Article II. www.nhinet.org/ccs/docs/ma-1780.htm

> against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind, this convention doth further, in the name and by the authority of the good people of this State, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided,* That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[28]

Virginia:

> Declaration of Rights, Section 16. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience, and that it is the mutual duty of all to practice Christian forebearance, love, and charity towards each other.[29]

In light of this Biblical, Reformation, and colonial background, it is understandable that James Madison submitted the religious liberty article of the Bill of Rights with this original wording:

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.

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[28] New York Constitution of 1777, Article XXXIX. avalon.law.yale.edu/18th_century/ny01.asp

[29] Virginia Constitution of 1776 and Declaration of Rights, Sec. 16. https://law.gmu.edu/assets/files/academic/founders/VA-Constitution

Because there was no verbatim transcript of the first session of Congress, it is unclear exactly how or why the phrase "equal rights of conscience" was changed to "free exercise." It seems likely that the Framers used the term "exercise" because they wanted to be sure that religious liberty included not only the right to believe but also the right to act in accordance with that belief, although such action is implied in the term liberty of conscience.

Otherwise, religious liberty is meaningless. So long as there is no machine that can read the thoughts of the heart, there is liberty of conscience everywhere in the world. Even in totalitarian nations like North Korea and Iran, a person is free to believe whatever one chooses so long as he or she does not say or do anything about it. Religious liberty is meaningful in a legal and political context only when it extends to words and actions.

The Framers clearly regarded religious liberty as the first and foremost of our freedoms. Religious liberty has eternal, not merely temporal consequences; and as J. Howard Pew has noted, "From Christian freedom comes all other freedoms."[30]

II. *Employment Division v. Smith* does not do justice to the Framers' vision of religious liberty, especially as applied by the District Court below.

The Framers might well view with skepticism the preoccupation of today's courts with tiers and tests. But they would be utterly incredulous that the Court in

[30] J. Howard Pew, quoted by Van Til 3.

Employment Division v. Smith would downgrade the Free Exercise Clause to a "lower tier" right that, unlike other rights, can be infringed with merely a rational basis.

The Foundation questions whether even strict scrutiny is sufficient to protect this first and foremost of our liberties. But unless and until the Court is willing to reconsider the whole issue of tiers and tests, at the very least Free Exercise should be given the strict scrutiny protection it gives to other fundamental rights.

Professor Leo Pfeffer called the Free Exercise Clause the "favored child" of the First Amendment. Leo Pfeffer, *Church, State and Freedom* 74 (1953). Chief Justice Burger seemed to share that view, writing in *Meek v. Pittinger,* 421 U.S. 349 (1975), "One can only hope that at some future date the Court will come to a more enlightened and tolerant view of the First Amendment's guarantee of free exercise of religion...." *Id.* at 387 (Burger, C.J., concurring in judgment in part and dissenting in part).

Professor Lawrence Tribe wrote that the First Amendment religion clauses embody two basic principles: separation (the Establishment Clause) and voluntarism (the Free Exercise Clause). "Of the two principles," he said, "voluntarism may be the more fundamental," and therefore, "the free exercise principle should be dominant in any conflict with the anti-establishment principle."

Lawrence H. Tribe, *American Constitutional Law* 833 (1978).[31] Voluntarism is central to the case at hand, for Maryland Code § 1-212.1 has the effect of prohibiting Dr. Doyle from following his most basic beliefs. This is a violation of the right to free exercise at its very core.

This Court appeared to accord strict scrutiny in early free exercise cases. In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court held:

> ...the [first] amendment raises two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Certain conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

310 U.S. at 303-04. The Court seems to say even as early as *Cantwell* that infringements on free exercise are subject to some higher standard than lower-tier reasonable relationship to a legitimate state purpose.

The strict scrutiny test was further articulated in *Sherbert v. Verner,* 374 U.S. 398 (1963), and developed into a three-part test in *Wisconsin v. Yoder,* 406 U.S. 205 (1972). But in *Employment Division v. Smith,* 494 U.S. 872 (1990), the Court appeared to limit *Yoder* to case in which either (1) the law was directly aimed at religion, or (2) the free exercise claim was asserted as a hybrid right alongside another right such as privacy or free speech.

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[31] *Cf.* 2d ed. at 1160.

