

No. 19-2064

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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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

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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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**REPLY BRIEF OF PLAINTIFF - APPELLANT**

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John R. Garza (Md. 8212010150)  
GARZA LAW FIRM, P.A.  
Garza Building  
17 W. Jefferson Street, Suite 100  
Rockville, Maryland 20850  
(301) 340-8200 ext. 100  
jgarza@garzanet.com

Mathew D. Staver (Fla. 0701092)  
Horatio G. Mihet (Fla. 026581)  
Roger K. Gannam (Fla. 240450)  
Daniel Schmid (Va. 84415)  
LIBERTY COUNSEL  
P.O. Box 540774  
Orlando, FL 32854  
(407) 875-1776  
court@LC.org

*Attorneys for Plaintiff-Appellant*

**DISCLOSURE**

Pursuant to Rule 26.1, Fed. R. App. P., and Local Rule 26.1, Plaintiff-Appellant CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients, makes the following disclosure:

- 1. Is party/amicus a publicly held corporation or other publicly held entity?.....NO
- 2. Does party/amicus have any parent corporations? .....NO
- 3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? .....NO
- 4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? .....NO
- 5. Is party a trade association?.....NO
- 6. Does this case arise out of a bankruptcy proceeding?.....NO

DATED this January 14, 2020

/s/ Roger K.Gannam  
 Roger K. Gannam  
*Attorney for Plaintiff-Appellant*

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## INTRODUCTION

Doyle showed in his opening brief that SB 1028 is unconstitutional because, at best, it is a content-based restriction on speech subject to strict scrutiny, which it cannot survive. (Br. Pl.-Appellant (“Doyle Br.”) at 30-44.) The brief of Defendants-Appellees (collectively, “Maryland” or the “State”) does nothing to avoid application of strict scrutiny or overcome SB 1028’s failure of strict scrutiny. To be sure, Maryland overstates its case from the beginning, claiming “a well-developed record of the risk of harm from conversion therapy,” and then that the State “took action to protect Maryland children from the harm caused by conversion therapy.” (Br. Appellees (“Md.Br.”) at 6, 16.) As already shown in Doyle’s brief, however, there is **no empirical or other concrete evidence of harm** caused by “conversion therapy” (however defined) (Doyle Br. 9-25), and Maryland’s brief does nothing to fill the void. Nor does Maryland’s brief show that Doyle lacks standing, or that Appellees are immune from suit. The Court should reverse the district court’s dismissal of Doyle’s claims and remand the case for entry of a preliminary injunction against enforcement of SB 1028.<sup>1</sup>

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<sup>1</sup> Maryland’s brief barely addresses Doyle’s viewpoint, vagueness, and prior restraint challenges. (Md.Br. 27-30.) Rather than address Maryland’s unconvincing effort here, Doyle stands on the arguments in his opening brief. (Doyle Br. 36-38, 49-52.)

## ARGUMENT

### **I. MARYLAND CANNOT MEET ITS BURDEN OF PROVING SB 1028 SATIFIES STRICT SCRUTINY.**

#### **A. Maryland Cannot Excuse SB 1028 From Strict Scrutiny by Labeling It a Regulation of Conduct.**

As already shown, the Supreme Court’s *NIFLA* decision is only the latest of a line of cases prohibiting the government from simply relabeling the speech of professionals as a pretext to restrict their speech with less scrutiny. (Doyle Br. 30-35 (citing, *inter alia*, *Nat’l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018) [hereinafter, “*NIFLA*”].) *NIFLA* affirmed the “stringent standard” of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), mandating strict scrutiny for all content-based restrictions on speech, and condemned the invidious discrimination inherent in bans on the speech of licensed professionals. 138 S. Ct. at 2371 (“As a general matter, such laws ‘are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.’”); *see also In re Murphy Brown, LLC*, 907 F.3d 788, 797 (4th Cir. 2018) (recognizing content-based laws subject to “twin presumptions” of *NIFLA* and *Reed* that such laws are “presumptively unconstitutional” and “must survive strict scrutiny” (citing *NIFLA*, 138 S. Ct. at 2371, and *Reed*, 135 S. Ct. at 2227)); *Washington Post v. McManus*, 355 F. Supp. 3d 272, 296-297 (D. Md. 2019) (observing *Reed* “was a watershed First Amendment case, refining the analysis of

content-based regulations and cementing the primacy of the rule that such regulations receive strict scrutiny” and that *NIFLA* “reaffirms the bedrock principal that content-based laws are presumptively unconstitutional”). Predictably, however, Maryland plays the labeling game anyway, arguing that SB 1028 avoids strict scrutiny because it only regulates “conduct” and not speech. (Md.Br. 17-23.)

But Maryland’s semantics cannot overcome *NIFLA*’s abrogation of this Court’s formulation of the very concept Maryland (and the district court below) used to repackage SB 1028 as a “conduct” regulation to avoid strict scrutiny. Thus, the following division of the speech of professionals is no longer valid after *NIFLA*:

[T]he relevant inquiry to determine whether to [excuse strict scrutiny] is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary. [Strict scrutiny is excused] in the former context . . . but not in the latter.

*Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013), *abrogated by NIFLA*, 138 S. Ct. at 2371-72.

Given the Supreme Court’s rejection of the ‘conduct-not-speech’ argument asserted by Maryland—whether labeled as “professional speech,” “treatment speech,” or something else—the Supreme Court’s dictum in *NIFLA* that “[s]tates may regulate professional conduct, even though that conduct incidentally involves speech,” 138 S. Ct. 2372, is inapposite. (Doyle Br. 30-35; *cf.* Md.Br. 17-23.) “[C]haracterizing speech as conduct is a dubious constitutional enterprise.”

*Wollschlaeger v. Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017). “**Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation.**” *Id.* at 1308 (emphasis added). Nor can Maryland find support in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), for its ‘conduct’ argument. Doyle’s talk therapy, **indisputably accomplished entirely through speech**, cannot be compared to the abortion **procedures** at issue in *Casey*, to which the regulated speech at issue might be merely “incidental[.]”

**B. Maryland Has No Empirical or Concrete Evidence of a Compelling Interest Justifying the Speech Restrictions of SB 1028.**

As also previously shown, the government is not entitled to deference in making speech-restrictive determinations in this context. (Doyle Br. 39-41.) Rather, under strict scrutiny, the government must support a content-based speech restriction with empirical or other concrete evidence of genuine, identifiable harm, not merely the anecdotes, conjecture, and supposition of proponents. (Doyle Br. 39-41.) *See also, e.g., Giovanni Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (requiring government to produce actual evidence of harm that is real and not conjectural). Maryland has utterly failed to identify empirical or concrete evidence of genuine harm justifying SB 1028, and therefore cannot satisfy the compelling interest prong of strict scrutiny.

As also already demonstrated, it is not Doyle's burden to prove the effectiveness of his talk therapy, or of "conversion therapy" or SOCE in general; rather, it is Maryland's burden to show empirical or concrete evidence of harm justifying SB 1028. (Doyle Br. 39-41.) Whatever **general** interest Maryland may rightfully proclaim in the health and safety of minors in the state, Maryland has no legitimate—let alone compelling—interest in protecting minors from the merely speculative narrative of harm crafted into position statements and uncritically adopted by the legislature.

Doyle's opening brief painstakingly exposed the recurring, unequivocal admissions of the 2009 APA Report—ostensibly a principal authority supporting SB 1028—that there is no empirical evidence of harm from "conversion therapy." (Doyle Br. 9-21.) Maryland's brief does not achieve any contradiction of these admissions, perhaps best summarized in this single passage from the Report:

**[T]here is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE.**

(JA112 (emphasis added).) Maryland’s Rule 30(b)(6) designee confirmed that the legislative record of SB 1028 contains no contradiction of the APA Report’s conclusions.<sup>2</sup> (JA831-34.)

Nor can Maryland overcome its admissions in discovery that it possessed no empirical or concrete evidence allowing it to determine the risk of any of the litany of SB 1028’s supposed harms from “conversion therapy,” and that Maryland could not determine “the relative risk of bad outcomes from what’s defined as conversion therapy as compared to bad outcomes from therapy in general.” (JA824-27.)

Worse than failing to overcome the utter lack of empirical evidence to support SB 1028, the State’s brief attempts to revive the falsehood that suicidality reportedly associated with “family rejection” can be causally linked to “conversion therapy.” Maryland does this by citing the written statement from amicus Free State Justice in the SB 1028 legislative history which, according to the State, “provided data about the rates of attempted suicide, drug abuse, and depression among LGBTQ youth, **especially those experiencing family rejection.**” (Md.Br. 10 (citing JA472-73) (emphasis added).) But Maryland did not ban “family rejection,” and Maryland already conceded in discovery that SB 1028 is not supported by any authority linking its banned “conversion therapy” with the suicide rates reportedly linked to “family

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<sup>2</sup> These answers are binding on the State. *See, e.g., HSK v. Provident Life & Accident Ins. Co.*, 128 F. Supp. 3d 874, 881 (D. Md. 2015).

rejection” as described in the SB 1028 recitals. (Doyle Br. 24 n.7 (citing JA1216); JA60.) Maryland’s apparent need to mislead the Court and sensationalize the legislative record undermines any argument that the State had an actual compelling interest justifying SB 1028.

