

# SEX, PSYCHOLOGY, AND THE RELIGIOUS “GERRYMANDER”: WHY THE APA’S FORTHCOMING POLICY COULD HURT RELIGIOUS FREEDOM\*

## INTRODUCTION

Even as early as elementary school, David always felt more comfortable around the girls in his class than the boys.<sup>1</sup> He was a momma’s boy and though he had various “girlfriends,” he really just wanted a male best friend.<sup>2</sup> In high school this struggle escalated.<sup>3</sup> David continued dating girls, but he longed for male acceptance.<sup>4</sup> When a popular guy sought out friendship with David in college and they discovered that they both felt attracted towards males, their friendship transitioned into a sexual relationship.<sup>5</sup> Post-college, David’s sexual encounters with males continued through online chat rooms, pornography, and a one night stand.<sup>6</sup>

This example of a youth’s exploration of homosexuality is not distinctively rare, but for one remaining factor: David grew up in a church-attending southern family and became a Christian when he was eleven years old.<sup>7</sup> His sexual encounters conflicted with his religious convictions. He felt distant from God and wanted help.<sup>8</sup>

What happens when the worlds of sexuality and religion collide? What is the response when individuals encounter sexual desires inconsistent with their religious beliefs? How do they sort through the incompatible thoughts and actions? Until recently, an individual dealing with these difficult issues could consult a psychologist who might recommend that the individual maintain an orientation or lifestyle consistent with his or her religious faith. But under the American Psychological Association’s (“APA”) potential forthcoming policy on therapies involving homosexuality (“Policy”),<sup>9</sup> psychologists may no longer be able to make certain recommendations based on a patient’s

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\* Winner of the first annual Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

<sup>1</sup> David Fountain, *Why Was It Worth It?*, EXODUS INTERNATIONAL 1 (2006), <http://exodus.to/files/DFountainTestimony.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Id.* at 1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *See infra* Part I.B.

religious faith, and religious patients may no longer be able to receive the breadth of counsel they need.<sup>10</sup>

The APA's Policy will likely cite to and reinterpret the APA's *Ethical Principles of Psychologists and Code of Conduct* ("*Ethics Code*") to articulate its position on counseling homosexuals.<sup>11</sup> Because many states incorporate the *Ethics Code* into their psychologists' licensing codes—which state psychology boards oversee and apply—a change in the APA's interpretation of the *Ethics Code* could promulgate a change in the way the state boards adjudicate ethics complaints.<sup>12</sup>

This Comment explores the constitutional issues, namely the First Amendment problems, with the Policy and whether state psychology boards should follow the APA's lead when applying their licensing codes. Part I discusses the historical background relevant to the Policy and predicts what problems the Policy will cause. Part II analyzes the First Amendment concerns, specifically regarding the Free Exercise Clause, created by the Policy as well as the resulting harmful effect the Policy could have on patients. In addition to examining problems arising under the U.S. Constitution, Part II also argues that state constitutions and religious liberty statutes conflict with the application of the Policy. Part III proposes as a solution a conscience clause addendum to the Policy, the *Ethics Code*, and state licensing codes.

## I. HISTORICAL BACKGROUND TO THERAPIES INVOLVING HOMOSEXUALITY AND THE APA'S FORTHCOMING POLICY CHANGE

### A. History of the APA's Position on Homosexuality

The APA is "a scientific and professional organization that represents psychology in the United States" and "is the largest association of psychologists worldwide."<sup>13</sup> As such, the APA's influence on therapy involving homosexuality is unmatched. After the American Psychiatric Association declared in 1973 that homosexuality is not a

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<sup>10</sup> David Crary, *Psychologists to Review Stance on Gays*, HUFFINGTON POST, July 10, 2007, <http://www.huffingtonpost.com/huff-wires/20070710/gays-psychologists>.

<sup>11</sup> The APA cited to and defined its 1997 position on homosexuality based on its *Ethics Code*. APA Council of Representatives, Resolution on Appropriate Therapeutic Responses to Sexual Orientation (Aug. 14, 1997), <http://www.apa.org/pi/sexual.html> [hereinafter 1997 Resolution].

<sup>12</sup> See *infra* note 32 and accompanying text. See generally Angela M. Liszcz & Mark A. Yarhouse, *A Survey on Views of How to Assist With Coming Out as Gay, Changing Same-Sex Behavior or Orientation, and Navigating Sexual Identity Confusion*, 15 ETHICS & BEHAV. 159, 160 (2005); Crary, *supra* note 10.

<sup>13</sup> About the American Psychological Association, <http://www.apa.org/about> (last visited Apr. 10, 2009).

mental disorder, altering its century-long position, the APA followed suit in 1975.<sup>14</sup>

Years later, in 1997, the APA advanced its position on homosexuality a step further by establishing a resolution ("1997 Resolution") about therapy involving sexual orientation.<sup>15</sup> One behavior health journal summarized the APA's 1997 Resolution as follows: "Homosexuality is not a mental illness and therefore does not need any so-called conversion therapy . . ."<sup>16</sup> In light of the coercive pressures gay, lesbian, and bisexual adults and youths experience to conform their actions to social norms, the 1997 Resolution aimed to discourage harmful therapy practices.<sup>17</sup> The APA resolved, among other things, that psychologists must obtain the client's informed consent to therapy and must not discriminate based on sexual orientation or allow sexual orientation biases to impact their work.<sup>18</sup> The 1997 Resolution further stated:

[T]he American Psychological Association opposes portrayals of lesbian, gay, and bisexual youth and adults as mentally ill due to their sexual orientation and supports the dissemination of accurate information about sexual orientation, and mental health, and appropriate interventions in order to counteract bias that is based in ignorance or unfounded beliefs about sexual orientation.<sup>19</sup>

The APA's 1997 Resolution, though reaffirming its position against treating homosexuality as a mental disorder, remained merely cautionary toward therapies that change homosexual orientation or behavior. The 1997 Resolution addressed general concerns that certain therapies may implicate, but the absence of specific prohibitions gave psychologists the discretion needed to best confront issues religious patients face.<sup>20</sup> Now, more than a decade later, the APA revisits its 1997 Resolution in a more directed sanction on certain therapies.

#### *B. The APA's Potential Policy Against Certain Therapies Involving Homosexuality*

Though the APA's 1997 Resolution sets forth authoritatively the APA's concerns about certain sexual orientation therapies, it wisely left

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<sup>14</sup> John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOLOGIST 620, 633 (1975).

<sup>15</sup> 1997 Resolution, *supra* note 11.

<sup>16</sup> *APA Passes Resolution on Homosexuality Conversion Therapy*, BEHAV. HEALTH TREATMENT, Sept. 1997, at 5, 5.

<sup>17</sup> 1997 Resolution, *supra* note 11.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See id.*

room for psychologists who disagreed. Allowing for dissenters was essential because there are multiple ways that psychologists approach counseling homosexual patients.<sup>21</sup>

Change therapy, for example, is one approach used by some psychologists, often in response to requests from clients who are highly religious.<sup>22</sup> It is the umbrella term for reorientation counseling techniques, including reparative therapy.<sup>23</sup> In contrast, the gay-integrative approach views “homosexuality and heterosexuality equally as natural or normal” and “facilitates the integration of same-sex attraction into an LGB [(lesbian, gay, and bisexual)] identity synthesis.”<sup>24</sup> The tension between these approaches makes the Policy remarkably polarizing. Even more alarming, the Policy could conceivably undermine a third approach, sexual identity therapy,<sup>25</sup> which views behavioral change as a legitimate option for patients seeking to harmonize their faith and lifestyle. After decades of maintaining a policy broad enough to include legitimate forms of change therapies, gay-integrative approaches, and sexual identity therapy, a potential ban on certain therapies is significant.<sup>26</sup>

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<sup>21</sup> See, e.g., Liszcz & Yarhouse, *supra* note 12.

<sup>22</sup> See STANTON L. JONES & MARK A. YARHOUSE, EX-GAYS?: A LONGITUDINAL STUDY OF RELIGIOUSLY MEDIATED CHANGE IN SEXUAL ORIENTATION ch. 1 (2007).

