IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CHRISTOPHER DOYLE, LPC, LCPC,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No. 1:19-CV-00190-DKC
	*	
LAWRENCE J. HOGAN, JR, *et al.* ,	*	
	*	
Defendants.	*	
	*	

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DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The defendants, Lawrence J. Hogan, Jr., Governor, and Brian E. Frosh, Attorney General, oppose the plaintiff's request that this Court enjoin preliminarily the enforcement of section 1-212.1 of the Health Occupations Article of the Annotated Code of Maryland. The Maryland General Assembly enacted that statute in 2018 to protect minors from the harmful effects of conversion therapy, a type of treatment that seeks to change an individual's sexual orientation or gender identity. As explained below, the plaintiff, Christopher Doyle, cannot establish his entitlement to the extraordinary remedy of a preliminary injunction.

I. Facts

A. Conversion Therapy

Section 1-212.1 of the Health Occupations Article of the Maryland Annotated Code defines conversion therapy as "a practice or treatment by a mental health or child care practitioner that seeks to change an individual's sexual orientation or gender identity." Md. Code Ann., Health Occ. § 1-212.1(a)(2)(i). The section then prohibits a mental health or child care practitioner from engaging in conversion therapy with a minor and provides that a mental

health or child care practitioner who has engaged in conversion therapy is subject to discipline by the practitioner's licensing or certifying board. *Id.* §§ 1-212.1(b), (c).

Section 1-212.1's prohibition on conversion therapy for minors is supported by existing research, professional health association reports, and expert clinical guidance. *See* Substance Abuse and Mental Health Services Administration, "Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth," HHS Publication No. (SMA) 15-4928, Rockville, MD: SAMHSA, 2015 ("SAMHSA Report") (attached as Exhibit 1 and available at https://store.samhsa.gov/system/files/sma15-4928.pdf). According to that report, there is the following professional consensus regarding the provision of conversion therapy to minors:

> - Same-gender sexual orientation (including identity, behavior, and/or attraction) and variations in gender identity and gender expression are a part of the normal spectrum of human diversity and do not constitute a mental disorder.
>
> - There is limited research on conversion therapy efforts among children and adolescents; however, none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation.
>
> - Interventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be a part of behavioral health treatments. Directing the child to be conforming to any gender expression or sexual orientation, or directing parents to place pressure for specific gender expressions, gender identities, and sexual orientations are inappropriate and reinforce harmful gender and sexual orientation stereotypes.

Id. at 11.

The SAMHSA Report notes that adolescents with a minority sexual orientation and those with gender identity issues are at increased risk for psychological distress, depression, and

suicidal ideation as well as an increased likelihood of experiencing violence and victimization. SAMHSA Report at 2-3. These increased risks "are not a function of their identity. Rather, [they] stem from the stresses of prejudice, discrimination, rejection, harassment, and violence." *Id.* at 20 (citing Bockting, W.O., Miner, M.H., Swinburne, R.E., Hamilton, A., & Coleman, E., "Stigma, mental health, and resilience in an online sample of the U.S. transgender population, *American Journal of Public Health*, *103(5)*, 943-951 (2013); Harper, G.W. & Schneider, M., "Oppression and discrimination among lesbian, gay, bisexual, and Transgendered people and communities: a challenge for community psychology," *Am. J. Community Psychol., 31(3-4)*, 243-252 (2003); Hendricks, M.L., & Testa, R.J., "A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the Minority Stress Model, *Professional Psychology: Research and Practice, 43(5)*, 460-467 (2012), http://dx.doi.org/10.1037/a0029597; Meyer, I.H., "Minority Stress and mental health in gay men," *Journal of health and social behavior,* 38-56 (1995)).

Because the professional consensus is that same-gender sexual orientation and variations in gender identity and gender expression are not mental disorders, behavioral health treatments seeking to change them are not indicated. SAMHSA Report at 24-25. This conclusion is consistent with the 2009 report issued by the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation Change Efforts ("APA Task Force"). That task force undertook a comprehensive review of available peer-reviewed literature regarding conversion therapy. That review concluded that no methodologically sound research demonstrated conversion therapy's efficacy in changing adults' sexual orientation and that, although there were no available studies on its effect on children, "adults' retrospective accounts of their experiences of conversion therapy during childhood or adolescence suggests that many

were harmed." SAMHSA Report at 25 (citing APA Task Force Report); *see also* APA Task Force Report at 3 (ECF Document 1-2). Accordingly, "every major medical, psychiatric, psychological, and professional mental health organization . . . has taken measures to end conversion therapy efforts to change sexual orientation." SAMHSA Report at 25; *see also* Preamble, Ch. 685, 2018 Md. Laws (attached as Exhibit 2).