Maryland’s other appeals to the legislative record likewise fail. (Md.Br. 10-11.) To make its best case in support of SB 1028, Maryland identified what it counts as complaints of harm justifying enactment. (Md.Br. 11.) None of the supposed complaints, however, provides justification. First, Maryland quotes a letter from ““a survivor of the dangerous and discredited idea that a therapist could change my sexual orientation or gender identity”” who ““**never chose** the “therapy” my family **subjected me to** during my formative years as a child.”” (Md.Br. 11 (quoting JA399) (emphasis added).) But Maryland also banned **voluntary, client-driven and client-centered talk therapy**, and, in any event, the activist<sup>3</sup> quoted did not describe in any way what he considered “conversion therapy” or how it purportedly harmed him, other than to claim it was **involuntary**. (JA399-400.) Maryland also quotes a social worker who claimed to have ““personally treated people who identify as survivors of conversion therapy, and...attest[ed] that it can take years to overcome the traumatic violation of trust that this type of “therapy” represents.”” (Md.Br. 11

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<sup>3</sup> The quoted complainant is the Head of Advocacy and Government Affairs for amicus The Trevor Project. (JA399-400.)

(quoting JA488).) Again, however, the complainant did not describe in any way what she considered “conversion therapy” (using the unscientific, non-medical term) or how it purportedly harmed anyone. (JA488-489.) Finally, Maryland quoted a pediatrician’s anecdotal account of “a patient who was ‘sent to summer camp for “conversion therapy,” only to leave camp with his self-esteem damaged immensely’ . . . .” (Md.Br.11 (quoting JA394).) The complainant, however, did not reveal the name or location of the “summer camp,” what kind of “conversion therapy” supposedly was offered, or whether the “conversion therapy” was offered by a licensed professional. (JA394.) And even here Maryland employs the suicidality feint, quoting the pediatrician’s anecdotal account that she had ““patients who have committed suicide because they didn’t receive the positive support they needed,”” but without identifying the involvement of any “conversion therapy” in their stories. (Md.Br. 11 (quoting JA394).)

In short, Maryland does not (and cannot) cite to any addition to the empirical record justifying SB 1028 (after the fact), or even a single complaint of harm caused by “conversion therapy” in Maryland, let alone harm caused by **voluntary, client-initiated and client-directed talk therapy**, such as that offered by Doyle and contemporary professionals. The State nonetheless contends it is entitled to rely upon studies and anecdotes from other locales and empirical judgments of independent organizations to satisfy its burden, citing as support *Gonzalez v.*

*Carhart*, 555 U.S. 124 (2007), and *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). (Md.Br. 24-25.) Neither case, however, involves a content-based speech restriction subject to strict scrutiny. *See Gonzalez*, 555 U.S. at 132 (addressing challenge to partial-birth abortion ban not involving speech); *Lorillard*, 533 U.S. at 555 (addressing First Amendment challenge involving commercial speech regulation subject to lower scrutiny). Moreover, as shown repeatedly, Maryland relies on **no empirical judgments or studies** whatsoever—from anyone—and others’ mere anecdotes cannot supply a compelling interest as a matter of law. (Doyle Br. 39-41, 43-44.) The Court should reject Maryland’s attempt to lower the strict scrutiny bar to accommodate the State’s paltry record.<sup>4</sup>

**C. SB 1028 Fails Narrow Tailoring Under Any Standard.**

Doyle’s opening brief shows Maryland also cannot make the required showing that SB 1028 is the least restrictive means for advancing its purported interests, or that the statute is otherwise narrowly tailored, primarily because the State did not seriously (or at all) consider any less restrictive alternative to its total speech ban. (Doyle Br. 44-49.) Maryland does not come close to proving it seriously

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<sup>4</sup> None of the amicus briefs reveals any addition to the empirical record that could justify SB 1028, either when enacted or since. Nor could any amicus properly add to the evidentiary record in any event. *See, e.g., Strasser v. Doorley*, 432 F.2d 567, 569 (1st Cir. 1970) (“[A]n *amicus* who argues facts should rarely be welcomed....”)

considered any less restrictive alternative, including the several presented by Doyle (Doyle Br. 44-49), or ruled out any alternative for good reason. *See Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016). Ultimately, and fatally, Maryland did not and cannot prove it “seriously undertook to address the problem with less intrusive tools readily available to it.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014).

The record further undermines the State’s and the district court’s reasoning in rejecting informed consent as a viable, less speech-restrictive alternative to the total speech ban of SB 1028. (*Cf.* Op. 16-17; Md.Br. 26-27.) SB 1028 does not prohibit irreversible cross-sex hormone treatments or permanent surgical removal of organs or tissue for minors on the grounds of their inability to consent, even though the SAMHSA Report lauded by Maryland indicates these are the options for “**adolescents**, if physical gender transition...is being considered....” Rather, Maryland apparently endorses trusting the consideration of these options, “including the effects on behavioral health disorders, cognitive and emotional development, and **potentially irreversible effects on physical health, fertility, and sexual health...to the adolescent** and parents or guardians.” (JA281 (emphasis added).) Nor does SB 1028 prohibit—on age-of-consent or any other ground—counseling to “provide[] acceptance, support, and understanding, or the facilitation of coping, social support, and identity exploration and development” (JA61) in support of a

minor's physical "transition." Thus, Maryland has no problem with a minor's being **legally** unable to consent to, or unable to refuse when parents insist, irreversible cross-sex hormone treatment or permanent surgical removal of organs or tissue in pursuit of "transition" to treat the minor's gender dysphoria or related emotional distress. *See* Md. Code Ann., Health-Gen. §§ 20-102, 20-104. (*Cf.* JA281 (presenting SAMHSA position that "[w]ithholding timely physical gender transition interventions for...adolescents...prolongs gender dysphoria and exacerbates emotional distress.").)

