Chapter 685

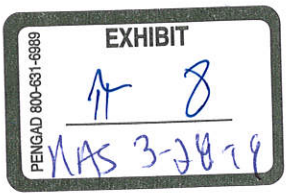
**(Senate Bill 1028)**

AN ACT concerning

**Health Occupations – Conversion Therapy for Minors – Prohibition**
**(Youth Mental Health Protection Act)**

FOR the purpose of prohibiting certain mental health or child care practitioners from engaging in conversion therapy with individuals who are minors; providing that a certain mental health or child care practitioner who engages in conversion therapy with an individual who is a minor shall be considered to have engaged in unprofessional conduct and shall be subject to discipline by a certain licensing or certifying board; prohibiting the use of State funds for certain purposes; requiring the Maryland Department of Health to adopt certain regulations; defining certain terms; making this Act severable; and generally relating to conversion therapy.

BY adding to
Article – Health Occupations
Section 1–212.1
Annotated Code of Maryland
(2014 Replacement Volume and 2017 Supplement)




Preamble

WHEREAS, Contemporary science recognizes that being lesbian, gay, bisexual, or transgender (LGBT) is part of the natural spectrum of human identity and is not a disease, a disorder, or an illness; and

WHEREAS, The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation that conducted a systematic review of peer–reviewed journal literature on sexual orientation change efforts and concluded in its 2009 report that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidal intentions, substance abuse, stress, disappointment, self–blame, decreased self–esteem and authenticity to others, increased self–hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high–risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources; and

WHEREAS, The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009 stating that it "advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services

that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth"; and

WHEREAS, The American Psychiatric Association stated in 2000 that "psychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm. In the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, the American Psychiatric Association recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm"; and

WHEREAS, The American Psychiatric Association also stated in 2000 that "the potential risks of reparative therapy are great, including depression, anxiety, and self–destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self–hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed"; and

WHEREAS, The American Psychiatric Association further stated in 2000 that it "opposes any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his/her sexual homosexual orientation"; and

WHEREAS, The American Academy of Pediatrics in 1993 published an article in its journal "Pediatrics" stating "[t]herapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation"; and

WHEREAS, The American Medical Association Council on Scientific Affairs prepared a report in 1994 in which it stated "[a]version therapy (a behavioral or medical intervention which pairs unwanted behavior, in this case, homosexual behavior, with unpleasant sensations or aversive consequences) is no longer recommended for gay men and lesbians"; and

WHEREAS, The American Medical Association Council on Scientific Affairs further stated in its 1994 report that "[t]hrough psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and understand the societal response to it"; and

WHEREAS, The National Association of Social Workers prepared a 1997 policy statement in which it stated "[s]ocial stigmatization of lesbian, gay, and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual

orientation changes. Sexual orientation conversion therapies assume that homosexual orientation is both pathological and freely chosen. No data demonstrates that reparative or conversion therapies are effective, and, in fact, they may be harmful"; and

WHEREAS, The American Counseling Association Governing Council issued a position statement in April 1999 that stated it opposed the promotion of reparative therapy as a "cure" for homosexual individuals; and

WHEREAS, The American School Counselor Association issued a position paper in 2014 in which it stated that "[i]t is not the role of the professional school counselor to attempt to change a student's sexual orientation or gender identity" and that "[p]rofessional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been proven ineffective and harmful"; and

WHEREAS, The American Psychoanalytic Association issued a position statement in June 2012 regarding attempts to change sexual orientation, gender identity, or gender expression, and in the position statement the Association states "as with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self–criticism through the internalization of such prejudice"; and

WHEREAS, The American Psychoanalytic Association also stated in June 2012 that "psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes"; and

WHEREAS, The American Academy of Child and Adolescent Psychiatry published in 2012 an article in its journal entitled "The Journal of the American Academy of Child and Adolescent Psychiatry", stating "[c]linicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self–esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial, or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated"; and

WHEREAS, The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May 2012 that states "[t]hese supposed conversion therapies constitute a violation of the ethical principles of health care and

violate human rights that are protected by international and regional agreements"; and

WHEREAS, The Pan American Health Organization also noted that reparative therapies "lack medical justification and represent a serious threat to the health and well–being of affected people"; and

WHEREAS, The American Association of Sexuality Educators, Counselors, and Therapists issued a statement in 2014 that states "same sex orientation is not a mental disorder and that [it] opposes any 'reparative' or conversion therapy that seeks to 'change' or 'fix' a person's sexual orientation"; and

WHEREAS, The American Association of Sexuality Educators, Counselors, and Therapists further stated in 2014 its belief that sexual orientation is not "something that needs to be 'fixed' or 'changed'" and provided as its rationale for this position that "[r]eparative therapy (for minors, in particular) is often forced or nonconsensual[,]", has "been proven harmful to minors[,]", and that "[t]here is no scientific evidence supporting the success of these interventions"; and

WHEREAS, The American Association of Sexuality Educators, Counselors, and Therapists also stated in 2014 that "[r]eparative therapy is grounded in the idea that non–heterosexual orientation is 'disordered'" and that "[r]eparative therapy has been shown to be a negative predictor of psychotherapeutic benefit"; and

WHEREAS, The American College of Physicians wrote a position paper in 2015 stating that it "opposes the use of 'conversion,' 'reorientation,' or 'reparative' therapy for the treatment of LGBT persons[,]", that "[a]vailable research does not support the use of reparative therapy as an effective model in the treatment of LGBT persons[,]", and that "[e]vidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons"; and

WHEREAS, Minors who experience family rejection based on their sexual orientation face especially serious health risks; and

WHEREAS, In a study published in 2009 in the journal "Pediatrics", lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse when compared with peers from families that reported no or low levels of family rejection; and

WHEREAS, Maryland has a 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; now, therefore,

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,

That the Laws of Maryland read as follows:

**Article – Health Occupations**

**1–212.1.**

(A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

(2) (I) "CONVERSION THERAPY" MEANS A PRACTICE OR TREATMENT BY A MENTAL HEALTH OR CHILD CARE PRACTITIONER THAT SEEKS TO CHANGE AN INDIVIDUAL'S SEXUAL ORIENTATION OR GENDER IDENTITY.

(II) "CONVERSION THERAPY" INCLUDES ANY EFFORT TO CHANGE THE BEHAVIORAL EXPRESSION OF AN INDIVIDUAL'S SEXUAL ORIENTATION, CHANGE GENDER EXPRESSION, OR ELIMINATE OR REDUCE SEXUAL OR ROMANTIC ATTRACTIONS OR FEELINGS TOWARD INDIVIDUALS OF THE SAME GENDER.

(III) "CONVERSION THERAPY" DOES NOT INCLUDE A PRACTICE BY A MENTAL HEALTH OR CHILD CARE PRACTITIONER THAT:

1. PROVIDES ACCEPTANCE, SUPPORT, AND UNDERSTANDING, OR THE FACILITATION OF COPING, SOCIAL SUPPORT, AND IDENTITY EXPLORATION AND DEVELOPMENT, INCLUDING SEXUAL ORIENTATION–NEUTRAL INTERVENTIONS TO PREVENT OR ADDRESS UNLAWFUL CONDUCT OR UNSAFE SEXUAL PRACTICES; AND

2. DOES NOT SEEK TO CHANGE SEXUAL ORIENTATION OR GENDER IDENTITY.

(3) "MENTAL HEALTH OR CHILD CARE PRACTITIONER" MEANS:

(I) A PRACTITIONER LICENSED OR CERTIFIED UNDER TITLE 14, TITLE 17, TITLE 18, TITLE 19, OR TITLE 20 OF THIS ARTICLE; OR

(II) ANY OTHER PRACTITIONER LICENSED OR CERTIFIED UNDER THIS ARTICLE WHO IS AUTHORIZED TO PROVIDE COUNSELING BY THE PRACTITIONER'S LICENSING OR CERTIFYING BOARD.

(B) A MENTAL HEALTH OR CHILD CARE PRACTITIONER MAY NOT ENGAGE IN CONVERSION THERAPY WITH AN INDIVIDUAL WHO IS A MINOR.

(C) A MENTAL HEALTH OR CHILD CARE PRACTITIONER WHO ENGAGED IN

**CONVERSION THERAPY WITH AN INDIVIDUAL WHO IS A MINOR SHALL BE CONSIDERED TO HAVE ENGAGED IN UNPROFESSIONAL CONDUCT AND SHALL BE SUBJECT TO DISCIPLINE BY THE MENTAL HEALTH OR CHILD CARE PRACTITIONER'S LICENSING OR CERTIFYING BOARD.**

**(D) NO STATE FUNDS MAY BE USED FOR THE PURPOSE OF:**

**(1) CONDUCTING, OR REFERRING AN INDIVIDUAL TO RECEIVE, CONVERSION THERAPY;**

**(2) PROVIDING HEALTH COVERAGE FOR CONVERSION THERAPY; OR**

**(3) PROVIDING A GRANT TO OR CONTRACTING WITH ANY ENTITY THAT CONDUCTS OR REFERS AN INDIVIDUAL TO RECEIVE CONVERSION THERAPY.**

**(E) THE DEPARTMENT SHALL ADOPT REGULATIONS NECESSARY TO IMPLEMENT THIS SECTION.**

SECTION 2. AND BE IT FURTHER ENACTED, That, if any provision of this Act or the application thereof to any person or circumstance is held invalid for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act that can be given effect without the invalid provision or application, and for this purpose the provisions of this Act are declared severable.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect October 1, 2018.

**Approved by the Governor, May 15, 2018.**

I SUPPORT HOUSE BILL 902

March 1, 2018 - Testimony to House Health and Government Operations Committee

Good afternoon, my name is Mark Eckstein and my family lives in Rockville. I strongly support House Bill 902. I am the father of a transgender child who attends one of our state's amazing elementary schools. I firmly believe that this bill will go a long way to protecting the already marginalized population of LGBT youth throughout MD. I am here to give a voice to my son and others like him; and, to help all of you better understand the mindset of these wonderful children--especially since they can't adequately advocate for themselves (for many reasons, including their age and security/privacy concerns).

Informed from direct experiences, I will specifically focus on elementary-aged trans youth. In this context, the word, "trans", is often used as an umbrella term that encompasses such identities as gender-nonconforming, gender-expressive, and non-binary. MSDE finds it helpful to try to describe this concept by explaining that our students are on a gender spectrum, in which there aren't simply the binary expressions of just BOY or just GIRL -- like was the case when we were in elementary school, (many years ago!).

As all of us think back to our youth and our elementary school experiences, I am sure all these terms relating to gender can be confusing, and maybe even a bit upsetting. I understand; two years ago I was in the same boat: I would have never been able to articulate these concepts and concerns. In fact, I admit to be judgmental of "these parents" that were allowing their young kids to express their authentic gender. But, when your kid is slipping away and your family is in crisis, you are forced to understand quickly...and, I am so glad I did. These trans youth, including my son, are some of the most mature, amazing kids that I have ever known—and, they have given me increased empathy to relate to so many other marginalized and stigmatized young kids.

I realize that most of you probably agree with the general concept that we need to that our Youth need Mental Health Protections, but I you may be asking yourself, "why..."why do we need this specific bill—WE live in Maryland, which some call an East Coast Blue State." We need this bill, and we need it now, because, as we have seen from the testimonies today, our kids are still being subjected to this conversion therapy and we need a law to stop it.

In conclusion, I support this conversion therapy ban, sometimes called reparative therapy, because I can assure you that my son does not need to be Converted, or Repaired. Thanks you.


EXHIBIT 4-10

water
Women's Alliance for Theology, Ethics, and Ritual

8121 Georgia Avenue, Suite 310
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T 301.589.2509 · F 301.589.3150

**STATEMENT OF SUPPORT**

**Mary E. Hunt, Ph.D. February 9, 2018**

The *Youth Mental Health Protection Act* is common sense law that responds to the pernicious efforts of some unscrupulous practitioners to try to convert, repair, or otherwise change individuals' sexual orientation and/or gender identity. These tactics are especially egregious when used on young people who are just coming into their adult selves. As a Catholic theologian, a mother, and a Maryland voter I urge the General Assembly to adopt this act as law, joining at least ten other states and many municipalities in protecting the well being of our children.

Conversion therapy is harmful according to the American Psychiatric Association, American Psychological Association, American Medical Association, and every other mainstream medical and mental health organization. Respected research shows that such change efforts pose numerous health risks to lesbian, gay, bisexual, transgender, and queer youth including depression, anxiety, guilt, shame, suicidal tendencies, and more.

My concern is with the religious aspects of this practice. I work with WATER, the Women's Alliance for Theology, Ethics, and Ritual, a global network, an educational and spiritual space, a center for dialogue on feminism, faith, and justice. We connect activists, religious leaders, students, scholars, and allies who are using feminist religious values to create social change.

Many religious traditions, including Christianity, Judaism, Islam, Buddhism, and others are in the midst of re-evaluating their teachings on sexuality in light of new research. Religions are dynamic, part of the shaping and being shaped by culture. The diverse options and fluid nature of both sex and gender are increasingly taken into account as religions reconfigure their moral teachings. Religious professionals minister in ways that must 'do no harm' and indeed can do a lot of good. This law does not coerce them.

THE TREVOR PROJECT
saving young lives



| | |
|---|---|
| BILL NO: | House Bill 902/Senate Bill 1028 |
| TITLE: | Health Occupations - Conversion Therapy for Minors - Prohibition (Youth Mental Health Protection Act) |
| COMMITTEE: | Health and Government Operations/Education, Health and Environmental Affairs |
| HEARING DATE: | March 1, 2018/March 7, 2018 |
| POSITION: | SUPPORT |

As the leading national organization providing crisis intervention and suicide prevention services for LGBTQ youth, The Trevor Project urges the support of legislation to protect LGBTQ youth from conversion therapy. Conversion therapists falsely claim be able to change LGBTQ youth into straight and cisgender youth. Prominent professional health associations—including the American Medical Association, the American Psychological Association, and the American Academy of Pediatrics, among numerous others—oppose the use of conversion therapy on youth, calling the practice harmful and ineffective.

Maryland is on track to be the 10th state to pass legislation limiting the practice though another 40 states still allow this terrible crisis to continue. The Trevor Project frequently receives calls of LGBTQ youth in crisis stemming from their experience with conversion therapy and aims to advocate for the eventual end of state sanctioned conversion therapy across the country via the 50 Bills 50 States campaign.

I am a survivor of the dangerous and discredited idea that a therapist could change my sexual orientation or gender identity. Although some may say that conversion therapy should be allowed as a choice, I simply reply that I never chose the "therapy" my family subjected me to during my formative years as a child. My experiences in conversion therapy ranged from talking about my faith's rejection of my bisexuality all the way to physically aversive techniques like the application of heat, cold, and electricity to try and forcibly train my body to have heterosexual attractions.

To respond to those painful years, I now serve as the Head of Advocacy and Government Affairs for The Trevor Project, the leading national organization providing crisis intervention and suicide prevention services to LGBTQ youth. The Trevor Project has been contacted by over **1,237 Maryland youth in crisis** in the past year. These youth call us considering suicide and needing someone to speak to when they feel alone and scared. Not all of these youth are victims of conversion therapy but all have been wounded by a culture that allows the idea of the choice of one's sexual orientation to permit violence, bullying, and family rejection. In new research, released by the Williams Institute, we now estimate that more than 700,000 LGBTQ people will have experienced the horrors of conversion therapy in the past decades. Nearly 80,000 youth are still at risk of conversion therapy in the coming few

years including many in Maryland. You have an opportunity to stop that number from continuing to grow.

Conversion therapy does not have a political party. Of the nine states that now protect LGBTQ youth from conversion therapy, four have had Republican governors sign the legislation and five have had Democratic governors sign the legislation. When polled, most agree that the discredited snake oil of conversion therapy does not have a place in a state like Maryland that prides itself on respect and dignity and the freedom to love openly. States like Kansas, Missouri, Idaho, West Virginia, and Arizona and countless others are having the same debate you are hearing today and in many cases are agreeing that the protection of youth trumps any political party affiliation.

Conversion therapy does not have a scientific standing. Every major medical and mental health organization has stated that the treatment of conversion therapy is ineffective and potentially harmful. Conversion therapists are stealing from hard working American families who have their best interest of their children at heart. This is consumer fraud and the Supreme Court has agreed on this point time and time again.

The trauma of conversion therapy will remain with me for decades to come but, next year, when I marry the love of my life who works every day in Maryland, I will know that I did all I can to protect the thousands of youth in Maryland who are in crisis. **It is for this reason I am asking you to support these bills to protect LGBTQ youth from conversion therapy today.** Thank you for your time.

Sincerely,

Samuel Brinton

Sam Brinton
Head of Advocacy and Government Affairs / The Trevor Project
202.768.4413 / Sam.Brinton@thetrevorproject.org



EXHIBIT 4-63

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**Dr. Faith Hackett**
**Dr. Jacalyn Ginsburg**

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BILL NO: House Bill 902/Senate Bill 1028

TITLE: Health Occupations - Conversion Therapy for Minors - Prohibition (Youth Mental Health Protection Act)

COMMITTEE: Health and Government Operations/Education, Health and Environmental Affairs

HEARING DATE: March 1, 2018/March 7, 2018

POSITION: SUPPORT

March 1, 2018

To the Chair, Vice-Chair and Esteemed Members of the Committee:

I am a pediatrician in Severna Park, Maryland. In my many years of practice, I've had several patients who have confided in me that they are struggling with their sexual identity. Those lucky enough to have supportive families have grown to adulthood well adjusted. However, there are those whose families have not been so supportive and have recommended that they undergo treatment for their sexual orientation, treating it like a disease. I remember once such young man was sent to a summer camp for "conversion therapy", only to leave camp with his self esteem damaged immensely. Unfortunately, I've even had patients who have committed suicide because they didn't receive the positive support they needed.