<sup>23</sup> Reparative therapy is a very specific approach that aims for change based on the assumption that “some childhood developmental tasks were not completed” and that the parents’ failings created inevitable wounds. JOSEPH NICOLSI, HEALING HOMOSEXUALITY: CASE STORIES OF REPARATIVE THERAPY 211–13 (1993).

<sup>24</sup> Liszcz & Yarhouse, *supra* note 12, at 161; see also *id.* at 176 (discussing results of a study that found “not all clinicians accept a gay-integrative treatment approach as acceptable ethical practice for every client who experiences same-sex attraction”).

<sup>25</sup> In sexual identity therapy, “the focus is not on changing orientation or integrating attractions into an LGB identity per se but on helping each client identify him- or herself publicly and privately in ways that are consistent with their beliefs and values about human sexuality and sexual behavior.” Liszcz & Yarhouse, *supra* note 12, at 162; see also Warren Throckmorton & Mark A. Yarhouse, *Sexual Identity Therapy: Practice Framework for Managing Sexual Identity Conflicts* (2006), <http://wthrockmorton.com/wp-content/uploads/2007/04/sexualidentitytherapyframeworkfinal.pdf>.

<sup>26</sup> The Department of Health and Human Services provides a question and answer document on sexuality, which states that therapy *cannot* change sexual orientation:

Even though most homosexuals live successful, happy lives, some homosexual or bisexual people may seek to change their sexual orientation through therapy, sometimes pressured by the influence of family members or religious groups to try and do so. The reality is that homosexuality is not an illness. It does not require treatment and is not changeable.

U.S. Dep’t of Health & Human Servs., *Answers to Your Questions About Sexual Orientation and Homosexuality*, [http://www.ct.gov/dcf/LIB/dcf/safe\\_harbor/pdf/Answers\\_About\\_Orientation.pdf](http://www.ct.gov/dcf/LIB/dcf/safe_harbor/pdf/Answers_About_Orientation.pdf) (last visited Apr. 10, 2009). In general, psychologists who oppose change therapy do so based on three prevailing arguments: “(a) homosexuality is no longer considered a mental illness, (b) those who request change do so because of internalized homophobia, and (c) sexual orientation is immutable.” Mark A. Yarhouse & Warren

In furtherance of this revision, an APA taskforce is currently considering which approaches to sexual orientation therapy the APA will endorse and oppose.<sup>27</sup> The taskforce will submit, subject to the full APA governance's review, recommendations for the APA's Policy on several topics, including "[t]he appropriate application of affirmative therapeutic interventions for adults who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both."<sup>28</sup> Though called a taskforce on "sexual orientation," the APA's reference to "*behavioral expression*" of sexual orientation could threaten therapies that simply focus on changing homosexual behavior.<sup>29</sup>

The APA taskforce was expected to develop a preliminary report by December 2007 with the final report submitted in early 2008.<sup>30</sup> As of this publication, however, the APA continues to compose the Policy, which will likely be released in 2009.

### C. State Psychology Boards and the Problematic Implications of the Policy

Even if the Policy remains merely aspirational and not mandatory for APA members, the contemplated Policy could create a ruckus for state boards of psychology. State psychology boards serve as arbitrators for ethical infractions committed in violation of state codes that govern the licensing of psychologists.<sup>31</sup> Many state codes incorporate by reference the *Ethics Code* into their licensing provisions.<sup>32</sup> Consequently,

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Throckmorton, *Ethical Issues in Attempts to Ban Reorientation Therapies*, 39 PSYCHOTHERAPY: THEORY/RES./PRAC./TRAINING 66, 66 (2002) [hereinafter *Ethical Issues*].

<sup>27</sup> See Press Release, Am. Psychological Ass'n, APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation (Mar. 13, 2007), <http://www.apa.org/releases/lgbctaskforce.html> [hereinafter APA Task Force]. To the chagrin of many conservatives, the APA taskforce failed to consider the input of many conservatives. See Jennifer Mesko, *APA Shuns Academic and Religious Coalition on Homosexuality*, CITIZENLINK (Dec. 3, 2007), available at <http://www.citizenlink.org/content/A000006042.cfm>.

<sup>28</sup> APA Task Force, *supra* note 27. In addition, the APA taskforce is reconsidering its sexual orientation policies for minors; specifically for those minors whose guardians desire change or who demonstrate early indicators of homosexuality. *Id.*

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> Crary, *supra* note 10.

<sup>31</sup> See, e.g., Department of Consumer Affairs, Board of Psychology, What is the California Board of Psychology?, <http://www.psychboard.ca.gov/about-us/whatis.shtml> (last visited Apr. 10, 2009); Ohio State Board of Psychology: Mission, Vision, Core Values, <http://www.psychology.ohio.gov/minutes/MISSION%20VISION%20VALUES.pdf> (last visited Apr. 10, 2009).

<sup>32</sup> See, e.g., ALA. ADMIN. CODE r. 750-x-5.03(c) (Supp. Dec. 31, 2008) (basing its disciplinary actions against psychologists on the "APA's *Ethics Code* and *General Guidelines for Providers of Psychological Services* ("*General Guidelines*")); ALASKA ADMIN. CODE tit. 12, § 60.185(a)-(b) (2008) (requiring that licensed psychologists abide by the *Ethics Code* and *General Guidelines*); GA. COMP. R. & REGS. 510-4-.01 to -.02 (2008) (requiring compliance with the "APA Ethical Standards"); IOWA ADMIN. CODE r. 645-242.2

when confronted with an ethics situation involving a religious psychologist's use of change therapy, or conceivably sexual identity therapy, state boards could defer to the Policy to interpret the *Ethics Code* and adjudicate the complaint.

The APA is a self-governing professional organization and thus possesses considerable leeway in making policy statements.<sup>33</sup> As a private actor, its freedom to establish and enforce a therapy policy is unquestioned. What is being challenged is the constitutional religious freedom problem the Policy might create in those states whose psychology boards abide by the *Ethics Code* and defer to the APA's policies. State psychology boards operate as agents of the state. Because a psychology board is a state actor, if it adopts an APA policy that burdens the free exercise of religion, it will be subject to constitutional scrutiny.<sup>34</sup>

## II. FIRST AMENDMENT IMPLICATIONS OF THE POLICY

The First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."<sup>35</sup> Historically, the Supreme Court has interpreted and applied the Free Exercise Clause in a manner safeguarding free religious expression.<sup>36</sup> The First Amendment, applied to the states through the Fourteenth Amendment,<sup>37</sup> stands as a protective buffer between a state's need to regulate aspects of society and a citizen's right to freely exercise religious beliefs.

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(2009) (mandating failure to comply with the *Ethics Code* as grounds for discipline); 251 MASS. CODE REGS. 1.10(1) (2009) (adopting the *Ethics Code*); 49 PA. CODE § 41.61 (1998) (requiring a psychologist's "competency" to be consistent with the *General Guidelines*).

<sup>33</sup> See APA Online, Governance, <http://www.apa.org/governance> (last visited Apr. 10, 2009).

<sup>34</sup> See Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191–92 (1988). "Embedded in our Fourteenth Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny under the Amendment's Due Process Clause, and private conduct, against which the Amendment affords no shield, no matter how unfair that conduct may be." *Id.* at 191 (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

<sup>35</sup> U.S. CONST. amend. I (emphasis added).

<sup>36</sup> See *infra* Part II.A. Then-Judge Alito, before coming to the Supreme Court, wrote in a court of appeals decision that "[f]or many years, the Supreme Court appeared to interpret the free exercise clause as requiring the government to make religious exemptions from neutral, generally applicable laws that have the incidental effect of substantially burdening religious conduct." Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359, 361 (3d Cir. 1999) (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

<sup>37</sup> Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

The power of states to enact laws that directly or indirectly infringe upon free exercise of religion has evolved in the last few decades.<sup>38</sup> The current controlling case, *Employment Division, Department of Human Resources v. Smith*,<sup>39</sup> faces criticism both from academics<sup>40</sup> and Supreme Court Justices<sup>41</sup> for the way it alters Free Exercise Clause precedent by minimizing religious protections. But even under *Smith*, the Policy will not satisfy Free Exercise requirements. Because the Policy could prohibit psychologists from adopting certain therapy methods consistent with their faith and prevent religious patients from accessing the treatment most suitable for addressing faith and sexuality conflicts, the Policy will likely undermine the free exercise of religion.