The Abstract for the APA Task Force Report states that the APA Task Force "concluded that efforts to change sexual orientation are unlikely to be successful and involved some risk of harm, contrary to the claims of SOCE practitioners and advocates. . . . . [T]he appropriate application of affirmative therapeutic interventions for those who seek SOCE involves therapist acceptance, support and understanding of clients and the facilitation of clients' active coping, social support, and identity exploration and development, *without imposing a specific sexual orientation outcome*." APA Task Force Report at v (emphasis added). The report's summary of the APA Task Force's literature review explained that the research conducted from 1999 to 2007 did not meet methodological standards that would permit conclusions about efficacy or safety, but that the studies conducted from 1969 to 1978 showed "that enduring change to an individual's sexual orientation is uncommon." *Id.* at 2. The report also noted that the Task Force "found some evidence to indicate that individuals experienced harm from SOCE." Finally, the Task Force found no evidence "that providing SOCE to children or adolescents has an impact on adult sexual orientation" or "that teaching or reinforcing stereotyped gender-normative behavior in childhood or adolescence can alter sexual orientation." The Task Force did express concerns that such interventions with children and adolescents could increase self-stigma and minority distress. *Id.* at 4.

Chapter 8 of the APA Task Force Report discussed in more detail the findings of the literature review for children and adolescents. APA Task Force Report at 71-80. After that discussion, the report recommended that mental health practitioners provide treatments that "support children and youth in identity exploration and development *without seeking predetermined outcomes*." *Id.* at 80 (emphasis added).

There is also no peer-reviewed literature that supports the efficacy of conversion therapy with gender minority youth, but there are concerns regarding the ethics of conversion therapy as well as its potential for harm. SAMHSA Report at 26 (citing Byne, W. *et al.*, "Report of the APA Task Force on treatment of gender identity disorder," *American Journal of Psychiatry*, *Supp. 1-35* (2013); Coleman, E., *et al.*, "Standards of care for the health of transsexual, transgender, and gender nonconforming people (7 ed., Vol. 13, pp. 165-232): International Journal of Transgenderism; Minter, S. "Supporting transgender children: new legal, social, and medical approaches," *J Homosex, 59*(3), 422–433 (2012); Wallace, R., & Russell, H. "Attachment and shame in gender-nonconforming children and their families: toward a theoretical framework for evaluating clinical interventions," *Int J Transgenderism, 14*(3), 113–126 (2013)). Accordingly, the SAMHSA Report also concludes that conversion therapy to change a youth's gender identity or expression is inappropriate. *Id.*

B. Maryland's Response

In 2018, the Maryland General Assembly considered Senate Bill 1028 and its counterpart, House Bill 902 – Health Occupations – Conversion Therapy for Minors – Prohibition (Youth Mental Health Protection Act). Both bills, as introduced, contained a lengthy preamble that first acknowledged that "being lesbian, gay, bisexual, or transgender (LGBT) . . . is not a disease, a disorder, or an illness" and then cited to the statements by ten professional

organizations criticizing the practice of conversion therapy. ECF Document 1-1, at 1-4.[1] The preamble concluded by asserting Maryland's "compelling interest in protecting the physical and psychological well-being of minors, including LGBT youth, and in protecting minors against exposure to serious harm caused by sexual orientation change efforts." *Id.* at 5. To further Maryland's compelling interest, both bills added section 1-212.1 to the Health Occupations Article to prohibit conversion therapy - a practice or treatment that seeks to change an individual's sexual orientation or gender identity. *Id.*

The Health and Government Operations Committee of the Maryland House of Delegates held a hearing on House Bill 902 on March 1, 2018. *See* HB0902 History (Apr. 10, 2018) (attached as Exhibit 3 and available at http://mgaleg.maryland.gov/webmga/frmMain.aspx?pid=billpage&stab=03&id=hb0902&tab=subject3&ys=2018rs). The Committee heard favorable testimony from fifteen witnesses and unfavorable testimony from one witness. Thirteen of the witnesses presented oral and written testimony; four presented only oral testimony, and four submitted only written testimony. *See* HB 902 Bill File at 94-95 (attached as Exhibit 4). In addition to the testimony listed on pages 94 and 95 of the Bill File, twelve additional witnesses presented written testimony in opposition to the bill. *See* HB 902 Bill File. The Committee voted a favorable report on March 21, 2018. *See* HB 902 Bill File at 5.