The Youth Mental Health Protection Act (HB 902/SB1028) would protect LGBT youth from so-called "conversion therapy," a range of dangerous and discredited practices that falsely claim to change a person's sexual orientation or gender identity or expression. These practices are based on the false premise that being lesbian, gay, bisexual, transgender, or queer (LGBTQ) is a mental illness that needs to be cured, a theory which has been rejected by every major medical and mental health organization.

Research has shown that conversion therapy poses dangerous health risks for LGBTQ youth. Use of these harmful practices can lead to depression, decreased self-esteem, substance abuse, homelessness, and even suicidal behavior.

The Youth Mental Health Protection Act is narrowly targeted at preventing state-licensed mental health care providers from engaging in conversion therapy with youth below the age of 18. The bill also expressly provides that the provision of conversion therapy to minors by state-licensed mental health care providers is unprofessional conduct subject to discipline by the relevant licensing authority. And it also protects parents from being taken advantage of by conversion therapy practitioners by making it clear that these practices are ineffective and harmful to their children.

California, Connecticut, Illinois, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and the District of Columbia have enacted laws or regulations to protect minors from being subjected to conversion therapy by state-licensed mental health providers. Additionally, a growing number of municipalities have enacted similar protections, including cities and counties in Ohio, Pennsylvania, Washington, Florida, and Arizona. The Youth Mental Health Protection Act would add Maryland to the growing number of states that protect LGBTQ youth from the abusive and fraudulent practice of conversion therapy.

For these reasons, I support HB 902/SB1028 and respectfully urge a favorable report.

Thank you,

Jacalyn Ginsburg, D.O., F.A.A.P.

EXHIBIT 6-41

**Kate MacShane, M.Ed., MSW, LCSW-C**
Clinical Social Worker in Private Practice, Frederick, Maryland
*Specializing in Affirmative Care for LGBTQ+ Children, Adolescents, and Adults*

| | |
|---|---|
| **BILL NO:** | House Bill 902/Senate Bill 1028 |
| **TITLE:** | Health Occupations - Conversion Therapy for Minors - Prohibition (Youth Mental Health Protection Act) |
| **COMMITTEE:** | Health and Government Operations/Education, Health and Environmental Affairs |
| **HEARING DATE:** | March 1, 2018/March 7, 2018 |
| **POSITION:** | **SUPPORT** |

To the Chair, Vice-Chair and Esteemed Members of the Committee:

My name is Kate MacShane, and I support the Youth Mental Health Protection Act (HB 902/SB 1028). I'm a licensed clinical social worker here in Maryland, and I am proud to be a resident of Frederick City and a constituent of Senator Ron Young and Delegate Karen Lewis-Young, co-sponsors of this bill. I received my master's degree in social work from the Smith College School for Social Work. I also hold a master's degree in education from American University. I am a member of the World Professional Association of Transgender Health; the American Association of Sexuality Educators, Counselors, and Therapists; and the National Association of Social Workers. I maintain a private therapy practice in Frederick, the focus of which is the care of people of diverse genders and sexual orientations. I see people ages three and up, and most of my clients are youth and young adults who are lesbian, gay, bisexual, transgender, or queer (LGBTQ). I work from an affirmative perspective and seek to help people explore and become their authentic selves, by their own determination.

It is a great privilege to be a therapist because people who seek therapy are fundamentally brave. It takes immense courage to, in the midst of suffering, make oneself vulnerable to a stranger. This is especially true for young people who hold gender and sexual identities that are still widely subject to discrimination. The therapeutic relationship should be one in which all people have confidence that they will not be condemned, exploited, or harmed. Unfortunately, many of my clients have experienced family members, teachers, doctors, and even previous therapists trying to dissuade and even prevent them from being themselves. Imagine seeking help from a professional and being told that the path to healing is to destroy, ignore, or deny a part of yourself that you couldn't change even if you wanted to. I have personally treated people who identify as survivors of conversion therapy, and I can attest that it can take years to overcome the traumatic violation of trust that this type of "therapy" represents. I urge you to vote in support of this bill that would prevent licensed mental health professionals from abusing the therapeutic privilege by harming the LGBTQ youth and families in their care.

I support the Youth Mental Health Protection Act because every day in my practice, I see firsthand the grievous emotional harm that can be done to LGBTQ young people who are forbidden, discouraged, or otherwise made afraid to be themselves by adults in positions of authority. We must ensure that mental health care providers are not among these. It is the overwhelming consensus among mental health professionals that conversion therapy is at best ineffective and at worst, dangerous. It is important that the few in my field who still choose to practice conversion therapy with young people are explicitly prevented from harming anyone else. Passing this bill would send a clear message that in the state of Maryland, LGBTQ youth are valued and considered worthy of protection.

# Title 10 MARYLAND DEPARTMENT OF HEALTH

## Subtitle 58 BOARD OF PROFESSIONAL COUNSELORS AND THERAPISTS

### Chapter 04 Hearing Procedures

**Authority: Health Occupations Article, §§17-205, 17-509, and 17-511; State Government Article, §§10-205, 10-206, 10-216, and 10-226(c)(2); Annotated Code of Maryland**

*10.58.04.01*

### .01 Scope.

These regulations apply to all formal hearings before the Board of Examiners of Professional Counselors.

*10.58.04.02*

### .02 Notice of Hearing.

A. Written notice of a hearing shall be sent by the Board to all interested parties at least 30 days before the hearing. The notice shall state the:

(1) Date, time, and place of the hearing; and

(2) Issues or charges involved in the proceeding, provided, however, that if by reason of the nature of the proceeding, the issues cannot be stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable.

B. Service upon a party shall be by delivery of the charging document and copy of the complaint to the party in person. Instead of personal service, the Board may serve the charging document and a copy of the complaint by registered or certified mail, restricted delivery, return receipt requested.

*10.58.04.03*

### .03 Representation of Parties.

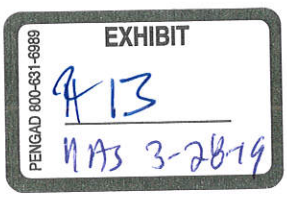
Each party appearing at a formal hearing shall have the right to appear in proper person, or by or with counsel.

*10.58.04.04*

### .04 Prehearing Procedures.

A. Discovery.





(1) Discovery on Request. By written request served on the other party and filed with the Board, a party may require another party to produce, within 15 days, the following:

(a) A list of witnesses to be called;

(b) Copies of documents intended to be produced at the hearing; or

(c) Both §A(1)(a) and (b) of this regulation.

(2) Mandatory Discovery.

(a) Each party shall provide to the other party not later than 15 days before the prehearing conference, if scheduled, or 45 days before the scheduled hearing date, whichever is earlier:

(i) The name and curriculum vitae of any expert witness who will testify at the hearing; and

(ii) A detailed written report summarizing the expert's testimony, which includes the opinion offered and the factual basis and reasons underlying the opinion.

(b) If the Board finds that the report is not sufficiently specific, or otherwise fails to comply with the requirements of this section, the Board shall exclude from the hearing:

(i) The testimony of the expert; and

(ii) Any report of the expert.

(c) The Board shall consider and decide arguments regarding the sufficiency of the report:

(i) At the prehearing conference, if scheduled; or

(ii) Immediately before the scheduled hearing.

(d) If an expert adopts a sufficiently specific charging document as the expert's report, that adoption satisfies the requirements set forth in this section.

(3) Parties are not entitled to discovery of items other than as listed in §A(1) and (2) of this regulation.

(4) Both parties have a continuing duty to supplement their disclosures of witnesses and documents.

(5) Absent unforseen circumstances which would otherwise impose an extraordinary hardship on a party, witnesses or documents may not be added to the list:

(a) After the prehearing conference, if scheduled; or

(b) Later than 15 days before the hearing if no prehearing conference is scheduled.

(6) The prohibition against adding witnesses does not apply to witnesses or documents to be used for impeachment or rebuttal purposes.

B. Prehearing Conferences. The Board may set prehearing conferences as it deems appropriate.

C. Oaths and Subpoenas.

(1) The Board may administer oaths and compel the attendance of witnesses and the production of physical evidence before it from witnesses upon whom process is served anywhere within the State, as in civil cases in the circuit court of the county or of Baltimore City, by subpoena issued over the signature of the Chairman or Secretary and the seal of the Board.

(2) Upon a request by a party and statement under oath that the testimony or evidence is necessary to the party's defense, the Board shall issue a subpoena in the party's behalf.

D. Motions filed by a party shall be accompanied by a memorandum of points and authorities, and shall be filed with the Board at least 10 working days before the hearing, and a copy served on the opposing party. Any response shall be filed with the Board at least 5 working days before the hearing and a copy shall be served on the opposing party.

*10.58.04.05*

## .05 Conduct of the Hearing.

A. Board Majority. Each hearing shall be held before not less than a quorum of the Board unless the hearing authority is delegated pursuant to State Government Article, §10-207, Annotated Code of Maryland. A delegation of authority shall be subject to the provisions of State Government Article, §10-212. If hearing authority is not delegated, Board action shall be by a majority vote of those Board members then serving on the Board.

B. Duties of Presiding Officer.

(1) The Chairman, or in the Chairman's absence a member designated by the Chairman, shall be the presiding officer, or if in a delegated hearing, an administrative law judge under State Government Article, §§9-1601—9-1610, Annotated Code of Maryland, shall be the presiding officer.

(2) The presiding officer shall:

(a) Have complete charge of the hearing;

(b) Permit the examination of witnesses;

(c) Admit evidence;

(d) Rule on the admissibility of evidence; and

(e) Adjourn or recess the hearing from time to time.

(3) The presiding officer may set reasonable time limits on arguments and presentation of evidence.

(4) The presiding officer shall be responsible for decorum in hearings and can suspend the proceedings as necessary to maintain decorum.

C. Legal Advisor and Counsel for the Board.

(1) The Board may request the Office of the Attorney General to participate in any hearing to present the case on behalf of the Board.

(2) The member of the Office of the Attorney General presenting the case on behalf of the Board shall have all the following rights:

(a) The submission of evidence;

(b) Examination and cross-examination of witnesses;

(c) Presentation of summation and argument; and

(d) Filing of objections, exceptions, and motions.

(3) The Board may also request a representative of the Office of the Attorney General to act as legal advisor to the Board as to questions of evidence and law.

D. Order of Procedure. The State shall present its case first. Then the respondent shall present his case. After this the State may present rebuttal.

E. Examination of Witnesses and Introduction of Evidence.

(1) The rules of evidence in all hearings under these regulations shall be as set forth in State Government Article, §§10-208 and 10-209, Annotated Code of Maryland.

(2) Each party has the right to:

(a) Call witnesses and present evidence;

(b) Cross-examine witnesses called by the Board or other party;

(c) Present summation and argument and file objections, exceptions, and motions.

(3) If a party is represented by counsel, the submission of evidence, examination and cross-examination of witnesses, and filing of objections, exceptions, and motions shall be done and presented solely by counsel.

(4) Witnesses.

(a) The presiding officer, or any person designated by the presiding officer for the purpose, may examine any witness called to testify.

(b) The presiding officer may call as witness any person in attendance at the hearing.

(c) Any member of the Board may examine any witness called to testify.

(5) If an accused or complainant fails to appear at a hearing after due notice, the Board or its designee may reschedule the hearing, or may proceed upon the available investigation, report, documents, witnesses, and records.

*10.58.04.06*

## .06 Records and Transcript.

A. The Board shall prepare an official record which shall include all pleadings, testimony, exhibits, and other memoranda or material filed in the proceeding.

B. A stenographic record of the proceedings shall be made at the expense of the Board. This record need not be transcribed, however, unless requested by a party, or by the Board. The cost of any typewritten transcripts of any proceedings, or part of them, shall be paid by the party requesting the transcript.

*10.58.04.07*

## .07 Decision and Order.

A. Each decision and order rendered by the Board shall be in writing and shall be accompanied by findings of fact and conclusions of law.

B. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed promptly to each party or attorney of record.

*10.58.04.08*

## .08 Rehearings.

A. A party aggrieved by the decision and order rendered may apply for rehearing within 10 days after service on the party of the decision and order. Action on an application shall lie in the discretion of the Board.

B. Unless otherwise ordered, neither the rehearing nor the application for it shall stay the enforcement of the order, or excuse the person affected for failure to comply with its terms.

C. The Board may consider facts not presented in the original hearing, including facts arising after the date of the original hearing, and may by new order abrogate, change, or modify its original order.

*10.58.04.09*

## .09 Appeals.

A person whose certificate has been revoked or suspended by the Board, or a person placed on probation or reprimand under the regulations in this chapter, may appeal the Board's decision as provided by the law.

*10.58.04.10*

## .10 Summary Suspension of a License or Certificate.

A. Pursuant to State Government Article, §10- 226(c)(2), Annotated Code of Maryland, the Board may order the summary suspension of a license holder if the Board determines that there is substantial likelihood that a licensee or certificate holder poses a risk of harm to the public health, safety, or welfare.

B. Notice of Intent to Summarily Suspend.

(1) Based on information gathered in an investigation or otherwise provided to the Board, the Board may vote to issue:

(a) A notice of intent to summarily suspend a license or certificate; or

(b) An order of summary suspension.

(2) If the Board votes to issue a notice of intent to summarily suspend a license or certificate or an order of summary suspension, the Board shall refer the matter to an administrative prosecutor for prosecution.

(3) A notice of intent to summarily suspend a license or certificate shall include:

(a) A proposed order of summary suspension which is unexecuted by the Board and includes:

(i) The statutory authority on which the action has been taken;

(ii) Allegations of fact that the Board believes demonstrate a substantial likelihood that the licensee or certificate holder poses a risk of harm to the public health, safety, or welfare; and

(iii) Notice to the respondent of the right to request a full hearing on the merits of the summary suspension if the Board executes the proposed order of summary suspension; and

(b) An order or summons to appear before the Board to show cause why the Board should not execute the order of summary suspension and which notifies the respondent of the consequences of failing to appear.

(4) Service.

(a) The Board shall serve a respondent with a notice of intent to summarily suspend a license or certificate not later than 5 days before a predeprivation show cause hearing is scheduled before the Board.

(b) Service of the notice of intent to summarily suspend shall be made:

(i) Personally upon the respondent;

(ii) By certified mail to the address the respondent is required to maintain with the Board; or

(iii) By other reasonable means to effect service.

(c) If the Board is unable to serve the notice of intent to summarily suspend a license or certificate upon the respondent as described in §B(4)(b) of this regulation, the Board may nevertheless proceed to prosecute the case.

C. Predeprivation Opportunity to Be Heard.

(1) If the Board issues a notice of intent to summarily suspend a license or certificate, the respondent may request an opportunity to appear before the Board to show cause why the respondent's license or certificate should not be suspended before the Board executes the order of summary suspension.

(2) Predeprivation Show Cause Hearing Before Board.

(a) The hearing shall be a nonevidentiary hearing to provide the parties with an opportunity for oral argument on the proposed summary suspension.

(b) The Board member presiding at the hearing shall determine all procedural issues and may impose reasonable time limits on each party's oral argument.

(c) The presiding Board member shall make rulings reasonably necessary to facilitate the effective and efficient operation of the hearing.

(d) The respondent and the administrative prosecutor may not exceed 30 minutes each to present oral argument.

(e) The respondent shall proceed first and may reserve part of the allotted time for rebuttal.

(3) The Board member who presides over the hearing:

(a) May allow either the respondent or the administrative prosecutor to present documents or exhibits which are relevant and material to the proceedings and which are not duly repetitious, if the presiding Board member believes that such documents or exhibits are necessary for a fair hearing; and

(b) May not allow testimony by any witness unless agreed to by the parties and approved by the Board in advance of the hearing.

(4) A Board member may be recognized by the presiding member to ask questions of either party appearing before the Board.

D. Summary Suspension Without Prior Notice or Hearing Opportunity.

(1) Extraordinary Circumstances. The Board may, after consultation with Board counsel, order the summary suspension of a license or certificate without first issuing a notice of intent to summarily suspend a license or certificate or providing a respondent with an opportunity for a predeprivation hearing if the Board determines that:

(a) The public health, safety, and welfare require the immediate suspension of the license; and

(b) Prior notice and an opportunity to be heard are not feasible.

(2) Time—Service and Hearing.

(a) An order of summary suspension under section §D(1) of this regulation shall be served upon the respondent within 48 hours after its execution.

(b) The respondent may request a show cause hearing before the Board within 30 days after the effective date of the summary suspension. The request shall be made within 10 days of the date of the notice of sumary suspension.

(3) If the respondent requests a hearing under §B(3)(a)(iii) of this regulation, that hearing shall:

(a) Be conducted before the Board as provided in §D(2)(b) of this regulation; and

(b) Provide the respondent with an opportunity to show cause why the Board should lift the summary suspension and reinstate the license or certificate.

E. Burdens of Production and Persuasion.

(1) In a show cause proceeding under §C of this regulation, the respondent may present argument in opposition to the allegations presented in the order for summary suspension or which otherwise demonstrate that the public health, safety, or welfare is not at risk.