The following hypothetical illustrates a type of case potentially implicated by the Policy: Psychologist A is a Christian. He believes that homosexuality is a sin, but as a professional psychologist is adamantly opposed to coercing patients into altering their sexual practices. When Patient B, also a Christian, comes to Psychologist A for counseling, Psychologist A discovers that Patient B is trying to sort out homosexual feelings that conflict with his religious beliefs. Patient B is confused and seeks advice from Psychologist A because he knows that he is both a licensed professional and a Christian. Psychologist A wants to help Patient B sort through his issues so that Patient B can live in a manner consistent with his faith. In Patient B's case, a lifestyle consistent with his religious beliefs might mean abstaining from homosexual conduct. Or, to go a step further, it might mean reorienting Patient B to heterosexuality. On one hand, if the APA's Policy is to include behavioral proscriptions, or a ban on reorientation, Psychologist A's recommendations might violate the Policy. In violating the Policy, Psychologist A also opens the door to state action through his state's psychologist licensing code, which likely incorporates the *Ethics Code*,

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<sup>38</sup> See Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise: Smith, Lukumi and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 851–52 (2001).

<sup>39</sup> 494 U.S. 872 (1990).

<sup>40</sup> E.g., Edward McGlynn Gaffney, Jr., *The Religion Clause: A Double Guarantee of Religious Liberty*, 1993 BYU L. REV. 189, 210–11 (1993) (calling *Smith* "a sweeping disaster for religious liberty"); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591 (1991) (discussing the tangled outcome of *Smith*).

<sup>41</sup> E.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993) (Blackmun, J., concurring) ("I continue to believe that *Smith* was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle." (citing *Smith*, 494 U.S. at 908–09 (Blackmun, J., dissenting)); *Smith*, 494 U.S. at 891 (O'Connor, J., concurring) ("[T]oday's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.")).

and which may accordingly deem his methods discriminatory, biased, or incompetent. But on the other hand, if Psychologist A does not recommend to Patient B to change his sexual behavior or orientation, he prevents Patient B from receiving the counseling that he, as a Christian, seeks.

In the end, both Psychologist A and Patient B are impaired because of the Policy and the state board's implementation of it.<sup>42</sup> Psychologist A cannot counsel in a way consistent with his Christian faith because he is unable to recommend reorientation from homosexuality—or, in the most extreme hypothetical, behavior changes—as a valid option. Patient B likewise suffers because he cannot receive therapy that takes into account both his sexual tendencies and his religious beliefs.

Though it may sound farfetched, recent cases indicate that public officials already struggle to balance psychology and the First Amendment. Thus, the Policy possesses the potential to increase the uncertainty of constitutional religious freedom. The City of Springfield and the City of Minneapolis, for instance, failed to renew a licensed psychologist's contract and terminated the psychologist's services after a critical newspaper column revealed that the psychologist served on the board of the conservative Illinois Family Institute.<sup>43</sup> Though serving Springfield's police and fire departments for more than a decade, the conservative affiliation tainted his proven expertise.<sup>44</sup> In Georgia, a counselor lost her contract with the Center for Disease Control ("CDC")

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<sup>42</sup> See generally Liszcz & Yarhouse, *supra* note 12. The article explains how those opposing all reorientation (or change) therapies themselves violate the *Ethics Code*:

Yarhouse and Burkett (2002) asserted that it is imperative for psychologists to recognize religion and sexual orientation as legitimate expressions of diversity, in keeping with APA (2002) ethical principles. Davision (2001) and others have asserted that clinicians who promote orientation-change therapy, even for religious beliefs, demonstrate bias and discrimination against sexual diversity. This argument is certainly true if clinicians do so in a way that shows disregard for scientifically derived information (Ethical Standard 2.04, Bases for Scientific and Professional Judgments) or reflects discrimination on the basis of sexual orientation (Ethical Standard 3.01, Unfair Discrimination). At the same time, those who would limit client options to gay-integrative therapy only do an injustice to some clients' values and may demonstrate a kind of bias and discrimination against religious expressions of diversity (Ethical Standard 3.01).

*Id.* at 176–77.

<sup>43</sup> *Campion, Barrow & Assocs., Inc. v. City of Springfield*, No. 06-3215, 2008 U.S. Dist. LEXIS 21249, at \*1–2, \*7, \*9–10 (C.D. Ill. Mar. 18, 2008); Verified Complaint For Declaratory Relief & Damages at 3–5, 8, *Campion, Barrow & Assocs., Inc. v. City of Minneapolis* (D. Minn. 2007) (No. 07–3935), available at <http://telladf.org/UserDocs/CampionComplaint.pdf>.

<sup>44</sup> See *Campion, Barrow & Assocs.*, 2008 U.S. Dist. LEXIS 21249, at \*1.



after referring a CDC employee's case to a colleague.<sup>45</sup> Because of her Christian faith, the counselor believed she could not adequately provide counsel regarding a lesbian employee's sexual relationship.<sup>46</sup> Believing the client's interests were best served by a referral, the counselor discussed the conflict with the client and arranged an appointment for the client minutes later with a colleague.<sup>47</sup> Nonetheless, the counselor faced homophobia accusations and lost her job.<sup>48</sup>

#### A. *The Pre-Smith World of Free Exercise*

The restrictions on religious freedom established under *Smith* complicate the constitutional analysis regarding a state's implementation of the potential APA Policy. There was a time when medical practitioners were expected to utilize freedom of conscience when facing moral dilemmas in their jobs. The Supreme Court's early decisions recognized the government's interest in placing some constraints on freedoms, including religious conduct, because it did not want "every citizen to become a law unto himself."<sup>49</sup> In contrast to the *Smith* legacy, the Court's pre-*Smith* jurisprudence understood that the government's ability to restrict religious freedom was itself bound by certain limitations.<sup>50</sup>

Similar to recent Free Exercise decisions, early decisions recognized the important distinction between freedom of religious *beliefs* and freedom of religious *conduct*.<sup>51</sup> Religious beliefs—the internal deliberations of the heart and mind—are outside the reach of state control,<sup>52</sup> while religious conduct is not.<sup>53</sup> That being said, pre-*Smith*

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<sup>45</sup> Verified Complaint For Declaratory Relief & Damages at 2, 9–10, *Walden v. Ctr. for Disease Control & Prevention*, No. 108-CV-2278 (N.D. Ga. 2008) [hereinafter *Walden Complaint*], available at <http://www.telladf.org/UserDocs/WaldenComplaint.pdf>; Pete Vere, *Gay Rights vs. Faithful*, WASH. TIMES, July 31, 2008, available at <http://www.washingtontimes.com/news/2008/jul/31/gay-rights-vs-faithful>.

<sup>46</sup> *Walden Complaint*, *supra* note 45, at 1–2; Vere, *supra* note 45.

<sup>47</sup> *Walden Complaint*, *supra* note 45, at 6.

<sup>48</sup> *Id.* at 6, 9–10.

<sup>49</sup> *Reynolds v. United States*, 98 U.S. 145, 167 (1879); see *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940).

<sup>50</sup> *Cantwell*, 310 U.S. at 304 (1940) ("In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.").

<sup>51</sup> *Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("Our cases have long recognized a distinction between the freedom of individual belief, which is absolute, and the freedom of individual conduct, which is not absolute.").

<sup>52</sup> *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) ("The freedom to hold religious beliefs and opinions is absolute." (citing *Cantwell*, 310 U.S. at 303)).

<sup>53</sup> *Id.* ("[T]he freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions." (citing *Cantwell*, 310 U.S. at 303–04, 306)); see, e.g., *Reynolds*, 98 U.S. at 164–65. In regard to the government's ability

cases afforded more protection of religious *conduct* than is granted today.<sup>54</sup> For instance, even in *Braunfeld v. Brown*, which upheld a Pennsylvania statute requiring Sunday business closings despite contentions that Jews observe the Sabbath on a different day, the Court acknowledged that the State could justify only limited infiltration into religious practices.<sup>55</sup> Recognizing that the “[a]bhorence of religious persecution and intolerance is a basic part of our heritage,” the Court reasoned, “[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.”<sup>56</sup>

The Supreme Court’s definition of religious belief and practice, which even encompasses beliefs incomprehensible or illogical to others,<sup>57</sup> is broad enough to encompass the faith-based conduct of religious psychologists burdened by the Policy. Before *Smith*, the Court favored Free Exercise over government burdens on religion and used a strict scrutiny standard for deciding such claims. All laws that substantially burdened religious freedom were void unless the state justified them based on two things: (a) a “compelling state interest,”<sup>58</sup> and (b) use of the “least restrictive means” to achieve that interest.<sup>59</sup> The *Sherbert v. Verner*<sup>60</sup> and *Wisconsin v. Yoder*<sup>61</sup> cases provide prime examples of how the pre-*Smith* Court applied the First Amendment to Free Exercise

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to ban polygamy in Utah, despite Mormon religious beliefs, the Court explained that “it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life.” *Reynolds*, 98 U.S. at 165.