In light of the foregoing, Maryland's argument that informed consent cannot work is, at best, unserious. Maryland has proven no barriers, legal or otherwise, to reliance on developmentally appropriate informed consent from minors and their parents or guardians in connection with voluntary talk therapy sought by minors to facilitate their change goals. Because Maryland never considered this or any other alternative to SB 1028's total speech ban, Maryland cannot satisfy narrow tailoring.<sup>5</sup>

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<sup>5</sup> Defendants make an even less serious effort, in three logically disconnected sentences, to prove why banning only aversive or coercive talk therapy would not be a workable, less restrictive alternatives to SB 1028's blanket speech ban. (Md.Br. 27.)

## II. DOYLE HAS INDIVIDUAL AND THIRD-PARTY STANDING.

### A. The Record Establishes a Sufficient Threat of Discipline to Confer Individual Standing to Challenge SB 1028, Contrary to Maryland's Disingenuous Interpretations.

#### 1. Doyle's Unrebutted Testimony Establishes a Sufficient Threat of Discipline.

The State argues that Doyle lacks individual standing to challenge SB 1028. (Md.Br. 33-35.) The district court rightly rejected this argument, concluding that Doyle actively treats minor clients in Maryland, and that Doyle “has experienced a non-speculative and objectively reasonable chilling effect due to [SB 1028].” (JA1038-1042 (internal quotation marks omitted).) Appellees claim, however, that “[g]iven Mr. Doyle’s testimony about his counseling practice, the language of the consent forms that he uses, and the terms of [SB 1028], the evidence does not support the conclusion that Mr. Doyle intends to engage in a course of conduct proscribed by the statute.” (Md.Br. 34-35.) This Court should reject Maryland’s argument because Doyle’s unrebutted testimony establishes a sufficient threat of discipline to confer individual standing.

Contrary to the portions of the record misrepresented or cherry-picked by the State to distort the reality of Doyle’s Maryland counseling affected by SB 1028 (Md.Br.34-35), Doyle’s unrebutted testimony establishes that he is prohibited by SB 1028 from providing counseling **that his Maryland minor clients seek and that he wants to provide:**

Q Now, in the course of your counseling, are you sometimes approached by minor clients that present with unwanted same sex attractions?

A **Yes.**

Q And that present with stress or anxiety that results from their unwanted same sex attractions?

MS. ELLIS: Objection.

A **Yes.**

Q And are you sometimes presented with clients who come to you because they have unwanted gender identity confusion?

A **Yes.**

Q And do they present with anxiety or stress resulting from the gender identity confusion?

A **Yes.**

Q And in both of those cases, do those clients sometimes include minors?

A **Yes.**

Q And --

A **I currently have minors in that situation.**

Q And are these minor clients sometimes residents of... Maryland?

A **Yes.**

Q When you are approached by such minor clients who are residents of... Maryland, do they sometimes identify a goal that they have for themselves to change or reduce or eliminate the unwanted attraction or confusion?

MS. ELLIS: Objection to form.

**A Sometimes they do, sometimes they don't.**

Q In those cases where the minor clients identify a goal of changing, reducing or eliminating the unwanted attractions or confusion, do you wish to provide them with the counseling that they seek in order to accomplish their self-chosen goals?

MS. ELLIS: Objection to form.

**A Yes, I do, and currently --**

Q Well, you've answered my question. Let me ask you another.

Currently, within the State of Maryland, are you able to provide them with the counseling that they seek in those circumstances?

**A No, not the counseling they seek, nor the counseling I would like to give. I can't give the full range of services that I would like to give.**

Q And why not?

**A Because the statute, the statute determines that the work that I do is called conversion therapy, although I object to that title and label.**

Q Well, but you don't call that work conversion therapy. I believe that was your testimony, right?

**A No.**

Q But you believe that the statute subsumes the work that you do within its definition of conversion therapy?

**A Yes.**

MS. ELLIS: Objection to form.