(2) The administrative prosecutor bears the burden of demonstrating by a preponderance of the evidence that the health, safety, or welfare of the public imperatively requires the Board to summarily suspend the respondent's license or certificate.

F. Disposition.

(1) If the Board issues a notice of intent to summarily suspend a license or certificate before summarily suspending a license or certificate, the Board may, after the show cause hearing, vote to:

(a) Order a summary suspension;

(b) Deny the summary suspension;

(c) Issue an order agreed upon by the parties; or

(d) Issue an interim order warranted by the circumstances of the case, including an order providing for a stay of the summary suspension subject to certain conditions.

(2) If the Board orders a summary suspension before a show cause hearing, the Board may, at the conclusion of the hearing, vote to:

(a) Affirm its order of summary suspension;

(b) Rescind its order of summary suspension;

(c) Issue an order agreed upon by the parties; or

(d) Issue an interim order warranted by the circumstances of the case, including an order providing for a stay of the summary suspension subject to certain conditions.

(3) An order for summary suspension or other order issued by the Board after the initiation of summary suspension proceedings are final orders of the Board and public records under State Government Article, §10–611, Annotated Code of Maryland.

G. Postdeprivation Opportunity for Evidentiary Hearing.

(1) If the Board orders the summary suspension of a license or certificate under §C or D of this regulation, the respondent may request an evidentiary hearing before the Board, or if the Board delegates the matter to the Office of Administrative hearings, before an administrative law judge.

(2) The respondent may request an evidentiary hearing within 10 days after the Board issues the order of summary suspension.

(3) Unless otherwise agreed by the parties, a hearing shall be provided within 45 days after the respondent's request.

(4) An evidentiary hearing may be consolidated with a hearing on charges issued by the Board that include the facts that form the basis for the summary suspension.

(5) An evidentiary hearing shall be conducted under the contested case provisions of State Government Article, Title 10, Subtitle 2, Annotated Code of Maryland.

(6) If the Board delegates the matter to the Office of Administrative Hearings, the administrative law judge shall issue a recommended decision to the Board with:

(a) Proposed or final findings of fact;

(b) Proposed or final conclusions of law;

(c) A proposed disposition; or

(d) Any combination of §G(6)(a), (b), or (c) of this regulation, pursuant to the Board's delegation of the matter to the Office of Administrative Hearings.

(7) If the hearing is one combined with charges, the administrative law judge's determination of the merits of the summary suspension shall be based only on the parts of the record available to the Board when the Board voted for summary suspension.

(8) The parties may file exemptions to the recommended decision, as provided in State Government Article, §10–216, Annotated Code of Maryland.

(9) An order issued by the Board after a post-deprivation evidentiary hearing is a final order of the Board and is a public record under State Government Article, §10–611, Annotated Code of Maryland.

# Title 10 MARYLAND DEPARTMENT OF HEALTH

## Subtitle 58 BOARD OF PROFESSIONAL COUNSELORS AND THERAPISTS

### Chapter 09 Disciplinary Sanctions and Monetary Penalties

**Authority: Health Occupations Article, §§1-606, 17-313.1, and 17-509—17-511, Annotated Code of Maryland**

*10.58.09.01*

### .01 Scope.

This chapter establishes standards for the imposition of disciplinary sanctions and monetary penalties for violations of the Maryland Professional Counselors and Therapists Act, Health Occupations Article, §17-509, Annotated Code of Maryland by any:

A. Licensed clinical professional counselor;

B. Licensed graduate professional counselor;

C. Licensed clinical alcohol and drug counselor;

D. Licensed graduate alcohol and drug counselor;

E. Licensed clinical marriage and family therapist;

F. Licensed graduate marriage and family therapist;

G. Licensed clinical art therapist;

H. Licensed graduate art therapist;

I. Certified professional counselor;

J. Certified professional counselor-alcohol and drug;

K. Certified professional counselor-marriage and family therapist;

L. Certified associate counselor-alcohol and drug; or

M. Certified supervised counselor-alcohol and drug.

*10.58.09.02*

## .02 Definitions.

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Act" means the Maryland Professional Counselors and Therapists Act.

(2) "Board" means the State Board of Professional Counselors and Therapists.

(3) "License" means one of eight types of licenses issued by the Board to practice as follows:

(a) Clinical professional counseling (LCPC);

(b) Clinical marriage and family therapy (LCMFT);

(c) Clinical alcohol and drug counseling (LCADC);

(d) Clinical professional art therapy (LCPAT);

(e) Graduate professional counseling (LGPC);

(f) Graduate marriage and family therapy (LGMFT);

(g) Graduate alcohol and drug counseling (LGADC); or

(h) Graduate professional art therapy (LGPAT).

(4) "Licensee" means:

(a) A clinical or graduate professional counselor;

(b) A clinical or graduate marriage and family therapist;

(c) A clinical or graduate alcohol and drug counselor; or

(d) A clinical or graduate professional art therapist who is licensed by the Board to practice clinical counseling, clinical marriage and family therapy, clinical alcohol and drug counseling or clinical professional art therapy.

(5) “Certificate” means a certificate issued by the Board to practice as a:

(a) Certified professional counselor (CPC);

(b) Certified professional counselor-alcohol and drug (CPC-AD);

(c) Certified professional counselor-marriage and family therapy (CPC-MFT);

(d) Certified associate counselor-alcohol and drug (CAC-AD); or

(e) Certified supervised counselor-alcohol and drug (CSC-AD).

(6) "Certificate holder" means a:

(a) Certified professional counselor;

(b) Certified alcohol and drug counselor;

(c) Certified supervised alcohol and drug counselor;

(d) Certified associate alcohol and drug counselor; or

(e) Certified professional counselor-marriage and family therapist.

(7) "Penalty" means a monetary penalty or fine.

(8) “Sanction” means a formal disciplinary action such as a reprimand, probation, suspension or revocation.

*10.58.09.02*

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(d) Certified associate alcohol and drug counselor; or

(e) Certified professional counselor-marriage and family therapist.

(7) "Penalty" means a monetary penalty or fine.

(8) “Sanction” means a formal disciplinary action such as a reprimand, probation, suspension or revocation.

*10.58.09.03*

## .03 Sanctioning and Imposition of Penalties.

A. If, after a hearing or an opportunity for a hearing under Health Occupations Article, §17-511, Annotated Code of Maryland, the Board finds that there are grounds for discipline under Health Occupations Article, §17-509, Annotated Code of Maryland, the Board may place any licensee or certificate holder on probation, reprimand any licensee or certificate holder, or suspend or revoke a license or certificate.

B. In addition to placing the licensee or certificate holder on probation, reprimanding the licensee or certificate holder, or suspending or revoking the license or certificate, the Board may impose a penalty as set forth in this chapter.

*10.58.09.04*

## .04 Guidelines for Disciplinary Sanctions and Penalties.

A. General Application of Sanctioning Guidelines. Except as provided in Regulation .05 of this chapter, for violations of the Act listed in the sanctioning guidelines, the Board shall impose a sanction not less severe than the minimum listed in the sanctioning guidelines or more severe than the maximum listed in the guidelines for each offense.

B. Ranking of Sanctions.

(1) For the purposes of this regulation, the severity of sanctions is ranked as follows, from the least severe to the most severe:

(a) Reprimand;

(b) Probation;

(c) Suspension; and

(d) Revocation.

(2) A stayed suspension in which the stay is conditioned on the completion of certain requirements is ranked as probation.

(3) A stayed suspension not meeting the criteria of §B(2) of this regulation is ranked as a reprimand.

(4) A penalty listed in the sanctioning guidelines may be imposed in addition to but not as a substitute for a sanction.

(5) The addition of a penalty does not change the ranking of the severity of the sanction.

C. The Board may impose more than one sanction provided that the most severe sanction neither exceeds the maximum nor is less than the minimum sanction permitted in the chart.

D. Any sanction may be accompanied by conditions reasonably related to the offense or to the rehabilitation of the offender. The inclusion of conditions does not change the ranking of the sanction.

E. If a licensee or certificate holder is found in violation of more than one ground for discipline as enumerated in this chapter, the sanction with the highest severity ranking shall be used to determine which ground will be used in developing a sanction and the Board may impose concurrent sanctions based on other grounds violated.

F. Notwithstanding the guidelines set forth in this chapter, in order to resolve a pending disciplinary action, the Board and licensee or certificate holder may agree to a surrender of license or certificate or to a consent order with terms, sanction, and penalty agreed to by the Board and the licensee or certificate holder.

G. If the Board imposes a sanction that departs from the sanctioning guidelines set forth in this chapter, the Board shall state its reasons for doing so in its final decision and order.

*10.58.09.05*

## .05 Mitigating and Aggravating Factors.

A. Depending on the facts and circumstances of each case, and to the extent that the facts and circumstances apply, the Board may consider mitigating and aggravating factors in determining whether the sanction in a particular case should fall outside the range of sanctions established by the guidelines.

B. Nothing in this regulation requires the Board or an Administrative Law Judge to make findings of fact with respect to any of these factors.

C. A departure from the guidelines set forth in this chapter is not a ground for any hearing or appeal of a Board action.

D. The existence of one or more of these factors does not impose on the Board or an Administrative Law Judge any requirement to articulate its reasoning for not exercising its discretion to impose a sanction outside of the range of sanctions set forth in this chapter.

(1) The absence of a prior disciplinary record;

(2) The offender self-reported the violation to the Board;

(3) The offender's full and voluntary admissions of misconduct to the Board and cooperation during Board proceedings;

(4) The offender implemented remedial measures to correct or mitigate the harm arising from the misconduct;

(5) The offender made timely good-faith efforts to make restitution or to rectify the consequences of the misconduct;

(6) The offender has been rehabilitated or exhibits rehabilitative potential;

(7) The absence of premeditation to commit the misconduct;

(8) The absence of potential harm to patients or the public or other adverse impact; or

(9) The offender's conduct was an isolated incident and is not likely to recur.

F. Aggravating factors may include, but are not limited to, the following:

(1) The offender has a previous criminal or administrative disciplinary history;

(2) The violation was committed deliberately or with gross negligence or recklessness;

(3) The violation had the potential for, or caused, serious patient or public harm;

(4) The violation was part of a pattern of detrimental conduct;

(5) The offender was motivated to perform the violation for financial gain;

(6) The vulnerability of the clients;

(7) The offender lacked insight into the wrongfulness of the conduct;

(8) The offender committed the violation under the guise of treatment;

(9) The offender attempted to hide the error or misconduct from patients or others;

(10) The offender did not cooperate with the investigation; or

(11) Previous attempts at rehabilitation of the offender were unsuccessful

*10.58.09.06*

## .06 Sanctioning Guidelines.

A. Subject to the provisions of Regulations .04 and .05 of this chapter, the Board may impose sanctions and penalties for violations of the Act and regulations according to the guidelines set forth in the following chart:

B. Range of Sanctions.

| Violation | Maximum Sanction | Minimum Sanction | Maximum Penalty | Minimum Penalty |
|---|---|---|---|---|
| (1) Fraudulently or deceptively obtains or attempts to obtain a license or certificate for the applicant, licensee, certificate holder or for another | Revocation or denial of license or certificate | Active suspension for 6 months | $5,000 | $1,000 |
| (2) Habitually is intoxicated | Revocation or denial of license or certificate | Active suspension until in treatment and abstinent for 6 months | $5,000 | $500 |
| (3) Provides professional services:<br>(a) While under the influence of alcohol; or<br>(b) While using any narcotic or controlled dangerous substances as defined in Criminal Law Article, §5-101, Annotated Code of Maryland, or other drug that is in excess of therapeutic amounts or without valid medical indication | Revocation or denial of license or certificate | Probation for 2 years | $5,000 | $250 |
| (4) Aids or abets an unauthorized individual in practicing clinical or nonclinical counseling or therapy or | Revocation or denial of license | Active suspension for 6 months | $5,000 | $1,000 |

| | | | | |
|---|---|---|---|---|
| representing to be an alcohol and drug counselor, marriage and family therapist, professional counselor or art therapist | or certificate | | | |
| (5) Promotes the sale of drugs, devices, appliances, or goods to a patient so as to exploit the patient for financial gain | Revocation or denial of license or certificate | Active suspension for 1 year | $5,000 | $1,000 |
| (6) Willfully makes or files a false report or record in the practice of counseling or therapy | Revocation | Probation for 2 years | $5,000 | $1,000 |
| (7) Makes a willful misrepresentation while counseling or providing therapy | Revocation | Reprimand | $5,000 | $500 |
| (8) Violates the Code of Ethics adopted by the Board | Revocation or Denial of license or certificate | Reprimand | $5,000 | $250 |
| (9) Knowingly violates any provision of Health Occupations Article, Title 17, Annotated Code of Maryland | Revocation or Denial of license or certificate | Reprimand | $5,000 | $500 |
| (10) Is convicted of or pleads guilty or nolo contendere to a felony or crime involving moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside | Revocation or Denial of license or certificate | Reprimand | $5,000 | $500 |
| (11) Incompetent. (a) Is professionally incompetent | Revocation | Reprimand | $5,000 | $100 |
| (b) Is physically or mentally incompetent | Revocation | Reprimand | $5,000 | $100 |
| (12) Submits a false statement to collect a fee | Revocation | Reprimand | $5,000 | $500 |
| (13) Violates any rule or regulations adopted by the Board | Revocation | Reprimand | $5,000 | $100 |
| (14) Is disciplined by a licensing or disciplinary authority of any other state or country or convicted or disciplined by a court of any state or country for an act that would be grounds for disciplinary action under the Board's disciplinary statutes | Revocation | Reprimand | $5,000 | $100 |
| (15) Refuses, withholds from, denies, or discriminates against an individual with regard to the provision of professional services for which the licensee is licensed and qualified or the certificate holder is certified and qualified to render because the individual is HIV positive | Revocation | Reprimand | $5,000 | $1,000 |
| (16) Commits an act of immoral or unprofessional conduct in the practice of clinical or nonclinical counseling or therapy | Revocation | Reprimand | $5,000 | $100 |
| (17) Knowingly fails to report suspected child abuse in violation of Family Law Article, §5-704, Annotated Code of Maryland | Revocation | Reprimand | $5,000 | $100 |
| (18) Fails to cooperate with a lawful investigation conducted by the Board | Revocation | Reprimand | $5,000 | $500 |

*10.58.09.07*

## .07 Payment of Penalty.

A. A licensee or certificate holder shall pay to the Board a penalty imposed under this chapter as of the date the Board's order is issued, unless the Board's order specifies otherwise.

B. Filing an appeal under State Government Article, §10-222, Annotated Code of Maryland, or Health Occupations Article, §17-512, Annotated Code of Maryland, does not automatically stay payment of a penalty imposed by the Board under this chapter.

C. If a licensee or certificate holder fails to pay, in whole or in part, a penalty imposed by the Board under this chapter, the Board may not restore, reinstate, or renew a license until the penalty has been paid in full.

D. In its discretion, the Board may refer all cases of delinquent payment to the Central Collection Unit of the Department of Budget and Management to institute and maintain proceedings to ensure prompt payment.

E. The Board shall pay all monies collected under this chapter into the State's General Fund.

# Board of Professional Counselors and Therapists

## General Information

- About the Board
- Public Information Act
- Forms
- Complaints
- Fees
- Information for Veterans
- Annual Report
- FAQ
- Contact Us

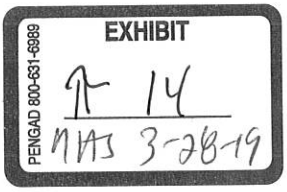
## For Licensees

- Behavior Analysts
- Verification Request Form
- Licensing Requirements
- Certification Requirements
- Ethics Course for Alcohol & Drug Counselors
- Exams
- Notice Regarding Approved Supervisors

## COMPLAINTS AND DISCIPLINARY PROCEDURE

*Download Complaint Form*

**How do I file a complaint?**



To submit a complaint, please use the complaint form found on the Board's website. Please be aware that the licensee/certificate holder may be informed of the complaint and asked to respond to the allegation. Anonymous complaints are not accepted. Complaints concerning fee disputes are not considered by the Board.

**What is the complaint process?**

Complaints are initially reviewed by the Disciplinary Review Committee ("DRC") of the Board. The DRC may recommend the following actions:

1) Dismiss the complaint;
2) Take informal disciplinary action; or
3) Refer the complaint for investigation.

The Board votes whether to accept, modify, or reject the DRC's recommendations.

If the Board votes to dismiss a complaint, the complainant and the licensee will be so notified.

The Board may vote to issue informal disciplinary action. Informal disciplinary action may consist of a letter of education or an advisory letter. Informal disciplinary actions are confidential and are not available to the public. Only licensees/certificate holders may receive notice of informal disciplinary action.

If the Board votes to refer the complaint for investigation, it will assign the matter to the Board investigator. A thorough investigation of the facts must precede the Board making a charge against a licensee/certificate holder. The investigator will gather information and present it to the Board. If the Board has a reasonable basis to conclude that a potential violation of the Maryland Professional Counselor and Therapist Act (the "Act") or other applicable laws has occurred, it will vote on whether to refer the matter to the Office of the Attorney General for charges against the licensee/certificate holder.