<sup>54</sup> See, e.g., *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981). When a “state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.” *Id.* Even if the “compulsion” on religious conduct was “indirect, the infringement upon free exercise is nonetheless substantial.” *Id.* at 718.

<sup>55</sup> *Braunfeld*, 366 U.S. at 605, 608–09.

<sup>56</sup> *Id.* at 606–07; see also *United States v. Lee*, 455 U.S. 252, 256–58, 260 (1982) (requiring the state to have an “overriding governmental interest” for refusing to grant an Amish employer religious exemption from Social Security taxes); *Gillette v. United States*, 401 U.S. 437, 439, 454 (1971) (requiring that “valid neutral reasons exist for limiting the exemption to objectors to all war” to justify the state’s refusal to grant religious exemptions for one particular war).

<sup>57</sup> *Thomas*, 450 U.S. at 714 (“[T]he resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.”).

<sup>58</sup> *Sherbert*, 374 U.S. at 406.

<sup>59</sup> *Thomas*, 450 U.S. at 718.

<sup>60</sup> 374 U.S. 398 (1963).

<sup>61</sup> 406 U.S. 205 (1972).

cases. In both cases, religious freedom prevailed because the states could not meet the compelling interest and least restrictive means requirements.

In *Sherbert*, a Seventh-day Adventist sued for unemployment benefits under South Carolina's Unemployment Compensation Act after she was fired for not working on Saturday, which she recognized as the "Sabbath."<sup>62</sup> Her disqualification for unemployment benefits was "solely from the practice of her religion,"<sup>63</sup> and because South Carolina could not demonstrate a compelling interest that justified this burden on Free Exercise,<sup>64</sup> the Court held that the State could not "constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest."<sup>65</sup>

The Supreme Court in *Yoder* used a similar analysis in a decision that gave an Amish family religious exemption from a compulsory education law.<sup>66</sup> The Court held that the state of Wisconsin could not compel the Amish children to attend formal high school.<sup>67</sup> Even though Wisconsin's law on education appeared facially neutral and applied uniformly to all citizens, the Court recognized that it "nonetheless offend[ed] the constitutional requirement for governmental neutrality if it unduly burden[ed] the free exercise of religion."<sup>68</sup> Because the compelled school "attendance interfere[d] with the practice of a legitimate religious belief,"<sup>69</sup> the state could only uphold the law if it showed that "there [was] a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."<sup>70</sup>

Both *Sherbert* and *Yoder*, though not formally overruled, were drastically undermined by *Smith*. *Smith* increased limitations on Free Exercise by shifting the balance away from religious freedom protections and towards enforcement of all state laws.

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<sup>62</sup> *Sherbert*, 374 U.S. at 399–400.

<sup>63</sup> *Id.* at 404.

<sup>64</sup> *Id.* at 408–09. Burdens on free exercise must be "justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

<sup>65</sup> *Id.* at 410. South Carolina's law forced the employee to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

<sup>66</sup> *Yoder*, 406 U.S. at 234.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 220 (citing *Sherbert*, 374 U.S. at 403).

<sup>69</sup> *Id.* at 214.

<sup>70</sup> *Id.*

*B. The Policy and the Smith Test*

Under *Sherbert* and *Yoder*, the present issue regarding a state's use of the APA Policy on therapies involving homosexuals would favor Free Exercise. Assuming a state's enforcement of the Policy burdens the Free Exercise rights of psychologists whose religious beliefs on homosexuality conflict with the APA's stance, the psychologist's religious views would likely prevent that state's enforcement of the Policy against him or her.<sup>71</sup>

The religious protections offered by *Sherbert* and *Yoder*, however, are obscured by *Smith*. The *Smith* decision dispels the strict scrutiny, compelling interest test and creates a new religious exercise rule: "the right of [F]ree [E]xercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'"<sup>72</sup> Thus, after *Smith*, valid state laws can trump Free Exercise rights.

This new rule came in the context of religious peyote use. When employees in *Smith* were fired from their jobs and denied unemployment benefits because of ceremonial peyote use in the Native American Church,<sup>73</sup> they argued that it violated their Free Exercise rights.<sup>74</sup> The Court disagreed: "[b]ecause respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug."<sup>75</sup> Because Oregon's controlled substance law did *not* target religion, but rather neutrally applied to all drug users, the Court upheld the law.<sup>76</sup>

The *Smith* decision pulls the reins in on religious expression that conflicts with valid laws, but it nonetheless prevents laws from targeting religious conduct. In contrast to the peyote proponents, faith-informed psychologists possess a strong argument that even under *Smith's* new test the Policy violates the Free Exercise Clause. States implementing the Policy against faith-informed psychologists would violate the *Smith* test for two reasons: the forthcoming Policy is neither a (1) religiously neutral, nor (2) generally applicable rule.

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<sup>71</sup> For a state to overcome the Free Exercise claim, it must possess a compelling interest for enforcing the APA's Policy despite its burden on some religious psychologists and patients, and it must be able to enforce that interest using the least restrictive means. *See supra* text accompanying notes 58–59.

<sup>72</sup> *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982)).

<sup>73</sup> *Id.* at 874.

<sup>74</sup> *Id.* at 878.

<sup>75</sup> *Id.* at 890.

<sup>76</sup> *Id.* at 882, 890.

States possess a vested interest in upholding and enforcing their laws; thus, a citizen's duty to obey valid laws does not disappear the instant a law conflicts with one's religious belief or practice.<sup>77</sup> It is entirely a different case, however, when a law is *not* religiously neutral or generally applicable. When it fails the *Smith* test, the pre-*Smith* compelling interest test of *Sherbert* and *Yoder* applies.<sup>78</sup>

### C. The Policy Is Not Religiously Neutral

In his Third Circuit decision *Blackhawk v. Pennsylvania*, then-Judge Alito explained that "[a] law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice."<sup>79</sup> Writing decades earlier, then-Chief Justice Burger underscored the historical importance of legal neutrality in *Walz v. Tax Commission of New York*:

Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.<sup>80</sup>

The *Smith* decision resolutely commits to religiously neutral laws. While the *Smith* analysis did not thoroughly define "neutrality," a Free Exercise case a few years after *Smith* helps clarify the requirement.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court defined a "neutral" law by explaining what it is not: "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral."<sup>81</sup> At a bare minimum, a neutral law cannot "discriminate on its face."<sup>82</sup> If a law "refers to a religious practice without a secular meaning discernible from the language or context," then it "lacks facial neutrality."<sup>83</sup>

The Policy on therapies involving homosexuality would likely meet the "bare minimum" neutrality requirement. It would not, on its face, openly suppress the actions of religious psychologists or patients. Moreover, a state board's application of the Policy is through the facially neutral *Ethics Code*, which does not single out religious conduct.

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<sup>77</sup> *Id.* at 879. "The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities." *Id.* (quoting *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 594–95 (1940)).

<sup>78</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993).

<sup>79</sup> 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 533).

<sup>80</sup> 397 U.S. 664, 676–77 (1970).

<sup>81</sup> *Lukumi*, 508 U.S. at 533 (citing *Smith*, 494 U.S. at 878–79).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

Because the Policy does not directly target religious practice in its text, psychologists cannot successfully challenge its facial neutrality under the *Lukumi* standard.