**A Yes. I believe the statute labels and describes my work under that umbrella term of conversion therapy.**

(JA1003-1006.) Thus, Doyle’s unequivocal and unrebutted testimony establishes that he has counseling relationships in Maryland directly affected by SB 1028.<sup>6</sup> Given this record, Doyle easily satisfies standing under the principal case cited by the State (Md.Br. 33), *Kenny v. Wilson*, 885 F.3d 280 (4th Cir. 2018):

There are two ways that plaintiffs’ allegations of a fear and risk of future [discipline] can satisfy the injury-in-fact requirement for prospective relief. First, there is a sufficiently imminent injury in fact if plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder. **It is not necessary that a plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.** Separately, there is an ongoing injury in fact if plaintiffs **make a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression.**

885 F.3d at 288 (emphasis added) (internal quotation marks and citations omitted).

The threat of official disciplinary action against Doyle under SB 1028 is more than credible. SB 1028 defines certain forms of counseling to be “conversion therapy,” which the counseling ban defines as “unprofessional conduct . . . subject to

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<sup>6</sup> Even without this testimony, Doyle’s verified complaint allegations establish his individual standing. (JA12-13 ¶¶ 2-7, JA21 ¶¶ 105-106, JA36-39 ¶¶ 123-143.)

discipline by the . . . practitioner’s licensing or certifying board.” (JA61-62.) Doyle’s un rebutted testimony is that the talk therapy counseling some of his minor clients seek, and that he wants to provide in response, is included within SB 1028’s definition of prohibited “conversion therapy” (even though he personally does not use that term), and therefore he refrains. Thus, the record establishes there is a sufficiently credible threat of prosecution of Doyle under SB 1028, the counseling ban “deters the exercise of his constitutional rights,” and, as a result, he engages in “self-censorship.” No more is required to establish standing.

## 2. Maryland’s Disingenuous Interpretation of SB 1028 Cannot Deprive Doyle of Standing.

The Court should reject Maryland’s disingenuous interpretation of SB 1028 that defies both the plain language of the statute and the discovery position Maryland represented to the court below. Maryland argues that Doyle lacks standing to challenge SB 1028 because he does not engage in “conversion therapy” under the statute. (JA34-35.) This argument, however, is purely semantic. Specifically, Maryland points to disclaimers in Doyle’s informed consent documentation provided to clients, in which Doyle states ““he does not practice . . . conversion therapy, or any type of sexual orientation change effort therapy.”” (Md.Br. 34 (citing JA859, 863, 867, 885-892).) But, as shown above, Doyle clearly testified that “conversion therapy” **as defined in SB 1028** includes counseling that his minor clients seek, and that he wants to provide in response, but cannot due to the

counseling ban. (JA1003-1006.) Doyle further explains the terminology conflict in response to questioning at his deposition:

**A ...I don't believe there's a standard or uniform definition of SOCE therapy, it tends to be more of a broad umbrella term that doesn't necessarily define the work that I do.**

....

**Q** What about, how would you define the term conversion therapy?

**A It's even more broad and ill-defined. There is no standard or uniform definition.**

(JA888-89.)

Irrespective of the different uses of the term “conversion therapy” within and without SB 1028, the plain language of Maryland’s counseling ban prohibits counseling that Doyle’s minor clients seek and that he wants to provide:

“Conversion therapy” includes **any effort to change the behavioral expression** of an individual’s sexual orientation, **change gender expression**, or **eliminate or reduce sexual or romantic attractions** or feelings toward individuals of the same gender.

(JA61 (emphasis added); JA1003-1006 (Doyle’s testifying SB 1028 prohibits his providing counseling, requested by minor clients, to facilitate changing unwanted same-sex attractions and gender identity confusion).) And although Doyle testified he does not enter into counseling with any predetermined goal to change a client’s sexual or gender attractions or identity, he did testify that he is open to facilitating a

client's change goals. (JA891-92.) SB 1028's prohibition of any "practice or treatment...that seeks to change" and "**any** effort to change the behavioral expression of an individual's sexual orientation, change gender expression, or eliminate or reduce sexual or romantic attractions" do not differentiate between change goals initiated by a practitioner and change goals initiated by a minor client. Thus, by its plain language, SB 1028 prohibits Doyle from affirming and facilitating a client's change goals **even where Doyle himself did not bring any predetermined change goals to the relationship.**

In *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019), involving a constitutional challenge to local counseling bans essentially identical to Maryland's, *id.* at 1243-44, the Southern District of Florida rejected a nearly identical semantic argument made by the government defendants. Like Doyle here, the therapist plaintiffs in *Otto* provide only talk therapy according to goals set by their clients. *Id.* at 1243-44. Specifically, Plaintiff Otto "practices exclusively talk therapy, consisting of client-centered and client-directed conversations with his clients, concerning the clients' goals." *Id.* at 1243. The government defendants, like Maryland here, argued Dr. Otto "does not seek to change his clients, and therefore does not have a practice of performing SOCE." *Id.* at 1245. The district court rejected the argument, observing that "both named Plaintiffs have counseled minors on their unwanted same sex attractions." *Id.* at 1246. Therefore, irrespective of their clients'

initiating the change goals, the court found “Drs. Otto and Hamilton will be regulated by the ordinances, and, if they establish their constitutional claims, will suffer ‘an injury in fact’ that is not ‘hypothetical.’ *Id.* For the same reasons, this Court should reject Maryland’s semantic argument in favor of the reality that Maryland’s counseling ban restricts Doyle and provides him standing.