The Education, Health, and Environmental Affairs Committee of the Maryland Senate held a hearing on Senate Bill 1028 on March 7, 2018. *See* SB1028 (CH0685) History (May 15, 2018) (attached as Exhibit 5 and available at http://mgaleg.maryland.gov/webmga/frm

[1] The Preamble cites to the APA Task Force Report, ECF Document 1-2, and several other statements by professional organizations. Those statements are attached as Exhibits 9-17. Although the Preamble does not refer to the SAMHSA Report, testimony before both House and Senate committees does cite it. *See* HB 902 Bill File at 23-24, 48-49; SB 1028 Bill File at 7-8, 10-11.

Main.aspx?pid=billpage&stab=03&id=sb1028&tab=subject3&ys=2018rs). The Committee heard oral testimony from twelve witnesses, ten favorable and two unfavorable, and received written testimony from a total of thirty-eight individuals and groups. *See* SB 1028 Bill File (attached as Exhibit 6). On March 22, 2018, the Committee voted a favorable report, and on March 28, 2018, the Senate passed SB1028, with a vote of 34 to 12. *See* SB1028 (CH0685) History. The House of Delegates passed SB1028 with a vote of 95 to 27 on April 4, 2018, after the House and Government Operations Committee voted in favor of it on April 3. The bill was returned to the Senate as passed on April 5, 2018 and signed by the Governor on May 15 as Chapter 685 of the 2018 Laws of Maryland.

Two parents of transgender children provided written testimony. *See* HB 902 Bill File at 10, 45; SB 1028 Bill File at 35. One described the turmoil and unhappiness experienced by one of her children and the family until her child disclosed that he is transgender. The parents sought help in understanding their child and were offered two options: Raise their child as a boy or continue raising him as a girl with the expectation of further unhappiness. According to his mother, "[b]y simply changing his name and pronouns and affirming his gender, our child's temperament drastically improved." HB 902 Bill File at 45; SB 1028 Bill File at 35. The other parent emphatically declared that his "son [did] not need to be Converted, or Repaired." HB 902 Bill File at 10. A pediatrician also described her experience with patients "struggling with their sexual identity." She recalled that one such patient was sent by his parents to "a summer camp for 'conversion therapy,' only to leave camp with his self-esteem damaged immensely." She also stated that she "had patients who have committed suicide because they didn't receive the positive support they needed." HB 902 Bill File at 57; SB 1028 Bill File at 41.

The Fiscal and Policy Note, prepared by the Maryland General Assembly's Department of Legislative Services for SB 1028, describes a January 2018 report from the Williams Institute at the University of California Los Angeles School of Law about those who have received conversion therapy. *See* SB 1028 Fiscal and Policy Note at 2 (attached as Exhibit 16 and available at http://mgaleg.maryland.gov/2018RS/fnotes/bil_0002/hb0902.pdf). The Williams Institute Report estimates that 698,000 adults in the United States received conversion therapy, including 350,000 who received the therapy when they were adolescents. Christy Mallory, Taylor N.T. Brown, and Keith J. Conron, "Conversion Therapy and LGBT Youth," The Williams Institute UCLA School of Law (Jan. 2018) (attached as Exhibit 17 and available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf). It also estimates that 20,000 youth aged 13-17 will receive conversion therapy from licensed health care practitioners before the age of eighteen in states that permit the treatment and that 6000 youth would have received the treatment if their state of residence had not banned it. *Id.*

C. Section 1-212.1 of the Health Occupations Article

SB 1028 added section 1-212.1 to Maryland's Health Occupations Article. It defines conversion therapy as a practice or treatment that seeks to change an individual's sexual orientation or gender identity and prohibits certain licensed or certified health care providers from engaging in conversion therapy with minors. Any licensed or certified health care professional who violates that prohibition is subject to discipline for unprofessional conduct by the professional's licensing or certifying board. *See* Md. Code Ann., Health Occ. § 1-212.1.

Section 1-212.1 applies only to mental health or child care practitioners licensed or certified under Titles 14, 17, 18, 19, or 20 of the Health Occupations Article and any other

practitioner licensed or certified under the Health Occupations Article to provide counseling. The provision only applies to those individuals acting in their professional capacity and does not apply to pastoral or religious counseling as long as the counselor is not acting under his or her State license. *See* Letter from Kathryn M. Rowe to the Honorable Bonnie Cullison (Apr. 3, 2018) (HB 902 Bill File at 3-4).