Beyond the minimum requirement of a facially neutral law, however, is a defense that supports religious psychologists.<sup>84</sup> The Court's rationale in *Bowen v. Roy*, which concluded that Social Security numbers as a prerequisite for welfare did not violate the First Amendment rights of those with religious views against them, provides insight: "[t]he statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms and uniformly applicable."<sup>85</sup> While in *Bowen* the welfare law did exhibit neutrality, the Court nonetheless made it clear that facial neutrality is not determinative in many cases.<sup>86</sup> It reasoned, "There is no claim that there is any attempt by Congress to discriminate invidiously or any covert suppression of particular religious beliefs."<sup>87</sup> Because the statute in *Bowen* was neutrally applied to all welfare recipients and "in no sense [did] it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons,"<sup>88</sup> it was constitutional. In contrast, the Policy, though potentially facially neutral, could affirmatively compel religious psychologists to stop using certain therapies or else face sanctions.<sup>89</sup>

The Court in *Lukumi* reinforced that the protection of Free Exercise is not limited to laws that overtly target religious expression; protection also extends to laws that represent "subtle departures from neutrality"<sup>90</sup> and "covert suppression of particular religious beliefs."<sup>91</sup> Thus, a law cannot immunize itself from inquiry by pretending to be neutral on its face. The Free Exercise Clause, in addition to prohibiting open and direct attacks on religious expression, also prevents "religious gerrymanders."<sup>92</sup> To eliminate such religious gerrymanders, courts

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<sup>84</sup> See *id.* at 534 ("Facial neutrality is not determinative.").

<sup>85</sup> 476 U.S. 693, 695, 703, 706 (1986) (plurality opinion).

<sup>86</sup> See *id.* at 703–04.

<sup>87</sup> *Id.* at 703.

<sup>88</sup> *Id.* (footnote omitted) (citing *United States v. Lee*, 455 U.S. 252, 259 (1982)).

<sup>89</sup> See *id.* at 706 ("We conclude then that government regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.").

<sup>90</sup> 508 U.S. at 534 (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)).

<sup>91</sup> *Id.* (quoting *Bowen*, 476 U.S. at 703 (plurality opinion)); see also *Gillette*, 401 U.S. at 452 ("[G]overnmental neutrality is not concluded by the observation that [the statute] on its face makes no discrimination between religions . . .").

<sup>92</sup> *Lukumi*, 508 U.S. at 534 (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring)).

should determine "whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter."<sup>93</sup>

The Policy is just that—a religious gerrymander, similar to the one identified in *Lukumi*. The Free Exercise claim in *Lukumi* involved devotees of the Santeria religion who, as part of their religious practices, engaged in animal sacrifice.<sup>94</sup> When the city council adopted an ordinance opposing animal sacrifice, the Santeria church brought suit.<sup>95</sup> Though the ordinance's language did not directly target the Santeria devotees on its face, the "central element of the Santeria worship service was the object of the ordinances."<sup>96</sup> It was the Santeria's use of animal sacrifice that initiated the community's concern, which in turn, motivated the city council to pass the prohibitions.<sup>97</sup> The ordinance in *Lukumi* was not a religiously neutral law; the Court recognized that its object was ending the Santeria's animal sacrifice.<sup>98</sup>

Just as the ordinances in *Lukumi* "had as their object the suppression of religion,"<sup>99</sup> the APA Policy, though potentially facially neutral, will likely target a methodology used by religious psychologists. Motivated by a religious understanding of sexual orientation, some psychologists believe that conversion from a homosexual lifestyle or orientation is possible—indeed, even recommended at times.<sup>100</sup> Because the APA rejects the moral underpinnings of this methodology, their new Policy purports to prohibit it. But the truth is that "[e]xperts in human sexuality do not agree on whether orientation is immutable; in fact, they do not agree as to what sexual orientation *is*."<sup>101</sup>

By adopting the Policy and applying it to resolve ethics complaints against religious psychologists, state boards will be implementing laws that, by design, constitute a "religious gerrymander." Notably, state psychology boards cannot escape the repercussions of implementing the Policy by claiming that they merely mechanically applied the law. Because neither the Policy nor its motivating impetus against religious

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<sup>93</sup> *Walz*, 397 U.S. at 696 (Harlan, J., concurring).

<sup>94</sup> *Lukumi*, 508 U.S. at 524.

<sup>95</sup> *Id.* at 528.

<sup>96</sup> *Id.* at 534.

<sup>97</sup> *Id.* at 534–35. "No one suggests, and on this record it cannot be maintained, that city officials had in mind a religion other than Santeria." *Id.* at 535.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 542.

<sup>100</sup> See, e.g., Exodus International, Policy Statements, <http://exodus.to/content/view/34/117> (last visited Apr. 10, 2009); National Association for Research & Therapy of Homosexuality, NARTH Position Statements, [http://www.narth.com/menus/position\\_statements.html](http://www.narth.com/menus/position_statements.html) (last visited Apr. 10, 2009).

<sup>101</sup> *Ethical Issues*, *supra* note 26, at 69–70.

psychologists is present on the face of state licensing codes, each state's psychology board will have to choose consciously whether to incorporate the Policy when interpreting its state code. In adopting the Policy, the state board willingly accepts a policy that targets a religious group and uses it to guide its understanding of the *Ethics Code*.<sup>102</sup>

Thus, as applied by state boards in their interpretation of the *Ethics Code*, the Policy is not neutral. It creates an unequal playing field among psychologists, specifically favoring one form of therapy, while banning approaches more compatible with a religious worldview.

#### *D. The Policy Is Not Generally Applicable*

In some circumstances it is permissible for laws to be “selective,” but when a law “has the incidental effect of burdening religious practice” it must be generally applicable.<sup>103</sup> For a law to meet the general applicability requirement, a law cannot “burden[] a category of religiously motivated conduct” while exempting or not applying to “a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.”<sup>104</sup> At a minimum, the government “cannot in a selective manner impose burdens only on conduct motivated by religious belief.”<sup>105</sup> One of the central functions of the Free Exercise Clause is preventing unequal legal treatment between the religious and the secular,<sup>106</sup> such as the unequal treatment furthered by laws like the Policy. The Free Exercise Clause safeguards religious observers especially against the “inequality [that] results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation.”<sup>107</sup>

The lack of general applicability in *Lukumi* sheds light on a comparable shortcoming in the Policy. *Lukumi*'s analysis of general applicability hinged on the fact that the ordinances prohibiting animal sacrifice were “underinclusive”: “[t]hey fail to prohibit nonreligious

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<sup>102</sup> See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360, 362 (1977) (establishing that although the American Bar Association (“ABA”) formulated its disciplinary rules as a private actor, the Supreme Court of Arizona’s use and enforcement of the ABA’s rules constituted state action).

<sup>103</sup> *Lukumi*, 508 U.S. at 542.

<sup>104</sup> *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 543–46).

<sup>105</sup> *Lukumi*, 508 U.S. at 543.

<sup>106</sup> *Id.* at 542 (stating that the Free Exercise Clause “protect[s] religious observers against unequal treatment” (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 148 (1987) (Stevens, J., concurring))).

<sup>107</sup> *Id.* at 542–43.



conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does."<sup>108</sup> A state cannot make laws in pursuit of an alleged state interest that substantially leaves out some groups while targeting others.<sup>109</sup>

In *Lukumi*, the state claimed that the animal sacrifice ordinance was intended to "protect[] the public health and prevent[] cruelty to animals."<sup>110</sup> In reality, however, the state's regulation only applied to a narrow set of circumstances:

[The ordinances] fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does. . . . Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice. Many types of animal deaths or kills for nonreligious reasons are either not prohibited or approved by express provision.<sup>111</sup>

The animal sacrifice ordinances, only effective against certain religious actions, were not generally applicable. While the ordinances applied to religious conduct, they did not similarly apply to equivalent secular conduct.

The APA's forthcoming Policy is likewise not generally applicable. The Policy will presumably address a type of therapy used by religious psychologists without reaching comparable concerns raised by secular methodologies. The APA argues that change therapy is an ineffective and scientifically inaccurate way to approach homosexuality issues.<sup>112</sup> Such criticisms could likewise implicate sexual identity therapy if the APA sanctions against changing not only homosexual orientation, but also homosexual behavior.<sup>113</sup> The APA will potentially ban such therapies in the name of medical competency, ending harmful or coercive practices, and preventing biases or sexual discrimination.<sup>114</sup> The problem with this justification, however, remains that the Policy most likely will not approach these ends in a generally applicable manner. Instead of creating a policy in which the APA and state boards target *all* harmful psychology practices, the Policy will likely target allegedly harmful practices used by many religious psychologists. Just as the city council in *Lukumi* had little reason to "explain why religion alone must bear the burden of the ordinances, when many of these secular killings fall within

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<sup>108</sup> *Id.* at 543.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> APA Help Center, Sexual Orientation and Homosexuality, <http://www.apahelpcenter.org/articles/pdf.php?id=31> (last visited Apr. 10, 2009).