Furthermore, Maryland expressly represented to the district court that the interpretation of SB 1028 the State necessarily adopts now—that SB 1028 must be interpreted not to prohibit talk therapy facilitating change if the change goal is introduced by the client rather than the practitioner (Md.Br. 34-35)—is unknowable outside a quorum of one of the health occupations boards charged with enforcing the statute. (Defs.’ Mem. Opp’n Pl.’s Mot. Compel, Doc. 52, at 5, 9.) This Court should not countenance the State’s duplicity.

Maryland’s Rule 30(b)(6) designee’s failure to answer Doyle’s interpretive questions on what constitutes prohibited “conversion therapy” under SB 1028 was a principal issue in Doyle’s motion below for, *inter alia*, an order compelling [the State] to provide a Rule 30(b)(6) deposition witness properly prepared and able to answer [Doyle’s] deposition questions concerning [the State’s] positions, interpretation, understanding, application, and enforcement of SB 1078.” (Pl.’s Mot. Compel, Doc. 44, at 3-13; Pl.’s Reply Supp. Mot. Compel, Doc. 54, at 2-13.) As shown to the district court in Doyle’s motion, Maryland’s designee, when asked

specifically whether a licensed counselor with no predetermined goals for treatment would be guilty of “conversion therapy” by agreeing to facilitate a minor client’s goal of change, was unwilling or unable to answer:

Q . . . . [I]f the minor requests it, requests help to change sexual orientation or gender identity and the practitioner responds by doing what the client asks, is that conversion therapy under SB 1028?

Ms. Ellis: Objection.

**A I believe that would be a matter for the board to consider if that’s unprofessional conduct.**

Q So you’re not able to tell me?

**A I’m not.**

. . . .

Q And I’m asking you based on what you see on the page, is that a correct interpretation of what’s here, that when the minor requests assistance to change or reduce or eliminate same-sex attractions and a practitioner responds by doing what the client asks, is that conversion therapy?

Ms. Ellis: Objection

**A And my answer is going to continue to be the same, that is legislative intent, that is judicial review. I cannot render an opinion on that.**

Q And so again just for the sake of completeness, is your answer the same if I asked about a minor who presented to a practitioner requesting help to change gender expressions and that practitioner responds by doing what the client asks, would that be conversion therapy under SB 1028?

Ms. Ellis: Objection

**A And my response would be the same.**

Q That you are unable to tell me?

**A Correct.**

(JA813-15; Pl.'s Mot. Compel at 9-10.)

Now that Maryland wants to attack Doyle's standing based on the discovery record, however, the State disregards its prior unwillingness to interpret SB 1028 on the record and its subsequent bald representation to the district court that such an interpretation is impossible outside of a health occupations board quorum, and offers this Court an unsupportable interpretation of SB 1028 in derogation of the statute's plain language. This Court should reject Maryland's unsupportable and duplicitous interpretation of SB 1028, and hold that Doyle has standing.

**B. Doyle Demonstrated Third-Party Standing to Assert His Minor Clients' First Amendment Rights to Receive Information.**

Doyle previously demonstrated the district court's error in denying third-party standing. (Doyle Br. 52-55.) Maryland argues in its brief, however, that Doyle did not sufficiently allege a hindrance to the ability of his minor clients to protect their own interests. (Md.Br. 32.) But a plain reading of the only Fourth Circuit case cited by Maryland, *Freilich v. Upper Chesapeake Health, Inc.*, shows not only that the district court erred, but also that Maryland missed the point:

The district court held that even assuming the existence of the first two elements, Dr. Freilich did not sufficiently allege a hindrance to her patients' ability to protect their own interests. Here Dr. Freilich **fails to allege sufficient obstacles to the patients bringing suit themselves**. The district court correctly pointed out that **“the dialysis patients and indigent patients on whose behalf Dr. Freilich advocated are not constrained in bringing suit by any obstacles made known in the Complaint.”**

313 F.3d 205, 215 (4th Cir. 2002) (emphasis added) (citations omitted).<sup>7</sup> Unlike the plaintiff in *Freilich*, who alleged no obstacles at all, Doyle alleged the very obstacles identified in cases approving third-party standing:<sup>8</sup>

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

(JA39; Doyle Br. 53-55.)

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<sup>7</sup> Contrary to Maryland's suggestion, *Freilich* does not impose an additional requirement that a plaintiff demonstrate “why a pseudonymous filing would not adequately protect his clients from stigma and invasion of privacy . . . .” (Md.Br. 33.) Nor does Maryland make any attempt to compare the actual third-party standing allegations in *Otto* or in the abrogated *King* and *Pickup* cases. (Md.Br. 33-34.)

<sup>8</sup> If necessary, Doyle stands ready to make even more specific allegations in an amended complaint, for which leave to file should be freely granted. (*See infra* pt. IV.)