Section 1-212.1 also does not do any of the following:

- Prevent mental health or child care practitioners from communicating with the public about conversion therapy;
- Prevent mental health or child care practitioners from expressing their views to patients, whether children or adults, about conversion therapy, homosexuality, or any other topic;
- Prevent mental health or child care practitioners from recommending conversion therapy to patients, whether children or adults;
- Prevent mental health or child care practitioners from administering conversion therapy to any person who is 18 years of age or older;
- Prevent mental health or child care practitioners from referring minors to unlicensed counselors, such as religious leaders; or
- Prevent unlicensed providers, such as religious leaders, from engaging in conversion therapy with children or adults.

Rather, it only subjects Maryland-licensed mental health and child care practitioners to discipline by their licensing board if they engage in conversion therapy with minors, *i.e.,* if they seek to change minors' sexual orientation or gender identity.

D. This Lawsuit

In this lawsuit, Christopher Doyle, a licensed clinical professional counselor in Maryland, ECF Document 1 ¶ 13, challenges the constitutionality of SB 1028. According to Mr. Doyle, section 1-212.1 of the Health Occupations Article violates his free speech rights under the First Amendment to the United States Constitution because it is a prior restraint, discriminates on

the basis of viewpoint and content, and is vague, overbroad, and underinclusive and violates his clients' rights to receive information. *See id.* Counts I and II. He also claims that section 1-212.1 violates his right to the free exercise of religion under the First Amendment, *id.* Count III, and violates Articles 10, 36, and 40 of the Maryland Declaration of Rights, *id.* Counts IV and V. In this motion, Mr. Doyle seeks a preliminary injunction based only on Count I of his complaint.

II. Argument

Mr. Doyle is not entitled to a preliminary injunction against the enforcement of section 1-212.1 of the Health Occupations Article. He does not have standing to assert the claims in Count I of the complaint because he does not allege that he practices in Maryland. In addition, the Governor and Attorney General, whom Mr. Doyle sued in their official capacities, have Eleventh Amendment immunity for the relief sought. Furthermore, section 1-212.1 survives his constitutional challenge under the Free Speech Clause of the First Amendment regardless of the level of scrutiny that applies. The State of Maryland has a compelling interest in the protection of minors, and the prohibition of a particular form of treatment as harmful to minors furthers that interest. Thus, the Court should deny Mr. Doyle's motion for a preliminary injunction.

A. Mr. Doyle Lacks Standing.

Article III of the United States Constitution gives federal courts jurisdiction over "cases" and "controversies," and standing is "an integral component of the case or controversy requirement." *Cooksey v. Futrell*, 721 F.3d 226, 234 (4th Cir. 2013) (quoting *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006)). "To meet the constitutional requirement for standing, a plaintiff must prove that: 1) he or she suffered an 'injury in fact' that is concrete and particularized, and is actual or imminent; 2) the injury is fairly traceable to the challenged action of the defendant; and 3) the injury likely will be redressed by a favorable decision." *Friends of*

the Earth, Inc. v. Gaston Copper Recycling Corp., 629 F.3d 387, 396 (4th Cir. 2011) (citations omitted). And "[i]t is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" *Chesapeake B & M, Inc. v. Harford County,* 58 F.3d 1005, 1014 (4th Cir. 1995) (quoting *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)). Although the injury-in-fact requirement for standing in cases involving the First Amendment is "somewhat relaxed," Mr. Doyle still must allege both "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and that "there exists a credible threat of prosecution thereunder." *Davison v. Randall*, 912 F.3d 666, 678 (4th Cir. 2019) (quoting *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018)).

Mr. Doyle has not alleged sufficient facts to give him standing to bring this lawsuit or request a preliminary injunction. He does not claim that he performs or intends to perform conversion therapy on minor clients in Maryland, only that he is a licensed clinical professional counselor in Maryland. ECF Document 1 ¶ 13. In both the Complaint and his Declaration in support of his Motion for Preliminary Injunction, however, Mr. Doyle affirmatively alleges that he practices in Virginia and the District of Columbia area. *See* ECF Document 1 ¶ 99 ("Plaintiff is the Executive Director of the Institute for Healthy Families, a non-profit Judeo-Christian therapeutic organization in the Washington, D.C. area, where he also maintains a counseling practice."); ECF Document 2-1 ¶ 3 ("I am a licensed psychotherapist and the Executive Director of the Institute for Healthy Families, a non-profit Judeo-Christian therapeutic organization in the Washington, D.C. area. I am also the founder of Northern Virginia Christian Counseling, specializing in the integration of psychology and theology in counseling. I am also employed as a mental health therapist for higher education students at Patrick Henry College in Purcellville,