If charges are issued, the licensee/certificate holder s given the opportunity to attend a Case Resolution Conference ("CRC"). The CRC is attended by a Board member, Board Counsel, the Administrative Prosecutor, the licensee/certificate holder, and his/her attorney, if applicable. The CRC is an informal meeting where the parties state their respective positions and attempt to resolve the matter.

A Board member who attended the CRC will make a recommendation to the full Board as to how the complaint should proceed. The Board may accept, modify, or reject the CRC recommendation.

If the parties were unable to come to an agreement at the CRC, the licensee/certificate holder then has the opportunity to defend himself/herself at an administrative hearing before the Board. If the Board determines that the licensee/certificate holder has violated the Act, or other applicable laws and regulations, it will issue its finding in a public order. Under the Act, the Board has the authority to,

among other things, issue a reprimand, probation, suspension, or revocation of a license. In addition, under certain circumstances, the Board may impose a monetary fine. The public order will be posted on the Board's website and reported to the National Practitioner Data Bank, if applicable.

If the licensee/certificate holder does not agree with the Board's decision after the administrative hearing, the licensee/certificate holder may pursue other remedies pursuant to Maryland law.

**How long does the complaint process take?**

The length of the complaint process depends on the facts and circumstances of a particular case. Many complaints can be resolved quickly in an informal manner. Some cases require more extensive investigations. When an investigation results in the Board bringing formal charges, the process takes longer. The Board strives to resolve all complaints within 18 months. However, in many cases it may take longer.

All complaints must be **signed** and submitted on form provided below. The completed form should be forwarded to:

Kimberly B. Link, J.D.
Executive Director
Board of Professional Counselors and Therapists
4201 Patterson Ave., Baltimore, MD 21215
Kimberly.link@maryland.gov
Fax: (410) 358-1610

*DEPARTMENT OF HEALTH & MENTAL HYGIENE BOARD OF PROFESSIONAL COUNSELORS & THERAPISTS*

***4201 PATTERSON AVENUE***
***SUITE 316***
***BALTIMORE, MD 21215***
***(410) 764-4732***
***www.health.maryland.gov/bopc***

# *COMPLAINT FORM*

**PLEASE COMPLETE THIS FORM AND RETURN TO THE ABOVE ADDRESS**

## 1. IDENTIFY THE TYPE OF HEALTH CARE PROVIDER

| | | |
|---|---|---|
| LCPC [ ☐ ] | LCPAT [ ☐ ] | CAC-AD [ ☐ ] |
| LGPC [ ☐ ] | LGPAT [ ☐ ] | CSC-AD [ ☐ ] |
| LCMFT [ ☐ ] | LCADC [ ☐ ] | CPC [ ☐ ] |
| LGMFT [ ☐ ] | LGADC [ ☐ ] | TRAINEE [ ☐ ] |

## 2. IDENTIFY THE HEALTH CARE PROVIDER

| Name: | Dr. ☐ Mr. ☐ Ms. ☐ Mrs. ☐ | | | |
|---|---|---|---|---|
| | | Last | First | MI |
| Business Address: | | | | |
| | Street | City | State | Zip Code |
| Office Telephone Number: | | | | |

## 3. CLIENT NAME

| Name: Dr. ☐ Mr. ☐ Ms. ☐ Mrs. ☐ | | | |
|---|---|---|---|
| | Last | First | MI |
| Home Address: | | | |
| | Street | City | State / Zip Code |
| Date of Birth: | | | |
| Client's Telephone Number: | | | |
| Client's Email: | | | |

**4. IDENTIFY COMPLAINANT**

If the person making the complaint is not the client, please provide the following information:

| Name: | Dr. ☐ Mr. ☐ Ms. ☐ Mrs. ☐ | | | |
|---|---|---|---|---|
| | Last | First | | MI |

| Home Address: | | | | |
|---|---|---|---|---|
| | Street | City | State | Zip Code |

| | |
|---|---|
| Home Telephone Number: | |
| Office Telephone Number: | |
| Email: | |

**5. IF YOU WERE THE CLIENT, LIST THE DATE(S) TREATED**

| | | |
|---|---|---|
| | | |

**6. RELATIONSHIP OF COMPLAINANT TO CLIENT**

| | | | |
|---|---|---|---|
| **Client** ☐ | **Spouse** ☐ | **Relative** ☐ | **No Relation** ☐ |

**7. WHAT, IF ANY ARE YOUR PROFESSIONAL OR PERSONAL RELATIONSHIPS WITH THE HEALTH PROVIDER?**

**8. STATE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ALL PERSONS WHO HAVE KNOWLEGDE OF YOUR COMPLAINT, INCLUDING ANY OTHER HEALTH PROVIDERS.**

9. NATURE OF COMPLAINT: PLEASE DESCRIBE, WITH AS MUCH DETAIL

AS POSSIBLE, WHAT EVENT(S) LEAD TO THE FILING OF THIS COMPLAINT, INCLUDE THE DATES AND REASON FOR SEEING THE HEALTH CARE PROVIDER IN YOUR DESCRIPTION. **(PLEASE TYPE YOUR INFORMATION IN THE SPACE PROVIDED BELOW. ATTACH ADDITIONAL SHEETS IF NECESSARY)**

10. NATURE OF COMPLAINT: PLEASE DESCRIBE, WITH AS MUCH DETAIL AS POSSIBLE, WHAT EVENT(S) LEAD TO THE FILING OF THIS COMPLAINT, INCLUDE THE DATES AND REASON FOR SEEING THE HEALTH CARE PROVIDER IN YOUR DESCRIPTION. **(PLEASE TYPE YOUR INFORMATION IN THE SPACE PROVIDED BELOW. ATTACH ADDITIONAL SHEETS IF NECESSARY)**

Insurance Identification Number:

Insurance Company Name:

Insurance Company Address:

11. LIST THE IDENTITY OF ANY PERSONS TO WHOM YOU HAVE MADE A SIMILAR COMPLAINT, INDICATE WHEN THE COMPLAINT WAS MADE.

12. WILL YOU CONSENT TO THE RELEASE TO THIS BOARD OR ITS DESIGNATED INVESTIGATING BODY, THE MEDICAL REPORTS RELATING TO YOU AND THIS OCCURRENCE FROM ANY CERTIFIED OR LICENSED COUNSELOR, HOSPITAL, RELATED INSTITUTION OR ANY MEDICAL DOCTOR?

Yes [ ☐ ] **No** [ ☐ ]

13. I HERE BY ATTEST THAT THE FOREGOING INFORMATION IS TRUE TO THE BEST OF MY KNOWLEGDE AND BELIEFS, AND THAT I AM COMPETENT TO MAKE THESE STATEMENTS.

_____ _____

Date of Complaint Signature of Complainant

**RELEASE OF MEDICAL AND CERTIFIED OR LICENSED PROFESSIONAL COUNSELORS RECORDS FOR NON ALCOHOL AND/OR SUBSTANCE ABUSE CLIENTS**

I, _____
(Your name)

Of _____
(Your address)

Do hereby authorize _____
(Counselor's name)

to release to the Department of Health and Mental Hygiene of the State of Maryland, all records relating to your treatment of me during the period of_____to the present, and permit discussion of the details of the treatment. This release is valid for one year.

_____ _____

(Date) (Signature)

# Gay 'conversion therapy' bill withdrawn as advocates pursue regulatory oversight

Baltimore County Del. Jon Cardin has withdrawn his bill to ban so-called "gay conversion therapy," saying regulatory oversight bodies exist to address patient concerns. (Amy Davis)

By **Kevin Rector, The Baltimore Sun**

MARCH 14, 2014

Gay rights advocates and the state legislator who introduced legislation this session to ban so-called "gay conversion therapy" in Maryland have withdrawn the bill, saying they will instead pursue regulatory oversight of the controversial practice.

"If we can do this without legislation, I am all about it," said Baltimore County Del. John Cardin, the bill's sponsor, in a statement Friday. "I am not interested in the glory. I'm interested in solving problems."

Cardin's bill would have banned mental health professionals, but not unlicensed church clergy or therapists, from engaging in efforts to change a youth's sexual orientation or gender identity.

Cardin and Equality Maryland, the state's largest lesbian, gay, bisexual and transgender advocacy group, called the practice dangerous, citing critical opinions of it from multiple medical organizations, including the

American Medical Association, the American Psychological Association and the American Psychiatric Association.

Equality Maryland, which backed Cardin's bill, said it would have established a law comparable to those in other states, including California and New Jersey.

Cardin pointed specifically to the Bowie-based International Healing Foundation as a Maryland-based practitioner of the practice.

On its website, the group says it believes in people's "right of self-determination," and that "homosexual feelings are not inborn."

In a joint statement Friday, Cardin and Equality Maryland officials said that in research for the bill, and in talking to "several organizations with expertise in regulatory protections for patients," they concluded that patients who feel they have been harmed by "conversion" or "reparative" therapy already have avenues to complain to state health occupation boards.

"Minors or anyone advocating on their behalf can file a complaint with a board, triggering a vigorous investigation," the statement said. "If the investigation uncovers proof that a licensed health care professional violated the standard of care, then the board has an array of regulatory tools to keep this from happening again."

The statement went on: "Delegate Cardin and Equality Maryland are confident that the existing regulatory framework provides a precise tool to protect minors from this harmful therapy, and we will work together and with other advocates to ensure that the process for filing complaints against anyone who engages in these practices is transparent and widely disseminated."

Carrie Evans, Equality Maryland's executive director, said the organization will "work to ensure LGBT youth and their parents have the information they need to file complaints."

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| CHRISTOPHER DOYLE, LPC, LCPC,<br><br>Plaintiff,<br><br>v.<br><br>LAWRENCE J. HOGAN, JR., *et al.*,<br><br>Defendants. | ) | Civil Action No. 1:19-cv-00190-DKC |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S REQUEST FOR ADMISSIONS**

Pursuant to the Federal Rules of Civil Procedure and this Court's Local Rules and Discovery Guidelines, the defendants, the Governor of Maryland and the Attorney General of Maryland, respond to the plaintiff's requests for admission. The defendants' responses are subject to the following general objections, incorporated as indicated in each response.

**Objections to Definitions and Instructions**

1. The defendants, the Governor of Maryland and the Attorney General of Maryland in their official capacities, object to Definition No. 7 as overly broad. The Governor and Attorney General will respond to these requests for admission based on information within their control to obtain. Neither has the authority to compel the legislative or judicial branch of the State of Maryland's government to provide information for these discovery responses. *See* Md. Declaration of Rights, Article 8.

2. The defendants, the Governor of Maryland and the Attorney General of Maryland in their official capacities, object to Definition No. 11 as overly broad. The Governor and the Attorney General construe the term "Legislative Record" to include only materials that are

publicly available, all of which are listed below, and they will respond to these requests for admission based on these materials:

a. MD0001 – MD0096 – HB 902 Bill File
b. MD0097 – MD0164 – SB 1028 Bill File
c. MD0165 – HB 902 Summary
d. MD0166 – HB 902 Documents
e. MD0167 – MD0170 – HB 902 Fiscal and Policy Note
f. MD0171 – MD0176 – HB 902 First Reader
g. MD0177 – HB 902 Voting Record
h. MD0178 – HB 902 History
i. MD0179 – SB 1028 Summary
j. MD0180 – SB 1028 Documents
k. MD0181 – MD0184 – Proposed Amendments to SB 1028 First Reader
l. MD0185 – MD0187 – Proposed Amendments to SB 1028 Third Reader
m. MD0188 – MD0191 – SB 1028 Fiscal and Policy Note
n. MD0192 – MD0197 – SB 1028 First Reader
o. MD0198 – MD0203 – SB 1028 Third Reader
p. MD0204 – MD0209 – Ch. 685, 2018 Laws of Maryland
q. MD0210 – MD0220 – SB 1028 Voting Record
r. Recording of Health and Government Operations Committee Hearing on HB 902
s. Recording of Education, Health and Environmental Affairs Committee Hearing on SB 1028
t. Recordings of floor proceedings in House of Delegates and Senate

3. The defendants, the Governor of Maryland and the Attorney General of Maryland in their official capacities, object to Instruction No. 2 because it purports to obligate the defendants to obtain and disclose information protected by the legislative privilege, the attorney client privilege, and the attorney work product doctrine. The term "SB 1028 Proponents" is defined to mean those individuals involved in legislative activities related to SB 1028 (2018), HB 902 (2018), and Ch. 685, 2018 Laws of Maryland, all of whom are protected by a legislative privilege from having to provide information in discovery. *See, e.g., 2BD Associates Ltd. Partnership v. County Commissioners for Queen Anne's County*, 896 F. Supp. 528, 533 (D. Md. 1995). To the extent that either or both of the defendants were involved in the activities listed in the definition of "SB Proponents," they were engaged in legislative activities and are thus,

protected by the legislative privilege. *See Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (determine scope of legislative privilege by the nature of the act); *Baraka v. McGreevey*, 481 F.3d 187, 196 (3d Cir. 2007) (Governor's advocacy for a bill in the legislature and Governor's signing of bill "squarely within the sphere of legitimate, legislative activity"); *Mandel v. O'Hara*, 322 Md. 103, 122-34 (1990) (Governor's deciding whether to veto or sign a bill is legislative act). Furthermore, the Governor and the Attorney General have no authority to require members of the General Assembly or their staffs to provide information or documents for discovery in this matter. *See* Md. Declaration of Rights, Article 8.

4. The defendants, the Governor of Maryland and the Attorney General of Maryland in their official capacities, object to Instruction No. 8 regarding the provision of a Privilege Log. With respect to the legislative privilege, no privilege log is necessary. *See North Carolina State Conference v. McCrory*, 2015 WL 12683665, at *7 (M.D.N.C. Feb. 4, 2015). Furthermore, the defendants object to Instruction No. 8 to the extent that it purports to require a privilege log of communications and documents created after the filing of the complaint. *See Interstate Indemnity Co. v. Black,* 2003 WL 23269342, at *1 (M.D.N.C. Oct. 24, 2003).

5. The defendants, the Governor of Maryland and the Attorney General of Maryland in their official capacities, object to Instruction No. 12 regarding the date range applicable to these discovery requests. There is no basis for requiring the production of information or documents for any time before the start of the legislative session in 2018 – January 10, 2018 – or for any time after the lawsuit was filed on January 22, 2019.

**Responses to Requests for Admission**

**REQUEST FOR ADMISSION 1**:

Admit that the Legislative Record of SB 1028 does not include any Complaint that any Minor was harmed by any SOCE counseling provided within the State of Maryland.

**RESPONSE**:

The defendants incorporate by reference their objections to Definition Nos. 7 and 11. The defendants further object to Request for Admission No. 1 as irrelevant and not likely to lead to the discovery of admissible evidence. There is no requirement that a legislature wait until it has evidence of actual harm before taking action to protect minors. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009); *King v. Governor of State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014); *Otto v. City of Boca Raton, Florida*, 2019 WL 588645, *20 (S.D. Fla. Feb. 14, 2019). Without waiving any of these objections, Request for Admission No. 1 is denied.

**REQUEST FOR ADMISSION 2**:

Admit that the Legislative Record of SB 1028 does not include any Complaint that any Minor was harmed by any SOCE counseling provided within the State of Maryland against that Minor's wishes or without that Minor's consent.

**RESPONSE**:

The defendants incorporate by reference their objections to Definition Nos. 7 and 11. The defendants further object to Request for Admission No. 2 as irrelevant and not likely to lead to the discovery of admissible evidence. There is no requirement that a legislature wait until it has evidence of actual harm before taking action to protect minors. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009); *King v. Governor of State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014); *Otto v. City of Boca Raton, Florida*, 2019 WL 588645, *20 (S.D. Fla. Feb. 14, 2019). Furthermore, under Maryland law, a minor under 16 years of age does not have the capacity to consent to medical treatment, including mental health treatment, and a minor 16 or 17

years of age does not have the ability to refuse treatment to which his or her parent or guardian has consented. *See* Md. Code Ann., Health-Gen'l § 20-104. Without waiving any of these objections, Request for Admission No. 2 is denied.

**REQUEST FOR ADMISSION 3:**

Admit that, prior to enacting SB 1028, the State did not conduct or commission any empirical study, research, or investigation of its own to determine whether any Minor within the State of Maryland had been harmed by any SOCE counseling or had been subjected to any SOCE counseling against the Minor's wishes or without the Minor's consent.

[For the sake of clarity, this RFA is limited to empirical studies, research, or investigations that the State itself conducted or commissioned, as opposed to studies, research, or investigations conducted by third parties which the State may have reviewed, considered, discussed, or debated.]

**RESPONSE:**

The defendants incorporate by reference their objections to Definition Nos. 7 and 11. The defendants further object to Request for Admission No. 3 as irrelevant and not likely to lead to the discovery of admissible evidence. There is no requirement that a legislature conduct or commission empirical studies, research, or investigation before taking action to protect minors. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009); *King v. Governor of State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014); *Otto v. City of Boca Raton, Florida*, 2019 WL 588645, *20 (S.D. Fla. Feb. 14, 2019). Furthermore, under Maryland law, a minor under 16 years of age does not have the capacity to consent to medical treatment, including mental health treatment, and a minor 16 or 17 years of age does not have the ability to refuse treatment to which his or her parent or guardian has consented. *See* Md. Code Ann., Health-Gen'l § 20-104. Without waiving these objections, Request for Admission No. 3 is admitted.

**REQUEST FOR ADMISSION 4:**

Admit that, prior to enacting SB 1028, the State did not conduct or commission any empirical study, research, or investigation of its own to determine whether voluntary SOCE

counseling, which a Minor who experiences unwanted same-sex attraction or gender confusion requests, consents to, and/or wishes to receive, is harmful to that Minor.