Maryland further erred in representing to this Court that no court has allowed third-party standing in a case challenging the constitutionality of a “conversion therapy” ban. (Md.Br. 33.) As shown in Doyle’s opening brief (Doyle Br. 54), the most recent decision in such a case **approved third-party standing**. *See Vazzo v. City of Tampa*, No. 8:17-CV-2896-T-02AAS, 2019 WL 1048294, at \*4-5 (M.D. Fla. Jan. 30, 2019) (“[G]iven the sensitive nature of SOCE counseling—which the amended complaint describes in detail—the plaintiffs sufficiently demonstrate the Tampa minor’s privacy interest presents an obstacle to bringing claims on his or her own behalf.”), *report and recommendation adopted by* 2019 WL 1040855 (M.D. Fla. Mar. 5, 2019); *see also Vazzo v. City of Tampa*, No. 8:17-cv-2896-T-02AAS, 2019 WL 4919302 (M.D. Fla. Oct. 4, 2019) (permanently enjoining Tampa “conversion therapy” ban).

### **III. APPELLEES ARE NOT IMMUNE FROM SUIT.**

Appellees also argue they are immune from Doyle’s claims under the Eleventh Amendment. (Md.Br. 36-41.) This Court, like the district court (JA1048-1050), should reject the argument because Doyle properly alleged and established that Appellees—Maryland’s Governor and Attorney General, in their official capacities—have sufficient connection to the enforcement of SB 1028. (JA15.)

The familiar *Ex parte Young* exception to Eleventh Amendment sovereign immunity “allows suits against state officers for prospective equitable relief from

ongoing violations of federal law.” *Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001). To sue a state official in a constitutional challenge to state law, “it is plain that such officer must have some connection with the enforcement of the act,” whether explicit in the act itself or arising out of general law pertaining to the office. *Ex parte Young*, 209 U.S. 123, 157 (1908). The Supreme Court observed, however, that while a state’s governor and attorney general may be convenient defendants for suits testing the constitutionality of state statutes, they are not always proper defendants if their connection to enforcement of the challenged law is too general. *See id.* But the *Young* Court did not decide that a state governor or attorney general is never a proper defendant in constitutional challenges. Indeed, in the case before it, the Supreme Court held the Minnesota attorney general’s “power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party . . . .” *Id.* at 161. Thus, where a governor or attorney general has a sufficient connection to enforcement of a challenged law “by virtue of his office” he may be a proper defendant. As the district court observed, “[t]he requirement is not a stringent one, as the officer being sued need only have some connection with the enforcement of the act.” (JA1049 (internal quotation marks omitted) (quoting *Stinnie v. Holcomb*, 734 F. App’x 858, 875 (4th Cir. 2018)).)

SB 1028, on its face, contemplates enforcement through “discipline by the . . . practitioner’s licensing or certifying board” under Titles 14, 17, 18, 19, or 20

of the Health Occupations Article of the Maryland Code. (JA61-62.) SB 1028 also provides that the Maryland Department of Health “shall adopt regulations necessary to implement this section.” (JA62.) Thus, although Appellees do not attempt to define whom they believe to be the proper defendants for Doyle’s challenge, SB 1028 itself suggests department- or board-level officials are among the class of state officials who may be proper defendants by virtue of explicit authority in SB 1028. *See Young*, 209 U.S. at 157. Maryland’s Constitution, however, also vests “[t]he executive power of the State” in the Governor, and provides that “[h]e shall take care that the Laws are faithfully executed.” Md. Const. Art. I, §§ 1, 9. The state constitution also requires the Attorney General, “whenever required by...the Governor” to “[g]ive his opinion in writing...on any legal matter or subject.” Md. Const. Art. V, § 3(a)(4). Furthermore, the Governor has statutory authority to “supervise and direct the officers and units in [the Executive] Branch,” Md. Code Ann., State Gov’t § 3-302, and the Attorney General has a statutory responsibility to be “the legal adviser of...each officer and unit of the State government,” Md. Code Ann., State Gov’t § 6-106(b). Thus, Maryland’s general laws provide sufficient connection between Appellees and enforcement of SB 1028, by virtue of their respective offices, to make them proper defendants in a federal constitutional challenge to the statute. *See Young*, 209 U.S. at 157. Specifically, this Court may declare SB 1028 unconstitutional and enjoin Appellees to halt its enforcement by

virtue of a directive issued to the Maryland Department of Health and its subsidiary licensing boards. Not only have Appellees not suggested who they believe would be better defendants, but they also have not shown this Court that such a directive would not be binding or otherwise efficacious on the department- and board-level Executive Branch officials identified in SB 1028.

Appellees argue they are immune because SB 1028 does not expressly confer enforcement authority on them. (Md.Br. 38-39.) But, as recognized by the district court, “[i]t is not even necessary that such duty of enforcement be declared in the same act which is to be enforced.” (JA1049-1050 (internal quotation marks omitted) (quoting *Stinnie*, 734 F. App’x at 875).) *See also Young*, 209 U.S. at 157 (“The fact that the state officer, **by virtue of his office**, has some connection with the enforcement of the act, is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.” (emphasis added)). Likewise unavailing is Appellees’ argument that the Governor is immune because he cannot undo a disciplinary decision already made by any of the health occupation licensing boards. (Md.Br. 40.) As shown above, the Governor can direct the Attorney General, as the statutory legal advisor to the Maryland Department of Health, to issue a directive to the Department and its subsidiary licensing boards—before enforcement. Whether the Governor has post-enforcement review authority is, thus, irrelevant.