<sup>113</sup> APA Task Force, *supra* note 27.

<sup>114</sup> See 1997 Resolution, *supra* note 11.

the city's interest in preventing the cruel treatment of animals,"<sup>115</sup> the APA has little reason to justify singling out the practice of religious psychologists for unequal treatment. As recognized by Justice Scalia in *Florida Starr v. B. J. F.*, "a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction . . . when it leaves appreciable damage to that supposedly vital interest unprohibited."<sup>116</sup>

*E. The Policy Does Not Pursue a Compelling State Interest Using the Least Restrictive Means*

Because the Policy, as applied by state psychology boards, will likely fail the religiously neutral or generally applicable requirements, the pre-*Smith* standard of strict scrutiny for Free Exercise applies.<sup>117</sup> A law restricting a religious practice that is not neutral or generally applicable is only constitutional if it advances "interests of the highest order"<sup>118</sup> and is "narrowly tailored in pursuit of those interests."<sup>119</sup> Moreover, the *Lukumi* analysis makes it clear that courts applying the pre-*Smith* standard to "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases."<sup>120</sup>

To survive strict scrutiny, a law that is not neutral or generally applicable must further a "compelling" interest of the state.<sup>121</sup> Infringement on a citizen's First Amendment rights requires a "state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."<sup>122</sup> When the government's actions are not "justifiable in terms of the [g]overnment's valid aims,"

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<sup>115</sup> *Lukumi*, 508 U.S. at 544. "[I]n sum . . . each of Hialeah's ordinances pursues the city's governmental interests only against conduct motivated by religious belief." *Id.* at 545.

<sup>116</sup> 491 U.S. 524, 541–42 (1989) (Scalia, J., concurring in part and concurring in the judgment) (quoting *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)).

<sup>117</sup> *Lukumi*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.")

<sup>118</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

<sup>119</sup> *Lukumi*, 508 U.S. at 546; *see also* *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest."); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) ("Accordingly, it must serve a compelling government interest and must be narrowly tailored to serve that interest." (citing *Lukumi*, 508 U.S. at 546)).

<sup>120</sup> *Lukumi*, 508 U.S. at 546.

<sup>121</sup> *Id.*

<sup>122</sup> *Yoder*, 406 U.S. at 214.

then the "Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience."<sup>123</sup>

For example, in *Thomas v. Review Board*, the Court concluded that the state could not withhold unemployment benefits when a Jehovah's Witness ended his job because of religious conflicts.<sup>124</sup> The justifications offered for denying benefits—to prevent "widespread unemployment" and funding problems due to employees quitting based on religious beliefs, and to "avoid a detailed probing by employers into job applicants' religious beliefs"—were not compelling enough to justify the restraint on religious freedom.<sup>125</sup> There was no indication that granting unemployment benefits to employees who quit for religious reasons would increase unemployment or an employer's detailed probing into the religious views of employees.<sup>126</sup>

In contrast, the Court in *Lukumi* did find a compelling interest: the city council's regulation furthered public health and minimized cruelty to animals.<sup>127</sup> Further, the state in *Yoder* claimed an interest in "universal compulsory education."<sup>128</sup> According to *United States v. Lee*, individuals with religious qualms concerning taxes cannot receive exemption from taxes because of "the broad public interest in maintaining a sound tax system."<sup>129</sup> This interest is "of such a high order" that any "religious belief in conflict with the payment of taxes affords no basis for resisting the tax."<sup>130</sup>

Regarding a state psychology board's use of the Policy, it remains unclear whether the state possesses a compelling interest to restrict the use of certain therapies despite the restriction's burden on the free exercise of religion. A state could argue that its compelling interest is to prevent coercive and discriminatory psychology practices because some psychologists argue that change therapy is harmful to patients.<sup>131</sup> One

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<sup>123</sup> *Gillette v. United States*, 401 U.S. 437, 462 (1971) (citing *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

<sup>124</sup> 450 U.S. 707, 720 (1981).

<sup>125</sup> *Id.* at 718–19.

<sup>126</sup> *Id.* at 719.

<sup>127</sup> *Lukumi*, 508 U.S. at 543.

<sup>128</sup> *Yoder*, 406 U.S. at 215. In analyzing the role a compelling state interest has in justifying a restraint on a fundamental right, the Court notes that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. . . . [H]owever strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests." *Id.*

<sup>129</sup> 455 U.S. 252, 260 (1982).

<sup>130</sup> *Id.*

<sup>131</sup> See generally Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. OF CONSULTING & CLINICAL PSYCHOL. 221 (1994) (referring to the "potentially harmful effects" of conversion therapy treatments).

could also argue, however, that the state does *not* have a compelling interest because the “harm” created by such therapies is too attenuated and unverifiable as to necessitate state intervention.<sup>132</sup>

In addition to demonstrating a compelling interest, a state that infringes upon religious practice must also show that its means were narrowly tailored.<sup>133</sup> Thus, for the sake of argument, even if state psychology boards adopt the Policy in pursuit of legitimate state interests, the states also must use the least restrictive means of pursuing such interests.<sup>134</sup>

In *Lukumi*, although the city council had a legitimate interest in regulating animal slaughters, for purposes of public health and animal cruelty, the city council used improper means to accomplish its interests.<sup>135</sup> The ordinances enacted by the city council were “underinclusive” and did not pursue the council’s concerns “with respect to analogous nonreligious conduct.”<sup>136</sup> Moreover, the ordinances were “overbroad” because the council’s interests “could be achieved by narrower ordinances that burdened religion to a far lesser degree.”<sup>137</sup> Because the ordinances singled out the Santeria’s use of animal sacrifice without including other health and animal cruelty concerns and burdened Santeria more than necessary to achieve its interests, the ordinances were unconstitutional.<sup>138</sup>

The tax exemption scheme in *Arkansas Writers’ Project, Inc. v. Ragland* similarly lacked narrow tailoring because of its “overinclusive and underinclusive” nature.<sup>139</sup> The Court concluded that even if the tax exemption encouraged “fledgling publishers,” it applied unnecessarily to successful publishers who did not financially need the exemption and did not apply to many struggling publishers.<sup>140</sup> Consequently, the Court reasoned that “[e]ven assuming that an interest in encouraging fledgling publications might be a compelling one, we do not find the exemption . . .

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<sup>132</sup> See *Ethical Issues*, *supra* note 26, at 70–71.

<sup>133</sup> *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O’Connor, J., concurring in part and dissenting in part) (“Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens.”); *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (explaining that an infringement can be justified by showing it is “the least restrictive means of achieving some compelling state interest”).

<sup>134</sup> *Lukumi*, 508 U.S. at 546 (“[E]ven were the governmental interests compelling, the ordinances are not drawn in narrow terms to accomplish those interests.”).

<sup>135</sup> *Id.* at 543, 546.

<sup>136</sup> *Id.* at 546.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* “The absence of narrow tailoring suffices to establish the invalidity of the ordinances.” *Id.* (citing *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987)).

<sup>139</sup> 481 U.S. at 232.

<sup>140</sup> *Id.* (quotation marks omitted).

of religious, professional, trade, and sports journals narrowly tailored to achieve that end.”<sup>141</sup>

The state psychology boards’ use of the Policy to adjudicate ethics complaints will most likely not be narrowly tailored to serve the state’s interests, such as preventing medical incompetency, bias, or sexual orientation discrimination. State boards that single out faith-influenced therapies for regulation would adopt a largely underinclusive policy. Even if there are valid concerns that a psychologist’s use of change therapy fosters harm, for example bias or discrimination, targeting change therapy exclusively ignores the similarly harmful effects of other therapy methods. Instead of banning the harmful effects of all practices, the forthcoming Policy will likely target the methods used by some religious psychologists. The Policy might also suffer from an unconstitutionally overbroad reach if it restricts all change therapy, or all sexual identity therapy, instead of limiting its allegedly negative effects. If, as expected, the Policy is underinclusive and overbroad, it cannot meet the narrowly tailored requirement.