[For the sake of clarity, this RFA is limited to empirical studies, research, or investigations that the State itself conducted or commissioned, as opposed to studies, research, or investigations conducted by third parties which the State may have reviewed, considered, discussed, or debated.]

**RESPONSE**:

The defendants incorporate by reference their objections to Definition Nos. 7 and 11. The defendants further object to Request for Admission No. 4 as irrelevant and not likely to lead to the discovery of admissible evidence. There is no requirement that a legislature conduct or commission empirical studies, research, or investigation before taking action to protect minors. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009); *King v. Governor of State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014); *Otto v. City of Boca Raton, Florida*, 2019 WL 588645, *20 (S.D. Fla. Feb. 14, 2019). Furthermore, under Maryland law, a minor under 16 years of age does not have the capacity to consent to medical treatment, including mental health treatment, and a minor 16 or 17 years of age does not have the ability to refuse treatment to which his or her parent or guardian has consented. *See* Md. Code Ann., Health-Gen'l § 20-104. Without waiving these objections, Request for Admission No. 4 is admitted.

**REQUEST FOR ADMISSION 5**:

Admit that no third-party empirical study, research, investigation, resolution, or position paper in the Legislative Record of SB 1028 identified or provided causal evidence of harm from, or a causal attribution of harm to, voluntary SOCE counseling, which a Minor who experiences unwanted same-sex attraction or gender confusion requests, consents to, and/or wishes to receive.

**RESPONSE**:

The defendants incorporate by reference their objections to Definition Nos. 7 and 11. The defendants further object to Request for Admission No. 5 as irrelevant and not likely to lead to the discovery of admissible evidence. There is no requirement that a legislature wait until it

has evidence of actual harm before taking action to protect minors. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009); *King v. Governor of State of New Jersey*, 767 F.3d 216, 239 (3d Cir. 2014); *Otto v. City of Boca Raton, Florida*, 2019 WL 588645, *20 (S.D. Fla. Feb. 14, 2019). Furthermore, under Maryland law, a minor under 16 years of age does not have the capacity to consent to medical treatment, including mental health treatment, and a minor 16 or 17 years of age does not have the ability to refuse treatment to which his or her parent or guardian has consented. *See* Md. Code Ann., Health-Gen'l § 20-104. Without waiving these objections, Request for Admission No. 5 is denied.

**REQUEST FOR ADMISSION 6**:

Admit that no third-party empirical study, research, investigation, resolution, or position paper in the Legislative Record of SB 1028 identified or provided causal evidence of family rejection from, or a causal attribution of family rejection to, voluntary SOCE counseling, which a Minor who experiences unwanted same-sex attraction or gender confusion requests, consents to, and/or wishes to receive.

**RESPONSE**:

The defendants incorporate by reference their objection to Definition No. 11. The defendants further object to Request for Admission No. 6 as irrelevant and not likely to lead to the discovery of admissible evidence. Under Maryland law, a minor under 16 years of age lacks capacity to consent to mental health treatment, and minors 16 or 17 years of age lack the ability to refuse to participate in mental health treatment to which their parent or guardian consents. *See* Md. Code Ann., Health-Gen'l § 20-104(b). Without waiving these objections, Request for Admission No. 6 is admitted.

**REQUEST FOR ADMISSION 7**:

Admit that there is no empirical study, research, investigation, resolution, or position paper in the Legislative Record of SB 1028 analyzing the ability or inability of Minors to consent to SOCE counseling.

**RESPONSE:**

The defendants incorporate by reference their objection to Definition No. 11. The defendants further object to Request for Admission No. 7 as irrelevant and not likely to lead to the discovery of admissible evidence. Under Maryland law, a minor under 16 years of age lacks capacity to consent to mental health treatment, and minors 16 or 17 years of age lack the ability to refuse to participate in mental health treatment to which their parent or guardian consents. *See* Md. Code Ann., Health-Gen'l § 20-104(b). Without waiving these objections, Request for Admission No. 7 is denied.

**REQUEST FOR ADMISSION 8:**

Admit that the Legislative Record of SB 1028 does not reflect any review, consideration, discussion, or debate of any alternative means of serving the State's interests recited in SB 1028 which would have been less restrictive on speech than SB 1028 as enacted.

**RESPONSE:**

The defendants incorporate by reference their objections to Definition Nos. 7 and 11. The defendants further object to Request for Admission No. 8 because it assumes that SB 1028 restricts speech, when it actually only prohibits a specific type of treatment and only for minors. Without waiving these objections, Request for Admission No. 8 is denied.

Respectfully Submitted:
Brian E. Frosh
Attorney General of Maryland

Kathleen A. Ellis
Assistant Attorney General
Federal Bar No. 04204
Brett E. Felter
Assistant Attorney General
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(410) 767-1867 (voice)
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kathleen.ellis@maryland.gov
brett.felter@maryland.gov

March 21, 2019

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21st day of March, 2019, I caused a true and correct copy of the foregoing to be served by e-mail on the following:

Roger K. Gannam
Rgannam@lc.org

Horatio Mihet
hmihet@lc.org

John Garza
jgarza@lc.org

Kathleen A. Ellis

**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**TAMPA DIVISION**

**ROBERT L. VAZZO,**
**DAVID H. PICKUP, SOLI DEO GLORIA INTERNATIONAL, INC. d/b/a NEW HEARTS OUTREACH TAMPA BAY**

**Plaintiffs,**

**v.** **Case No. 8:17-cv-2896-T-02AAS**

**CITY OF TAMPA,**

**Defendant,**

_____/

**REPORT AND RECOMMENDATION**

The plaintiffs—Robert Vazzo, David Pickup, and New Hearts Outreach—move for a preliminary injunction enjoining the City of Tampa from enforcing Ordinance 2017-47. (Docs. 85, 145). The City and amicus Equality Florida oppose the plaintiffs' motion. (Docs. 98, 99, 142, 143). The plaintiffs' motion for a preliminary injunction focuses on two of the eight claims in their first amended complaint: their free-speech claims under the First Amendment (Count I) and their claim that the City lacked the authority to enact Ordinance 2017-47 under the Florida Constitution (Count VI). (Docs. 85, 145).

The plaintiffs failed to establish a substantial likelihood of success on the merits of their claim that the City lacked the authority to enact Ordinance 2017-47



**EXHIBIT A**

(Count VI). But the plaintiffs established a substantial likelihood of success on the merits of their free-speech claims under the First Amendment (Count I). The plaintiffs also established they will suffer irreparable injury if the court enters no injunction; the threatened injury to the plaintiffs outweighs the damage a limited injunction would cause the City; and a limited injunction against enforcing Ordinance 2017-47's ban against non-coercive, non-aversive SOCE counseling—that consists entirely of speech or "talk therapy"—is in the public interest. Therefore, the plaintiffs' motion for a preliminary injunction should be **GRANTED-IN-PART** and **DENIED-IN-PART**.

## I. GENERAL BACKGROUND

The plaintiffs move to enjoin the enforcement of Ordinance 2017-47, which prohibits mental health professionals from practicing conversion therapy on minors. (Doc. 85, Doc. 24-1). The ordinance defines conversion therapy to include counseling or treatment aimed at changing an individual's sexual orientation or gender identity. (Doc. 24-1, p. 6). Conversion therapy, under the ordinance, also includes counseling an individual with the goal of eliminating or reducing "sexual or romantic attractions or feelings toward individuals of the same gender or sex." (*Id.*).

Messrs. Vazzo and Pickup are licensed marriage and family therapists[1] whose practices include providing sexual-orientation-change-efforts (SOCE) counseling.

[1] Mr. Vazzo is licensed to practice mental health counseling in Florida. (Doc. 78, ¶14). Mr. Pickup is not licensed in Florida, but he is in the process of obtaining his Florida license. (*Id.* at ¶15).

(Doc. 78, ¶¶14–15, 102, 116). According to the plaintiffs, SOCE counseling helps clients, including minors, "reduce or eliminate same-sex sexual attractions, behaviors or identity." (*Id.* at ¶60). During SOCE counseling, Messrs. Vazzo and Pickup use speech to help their clients "understand and identify their anxiety or confusion regarding their attractions, or identity and then help the client formulate the method of counseling that will most benefit that particular client." (*Id.* at ¶65).

According to the plaintiffs, clients, including minors, initiate SOCE counseling by giving their informed consent. (*Id.* at ¶8). The plaintiffs allege some clients request SOCE counseling to "address the conflicts between their sincerely held religious beliefs and goals to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity." (Doc. 78, ¶9).

New Hearts Outreach is a Christian ministry in Tampa. (*Id.* at ¶¶16, 126). Part of its ministry is to refer individuals, including minors, "struggling with unwanted same-sex attractions, behaviors, and identity" to mental health professionals to receive SOCE counseling. (*Id.* at ¶¶132–34).

Messrs. Vazzo and Pickup cannot provide SOCE counseling to minors in Tampa under Ordinance 2017-47. (*Id.* at ¶¶112, 116). Nor can New Heart Outreach refer minors to Messrs Vazzo and Pickup for SOCE counseling in Tampa. (*Id.* at ¶135). If Messrs Vazzo and Pickup provided SOCE counseling to minors in Tampa, they would be subject to penalties of a $1,000 fine for the first violation and a $5,000 fine for each following violation. (Doc. 24-1, p. 7).

The plaintiffs sued the City and allege Ordinance 2017-47 violates their federal and state constitutional rights. (Doc. 78). Most relevant to their motion for preliminary injunction, the plaintiffs allege Ordinance 2017-47 violates their right to freedom of speech under the First Amendment (Count I). (*Id.* at ¶¶177–96). The plaintiffs also allege Ordinance 2017-47 violates the Florida Constitution because the state legislature preempted the field of regulating mental health professionals (Count VI). (*Id.* at ¶¶262–75).

Before turning to the substance of the plaintiffs' motion for a preliminary injunction, the undersigned will provide the procedural background leading to this point of the litigation.

## II. PROCEDURAL BACKGROUND

The City adopted Ordinance 2017-47 on April 6, 2017, and the mayor approved the ordinance four days later. (Doc. 24-1, p. 8). The plaintiffs began this lawsuit against the City on December 4, 2017. (Doc. 1). At the same time they filed their complaint, the plaintiffs moved for a preliminary injunction enjoining the City's enforcement of Ordinance 2017-47. (Doc. 3).

After moving for an extension of time, which the undersigned granted, the City moved to dismiss the plaintiffs' original complaint on January 12, 2018. (Docs. 19, 22). The city also submitted its response to the plaintiffs' motion for preliminary injunction on January 12th. (Doc. 23). The plaintiffs moved to submit a consolidated response that would include a response to the City's motion to dismiss and a reply in

further support of their motion for preliminary injunction. (Doc. 37). The undersigned allowed the plaintiffs to submit a consolidated response, which the plaintiffs submitted on January 29, 2018, after asking for a one-day extension. (Docs. 39, 41, 43).

Between January and March 2018, the plaintiffs and Equality Florida—a civil-rights organization that helped draft Ordinance 2017-47—argued over whether the court should allow Equality Florida to intervene. (Docs. 30, 42, 45, 50). The plaintiffs and the City also argued over whether the court should allow the City to file DVDs and other documents of the legislative proceedings for Ordinance 2017-47. (Docs. 27, 44). On March 15, 2018, the undersigned granted the City's motion to file its DVDs and other documents. (Doc. 51). That same day, the undersigned issued a report that recommended allowing Equality Florida to participate in this litigation as amicus curiae. (Doc. 52). After the parties' two-week period to object to the undersigned's March 15th report and recommendation, the court adopted the undersigned's report and recommendation. (Doc. 60).

The plaintiffs and the City then jointly moved to stay discovery pending the court's ruling on the plaintiffs' motion for preliminary injunction and the City's motion to dismiss. (Doc. 49). The court denied the parties' motion to stay discovery. (Doc. 61). In the meantime, the undersigned scheduled a hearing on the plaintiffs' motion for preliminary injunction and the City's motion to dismiss. (Doc. 59). The undersigned scheduled the hearing for June 7, 2018, despite providing the parties

multiple dates in April because, according to the parties and Equality Florida, June 7th was the earliest date available for all parties. (Doc. 59, p. 2 n.2).

On May 25, 2018—less than two weeks before the scheduled hearing on the plaintiffs' motion for preliminary injunction and the City's motion to dismiss—the plaintiffs moved to amend their complaint. (Doc. 71). As a result, the undersigned cancelled the June 7th hearing. (Doc. 72). The court granted the plaintiffs' motion to submit an amended complaint and denied as moot the plaintiffs' original motion for preliminary injunction and the City's motion to dismiss. (Docs. 76, 79, 80).

The plaintiffs submitted their first amended complaint, the operative complaint, on June 12, 2018. (Doc. 78). The plaintiffs also submitted their current motion for preliminary injunction on June 26th—the same day the City moved to dismiss the plaintiffs' first amended complaint. (Docs. 84, 85).

Following the parties' joint request, the undersigned adopted the parties' proposed briefing schedule. (Doc. 88). Under that schedule, the last briefing concerning the plaintiffs' motion for preliminary injunction and the City's motion to dismiss was due August 10, 2018. (Doc. 87, p. 2). At the same time the undersigned adopted the parties' briefing schedule, the undersigned provided the parties multiple dates in August and September to hold the hearing on the motions. (Doc. 88, p. 2). The parties could not choose from the dates provided, so the undersigned provided dates in October to hold the hearing. (Doc. 94).

The parties eventually agreed to hold the hearing on October 10, 2018, which

the undersigned then scheduled. (Docs. 97, 99). But the parties then had discovery disputes, which resulted in the October 10th hearing being rescheduled to November 15, 2018. (Docs. 106, 111, 118, 119, 121, 125, 128, 130).

On November 15th, the undersigned finally held the hearing on the plaintiffs' motion for preliminary injunction and the City's motion to dismiss. (Doc. 136). At the conclusion of the hearing, the undersigned allowed the parties and Equality Florida to submit supplemental briefs by December 3, 2018, which they did. (Docs. 142, 143, 145). Undisputedly, the plaintiffs' motion for a preliminary injunction is fully ripe for the court's determination.

## III. LEGAL STANDARD

A party moving for a preliminary injunction must establish (1) the party has a likelihood of success on the merits; (2) the party will suffer irreparable injury if the court issues no injunction; (3) the threatened injury to the moving party outweighs whatever damage the injunction may cause the opposing party; and (4) the injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (citations omitted). The burden is on the moving party to clearly establish that all four factors for a preliminary injunction are met. *Siegel*, 234 F.3d at 1176 (citations omitted).[2]

[2] The Eleventh Circuit requires the party moving for a preliminary injunction to satisfy all four factors. *Siegel*, 234 F.3d at 1176 (citations omitted). A question exists whether the Supreme Court requires all four factors to be met. *See Winter*, 555 U.S.

A preliminary injunction is an extraordinary remedy. *Winter*, 555 U.S. at 24 (citation omitted). When a court enjoins a municipal ordinance, "the court overrules the decision of the elected representatives of the people and, thus, in a sense interferes with the processes of democratic government." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). As a result, courts must grant preliminary injunctions against municipal ordinances only if an injunction "is definitely demanded by the Constitution and by the other strict legal and equitable principles that restrain courts." *Id.* Courts must particularly consider the public consequences of issuing a preliminary injunction. *Winter*, 555 U.S. at 24.

The plaintiffs focused only on their free-speech claims under the First Amendment (Count I) and their claim that the City lacked authority to enact Ordinance 2017-47 under the Florida Constitution (Count VI) in their briefing in support of their motion for a preliminary injunction and at the November 15th hearing. Therefore, the undersigned will focus on those claims only and will not analyze the merits of issuing an injunction based on the plaintiffs' other six claims.

The undersigned's analysis will begin with determining whether the plaintiffs established a likelihood of success on the merits on their preemption and First

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at 391–92 (Ginsburg, J., dissenting) (stating that preliminary-injunction analyses require a sliding-scale approach, which *Winter* did not reject). In this case, whether the court adopts the Eleventh Circuit's approach or a sliding-scale approach, the plaintiffs meet all four factors on their free-speech claim under the First Amendment.

Amendment claims. The undersigned will then turn to whether the plaintiffs satisfied the other requirements for a preliminary injunction

## IV. ANALYSIS

### A. Likelihood of Success on the Merits

#### 1. Count VI: The Plaintiffs' Claim that the City Lacked Authority to Enact Ordinance 2017-47

In their briefing and oral arguments concerning Count VI of the amended complaint, in which the plaintiffs allege the City lacked authority under the Florida Constitution to enact Ordinance 2017-47, the plaintiffs argue three theories: the Florida Legislature expressly preempted the area of regulating mental health professionals; the Florida Legislature impliedly preempted the area of regulating mental health professionals; and Ordinance 2017-47 conflicts with Florida law governing mental health professionals. (Docs. 85, 114, 145). The undersigned will address each argument, beginning with the plaintiffs' conflict-of-laws argument.

*a. Conflict-of-Laws Argument*

Although missing from Count VI of their amended complaint, the plaintiffs argue they are likely to succeed on a claim that Ordinance 2017-47 conflicts with Chapter 491, Florida Statutes, which governs "Clinical, Counseling, and Psychotherapy Services." (Doc. 85, pp. 23–24). The plaintiffs argue the ordinance conflicts with Chapter 491 because it imposes additional fees and penalties on conduct—in this case, SOCE counseling—legal in other parts of Florida. (*Id.* at 23).