Unlike *Yoder*, which was an almost-unanimous decision,[32] *Smith* was decided by a sharply divided Court. Justice Scalia wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Justice Blackmun dissented, joined by Justices Brennan and Marshall, arguing that the strict scrutiny test must be preserved in free exercise cases. Justice O'Connor wrote a concurrence that sounded much more like a dissent: she excoriated the majority for departing from the strict scrutiny test but concurred because she believed there was a compelling interest in regulating controlled substances that could not be achieved by less restrictive means.

Smith received harsh criticism from the beginning. A massive coalition of organizations, ranging from liberal groups like the American Civil Liberties Union and People for the American Way to more conservative groups like the National Association of Evangelicals, the United States Catholic Conference, and the Southern Baptist Convention, joined together to denounce the decision and call for a return to the *Yoder* standard. Congress responded by passing the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-3, in the House by a voice vote and in the Senate 97-3, which was signed into law by President Clinton, and

[32] Only Justice Douglas dissented, and he dissented only in part. He did not dispute the tripartite strict scrutiny test but dissented only because he felt there might be a conflict between the rights of the parents and those of the child which had not been fully articulated in the case.

which was struck down as applied to the states by a vote of 6 to 3 in *City of Boerne v Flores*, 521 U.S. 507 (1997), but unanimously upheld as applied to the federal government in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006).

Following *Flores,* in 2000 the American Civil Liberties Union worked with a coalition of organizations to secure passage of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc et seq. RLUIPA prohibits the imposition of burdens on the free exercise rights of prisoners and limits the use of zoning laws to restrict religious institutions' use of their property.

Twenty-one states have adopted state versions of the Religious Freedom Restoration Act requiring their state governments to apply the compelling-interest/less-restrictive-means test, and ten additional states have incorporated the principles of the Act by state court decision.[33]

[33] States which have adopted "mini-RFRA" statutes include Connecticut, Rhode Island, Pennsylvania, Virginia, South Carolina, Florida, Alabama, Mississippi, Louisiana, Tennessee, Kentucky, Illinois, Indiana, Missouri, Kansas, Oklahoma, Texas, New Mexico, Arizona, and Idaho. Similar proposals are pending in other states. The state courts of another ten states (Alaska, Hawaii, Ohio, Maine, Massachusetts, Michigan, Minnesota, Montana, Washington, and Wisconsin) have incorporated the principles of the Act by state court decision. *See State Religious Freedom Restoration Acts*, National Conference of State Legislatures (May 4, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

Scholars have likewise criticized *Smith*. One of the most noteworthy is Professor Michael McConnell, who cogently observes that the Court effectively decided *Smith* on its own, as none of the parties had asked the Court to depart from the *Yoder* test in deciding the case.[34] Jane Rutherford, writing in the *William and Mary Bill of Rights Journal,* argues that *Smith* leads to the unfortunate result of subjecting minority faiths to the power of the majority and decreasing the rights of minorities to express their individual spirituality.[35] John Witte, Jr., of Emory University, writing in the *Notre Dame Law Review,* demonstrates that *Smith* is at odds with the basic principles that underlie the religion clauses, especially liberty of conscience, free exercise, pluralism, and separationism.[36]

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[34] Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. Chi. L. Rev. 1109 (1990). Professor McConnell also notes that "over a hundred constitutional scholars" had petitioned the Court for a rehearing which was denied. *Id.* at 1111. See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

[35] Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 Wm. & Mary Bill Rts J. 303 (2001).

[36] John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371, 376-78, 388, 442-43 (1996).

Aden and Strang document the failure of lower federal courts to follow *Smith* by routinely ignoring the "hybrid rights" exception.[37] According to Aden and Strang,

> One would assume, *a priori*, that the Supreme Court's pronouncement in *Smith*--that when a plaintiff pleads or brings both a free exercise claim with another constitutional claim the combination claim is still viable post-*Smith*--is the law. In fact, litigants assumed just that, but the appellate courts have been thoroughly unreceptive to hybrid right claims.[38]

After discussing numerous federal circuit court cases in which hybrid rights claims have been denied, Aden and Strang suggest reasons the circuit courts have not followed: (1) the fact that the hybrid exception was created in what many view as a post-hoc attempt to distinguish controlling precedent; (2) the compelling interest test in the realm of free exercise jurisprudence was never "compelling," and hybrid claims simply suffer a continuation of that reluctance to excuse conduct because of religious belief; (3) the difficulty in determining the proper burdens and procedures to assert a hybrid claim-the analytical difficulty in conceptualizing how hybrid claims fit into free exercise jurisprudence; and (4) growing hostility to

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[37] Stephen H. Aden and Lee J. Strang, *When a 'Rule' Doesn't Rule: the Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 Penn St. L. Rev. 573 (2002).