The Policy will fail the *Smith* analysis because it will be neither religiously neutral nor generally applicable. Moreover, as a nonneutral, nongeneral law, it will likewise fail *Lukumi*’s compelling interest and least restrictive means standard. The Policy, as a result, remains unconstitutional as incorporated and applied by state psychology boards against licensed psychologists.

#### F. State Religious Freedoms Implicated by the Policy

On a federal constitutional level, because the Policy as implemented by state psychology boards will likely lack neutrality and general applicability, it violates the Free Exercise Clause under *Smith*. Even if one disagreed, however, and successfully argued that the Policy failed the *Smith* test—convincing a court, for instance, that the Policy *was* religiously neutral and generally applicable—it remains suspect under many state laws.

Many state constitutions and statutes, such as those modeled after the Religious Freedom Restoration Act<sup>142</sup> (“RFRA”), require *more* religious freedom than *Smith*. They implement the pre-*Smith* strict scrutiny, compelling interest standard, even against neutral or generally applicable laws. For instance, the Ohio Constitution affords greater religious freedom than *Smith*. It states that “[a]ll men have a natural and infeasible right to worship Almighty God according to the dictates of their own conscience”; consequently, “no preference shall be given, by

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<sup>141</sup> *Id.*

<sup>142</sup> 42 U.S.C. § 2000bb to 2000bb-4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997).

law, to any religious society; *nor shall any interference with the rights of conscience be permitted.*<sup>143</sup> The Ohio Constitution goes on to affirm “[r]eligion, morality, and knowledge . . . [as] being essential to good government” and making it “the duty of the general assembly to pass suitable laws *to protect every religious denomination in the peaceable enjoyment of its own mode of public worship.*”<sup>144</sup> The Ohio Supreme Court interpreted this free exercise clause as broader than that found in the U.S. Constitution: “[t]he Ohio Constitution allows no law that even *interferes* with the rights of conscience,” while the U.S. Constitution only applies to “laws that *prohibit* the free exercise of religion.”<sup>145</sup> Thus, Ohio’s free exercise clause “applies to direct and indirect encroachments upon religious freedom” and requires “that the state enactment must serve a compelling state interest and must be the least restrictive means of furthering that interest.”<sup>146</sup> Other courts have likewise held that state constitutions can guarantee *more* religious freedom than required by the federal Constitution as interpreted by *Smith*.<sup>147</sup>

In addition to state constitutions, states that have enacted statutes such as RFRA have enhanced their citizens’ religious freedom protections. When the *Smith* decision dramatically shifted the Free Exercise climate in the courts, Congress responded by enacting the RFRA.<sup>148</sup> The intent of RFRA was clear:

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.<sup>149</sup>

In short, RFRA directly aimed to undo the *Smith* test. Congress’s attempt to undermine *Smith*, however, did not stand. In 1997, the Supreme Court in *City of Boerne v. Flores* invalidated RFRA as it applies

<sup>143</sup> OHIO CONST. art. I, § 7 (emphasis added).

<sup>144</sup> *Id.* (emphasis added).

<sup>145</sup> *Humphrey v. Lane*, 728 N.E.2d 1039, 1044 (Ohio 2000).

<sup>146</sup> *Id.* at 1045.

<sup>147</sup> *E.g.*, *Swanner v. Anchorage Equal Rights Comm’n*, 874 P.2d 274, 280 (Alaska 1994) (“[A] state court may provide greater protection to the free exercise of religion under the state constitution than is now provided under the United States Constitution.” (citing *Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969))); *Catholic Charities, Inc. v. Superior Court*, 85 P.3d 67, 90 (Cal. 2004) (“Certainly the high court’s decision in *Smith* does not control our interpretation of the state [c]onstitution’s free exercise clause.” (citing *Smith*, 494 U.S. 872)).

<sup>148</sup> 42 U.S.C. § 2000bb to 2000bb-4 (2000), *invalidated in part by City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>149</sup> *Id.* § 2000bb(b).

to the states and, in doing so, reaffirmed *Smith's* Free Exercise analysis.<sup>150</sup>

The *Flores* decision caused state legislatures to fight back by passing state versions of RFRA.<sup>151</sup> In more than one dozen states that maintain RFRA statutes, use of the APA's Policy would most likely not be upheld because the state potentially lacks a "compelling interest" and its means are not "narrowly tailored."<sup>152</sup>

### G. Psychologists, Pharmacists, and the Ironic Effect of the Policy

Because litigation of the religious freedom of psychologists has been so infrequent, it is helpful to draw comparisons with an analogous profession. The right of conscience for pharmacists and other medical professions, especially regarding the right to refuse dispensing emergency contraception (commonly known as "Plan B" or the morning-after pill), provides insight into how courts might analyze the right of psychologists to use change therapies.

Many religious pharmacists believe that Plan B acts as an abortifacient; thus, they argue that being forced to distribute it compromises their faith.<sup>153</sup> In lawsuits arising from this issue, the pharmacists use the Free Exercise Clause to justify their right to refuse distribution of Plan B.<sup>154</sup> Courts seem to recognize that the religious freedom of pharmacists necessitates some recourse towards pharmacists who cannot issue emergency contraception for religious reasons.<sup>155</sup>

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<sup>150</sup> 521 U.S. 507 (invalidating RFRA as it applies to the states on separation of powers grounds).

<sup>151</sup> *E.g.*, ALA. CONST. art. I, § 3.01; ARIZ. REV. STAT. ANN. § 41-1493.01 (2004); CONN. GEN. STAT. ANN. § 52-571b (West 2005); FLA. STAT. ANN. §§ 761.01-.05 (West 2008); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/10 (West 2001); MO. ANN. STAT. §§ 1.302, 1.307 (West Supp. 2008); N.M. Stat. Ann. §§ 28-22-1 to -5 (LexisNexis 2000); OKLA. STAT. ANN. tit. 51, §§ 251-258 (West 2005); 71 PA. CONS. STAT. ANN. §§ 2401-2407 (West Supp. 2008); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005); TEX. CIV. PRAC. & REM. CODE ANN. §§ 110.001-.012 (Vernon 2005).

<sup>152</sup> See *supra* Part II.E.

<sup>153</sup> Lora Cicconi, Comment, *Pharmacist Refusals and Third-Party Interests: A Proposed Judicial Approach to Pharmacist Conscience Clauses*, 54 UCLA L. REV. 709, 713-16 (2007); Daniel C. Vock, *FDA Ruling Puts Pharmacists in Crossfire*, STATELINE.ORG, Sept. 6, 2006, <http://www.stateline.org/live/details/story?contentId=139338>. See generally Amanda Freeman, Note, *Does "Emergency" Trump Conscience, Thus Drawing Another Line in the Sand for Pharmacists?*, 21 REGENT U. L. REV. 181 (2008) (discussing the religious freedom impact of the "Final Rule" in Illinois).

<sup>154</sup> *E.g.*, *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (C.D. Ill. 2006); *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007).

<sup>155</sup> *Menges*, 451 F. Supp. 2d at 1001-02 ("[W]hen viewed in the light most favorable to the Plaintiffs [pharmacists], the Plaintiffs sufficiently allege that the Rule fails to be narrowly tailored to advance a compelling state interest. The Plaintiffs state a claim that the Rule violates the First Amendment Free Exercise clause."); *Stormans*, 524 F. Supp. 2d at 1266 ("On the issue of Free Exercise of Religion alone, the evidence before the Court

Opponents of pharmacists' religious freedom regarding Plan B, however, argue that allowing religious pharmacists to opt out of their duties to fulfill prescriptions, specifically for emergency contraception, injures patients who require a timely receipt of the drug.<sup>156</sup>

Whereas the pharmacists' First Amendment rights allegedly conflict with the patients' rights to access emergency contraception, the present issue regarding the Policy has the *opposite* impact on patients. In the name of ending discrimination and coercive psychology, state psychology boards may adopt the Policy against change therapy. The Policy's influence could conceivably extend to sexual identity therapy, if it includes prohibitions on behavioral changes. Ironically, the Policy undermines the very state interests it purports to protect. One of its core justifications is that such therapies allegedly discriminate against patients and, in doing so, might coerce them into changing their orientation or behavior.<sup>157</sup> The Policy, however, will actually harm patients. By dictating the type of therapies patients can seek, the Policy negatively limits patients' options. According to a recent sexual identity study, "harm must also be considered for those whose religious beliefs and formed judgments lead them away from gay-integrative approaches and toward other interventions to address sexual behavior and identity in light of greater weight given to their religious identity."<sup>158</sup>

Both psychologists, who desire to engage their profession from a religious perspective, as well as patients, who seek counsel due to conflicts between their faith and sexuality, profit from limited application of the Policy to its *Ethics Code*. Freedom to pursue the full range of counseling approaches, including change therapy or sexual identity therapy, fosters a better atmosphere for Free Exercise.