The plaintiffs failed to allege a conflict-of-laws claim in their first amended

complaint. Their claim under Article VIII, Section 2(b) of the Florida Constitution focuses exclusively on preemption. (*See* Doc. 78, ¶¶262–75) (alleging Chapter 491, Florida Statutes, preempts regulation of mental health professionals). In fact, the plaintiffs only use the word "conflict" to describe the alleged conflict between clients' "unwanted same sex attractions, behaviors, or identity," clients' religious beliefs and Ordinance 2017-47. (*Id.* at ¶¶4, 9, 45, 79, 97–99, 208, 211, 213, 246, 249, 251, 296, 299). The plaintiffs cannot establish a likelihood of success on a claim they failed to plead in their amended complaint. A preliminary injunction based on a conflict-of-law claim—which the plaintiffs never alleged—is therefore inappropriate.

*b. Express-Preemption Claim*

The plaintiffs allege Ordinance 2017-47 violates Article VIII, Section 2(b) of the Florida Constitution because the City had no authority to adopt a law in a field preempted by the Florida Legislature—in this case, the field of regulating mental health professionals. (*Id.* at ¶¶262–75).

Article VIII, Section 2(b) of the Florida Constitution states the following:

> POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

A city ordinance may be beyond the city's authority under the Florida Constitution if the legislature preempted a particular subject area. *Sarasota Alliance For Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 885–86 (Fla. 2010) (citation

omitted); *Orange Cty. v. Singh*, No. SC18-79, ___So. 3d___, 2019 WL 98251, at *3 (Fla. Jan. 4, 2019) (citations omitted).[3]

The Florida Legislature can preempt an area of law in two ways: express or implied preemption. *Sarasota Alliance*, 28 So. 3d at 886. Express preemption requires a specific legislative statement—courts cannot imply or infer express preemption. *Id.* (citations omitted). The Florida Legislature accomplishes express preemption when the legislature uses clear language stating its intent. *Id.* (citation omitted).

Finding express preemption "is a very high threshold to meet." *D'Agastino v. City of Miami*, 220 So. 3d 410, 422 (Fla. 2017) (citations omitted). If a preemption claim requires inferences, that claim fails the test for express preemption. *Id.* at 23 (citations omitted). Courts have little justification to create preemption in a state statute because the legislature can easily do so by including clear language that expressly preempts an area of law. *Phantom of Clearwater, Inc. v. Pinellas Cty.*, 894 So. 2d 1011, 1019 (Fla. 2d Dist. Ct. App. 2005) (citation omitted).

The plaintiff failed to establish a likelihood of success on the merits on an express-preemption claim. In their complaint, the plaintiffs cite no express statement or specific language in Chapter 491, Florida Statutes, which governs "Clinical,

[3] *Singh* supersedes *Sarasota Alliance* because the ordinance at issue in *Singh* (challenged under preemption theory) was adopted in reaction to the holding in *Sarasota Alliance*. *See Singh*, 2019 WL 98251, at *3 (discussing the ordinance at issue). The legal standards *Sarasota Alliance* explained, however, remain unchanged. *See Singh*, 2019 WL 98241, at *4 (explaining the court's decision).

Counseling, and Psychotherapy Services," in which the legislature expressly preempted local regulations over mental health counseling. Nor does Chapter 491 have such an express statement. *See* Fla. Stat. §§ 491.002–491.016 (listing laws that apply to mental health counseling). The plaintiffs' exemption claim instead requires inferences. (*See* Doc. 85, pp. 22–24) (arguing Chapter 491 creates a pervasive regulatory scheme). So, the plaintiffs can only plausibly claim the Florida Legislature impliedly preempted the field of regulating mental health professionals. A preliminary injunction based on an express-preemption claim is therefore inappropriate.

c. *Implied-Preemption Claim*

The plaintiffs argue they are likely to succeed on the merits of their implied-preemption claim. (Doc. 85, pp. 22–24). The City argues the plaintiffs failed to demonstrate the Florida Legislature intended to preempt the area of regulating mental health professionals. (Doc. 99, pp. 22–25).

Implied preemption exists when "the legislature scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted by the Legislature." *Id.* (quotation marks and citation omitted). The Florida Legislature impliedly preempts an area of law when local legislation might endanger the legislature's "pervasive regulatory scheme." *Sarasota Alliance*, 28 So. 3d at 886 (citation omitted).

The court must look at the whole state regulation and the regulation's object

and policy to determine if implied preemption applies. *State v. Harden*, 938 So. 2d 480, 486 (Fla. 2006) (citation omitted). "The nature of the power exerted by the legislature, the object sought to be attained by the statute at issue, and the character of the obligations imposed by the statute" are vital to determining if implied preemption applies. *Sarasota Alliance*, 28 So. 3d at 886 (citation omitted). Another crucial factor in determining whether implied preemption exists is whether the state's statutory scheme specifically recognizes the need for local control. *See id.* at 887 (discussing *GLA and Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278 (Fla. 4th Dist. Ct. App. 2003)).

Courts must be careful when imputing an intent that prohibits "a local elected governing body from exercising its home rule powers." *D'Agastino*, 220 So. 3d at 421 (citation omitted); *see also Black's Law Dictionary*, 850 (10th ed. 2014) (defining "home rule" as the measure of autonomy state legislatures give local governments). A municipality in Florida has broad authority to exercise its home rule powers not expressly limited by the constitution, general or special law, or county charter. Fla. Stat. § 166.021(4); *Masone v. City of Aventura*, 147 So.3d 492, 494–95 (Fla. 2014) (citations omitted). Implied preemption is limited to areas where the Florida Legislature expressed its will to be the sole regulator. *Phantom of Clearwater*, 894 So. 2d at 1019 (quotation and citations omitted).

Some factors weigh in favor of concluding the Florida Legislature intended to preempt the area of regulating mental health professionals. To begin, Chapter 491

has no language expressly recognizing local regulation of mental health professionals. *See* Fla. Stat. §§ 491.002–491.016 (listing laws that apply to mental health counseling). Statutory language that expressly recognizes local regulation weighs against finding implied preemption. *See Sarasota Alliance*, 28 So. 3d at 887–88 (finding no implied preemption in the state Election Code, which "specifically delegates certain responsibilities and powers to local authorities"); *Phantom of Clearwater*, 894 So. 2d at 1019 (finding no implied preemption in Chapter 791, which regulates the sale of fireworks, because the statute "expressly delegates enforcement to local government" and "authorizes boards of county commissioner to set and require surety bonds" from fireworks vendors). The lack of language expressly recognizing local control in Chapter 491, therefore, weighs in favor of finding implied preemption.

Another factor that weighs in favor of finding implied preemption in Chapter 491 is the reluctance to allow municipalities to regulate an area traditionally left to the state. The state legislature has the power to regulate professions that affect the health, safety, and welfare of the public. *Gillett v. Fla. Univ. of Dermatology*, 197 So. 852, 855 (Fla. 1940). If doubt exists about whether a municipality has a specific power, that doubt is resolved against the municipality. *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 803 (Fla. 1972) (citation omitted). A municipality has no power "in the absence of specific delegation of power" in its city charter. *Fleetwood Hotel*, 261 So. 2d at 803 (citation omitted). An area of statewide

concern is not the proper subject of a municipal government's legislation. *Lowe v. Broward Cty.*, 766 So. 2d 1199, 1204–05 (Fla. 4th Dist. Ct. App. 2000).

Mental health counseling is a profession the state legislature has the power to regulate. *See* Fla. Stat. § 491.002 (referring to mental health counseling as a profession). And the City failed to cite to a specific delegation of power in its charter that allows the City to regulate mental health counseling. These two facts, combined with the presumptive doubt against municipal powers, weigh in favor of finding implied preemption in Chapter 491.

Perhaps the most notable factor weighing in favor of finding implied preemption in Chapter 491 is the statute's disciplinary provision. *See* Fla. Stat. § 491.009 (listing "acts that constitute grounds for denial of a license or disciplinary action"). Section 491.009 states that mental health professionals can be penalized if they violate Section 456.072(1), Florida Statutes. Chapter 456 regulates health professions and occupations. Fla. Stat. §§ 456.001–456.50. Section 456.072 lists acts that constitute grounds for discipline and specifically states the following:

> The purpose of this section is to facilitate uniform discipline for those actions made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference.

Fla. Stat. § 456.001(8).[4] When read together, Sections 491.009 and 456.001(8) state

[4] The doctrine of incorporation by reference requires some expression in a document of an intention to be bound by the referenced document. *See Kanter v. Boutin*, 624 So. 779, 781 (Fla. 4th Dist. Ct. App. 1993) (discussing the doctrine of incorporation by reference in the context of contract law).

the purpose of the disciplinary provisions in Section 491.009 is to have uniform discipline standards for mental health counselors.

The legislature's intent for uniform discipline is an important consideration in determining whether implied preemption exists. *See D'Agastino*, 220 So. 2d at 426 (concluding county's disciplinary proceedings conflicted with those outlined in state law); *Classy Cycles, Inc. v. Bay Cty.*, 201 So. 3d 779,788 (Fla. 1st Dist. Ct. App. 2016) (concluding the legislature impliedly preempted county ordinances, which included penalties for failure to obtain motorcycle insurance, because the legislature "created a pervasive scheme of regulation" for motor-vehicle insurance).

Ordinance 2017-47 threatens the legislature's desired uniformity because other municipalities may choose to allow mental health professionals to provide conversion therapy. A mental health professional could therefore be subject to discipline in Tampa for providing conversion therapy but subject to no discipline in a neighboring municipality within the same county. This potential threat to uniform discipline under Section 491.009 weighs in favor of finding implied preemption.

But factors also weigh against finding implied preemption in Chapter 491. Courts are notably hesitant to impute an intent to the legislature because the legislature knows how to expressly preempt an area of regulation. *See City of Hollywood v. Mulligan*, 934 So. 1238, 1245–46 (finding no express preemption in the Florida Contraband Forfeiture Act because the legislature removed previous statutory language that reserved power to regulate forfeiture to the state);

*D'Agastino*, 220 So. 3d at 423 (stating implied preemption involving a municipality's home rule powers is disfavored). So, the hesitancy to find implied preemption in state statutes weighs in favor of finding no implied preemption.

The plaintiffs also failed to cite a case in which a court concluded the Florida Legislature preempted regulation of a profession, like mental health counseling. Nor did the undersigned find such case law. These factors—courts' hesitation to conclude implied preemption exists and lack of case law concluding the state legislature preempted regulation of a profession—weigh in favor of concluding no implied preemption in Chapter 491—at least at this early stage of the litigation.

A plaintiff moving for a preliminary injunction establishes substantial likelihood of success on the merits when the plaintiffs shows a probability he or she will succeed on the merits. *Shatel Corp. v. Mao Ta Lumber and Yacht Corp.*, 697 F.2d 1352, 1354 n.2 (11th Cir. 1983) (citations omitted). "A probability signifies that an event has a better than fifty-percent chance of occurring." *Mercantile Texas Corp. v. Bd. of Gov. of Fed. Reserve Sys.*, 638 F.2d 1255, 1268 (5th Cir. Unit A 1981).[5] "[T]he word 'substantial' does not add to the quantum of proof required to show a likelihood of success on the merits." *Shatel Corp.*, 697 F.2d at 1354 n.2.

The undersigned concludes that, although the plaintiffs demonstrated they might succeed on the merits of their implied-preemption claim, the plaintiffs' success

[5] The former Fifth Circuit's decisions are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

is not necessarily likely nor probable considering the general reluctance to find implied intent and the lack of case law concluding the legislature preempted regulation of a profession like mental health counseling. The plaintiffs therefore failed to establish a likelihood of success on the merits of their implied-preemption claim based on the record currently available to the court.

A party moving for a preliminary injunction must establish all four factors needed for a preliminary injunction. *Siegel*, 234 F.3d at 1176 (citations omitted). The court should not grant a preliminary injunction based on the plaintiffs' implied-preemption claim because the plaintiffs failed to establish a likelihood of success on the merits. The court also need not consider whether the plaintiffs satisfied the other three factors for a preliminary injunction based on their implied-preemption claim because the plaintiffs failed to establish a likelihood of succeed on the merits.

* * *

The plaintiffs cannot demonstrate a substantial likelihood of success on a claim that Ordinance 2017-47 conflicts with Florida law because the plaintiffs failed to allege a conflict-of-laws claim in their amended complaint. The plaintiffs also failed to demonstrate a likelihood of success on the merits of their claim that the Florida Legislature preempted the area of regulating mental health professionals. The court therefore should not enjoin enforcement of Ordinance 2017-47 based on the plaintiffs' claim that the City lacked authority to enact Ordinance 2017-47 (Count VI).

The undersigned will now turn to whether the plaintiffs demonstrated a

likelihood of success on the merits on their free-speech claims under the First Amendment.

2. Count I: Plaintiffs' Claim that Ordinance 2017-47 Violates their Freedom of Speech under the First Amendment

Count I of the plaintiffs' first amended complaint, which alleges Ordinance 2017-47 violates the free-speech protections under the First Amendment, alleges six theories on why the ordinance is unconstitutional: Ordinance 2017-47 is an unconstitutional content-based law; the ordinance commits viewpoint discrimination; the ordinance is unconstitutionally vague; the ordinance is unconstitutionally overbroad; the ordinance is underinclusive; and the ordinance is an unconstitutional prior restraint on free speech. (Doc. 78, ¶¶179, 180, 182, 192–94).

In their briefing and oral arguments at the November 15th hearing, the plaintiffs focused on the likelihood of success on their claims that Ordinance 2017-47 is a content-based law; the ordinance commits viewpoint discrimination; the ordinance is unconstitutionally vague; the ordinance is unconstitutionally overbroad; and the ordinance is an unconstitutional prior restraint of free speech. The undersigned will therefore focus on whether the plaintiffs demonstrated a substantial likelihood of success on those claims.

*a. Content-Based-Law Claim*

The First Amendment protects freedom of speech. U.S. Const. amend. I; *see also* 42 U.S.C. § 1983 (prohibiting persons acting under color of any ordinance from violating individuals' constitutional rights). Two types of laws commonly come into

play in First Amendment challenges: content-neutral laws and content-based laws. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *United States v. Playboy Ent. Group*, 529 U.S. 803 (2000); *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

A law is content-neutral when its restrictions "are justified without reference to the content of the regulated speech." *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (citations omitted). A law that has an incidental effect on some speakers or messages is content-neutral if the regulation serves a purpose unrelated to the content of expression. *Ward*, 491 U.S. at 791 (citation omitted).[6]

A law is content-based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227 (citations omitted). Content-based laws also include laws that cannot be justified without reference to the content of the regulated speech and laws the government adopted because it disagrees with the message the regulated speech conveys. *Id.*; *Ward*, 491 U.S. at 791 (citation omitted).

Content-based laws must satisfy strict-scrutiny analysis. *Playboy*, 529 U.S. at 813. That is, the law must be narrowly tailored to promote a compelling

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[6] A content-neutral law must be narrowly tailored to serve a significant governmental interest. *Creative Non-Violence*, 468 U.S. at 293 (citations omitted). A law is narrowly tailored when it is "not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 799. The regulation need not be the least restrictive or least intrusive means of serving a significant governmental interest. *Id.* at 798–99. But the law must "leave open ample alternative channels" for communicating the affected speech. *Id.* at 791.

governmental interest. *Id.* If a less strict alternative would promote the government's compelling interest, the government must use that alternative. *Id.* Content-based laws are presumptively invalid. *R.A.V.*, 505 U.S. at 382 (citations omitted).

The plaintiffs argue Ordinance 2017-47 is an unconstitutional content-based law because the ordinance prohibits Messrs. Vazzo and Pickup from providing SOCE counseling, which "takes place only through speech." (Doc. 114, p. 3). According to the plaintiffs, the City adopted Ordinance 2017-47 because the City disagrees with the content of the speech that takes place during SOCE counseling. (*Id.* at 4; Doc. 85, p. 11). So, the plaintiffs argue strict-scrutiny analysis applies and the ordinance fails that test because it is not the least restrictive means of furthering a compelling governmental interest. (Doc. 114, pp. 16–27).

The City argues the plaintiffs failed to demonstrate a likelihood of success on their content-based-law claim because the ordinance is narrowly tailored to satisfy a significant governmental interest. (Doc. 99, pp. 8–19). Equality Florida similarly argues the plaintiffs failed to demonstrate a likelihood of success on their First Amendment claims. (Doc. 98, p. 4).

The undersigned concludes the plaintiffs demonstrated a likelihood of success on their content-based-law claim. To understand this conclusion, an overview of the four most relevant cases is necessary—two of which directly address bans on conversion therapy, including SOCE counseling.

The first case is *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). *Pickup* addressed a California law banning SOCE counseling. *Id.* at 1221. The plaintiffs in *Pickup* included SOCE counselors, including David Pickup (also the plaintiff in this case), who claimed the California ban on SOCE counseling violated their free-speech rights under the First Amendment. *Id.* at 1224. *Pickup* held the state ban on SOCE counseling regulated conduct—not speech. *Id.* at 1229. *Pickup* then applied rational-basis review (meaning the law must bear a rational relationship to a legitimate state interest) to the California ban on SOCE counseling because any effect the ban had on the plaintiffs' speech during SOCE counseling was "merely incidental." *Id.* at 1231. Finding the state had a legitimate interest in protecting minors and the legislature reasonably relied on reports and opinions that asserted SOCE counseling was harmful and ineffective, *Pickup* held the state ban on SOCE counseling satisfied rational-basis review and was therefore constitutional. *Id.* at 1231–32.