[38] *Id.* at 587.

exemptions from state anti-discrimination laws with ever increasing numbers of protected classes.[39]

Additional reasons may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims,"[40] "a more 'progressive' attitude toward persons with traditional religious beliefs (especially evangelical Christians) seeking exemption from laws or regulations synchronous with the judges' leanings,"[41] and "the increasing regulation of private life by state governments through anti-discrimination statutes."[42]

Furthermore, *Smith* as applied by the court below results in a logical and practical absurdity. The *Smith* majority said the *Yoder/Sherbert* compelling interest analysis applies to free exercise cases only if (1) the statute is directly aimed at religion, either expressly or by implication,[43] or (2) the free exercise claim is asserted alongside another claim of constitutional right. The court below refused to consider that Doyle was raising his free exercise claim alongside a free speech claim, probably because the court erroneously downgraded Doyle's free speech

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[39] *Id.* at 602.

[40] *Id.* at 602-03.

[41] *Id.* at 604.

[42] *Id.*

[43] *See Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

claim to a fictional category called "professional speech" and therefore gave it less protection than "pure speech." This conclusion is erroneous because

(A) the Supreme Court has never recognized a separate category called professional speech but rather has treated such expression as pure speech, as will be demonstrated in Part III of this brief; and because

(B) the Supreme Court in *Smith* never said the "other" asserted right must be a "fundamental" or "upper tier" right.

Holding that the other asserted right must be fundamental results in a logical and practical absurdity. If the other right is fundamental, then it is entitled to strict scrutiny by itself and the free exercise claim becomes superfluous. Doyle could then prevail on his free speech claim alone. And *Smith* never said the other right must be fundamental, only that the free exercise claim must be asserted alongside another right, although *Smith's* discussion concerning assertion alongside another right is *dicta* rather than holding.

In summary, *Employment Division v. Smith*:

* Was adopted *sua sponte* without request, argument, or briefing from the parties.

* Is partially dicta rather than holding.

* Was adopted by a bare majority over a strong dissenting opinion by three Justices and a concurring opinion that rejected the *Smith* rationale and concurred only in the result.

* Rests upon a strained attempt to reconcile its reasoning with that of *Yoder* and other decisions.

* Was sharply criticized by a wide spectrum of the legal and religious community of the nation.

* Was criticized by a wide spectrum of constitutional scholars.

* Was repudiated by an overwhelming vote of Congress in adopting the Religious Freedom Restoration Act which was signed into law by President Clinton but partially invalidated by this Court in *Flores*.

* Was repudiated by (thus far) thirty-one states through the adoption of mini-RFRA statutes or state constitutional amendment or state court decisions.

* Has been ignored, strained, or limited by many circuit courts and other courts.

* Has resulted in bewildering application, such as lower court holdings that the right asserted alongside free exercise must be a fundamental right, which is an absurdity because the other fundamental right is entitled to strict scrutiny by itself.

* Has proven unfair and unworkable in practice.

* Is manifestly contrary to the Framers' elevated view of religious liberty because it downgrades this most-cherished right to mere lower-tier status.

Because of all of these factors, it is clearly time for the courts to reconsider *Employment Division v. Smith.* But does this Court have the authority to reconsider a Supreme Court decision? Understandably, many believe a lower court may not reconsider a high court precedent. But no less an authority than Judge Learned Hand argued:

> It is always embarrassing for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not chose to appeal. In either event the actual decision will be one which the judges do not believe to be that which the higher court would make. ... Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it.

Spector Motor Service v. Walsh, 139 F.2d 809, 823 (2d Cir. 1943) (Learned Hand, J., dissenting). Significantly, the Supreme Court vacated the Second Circuit majority's decision and remanded the case to the District Court; *vacated sub nom. Spector Motor Service v. McLaughlin,* 323 U.S. 101 (1944).

Judge Hand seems to suggest that the lower court may overrule a higher court precedent if the lower court reasonably believes the higher court might

decide the case differently today. This is sometimes called "anticipatory overruling," "anticipatory action," or "anticipatory review," see Professor C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 Fordham L. Rev. 39, 84 (1990). *See also* Professor Margaret N. Kniffen, *Overruling Supreme Court Precedents: Anticipation Action by United States Courts of Appeals*, 51 Fordham L. Rev. 53 (1982) (discussing common reasons for anticipatory review, including belief that the precedent has been eroded, changes in Supreme Court membership, and practical, application of the precedent, and discussing cases in which anticipatory review has taken place).