Doyle properly alleged Appellees' enforcement connections to SB 1028. (JA15.) Should this Court, however, determine these allegations insufficient, allowing amendment to name different officials is the appropriate course. *See, e.g., Lytle*, 240 F.3d at 410 (“Moreover, in light of the disagreement over the naming of appropriate defendants, the district court may consider permitting amendments to the pleadings to resolve any Eleventh Amendment difficulties in this case. Such a remand would not, apparently, be unwelcome by the district court.”).<sup>9</sup>

#### **IV. MARYLAND CONCEDED DOYLE IS ENTITLED TO LEAVE TO AMEND HIS COMPLAINT IF THIS COURT AFFIRMS DISMISSAL.**

Doyle showed in his opening brief not only that he sufficiently stated his claims, but also that he is entitled to leave to amend his complaint should this Court determine that his complaint is lacking in any respect. (Doyle Br. 55.) For example, if the Court were to affirm dismissal on the alternative grounds that the named appellees have Eleventh Amendment immunity (which Doyle does not concede would be proper, *see supra* pt. III), permitting Doyle to amend his complaint to name different state officials must be allowed under Rule 15 and Fourth Circuit precedent. This Court has “interpreted Rule 15(a) to provide that ‘leave to amend a pleading should be denied only when the amendment would be prejudicial to the opposing

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<sup>9</sup> If necessary, Doyle stands ready to name the department- and board-level officials identified in SB 1028 as defendants in an amended complaint, for which leave to file should be freely granted. (*See infra* pt. IV.)

party, there has been bad faith on the part of the moving party, or the amendment would have been futile.” *Ostrzenski v. Seigel*, 177 F.3d 245, 252 (4th Cir. 1999). Futility does not apply because Doyle’s well-pleaded allegations must be allowed against **some** state official(s), even if not the Governor and Attorney General. Moreover, there are no grounds to assert bad faith in Doyle’s prosecution of this action against the Governor and Attorney General in their official capacities, and no prejudice to them or any substitute state official would result from amendment. To be sure, any state official named in an amendment could continue with the same counsel from the Attorney General’s office, and all discovery and other proceedings to date would continue to apply.<sup>10</sup>

By failing to offer any argument in opposition to amendment in its brief, Maryland has conceded the point. *W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App’x 214, 226 (4th Cir. 2019) (“[A]n appellee’s wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant’s brief ordinarily constitutes a forfeiture.”) (citing *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) (observing “such an outright failure to join in the adversarial process would ordinarily result in waiver”)). Doyle made a conspicuous, nonfrivolous argument

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<sup>10</sup> “Delay alone, however, is an insufficient reason to deny the plaintiff’s motion to amend.” *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006).

that he is entitled to leave to amend,<sup>11</sup> and Maryland made no argument whatsoever in opposition. Thus, Maryland has forfeited the point. If this Court affirms dismissal of any of Doyle's claims for insufficiency of allegations, which the Court should not do, the Court should remand with instructions to the district court to grant Doyle leave to amend.

### **CONCLUSION**

For the foregoing reasons, the district court's dismissal of Doyle's claims should be reversed, and the case remanded to the district court for entry of a preliminary injunction against enforcement of SB 1028.

Dated this January 14, 2020.

s/ Roger K. Gannam  
Mathew D. Staver (Fla. 0701092)  
Horatio G. Mihet (Fla. 026581)  
Roger K. Gannam (Fla. 240450)  
Daniel Schmid (Va. 84415)  
Liberty Counsel  
P.O. Box 540774  
Orlando, FL 32854  
Phone: (407) 875-1776  
E-mail: court@lc.org

*Attorneys for Plaintiff-Appellant*

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<sup>11</sup> Doyle also expressly requested leave to amend from the court below. (Pl.'s Mem. Opp'n Defs.' Mot. Dismiss, Doc. 47, at 18.)

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DATED this January 14, 2020

s/ Roger K. Gannam \_\_\_\_\_  
Roger K. Gannam  
*Attorney for Plaintiff-Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that, on this January 14, 2020, a copy of the foregoing was electronically filed through the Court's CM/ECF system, which will effect service on the following counsel and parties of record:

Kathleen A. Ellis  
Brett E. Felter  
Office of the Attorney General of Maryland  
Suite 302, 300 West Preston Street  
Baltimore, Maryland 21201  
kathleen.ellis@maryland.gov  
brett.felter@maryland.gov

*Attorneys for Defendants-Appellees*

s/ Roger K. Gannam  
Roger K. Gannam  
*Attorney for Plaintiff-Appellant*