The next case to consider is *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014). *King*, decided over eight months after *Pickup*, addressed a New Jersey law that banned SOCE counseling. *Id.* at 221–22. The plaintiffs in *King* also included counselors who brought free-speech claims under the First Amendment against the state law. *Id.* at 220–21. *King* disagreed with *Pickup* and held communications during SOCE counseling between the counselor and client are speech—not conduct—for First Amendment analyses. 767 F.3d at 224–29. *King* also held, however, speech during SOCE counseling is professional speech and laws prohibiting professional

speech "are constitutional only if they directly advance the state's interest in protecting its citizens from harmful or ineffective practices and are no more extensive than necessary to serve that interest." *Id.* at 223. *King* held the state ban was constitutional because the state had a substantial interest in protecting citizens from harmful professional practices; the legislature relied on substantial evidence when passing the state ban, including reports from professional and scientific organizations; and the plaintiffs provided no other adequate suggestion on how the state could protect minors. *Id.* at 236–40.

The first binding case most relevant here is the 2017 decision in *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (11th Cir. 2017) (en banc). *Wollschlaeger* addressed Florida law provisions prohibiting doctors and medical professionals from asking patients whether they had firearms in their homes. *Id.* at 1303. *Wollschlaeger* holds a communication between a doctor and a patient about ownership of firearms is speech under the First Amendment. 848 F.3d at 1307 (citing *King*'s holding that communication during SOCE counseling is speech under the First Amendment). *Wollschlaeger* further holds prohibiting doctors from discussing firearm ownership with their patients is a content-based law. *Id.* But *Wollschlaeger* declined to decide whether heightened-scrutiny analysis or strict-scrutiny analysis applied to the doctors' speech about firearm ownership. *Id.* at 1308. Instead, *Wollschlaeger* did not need to reach strict-scrutiny analysis because the majority of the Eleventh Circuit, sitting en banc, concluded the prohibition on doctors asking about firearm ownership

failed heightened (intermediate) scrutiny because the challenged provision failed to address concerns identified by the six anecdotes the legislature relied on when passing the law. 848 F.3d at 1317.

The last, and most recent, case to consider is *National Institute of Family and Life Advocates* (NIFLA) *v. Becerra*, 138 S. Ct. 2361 (2018). At issue in *NIFLA* was a California law requiring pregnancy centers to post a notice advising patients the state provided free or low-cost abortions for women. *Id.* at 2369. The plaintiffs, including pregnancy centers devoted to opposing abortion, claimed the California law violated their free-speech protections under the First Amendment. *Id.* at 2370. In *NIFLA*, a divided Supreme Court held the California law was content-based because the law altered the pregnancy centers' speech by requiring the centers "to inform women how they can obtain state-subsidized abortion." *Id.* at 2371.

*NIFLA* expressly rejected the analyses in *Pickup* and *King* recognizing "professional speech" as a separate category of speech subject to different constitutional analysis. *Id.* at 2371–72.[7] Instead, professional speech is usually given less protection if it is commercial speech or if a law regulates professional conduct that incidentally involves speech. *NIFLA*, 138 S. Ct. at 2372. Although stating traditional strict-scrutiny analysis applies to a content-based law that regulates neither commercial speech nor conduct that incidentally involves speech, *NIFLA*

[7] Although *NIFLA* rejected the free-speech analysis in *Pickup* and *King*, the Supreme Court denied petitions for writs of certiorari in *Pickup* and *King*. *Pickup v. Brown*, 134 S. Ct. 2871 (2014); *King v. Christie*, 135 S. Ct. 2048 (2015).

applied intermediate scrutiny to the California law requiring pregnancy centers to post notices. *See NIFLA*, 138 S. Ct. at 2375 (stating, "We need not [determine whether professional speech is exempt from ordinary First Amendment principles] because the licensed notice cannot survive even intermediate scrutiny").

These four cases taken together indicate strict-scrutiny analysis applies to laws banning SOCE counseling. The Ninth Circuit's holding in *Pickup* that SOCE counseling is conduct—not speech—was rejected by the Third Circuit in *King*, which held communications during SOCE counseling are speech under the First Amendment. 767 F.3d at 224–29. The Eleventh Circuit, sitting en banc, held in *Wollschlaeger* a doctor-patient communication about firearm ownership is speech under the First Amendment and approvingly cited *King*'s similar holding. 848 F.3d at 1307. And *NIFLA* held that traditional First Amendment analyses apply to professional speech that is neither commercial nor incidentally affected by a law regulating conduct. 138 S. Ct. at 2372.[8]

Importantly, the City and Equality Florida's arguments that SOCE counseling is conduct and therefore Ordinance 2017-47 regulates conduct is undermined by the

[8] *But see NIFLA*, 138 S. Ct. at 2373 (suggesting if speech is "tied to a procedure" it can be subject to content-based regulation) (citations omitted); *Planned Parenthood v. Casey*, 505 U.S. 845 (1992) (plurality) (rejecting free-speech claim under the First Amendment against state law that required doctors to give women information about abortion because the doctors' free-speech rights were affected "only as part of the practice of medicine, subject to reasonable . . . regulation by the state"); *Pickup*, 740 F.3d at 1229 (stating the law prohibiting SOCE counseling "bans a form of treatment").

language in Ordinance 2017-47 itself, which specifically refers to counseling as speech in a "whereas clause" adopted as part of Section One of the ordinance. (*See* Doc. 24-1, p. 4) (stating "courts found that counseling is professional speech, subject to a lower level of judicial scrutiny"); (Doc. 134-2, p. 10) (a city attorney's PowerPoint presentation on code enforcement refers to conversion therapy as professional speech); (*see also* Doc. 52, p. 10) (acknowledging Equality Florida's claim that it was "actively involved in the enactment of [Ordinance 2017-47]").

Under *King*, *Wollschlaeger*, and Ordinance 2017-47, a communication during SOCE counseling is speech. Under *King* and *Wollschlaeger*, laws that ban certain communications between medical professionals and their patients are content-based laws. And under *NIFLA*, content-based laws that prohibit professional speech that is neither commercial nor incidentally affected by a law regulating conduct are subject to traditional First Amendment analyses. *See also Wollschlaeger*, 848 F.3d at 1323–27 (Wilson, J., concurring) (stating strict-scrutiny analysis applies to the state law that prohibited doctors from asking patients about firearm ownership). Therefore, applying this case law, Ordinance 2017-47 is a content-based law subject to strict-scrutiny analysis. The plaintiffs must therefore establish Ordinance 2017-47 is not narrowly tailored to promote a compelling governmental interest.

The undersigned will now analyze whether the plaintiffs are likely to succeed in proving Ordinance 2017-47 fails strict scrutiny.

i. Compelling Governmental Interest

The stated purpose of Ordinance 2017-47 is to protect the physical and psychological well-being of minors from harms caused by conversion therapy. (Doc. 24-1, p. 5). The government has a compelling interest in protecting the physical and psychological well-being of minors. *Sable Commc'ns of Calif., Inc. v. FCC*, 492 U.S. 115, 126 (1989). So, Ordinance 2017-47 serves a compelling governmental interest.

ii. Narrowly Tailored

A content-based law must be narrowly tailored to serve a compelling governmental interest. *Reed*, 135 S. Ct. at 2231 (citation omitted). To meet the narrow-tailoring requirement, the government must prove plausible alternatives, which burden less speech than the enacted law, would fail to achieve the government's interest. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (citation omitted); *see also McCullen v.* Coakley, 134 S. Ct. 2518, 2530 (2014) (stating the Court considered less-restrictive alternatives when analyzing whether a law is narrowly tailored).

The court will not assume plausible alternatives will fail to protect compelling interests; "there must be some basis in the record, in legislative findings or otherwise, establishing the law as enacted as the least restrictive means." *Denver Area Educ. Telecommuc'ns Consortium, Inc. v. FCC*, 518 U.S. 727 807 (1996) (citations omitted) (Kennedy & Ginsburg, JJ., concurring in part, concurring in the judgment in part, dissenting in part). If a less restrictive means would serve the compelling

governmental interest, the government must use that alternative. *Playboy*, 529 U.S. at 813 (citations omitted).

The plaintiffs sufficiently demonstrated they are likely to succeed in proving Ordinance 2017-47 is not narrowly tailored to serve the City's interest in protecting minors because the City considered no lesser restrictions on mental health professionals' speech. The City's designated party representative under Federal Rule of Civil Procedure 30(b)(6), who was also the City Council member who sponsored the ordinance, testified the City considered no alternatives to its total ban on conversion therapy. (Doc. 133-2, p. 98). Consistent with that testimony, the City put forward no evidence at the hearing to show it considered any alternatives to a complete ban on conversion therapy despite the ordinance's language that minors "are not effectively protected by other means." (Doc. 24-1, p. 5).

The plaintiffs, on the other hand, put forward suggested alternatives to Ordinance 2017-47's total ban on conversion therapy—none studied or considered by the City. For example, the plaintiffs argue the City could have enacted a ban on involuntary SOCE counseling—as opposed to the voluntary, consensual counseling the plaintiffs provide. (Doc. 114, p. 22). The plaintiffs also suggest the City could have more narrowly banned aversive conversion therapy techniques, like electroshock therapy, while permitting the plaintiffs' "speech-only talk therapy."

(*Id.*).[9] And the plaintiffs suggest the City could have required informed consent from minors and parents before a mental health counselor could provide SOCE counseling to a minor. (*Id.* at 31–32); *but see King*, 767 F.3d at 239–40 (finding an informed-consent requirement would not adequately protect minors).

The City failed to demonstrate how plausible alternatives, which the City apparently never considered before enacting Ordinance 2017-47, could not achieve the City's compelling interest in protecting minors. The plaintiffs are likely to succeed in proving that Ordinance 2017-47 is not narrowly tailored to promote the City's interest in protecting the physical and psychological well-being of minors. Therefore, the plaintiffs are likely to succeed on the merits on their claim that Ordinance 2017-47 is an unconstitutional content-based law under the First Amendment.

b. *Viewpoint-Discrimination Claim*

The plaintiffs sufficiently demonstrated they are likely to succeed on the merits of their First Amendment claim that Ordinance 2017-47 is viewpoint discrimination. Section IV(A)(2)(a) of this report discusses how Ordinance 2017-47 is a content-based

[9] At the hearing on the plaintiffs' motion for preliminary injunction, the City argued it determined both aversive and non-aversive conversion therapies threatened the well-being of minors; so, a ban on just aversive techniques is not plausible. The City's argument, however, is undermined by Ordinance 2017-47's legislative findings, which make no distinction between aversive and non-aversive techniques. (*See* Doc. 24-1, pp. 2–6) (listing the City's findings). Further, the City's designated party representative testified he did not know what the terms "aversive therapy" and "non-aversive therapy" meant. (Doc. 133-2, p. 36).

law for which the City considered no alternatives. These facts also sufficiently demonstrate the plaintiffs' claim that the City adopted Ordinance 2017-47 because the City disagreed with the viewpoint mental health counselors express during SOCE counseling. (*See also* Doc. 24-1, p. 6) (prohibiting counseling aimed at "chang[ing] . . . gender identity, or gender expression" while allowing counseling "that provides support and assistance to a person undergoing gender transition"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (citation omitted) (stating viewpoint discrimination occurs when the government targets specific views on a subject); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (citations omitted) (stating content-based laws can be viewpoint discriminatory). The plaintiffs therefore sufficiently demonstrated they are likely to prove Ordinance 2017-47 is unconstitutional viewpoint discrimination.

*c. Unconstitutionally-Overbroad Claim*

The plaintiffs similarly demonstrated they are likely to succeed on the merits of their claim that Ordinance 2017-47 is overbroad. A law is overbroad when every application of the law creates the risk that ideas might be suppressed, such as when the law gives overly broad discretion to the person enforcing it. *Nationalist Movement*, 505 U.S. at 129–30 (citations omitted); *Catron v. City of St. Petersburg*, 658 F.3d, 1260, 1269 (11th Cir. 2011). Because the plaintiffs are likely to succeed in proving Ordinance 2017-47 constitutes viewpoint discrimination, the plaintiffs are likely to prove that every application of the ordinance creates the risk ideas might be

suppressed. In other words, if the City adopted Ordinance 2017-47 because it disagreed with the ideas expressed during SOCE counseling, every application of Ordinance 2017-47 creates the risk the ideas expressed during SOCE counseling might be suppressed. Therefore, the plaintiffs demonstrated they are likely to succeed on the merits of their claim that Ordinance 2017-47 is overbroad.

*d. Prior-Restraint Claim*

The plaintiffs also sufficiently demonstrated Ordinance 2017-47 restricts the plaintiffs' speech during SOCE counseling before they can express it. *See Black's Law Dictionary* 1387 (10th ed. 2014) (defining prior restraint on speech as a government restriction on speech before its expression); *Foryth Cty. v. Nationalist Movement*, 505 U.S. 123, 129–30 (1992) (citations omitted) (stating there is a "heavy presumption" against prior-restraint laws). So, the plaintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is an unconstitutional prior restraint on the plaintiffs' free speech.

*e. Unconstitutionally-Vague Claim*

The plaintiffs sufficiently demonstrated a likelihood of success on the merits of their claim that Ordinance 2017-47 is unconstitutionally vague. A plaintiff who claims that a law is unconstitutionally vague must prove either (1) the law fails to provide people of ordinary intelligence to understand what conduct the law prohibits or (2) the law authorizes or encourages arbitrary and discriminatory enforcement. *Konikov v. Orange Cty.*, 410 F.3d 1317, 1329 (11th Cir. 2005) (citations omitted). The

plaintiffs sufficiently demonstrated the City adopted Ordinance 2017-47 because it disagreed with the ideas and messages expressed during SOCE counseling. The ordinance therefore authorizes and encourages discriminatory enforcement by code enforcement officers (who may or may not have any medical or mental health counseling training) against the viewpoints of mental health professionals who provide SOCE counseling. So, the plaintiffs established a likelihood of success on the merits on their claim that Ordinance 2017-47 is unconstitutionally vague.

**B. Irreparable Harm**

The plaintiffs argue they are suffering irreparable harm because of Ordinance 2017-47 and will continue to do so without a preliminary injunction. (Doc. 85, p. 24; Doc. 114, pp. 27–29).

The City and Equality Florida argue the plaintiffs failed to demonstrate they will suffer irreparable harm without an injunction because the plaintiffs waited almost eight months after the ordinance's enactment to begin this lawsuit and repeatedly delayed in seeking injunctive relief. (Doc. 98, pp. 3–4; Doc. 99, pp. 28–30; Doc. 143, pp. 3–4).

The party requesting an injunction must demonstrate he or she will likely suffer irreparable harm without an injunction. *Winter*, 555 U.S. at 22 (citations omitted). A party's months-long delay in seeking a preliminary injunction "militates against a finding of irreparable harm." *Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016). Preliminary injunctions are meant to provide "speedy

and urgent action to protect a plaintiff's rights before a case can be resolved on the merits." *Wreal*, 840 F.3d at 1248 (citations omitted). That said, the Supreme Court instructs the loss of First Amendment freedoms constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373–74 (citation and footnote omitted).

Section II of this report illustrates the plaintiffs' months-long delay in seeking injunctive relief against Ordinance 2017-47. The plaintiffs' actions in this litigation repeatedly prevented a decision on their motion for preliminary injunction. These actions would normally weigh heavily against finding a likelihood of irreparable injury without an injunction. But the plaintiffs demonstrated they are likely to succeed on the merits of most of their First Amendment free-speech claims. Because of the seemingly automatic conclusion of irreparable injury in a First Amendment action, the plaintiffs sufficiently demonstrated they will likely be irreparably harmed without an injunction.

**C. Balance of Equities**

The plaintiffs argue the balance of equities tips in their favor because the City will not be harmed if enforcement of Ordinance 2017-47 is enjoined. (Doc. 85, p. 25; Doc. 114, pp. 29–30).

The party moving for a preliminary injunctive must demonstrate the balance of equities tips in his or her favor. *Winter*, 555 U.S. at 20. In other words, the threatened injury to the plaintiff must outweigh any harm the defendant might suffer. *Gen. Contractors*, 896 F.2d at 1284 (citations omitted); *see also Benisek v.*

*Lamone*, 138 S. Ct. 1942, 1944 (2018) (stating that years-long delay in seeking preliminary injunctive relief weighs against the plaintiff when considering balance of equities).

The plaintiffs sufficiently demonstrated their First Amendment rights will be irreparably harmed without a preliminary injunction. The City, however, failed to show any harm it may suffer if enforcement of Ordinance 2017-47 is enjoined. The City and Equality Florida instead focus on potential harm to non-defendants, especially minors, if the ordinance is enjoined. (Doc. 98, pp. 4–8; Doc. 99, pp. 30–35; Doc. 143, pp. 4–5). But the public interest is a separate factor in determining whether the court should grant a preliminary injunction. *Winter*, 555 U.S. at 20. Further, a "city has no legitimate interest in enforcing an unconstitutional ordinance." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006). Therefore, the balance of equities tips in the plaintiffs' favor because the City failed to show any harm it would suffer if enforcement of Ordinance 2017-47 is enjoined and the City has no legitimate interest in enforcing an ordinance likely to be ruled unconstitutional.