### III. PROPOSED RECOMMENDATIONS TO THE APA AND THE STATES

Any attempts to limit certain psychology approaches should leave open freedom for faith-based practices, seeking to minimize the ill effects of all psychology methods instead of banning *carte blanche* those used by some religious psychologists. Additionally, the incorporation of conscience clauses into the APA's Policy, its *Ethics Code*, and state licensing codes would help safeguard religious freedom.

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convinces it that plaintiffs, individual pharmacists, have demonstrated both a likelihood of success on the merits and the possibility of irreparable injury.").

<sup>156</sup> See e.g., Charu A. Chandrasekhar, *RX for Drugstore Discrimination: Challenging Pharmacy Refusals to Dispense Prescription Contraceptives Under State Public Accommodations Laws*, 70 ALB. L. REV. 55 (2006) (contending that "refusals to dispense prescription contraceptives in pharmacies constitute sex-based discrimination").

<sup>157</sup> See generally APA Help Center, *supra* note 112.

<sup>158</sup> Liszcz & Yarhouse, *supra* note 12, at 177.



A. *The APA's Policy and Ethics Code Should Include Conscience Clauses*

In the event that the APA adopts a policy banning change therapy, or sexual identity therapy, it should do so in a way that minimizes the ill effects that it will have on individuals' freedom of conscience by including a conscience clause, which would exempt psychologists' religiously based therapy from certain provisions. A conscience clause could safeguard religious freedom on two fronts: (1) through a specific conscience clause exemption within the Policy and (2) through a general APA conscience clause governing its *Ethics Code* and policies. By including a conscience clause in its Policy and *Ethics Code*, the APA could address therapy methods without trampling on the religious beliefs of psychologists and patients.

Similar conscience clause provisions have been used by other professional organizations, such as the American Pharmacist Association ("APhA"). For example, the differences in religious convictions among pharmacists compelled the APhA to create the Pharmacist Conscience Clause in 1998:

1. APhA recognizes the individual pharmacist's right to exercise conscientious refusal and supports the establishment of systems to ensure patient's access to legally prescribed therapy without compromising the pharmacist's right of conscientious refusal.
2. APhA shall appoint a council to serve as a resource for the profession in addressing and understanding ethical issues.<sup>159</sup>

Recognizing that pharmacists should not be required to participate in practices that they find morally reprehensible, the APhA again averred to its conscience clause policy in 2004.<sup>160</sup>

The American Medical Association ("AMA") likewise affirmed a conscience clause, which protects medical professionals from performing abortions against their moral beliefs. The AMA policy states that "[n]either physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles."<sup>161</sup> Similarly, medical schools are required to protect the consciences of their students: "Medical schools should have mechanisms in place that permit

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<sup>159</sup> Am. Pharmacists Ass'n, *Current APhA Policies Related to the Practice Environment & Quality of Worklife Issues* (2002), [http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=Control\\_Your\\_Practice1&template=/CM/ContentDisplay.cfm&ContentFileID=267](http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=Control_Your_Practice1&template=/CM/ContentDisplay.cfm&ContentFileID=267).

<sup>160</sup> Ed Lamb, *Dispensing with the Dilemma: Pharmacists Can Meet Duties to Patients and Conscience*, PHARMACY TODAY, Aug. 2005, available at [http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=PT\\_Archive\\_PDfs\\_&template=/CM/ContentDisplay.cfm&ContentFileID=2275](http://www.pharmacist.com/AM/Template.cfm?Section=Search1&section=PT_Archive_PDfs_&template=/CM/ContentDisplay.cfm&ContentFileID=2275).

<sup>161</sup> Am. Med. Ass'n, *Health and Ethics Policies of the AMA House of Delegates 2*, <http://www.ama-assn.org/ad-com/polfind/Hlth-Ethics.pdf> (last visited Apr. 10, 2009).

students to be excused from activities that violate the students' religious or ethical beliefs."<sup>162</sup>

A conscience provision in the *Ethics Code* would preserve the Free Exercise rights of psychologists in many situations, including those psychologists whose religious beliefs inform their decision to employ certain approaches to homosexual clients. A conscience clause for psychologists is likewise consistent with upholding the rights of religious patients to participate in therapies compatible with their beliefs. Though the APA does not include a conscience clause in its *Ethics Code*, it recently promulgated the Resolution on Religious, Religion-Based and/or Religion-Derived Prejudice.<sup>163</sup> The resolution condemns religious prejudice and discrimination, but also distinguishes the field of religion from that of psychology.<sup>164</sup> Adopted in 2007, the resolution's stance against religious discrimination must inform the APA's forthcoming Policy.

*B. States Relying on the APA's Ethics Code Should Pass a Conscience Clause Exception for Psychologists*

Many state psychology boards abide by the *Ethics Code* in regulating the licensing of psychologists.<sup>165</sup> Even if the Policy alters the way the APA interprets and applies its *Ethics Code*, the state boards should not use the Policy to redefine the states' application of the *Ethics Code*.

As a preventative measure, and to ensure that the Free Exercise rights of psychologists are not undermined by the state's use of the Policy, states that incorporate the *Ethics Code* into their administrative codes should amend the code to include a conscience clause exemption. For example, in response to legalized abortion after *Roe v. Wade*,<sup>166</sup> approximately forty-seven states currently have a type of conscience clause statute.<sup>167</sup> These statutes protect medical professionals from being

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<sup>162</sup> *Id.* at 296.

<sup>163</sup> APA Council of Representatives, Resolution on Religious, Religion-Based and/or Religion-Derived Prejudice (Aug. 16, 2007), [http://www.apa.org/pi/religious\\_discrimination\\_resolution.pdf](http://www.apa.org/pi/religious_discrimination_resolution.pdf).

<sup>164</sup> *Id.*

<sup>165</sup> See *supra* note 32.

<sup>166</sup> 410 U.S. 113 (1973).

<sup>167</sup> Brittany L. Grimes, Note, *The Plan B for Plan B: The New Dual Over-the-Counter and Prescription Status of Plan B and Its Impact Upon Pharmacists, Consumers, and Conscience Clauses*, 41 GA. L. REV. 1395, 1401–02 (2007).

[F]orty-three states have some form of legislation allowing a health care institution to refuse to perform abortion services, but of those states, fifteen limit the statutory application to private health care institutions only, and one state further limits the protection to religious facilities only. A total of thirteen states allow individuals to not provide contraception in its various forms. Only

forced to perform procedures, namely abortions, that violate their moral conscience.

To likewise prevent psychologists from having to compromise their faith when approaching sexual orientation issues, states should create an addendum to their code stating that incorporating the APA's *Ethics Code* will not be interpreted or applied to abridge a psychologist's right to practice psychology according to the dictates of his or her conscience.

#### CONCLUSION

James Madison, in his *Memorial and Remonstrance*, wrote that it is the "duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."<sup>168</sup> Though expressed centuries ago, Madison's belief that "[c]onscience is the most sacred of all property"<sup>169</sup> resonates even with a modern audience. Freedom of conscience necessitates affording psychologists the ability to practice and patients the ability to receive psychological therapy consistent with their faith. Because the Policy will likely undermine this sacred freedom, state psychology boards must beware in adopting it as their own.

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four of these states, however, explicitly include pharmacists in the protective custody of the statutes. Four additional states possess broadly worded statutes that likely enable their application to pharmacists.

*Id.* (footnotes omitted).

<sup>168</sup> 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, in THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901).

<sup>169</sup> James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, available at <http://www.vem.duke.edu/POI/madison.pdf>.