VA."). The Institute for Healthy Families is located in Manassas, Virginia, *see* Letter from Internal Revenue Service to Institute for Healthy Families (Mar. 30, 2016) (attached as Exhibit 18), at the same address at which the National Provider Identifier Database lists Mr. Doyle as practicing, NPI Profile for Christopher Doyle (attached as Exhibit 19). Mr. Doyle does not specifically allege that he has *any* patients in Maryland, let alone any minors that want to pursue conversion therapy. Mr. Doyle fails to allege any connection between his alleged injury and section 1-212.1. As such, Mr. Doyle does not have standing, and his request for injunctive relief should be denied.

B. The Eleventh Amendment Protects the Governor and the Attorney General From Suit.

The Eleventh Amendment provides that, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. In practice, the Eleventh Amendment has been interpreted to "bar[ ] suit in federal court against an unconsenting state and any governmental units that are arms of the state unless Congress has abrogated the immunity." *Weigel v. Maryland*, 950 F. Supp. 2d 811, 830 (D. Md. 2013) (quoting *Coleman v. Md. Ct. App.*, 626 F.3d 187, 191 (4th Cir.2010) (further citation omitted). In *Ex parte Young*, 209 U.S. 123 (1908), however, the Supreme Court held that the Eleventh Amendment does not "prevent private individuals from bringing suit against State officials for prospective or declaratory relief for ongoing violations of federal law." *Weigel*, 950 F. Supp. 2d at 831. For that exception to Eleventh Amendment immunity to apply, "there must be a 'special relation' between the officer being sued and the challenged statute." *Id.* (citation omitted). "This requirement of 'proximity to and responsibility for the challenged state action' is not met when an official merely possesses '[g]eneral authority to enforce the laws of

the state,'" *Id*. (quoting *S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 332-33 (4th Cir. 2008)) and "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001) (quoting *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir.1979)).

In his Complaint, Mr. Doyle sues both the Governor and the Attorney General in their official capacities and alleges generally that the Governor is "responsible for executing the laws of the State of Maryland" and that the Attorney General is "charged with enforcement of the laws of the State of Maryland." ECF Document 1 ¶¶ 14-15. Mr. Doyle does not, and cannot, allege a specific role that the Governor and Attorney General play in executing or enforcing the standard of practice set forth in section 1-212.1. The pleading in this case is not sufficient to meet the "special relation" requirement of the *Ex parte Young* exception to Eleventh Amendment immunity. *See, e.g., Weigel*, 950 F. Supp. 2d at 832 ("Here, although [Governor] O'Malley and [Attorney General] Gansler are generally under a duty to enforce and protect Maryland law, neither is charged with the duty to "enforce" *Tracey*. . . . Thus, Counts I through IV, VII, and VIII are barred by Eleventh Amendment immunity."); *Gilmore*, 252 F.3d at 331 ("Here, although Governor Gilmore is under a general duty to enforce the laws of Virginia by virtue of his position as the top official of the state's executive branch, he lacks a specific duty to enforce the challenged statutes. Thus, we vacate the judgment against him and remand with instructions that the district court dismiss him as a defendant in this action."); *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2016 WL 4192406, at *3-4 (E.D. Cal. Aug. 8, 2016) ("Here, in contrast, Governor Brown has a general overarching duty to execute California law. The first amended complaint is devoid of any factual allegations that Governor Brown has a specific duty to enforce

or implement SB 1172 in particular. . . . Accordingly, the court GRANTS the motion as to defendant Governor Brown."). Thus, the Governor and the Attorney General, the only two defendants, are immune from this suit and should be dismissed as defendants. Without any proper defendants, Mr. Doyle's request for a preliminary injunction must be denied.

C. Mr. Doyle Is Not Entitled to a Preliminary Injunction.

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain that extraordinary relief, Mr. Doyle "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20. Mr. Doyle cannot meet that burden.