Because of the shaky basis for the *Smith* decision, because of the strong dissents to that decision, because of the decision's inconsistency with the clear intent of the Framers to recognize religious freedom as the highest of all unalienable rights, because of the rejection of the decision by Congress and by many state legislatures and state courts, because the decision has proven problematic in application, of subsequent problems in application of the, and because of important recent changes in the Supreme Court's membership, the Foundation urges this Court to reconsider and clarify *Smith.*

If this Court does not believe it has the authority to reconsider *Smith,* we urge this Court to ask the Supreme Court to reconsider *Smith* at the earliest possible opportunity.

III. This Court should give full protection to the free speech rights of those who provide and receive conversion therapy.

Downgrading Doyle's free speech rights to a fictional category called "professional speech," the District Court's analysis curiously but totally overlooks *National Institute of Family and Life Advocates v. Becerra,* 138 S.Ct. 2361 (2018), in which the California Attorney General tried to argue that required notices in pregnancy centers were not entitled to strict scrutiny because they were "professional speech" and therefore subject to lesser scrutiny. But the Court noted that "...this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371-72. The Court said further, "...this Court's precedents have long protected the First Amendment rights of professionals," *Id.* at 2374, "The dangers associated with content-based regulations of speech are also present in the context of professional speech," *Id.* at 2374, and "Throughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities"[44], *Id.* at 2374. The Court recognized that professional conduct

[44] The LGBT community has regarded itself as a minority, but today the minority most in danger of government suppression may be those who hold traditional

that "may incidentally involve speech" may be less protected, but conversion therapy is speech that may incidentally involve conduct. As Dr. Doyle has explained, his conversion therapy is conducted by talking with the patient and listening to the patient, nothing else.

Furthermore, conversion therapy involves intimate discussion of religious beliefs and human sexuality, issues that are highly theological, ideological, philosophical, ethical, moral, and intimately personal. Probably no field of medicine is more about ideas than psychology, and few areas of psychology involve more intimate exchange of ideas than conversion therapy.

In fact, Sigmund Freud described psychology as within the realm of religion rather than medicine:

> [T]he words, "secular pastoral worker," might well serve as a general formula for describing the function [of] the analyst ... We do not seek to bring [the patient] relief by receiving him into the catholic, protestant or socialist community. We seek rather to enrich him from his own internal sources. ... Such activity as this is pastoral work in the best sense of the word.[45]

And Carl Jung echoed a similar theme:

> Religions are systems of healing for psychic illness. ... That is why patients force the psycho-therapist into the role of a priest, and expect and demand of him that he shall free them from their distress. That is

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religious beliefs about human sexuality. See Justice Alito's dissent in *Obergefell v. Hodges,* 135 S.Ct. 2584, 2642-43 (2015).

[45] Sigmund Freud, quoted by Dr. Thomas S. Szaz, "The Theology of Therapy: The Breach of the First Amendment Through the Medicalization of Morals," *New York University Review of Law and Social Change,* V:2 (1975) 127, 133-135.

> why we psycho-therapists must occupy ourselves with problems which, strictly speaking, belong to the theologian.[46]

See also, Dr. Paul Vitz, *Psychology as Religion: The Cult of Self-Worship,* 2nd Edition (Grand Rapids: Eerdmans 1994). Dr. Vitz carefully documents the religious or anti-religious thought of Freud, Jung, and other leaders of the mental health profession. He cites books of Jung such as *An Answer to Job,* trans. R.F.C. Hull (London: Routledge and Kegan Paul, 1954), and *Modern Man in Search of a Soul* (New York: Harcourt, Brace, 1933).

Because psychology, psychiatry, psychotherapy, and related disciplines deal with spiritual and moral questions, their practice constitutes speech of the highest order and deserves the fullest protection of the First Amendment.

CONCLUSION

The very fact that the LGBT community has so vehemently opposed conversion therapy demonstrates that this is the kind of marketplace speech the Framers intended to protect by the First Amendment. But under our constitutional system of government, the remedy for those who oppose conversion therapy is not to censor and silence it, but to counter it with speech and ideas of their own.

We urge this Court to reverse the District Court and hold that Maryland Code § 1-212.1 violates the free exercise, free speech, and associational rights of

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[46] Carl G. Jung, "Psychotherapists or the Clergy," *Modern Man in Search of a Soul* (New York: Harcourt, Brace, 1933), 240-41.

those who practice conversion therapy and of those who want conversion therapy for themselves and their children.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 6,653 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of December, 2019, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

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