1. Mr. Doyle Cannot Demonstrate a Likelihood of Success on the Merits.

As the Supreme Court recently affirmed, "States may regulate professional conduct, even though that conduct incidentally involves speech." *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). In particular, courts have long acknowledged that a state may subject the practice of health care providers to reasonable regulation – even when that regulation may implicate the provider's First Amendment rights. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992). In this case, Maryland has chosen to regulate the practice of licensed mental health and child care practitioners by prohibiting a particular type of treatment that the legislature determined to be harmful to minors. That choice regulates conduct – not speech, and thus is subject only to

rational basis review. *See Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014), *cert. denied*, 573 U.S. 945 (2014).[2]

As the court in *Pickup* explained with respect to California's version of SB 1028,

> It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of [conversion therapy] with their patients. . . . . Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful. Under *Giboney* [*v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)], the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech.

Id. Because it concluded that the California statute only regulated conduct, while leaving providers free to discuss and make recommendations regarding conversion therapy, the court also concluded that the statute's effect on speech was only incidental. Thus, the statute would be upheld if it bore a rational relationship to a legitimate state interest. *Id.* at 1231.

SB 1028 also prohibits a form of treatment for minors and does not prevent licensed therapists from expressing their views about conversion therapy to the public and to their patients. And Maryland, like California, has the authority to regulate the practice of mental health counseling. Furthermore, the statute defines its violation as unprofessional *conduct*. *See* Md. Code Ann., Health Occ. § 1-212.1(c) (emphasis added). Based on the analysis in *Pickup*, section 1-212.1 regulates conduct and must be upheld if it bears a rational relationship to a legitimate state interest. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 580 (1991) (Scalia, J.,

[2] In *NIFLA*, the Court objected to the category of "professional speech" recognized by some courts and rejected the use of that label in analyzing First Amendment issues. 138 S. Ct. at 2371-75. The court in *Pickup* did not rely on the concept of professional speech in upholding California's ban on sexual orientation change efforts or conversion therapy; rather it determined that the California statute regulated conduct. 740 F.3d at 1229.

concurring in the judgment); *Willis v. Town of Marshall, N.C.*, 426 F.3d 251, 262 (4th Cir. 2005).

There can be no doubt that the State of Maryland has a legitimate interest in protecting minors from harmful conduct. *E.g., Sable Communications of California, Inc. v. FCC*, 494 U.S. 115, 126 (1989). There also can be no dispute that the legislature determined, in passing SB 1028, that conversion therapy harmed minors. *See* Preamble, SB 1028 (ECF Document 1-1). And, a review of the documents cited in the Preamble as well as those discussed in the testimony establish a consensus among major health professional organizations that there is a risk of harm to minors from conversion therapy. No more is required to uphold the constitutionality of section 1-212.1 of the Health Occupations Article and to reject Mr. Doyle's request for a preliminary injunction.

In the alternative, as the court found in *Otto v. City of Boca Raton, Florida*, ___ F. Supp. 3d __, 2019 WL 588645, at *15 (S.D. Fla. Feb. 13, 2019), "applying intermediate scrutiny to medical treatments that are effectuated through speech would strike the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that treatments may be subject to significant regulation under the government's police powers." Furthermore, the court noted that applying intermediate scrutiny to an ordinance similar to SB 1028 was entirely consistent with the historic understandings of the First Amendment and its purpose "'to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail.'" *Id.* (quoting *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984))).

The court then concluded that the "[p]laintiffs' words serve a function; their words constitute an act of therapy with their minor clients, which makes [the] plaintiffs' speech

different from the protected dialogues in *Wollschlaeger* and *NIFLA*, and from highly protected, political speech in the metaphoric or literal "public square." *Id.* at *16. In addition, the court noted that "[t]he public marketplace of ideas is not limited in any way. What is limited, is the therapy (delivered through speech and/or conduct) by a licensed practitioner to his or her minor patient, within the confines of a therapeutic relationship. In the context of the relationship between a minor and his or her therapist, there is no competitive marketplace of ideas to infringe upon." *Id.* Thus, intermediate scrutiny is consistent with the justifications for and principles of the First Amendment. *Id.*

The analysis in *Otto* is equally applicable here. And the application of an intermediate level of review demonstrates that Mr. Doyle cannot show a likelihood of success on the merits. *See Reynolds v. Middleton*, 779 F.3d 222, 228 (4th Cir. 2015) (discussing elements of intermediate scrutiny). Certainly, the legislature's interest in protecting minors is important, and the ban on the practice of conversion therapy with minors furthers that interest. Finally, the ban does not burden more speech than necessary; it prohibits only the therapy that the legislature found to be harmful. It only affects certain licensed health care providers and treatment that they provide to minors. It does not limit in any way Mr. Doyle's or any other individual's right to advocate for conversion therapy or a repeal of the statute. It does not limit Mr. Doyle's ability to engage in conversion therapy with adults or his right to express and discuss his views about conversion therapy to his clients. Thus, it is likely that SB 1028 would survive an intermediate scrutiny review.

Mr. Doyle, however, claims that the statute must survive strict scrutiny and that it cannot. *See* ECF Document 2 at 18-33. In Mr. Doyle's view, the statute does not serve a compelling interest of the State, is both content and viewpoint based, and is neither narrowly tailored nor the

least restrictive means of addressing any interest that the State has. *See id.*. He is wrong on all counts.

First, SB 1028 identifies the State's compelling interest: "protecting the physical and psychological well-being of minors, including LGBT youth, and . . . protecting minors against exposure to serious harm caused by sexual orientation change efforts." ECF Document 1-1 at 5. The Supreme Court has repeatedly recognized that "[t]here is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications*, 492 U.S. at 115; *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling.") (internal citation omitted); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (government's interest in well-being of its youth justifies special treatment of indecent broadcasting); *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.")

Mr. Doyle disputes the State of Maryland's compelling interest in protecting minors by attacking the APA Task Force Report. *See* ECF Document 2 at 2-17. He notes all of the caveats in the report, but ignores the overall conclusion that there is a risk of harm. He also ignores the conclusion in both the APA Task Force Report and the SAMHSA Report that therapy and support should be provided without imposing a predetermined outcome. And, he ignores the admonition in the 2000 statement from the American Psychiatric Association "to first, do no harm." *See* Exhibit 10. Most importantly, he ignores the limitation in section 1-212.1 itself: its prohibition on the practice of conversion therapy is limited to minor clients.

In any event, courts allow "litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555 (2001). Furthermore, "[l]egislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review . . .," *id.*, and to make choices in the face of medical or scientific uncertainty, *see Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). The Maryland General Assembly relied on just such studies, anecdotes, and empirical judgments to support its compelling interest in protecting minors.

Second, SB 1028 is narrowly tailored to address that compelling interest. The statute only bars the practice of conversion therapy with minors and only applies to certain licensed mental health and child care practitioners. *See* Md. Code Ann., Health Occ. § 1-212.1(b). To the extent that the statute regulates speech, it does not reach any speech about conversion therapy other than the use of speech to practice conversion therapy with minors. And, the statute is the least restrictive means of promoting the State's compelling interest. Requiring that participation in conversion therapy be voluntary does not protect minors; they generally cannot consent to treatment or object to treatment to which their parents consent.[3] *See* 80 Md. Op. Att'y Gen. 62, 64-65 (1995) (health care providers generally must obtain parents' consent before treating minors); 79 Md. Op. Att'y Gen. 244, 252 (1994) ("[M]inors are generally considered legally incompetent for purposes of medical decision-making."). Requiring informed consent for participation in conversion therapy is simply a variation of the suggestion that only voluntary

[3] Section 20-104(b) of the Health-General Article of the Maryland Annotated Code does allow a minor 16 or 17 years old to consent to mental health treatment, but does not allow that minor to refuse treatment to which the minor's parent consents. Furthermore, section 1-212.1 of the Health Occupations Article, as the more specific statute, would control over the general consent provisions of section 20-104(b). *See Suter v. Stuckey,* 935 A.2d 731, 743 (Md. 2007).

participation be permitted and thus, does not protect minors. Finally, limiting the ban to so-called aversive therapy also does not adequately protect minors. Both the APA Task Force Report and the SAMHSA Report emphasize the importance of supportive therapy without a predetermined outcome to avoid the risk of harm from conversion therapy. APA Task Force Report at v, 80; SAMHSA Report at 11. Only banning the harmful treatment for minors could adequately serve the State's compelling interest in protecting minors.[4]

Furthermore, the statute's prohibition on engaging in conversion therapy with minors is neither content nor viewpoint based restriction. It does not limit what Mr. Doyle or other licensed practitioners may say to minor clients; it limits the object that the therapy provided by licensed practitioners may have. *See* Md. Code Ann., Health Occ. §§ 1-212.1(a)(2)(i), (b) (defining conversion therapy as "a practice or treatment that seeks to change an individual's sexual orientation or gender identity" and prohibiting certain licensed practitioners from engaging in that practice). Even if it is content-based, it does not discriminate based on viewpoint. As the court in *Otto* found, "the alleged viewpoint discrimination against those who believe that it is possible to change a person's sexual orientation or attractions is not distinguishable from the subject matter being regulated. The ordinances may be construed to be content discriminatory, because they may prohibit speech based on the ideas, or the message that it conveys. But, '[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or

[4] Mr. Doyle suggests that the application of section 1-212.1 only to certain licensed practitioners and not to unlicensed religious counselors and clergy somehow demonstrates that it is not narrowly tailored. ECF Document 2 at 30-31. "We will not punish [a government] for leaving open more, rather than fewer, avenues of expression . . . ." *Williams Yulee v. Florida Bar*, 135 S. Ct. 1656, 1670 (2015).

viewpoint discrimination exists.'" *Otto*, 2019 WL 588645, at *25 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

In this case, the State chose to regulate conversion therapy because of the harm or potential harm in the treatment, not because of the viewpoint or beliefs of the speaker about conversion therapy, homosexuality, or human attraction more generally. Section 1-212.1 does not indicate a preference between heterosexual or homosexual individuals seeking to change their sexual orientation one way or another. It does regulate the practices of licensed medical providers in trying to change a minor's sexual orientation or gender identity. The practice is what is regulated, not any particular viewpoint on the subject matter. *See Otto*, 2019 WL 588645, at *25.

Mr. Doyle also claims that Section 1-212.1 is unconstitutionally vague and "forces both mental health professionals and those enforcing the law to guess at its meaning and differ as to its application." ECF Document 2 at 31. A law is impermissibly vague if it does not provide a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, or if it authorizes or encourages arbitrary and discriminatory enforcement. *Hill v. Colorado,* 530 U.S. 703, 732 (2000). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A statute is not unconstitutionally vague if "it is clear what the [the statute] as a whole prohibits." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

In this case, the language of section 1-212.1 is clear. It prohibits certain licensed practitioners from seeking to change a minor's sexual orientation or gender identity, defines the practice of conversion therapy by certain licensed practitioners as unprofessional conduct, and subjects them to discipline by their licensing board. It is hard to believe that a licensed

practitioner who claims to support the practice of conversion therapy or sexual orientation change efforts does not understand the meaning of section 1-212.1. *See Pickup*, 740 F.3d at 1234.

Finally, Mr. Doyle claims that section 1-212.1 is an unconstitutional prior restraint on his ability to speak. *See* ECF Document 2 at 31-32. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis and quotation marks omitted). A prior restraint on speech must be distinguished from a sanction for past speech. *See id*. at 553–54 ("our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments"). Mr. Doyle ignores this key distinction. Section 1-212.1 does not establish a permit or licensing scheme enabling the government to allow or forbid speech in advance, but rather penalize providers who have practiced conversion therapy.

For all these reasons, Mr. Doyle has not demonstrated a likelihood of success on his claim that section 1-212.1 of the Health Occupations Article violates his First Amendment rights.

2. Mr. Doyle Cannot Show the Other Prerequisites for Issuance of a Preliminary Injunction.

In addition to demonstrating a likelihood of success on the merits, Mr. Doyle must show that he will suffer irreparable harm in the absence of a preliminary injunction, that the balance of equities is in his favor, and that injunction is in the public interest. *See Winter*, 555 U.S. at 20. Mr. Doyle asserts that he has met his burden on these three criteria by demonstrating a likelihood of success on the merits. He ignores, however, other relevant factors. For example, a delay in seeking preliminary injunctive relief may indicate a lack of irreparable harm and is also relevant to the balance of the equities. *See Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75,

80 (4th Cir. 1989); *Noya v. Frontier Adjusters, Inc.*, 2013 WL 2490360, at *6 (D. Md. Jun. 7, 2013) (plaintiff's undue delay in seeking preliminary injunction can preclude, as a matter of law, finding of irreparable harm). He also ignores the irreparable harm to the State if it cannot enforce a statute enacted by the Maryland General Assembly. *See Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (internal citation omitted)).

In this case, Mr. Doyle waited nine months after the Governor signed SB 1028 into law and three and a half months after it became effective to file this lawsuit. Mr. Doyle was well aware that the legislature was considering SB 1028 and its counterpart, HB 902 – he provided testimony against both bills. *See* HB 902 Bill File at 58-61. This delay, as well as the harm to the State and the public interest from the entry of preliminary injunctive relief, support denial of Mr. Doyle's motion.

III. Conclusion

For all these reasons, the Governor and Attorney General urge this Court to deny Mr. Doyle's motion for a preliminary injunction.

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March 8, 2019