**D. Public Interest**

The plaintiffs argue enjoining Ordinance 2017-47 is in the public interest because the ordinance is unconstitutional and the City presented no evidence of minors being harmed by SOCE counseling within city limits. (Doc. 85, p. 25; Doc. 114, pp. 29–30). The City and Equality Florida argue enjoining Ordinance 2017-47

is against the public interest because minors could be potentially harmed by conversion therapy while enforcement of the ordinance is enjoined. (Doc. 98, pp. 4–8; Doc. 99, pp. 30–35; Doc. 143, pp. 4–5).

The plaintiffs sufficiently demonstrated Ordinance 2017-47's overbroad prohibition on non-coercive, non-aversive SOCE counseling consisting entirely of speech or "talk therapy" is likely unconstitutional. The public has no interest in enforcing an unconstitutional ordinance. *KH Outdoor*, 458 F.3d at 1272–73 (citations omitted). Further, the City and Equality Florida's argument that minors will be harmed by SOCE counseling if Ordinance 2017-47 is enjoined is undermined by the fact the City received no complaints related to any minor harmed by SOCE counseling within the city limits. (Doc. 132-1, p. 8). In the absence of any harm to the public, the plaintiffs, therefore, sufficiently demonstrated it is in the public's interest to enjoin Ordinance 2017-47's prohibition on SOCE counseling.

**E. Limited Injunction**

An injunction should be no broader than necessary to avoid the harm on which the injunction is based. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (discussing how traditional courts of equity had discretion to "tailor a remedy" to the issue before the court); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 933 n.81 (D.C. Cir. 1984) (discussing limited injunctions in the context of international litigation); *Uber Promotions, Inc. v. Uber Tech., Inc.* 162 F. Supp. 3d 1253, 1281–82 (N.D. Fla. 2016) (granting limited preliminary injunction

narrowly tailored to address the harm to the plaintiff); *Occupy Ft. Myers v. City of Ft. Myers*, 882 F. Supp. 2d 1320, 1339 (M.D. Fla. 2011) (granting limited injunction that enjoined parts of city ordinance found likely to violate the First Amendment in Section 1983 case).

The plaintiffs here repeatedly state that if Ordinance 2017-47 only banned aversive conversion-therapy techniques, like electroshock therapy, the plaintiffs would not be challenging the ordinance's constitutionality because Messrs. Vazzo and Pickup only provide non-aversive therapy. (*See, e.g.*, Doc. 114, p. 3) (stating the plaintiffs would not have filed this lawsuit if the ordinance only banned aversive therapy because Messrs. Vazzo and Pickup do not provide that therapy).

The City and Equality Florida also sufficiently demonstrated minors in the city limits could be harmed by techniques like electroshock therapy if enforcement of Ordinance 2017-47 is completely enjoined. (*See, e.g.*, Doc. 98, p. 6) (discussing dangers of coercive conversion therapy).

The lack of harm to the plaintiffs' First Amendment rights if Ordinance 2017-47's ban on aversive conversion therapy remains and the possible harm to minors if the ordinance is completely enjoined weigh in favor of a limited injunction. The court should preliminarily enjoin the enforcement of Ordinance 2017-47 to the extent the City may not enforce the ordinance against mental health professionals who provide non-coercive, non-aversive, SOCE counseling—which consists entirely of speech, or "talk therapy"—to minors within the city limits. This type of limited injunction will

balance the plaintiffs' First Amendment rights and the health and safety of minors within the city limits.

## V. CONCLUSION

The plaintiffs failed to establish a likelihood of success on the merits of their claims that the City lacks authority to enact Ordinance 2017-47 (Count VI). The court should not grant a preliminary injunction on that basis.

But the plaintiffs established a likelihood of success on the merits of most of their First Amendment claims against Ordinance 2017-47 in Count I. The plaintiffs also demonstrated irreparable harm without an injunction; the balance of equities tips in the plaintiffs' favor; and partially enjoining enforcement of Ordinance 2017-47 is in the public interest. Therefore, the plaintiffs' motion for preliminary injunction (Doc. 85) should be **GRANTED-IN-PART** and **DENIED-IN-PART** as follows:

1. The plaintiffs' motion for preliminary injunction should be **GRANTED** to the extent that the City should be enjoined from enforcing Ordinance 2017-47 against mental health professionals who provide non-coercive, non-aversive SOCE counseling—which consists entirely of speech, or "talk therapy"—to minors within the city limits.

2. The plaintiffs' motion for preliminary injunction should be **DENIED** to the extent that the plaintiffs seek to completely enjoin the enforcement of Ordinance 2017-47.

3. If the court agrees a limited preliminary injunction should issue, in its order, the court should require the plaintiffs to provide a proposed preliminary injunction order consistent with the court's order, Local Rules 4.06(b)(1), 4.05(b)(3)(iii), and Federal Rule of Civil Procedure 65(d).

**RECOMMENDED** in Tampa, Florida, on January 30, 2019.

Amanda Arnold Sansone

AMANDA ARNOLD SANSONE
United States Magistrate Judge

**NOTICE TO PARTIES**

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days from the date of this service bars an aggrieved party from attacking the factual findings on appeal. 28 U.S.C. § 636(b)(1).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| CHRISTOPHER DOYLE, LPC, LCPC, Individually and on behalf of his clients | : | |
| v. | : | Civil Action No. DKC 19-0190 |
| LAWRENCE JOSEPH HOGAN, JR., et al. | : | |

**MEMORANDUM OPINION**

Plaintiff Christopher Doyle ("Plaintiff") initiated the instant action against Defendants Lawrence J. Hogan, Jr. in his official capacity as Governor of the State of Maryland and Brian E. Frosh in his official capacity as the Attorney General of the State of Maryland (collectively, "Defendants") on January 18, 2019.

At issue in this case is § 1-212.1 of the Health Occupations Article of the Maryland Code which states: "A mental health or child care practitioner may not engage in conversion therapy with an individual who is a minor." The complaint alleges that § 1-212.1 violates Plaintiff's: (1) right to freedom of speech under the First Amendment (ECF No. 1 ¶¶ 144-163); (2) clients' First Amendment rights to receive information (*id.* ¶¶ 164-172); (3) right to free exercise of religion under the First Amendment (*id.* ¶¶ 173-189); (4) "right to liberty of speech under Articles 10 and 40 of the Declaration of Rights of the Constitution of Maryland" (*id.*

¶¶ 190-210); and (5) "right to free exercise and enjoyment of religion under Article 36 of the Declaration of Rights of the Constitution of Maryland" (*id.* ¶¶ 211-227). Plaintiff seeks (1) "a preliminary injunction enjoining Defendants and Defendants' officers, agents, servants, employees, and attorneys, and all other persons who are in active concert or participation with them . . . from enforcing [§ 1-212.1][;]" (2) "a permanent injunction enjoining [enforcement of § 1-212.1;]" (3) "a declaratory judgment declaring unconstitutional [§ 1-212.1] and Defendants' actions in applying [§ 1-212.1] under the United States Constitution and Constitution of Maryland[;]" (4) "nominal damages for the violation of [his] constitutional rights;" (5) "actual damages in an amount to be determined at trial;" (6) a declaration that "the rights and other legal relations with the subject matter here [are] in controversy so that such declaration shall have the force and effect of final judgment;" (7) the court's continued jurisdiction after finding in Plaintiff's favor "for the purpose of enforcing th[e] [c]ourt's order;" and (8) "reasonable costs and expenses of this action, including attorney's fees, in accordance with 42 U.S.C. § 1988[.]" (ECF No. 1, at 42-45).

Plaintiff filed a motion for preliminary injunction on January 18, 2019. (ECF No. 2). Defendants filed a motion to dismiss for failure to state a claim on March 8, 2019. (ECF No. 26). A memorandum opinion and order were issued on August 1, 2019,

granting Freestate Justice, Inc. and The Trevor Project leave to file an amicus brief, denying Plaintiff's motion to compel, and granting Plaintiff's motion to file surreply. (ECF Nos. 65 & 66). The opinion also resolved four of the preliminary issues raised in Defendants' motion to dismiss, finding that: (1) the free speech arguments Defendants originally provided in their opposition to Plaintiff's motion for preliminary injunction would be evaluated as part of their motion to dismiss; (2) Plaintiff possesses standing; (3) Plaintiff does not possess standing to bring claims on behalf of his minor clients; and (4) Defendants are not entitled to Eleventh Amendment immunity. The issues have been briefed and the parties argued their positions regarding the motion for preliminary injunction and the motion to dismiss during a motions hearing on August 5, 2019. For the following reasons, Plaintiff's motion for preliminary injunction will be denied as moot and Defendants' motion to dismiss will be granted.

## I. Motion to Dismiss

### A. Standard of Review

Defendants' argument that the complaint fails to state a plausible claim for relief is governed by Fed.R.Civ.P. 12(b)(6). The purpose of a motion to dismiss under Rule 12(b)(6) is to test the sufficiency of the complaint. *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006). A complaint need only satisfy the standard of Rule 8(a)(2), which requires a

"short and plain statement of the claim showing that the pleader is entitled to relief[.]" "Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3 (2007). That showing must consist of more than "a formulaic recitation of the elements of a cause of action" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and internal quotation marks omitted). At this stage, all well-pleaded allegations in a complaint must be considered as true, *Albright v. Oliver*, 510 U.S. 266, 268 (1994), and all factual allegations must be construed in the light most favorable to the plaintiff, *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). In evaluating the complaint, unsupported legal allegations need not be accepted. *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989). Legal conclusions couched as factual allegations are insufficient, *Iqbal*, 556 U.S. at 678, as are conclusory factual allegations devoid of any reference to actual events, *United Black Firefighters v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979); *see Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009).

**B. Free Speech**

Defendants argue that Plaintiff fails to state a claim for violation of his free speech rights under the First Amendment.

(ECF No. 26-1, at 13). According to Defendants, § 1-212.1 regulates "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." (ECF No. 25, at 14). Thus, Defendants conclude that the law is subject only to rational basis review because it "regulates conduct — not speech[.]" (*Id.*). Because "[t]here can be no doubt that the State of Maryland has a legitimate interest in protecting minors from harmful conduct[,]" Defendants assert that § 1-212.1 easily withstands rational basis review. (*Id.*, at 16).

Defendants add that, if § 1-212.1's prohibitions are found to have more than an incidental burden on Plaintiff's speech, the statute may alternatively be subject to intermediate scrutiny. (ECF No. 25, at 16). Defendants rely on *Otto v. City of Boca Raton*, 353 F.Supp.3d 1237 (S.D.Fla. 2019) to assert that Plaintiff's free speech claim fails because the law survives intermediate scrutiny:

> [T]he legislature's interest in protecting minors is important[] and the ban . . . furthers that interest. [] [T]he 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 the treatment that they provide to minors. It does not limit in any way [Plaintiff]'s or any other individual's right to advocate for conversion therapy or a repeal of the statute. It does not limit [Plaintiff]'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 [§ 1-212.1] would survive an intermediate scrutiny review.

(ECF No. 25, at 17). Defendants add that § 1-212.1 is not a content- or viewpoint-based restriction because "[i]t does not limit what [Plaintiff] or other licensed practitioners may say to minor clients; it limits the object that the therapy provided by licensed practitioners may have." (*Id.*, at 20).

Plaintiff maintains that he "has stated a First Amendment claim under federal pleading standards." (ECF No. 47, at 12). At the outset, Plaintiff asserts that he "sufficiently alleged that [§ 1-212.1] is a viewpoint- and content-based restriction . . . [and] chills expression." (*Id.*, at 11). Plaintiff dismisses Defendants' conclusion that § 1-212.1 regulates conduct by conflating the categories of professional speech and professional conduct:

> The government cannot simply relabel the speech of health professionals as "conduct" in order to restrain it with less scrutiny. *See, e.g., Nat'l Inst. for Family & Life Advocates v. Becerra [(NIFLA)]*, 138 S.Ct. 2361, 2371-72 (2018) . . . ("[T]his Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals."); *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2229 (2015) (same); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27[-28] (2010) (holding government may not apply alternative label to protected speech to evade First Amendment review, when only "conduct" at issue is speech); *Legal Servs. Corp. v. Velazquez*, 531

> U.S. 533 (2001) (same); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[A] state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

(*Id.*, at 12). Plaintiff argues that, because he primarily uses speech to provide counseling to his minor clients, the act of counseling must be construed as speech for purposes of First Amendment review. (*Id.*, at 13). As such, § 1-212.1 is subject to and unable to "withstand the requisite [strict] constitutional scrutiny." (*Id.*, at 11).

Determining the proper level of review first requires distinguishing whether § 1-212.1 regulates speech, conduct, or something in between. Although the line between speech and conduct is often murky, it is without question that "restrictions on protected expression" are treated distinctly from "restrictions on . . . nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "[T]he First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." *Id.* Indeed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). Thus, government regulations of professional practices that entail and incidentally burden speech receive

deferential review. *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 879 F.3d 101, 109 (4th Cir.), *cert. denied*, 138 S.Ct. 2710 (2018) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.") (quoting *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985)) (internal quotation marks omitted). However, "that does not mean that individuals simply abandon their First Amendment rights when they commence practicing a profession." *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014). When a professional asserts that the professional's First Amendment rights "are at stake, the stringency of review thus slides 'along a continuum' from 'public dialogue' on one end to 'regulation of professional *conduct*' on the other." *Id*. at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2014), *abrogated by Becerra*, 138 S.Ct. 2361). As the Fourth Circuit has explained:

> Because the state has a strong interest in supervising the ethics and competence of those professions to which it lends its imprimatur, this sliding-scale review applies to traditional occupations, such as medicine or accounting, which are subject to comprehensive state licensing, accreditation, or disciplinary schemes. *See[,] e.g.*, *Stuart*, 774 F.3d 238 (doctors); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988) (accountants). More generally, the doctrine may apply where "the speaker is providing personalized advice in a private setting to a paying client." *Moore–King v. Cty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013).

*Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 879 F.3d at 109. Thus, Plaintiff's free speech claim turns on "whether verbal communications become 'conduct' when they are used as a vehicle for mental health treatment." *King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014), *abrogated by Becerra*, 138 S.Ct. 2361.

Section 1-212.1 obviously regulates professionals, or "individuals who provide personalized services to clients and who are subject to a generally applicable licensing and regulatory regime." *Becerra*, 138 S.Ct. at 2371 (internal quotation marks omitted). Although § 1-212.1 regulates speech by prohibiting the use of language employed in the process of conducting conversion therapy on minor clients, it "does not prevent licensed therapists from expressing their views about conversion therapy to the public and to their [clients]." (ECF No. 25, at 15). Most importantly, § 1-212.1 does not prohibit practitioners from engaging in any form of personal expression; they remain free to discuss, endorse, criticize, or recommend conversion therapy to their minor clients. (ECF No. 25, at 17). Instead, § 1-212.1 "is a regulation of [psychological] treatment insofar as it directs [mental health or child care practitioners] to do certain things in the context of treating a [client]. In that sense, the government can lay claim to its stronger interest in the regulation of professional conduct." *Stuart,* 774 F.3d at 248; *see also*, *Pickup*, 740 F.3d at 1229 ("Most, if not all, medical and mental health treatments

require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment."); *Otto*, 353 F.Supp.3d at 1256 ("The regulated treatment is both speech and conduct – directed at minors – administered by a licensed medical professional, as part of the practice of medicine[.]") (internal quotation marks omitted); *Capital Associated Indus., Inc*. v. *Stein*, 922 F.3d 198, 208 (4th Cir. 2019) (considering ban on practice of law by corporations and finding that the statutes in question regulated conduct because they did not "target the communicative aspects of practicing law, such as the advice lawyers may give to clients."). Thus, § 1-212.1 lands on the conduct end of the sliding scale.[1]

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[1] Plaintiff suggests that the therapy prohibited by § 1-212.1 cannot be construed as conduct due to the Court's holding in *Becerra*. (ECF No. 47, at 12-13 ("[*Becerra*] abrogated by name the principal authority Defendants rely on in their . . . opposition to make their 'conduct' argument, *Pickup*[.]") (internal emphasis omitted)). Plaintiff misconstrues the Court's findings in *Becerra*. Although *Becerra* abrogated *King* and *Pickup*, it did so only on the ground that professional speech is not a separate category of speech for purposes of reviewing a content-based speech regulation. 138 S.Ct. at 2372. The Court found that California's law requiring licensed clinics to provide clients notice of publicly-funded family-planning services did not qualify as professional conduct:

> The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all. It applies to all interactions between a covered facility and its clients, regardless of whether a medical

Plaintiff's arguments that conversion therapy cannot be characterized as conduct are unpersuasive. During the motions hearing, Plaintiff argued that some therapies, such as aversive therapy, clearly involve conduct and, as such, should be differentiated from talk therapy. However, conduct is not confined merely to physical action. Plaintiff asserted at the motions hearing that he wishes to conduct speech-based conversion therapy when the change goal originates with his minor client. If his client presents with such a goal, Plaintiff would presumably adopt the goal of his client and provide therapeutic services that are inherently not expressive because the speech involved does not seek to communicate Plaintiff's views. Thus, Plaintiff's argument fails to demonstrate how speech therapy is any more expressive, and thus less in the nature of conduct, than aversive therapy.

According to the Fourth Circuit, "intermediate scrutiny strikes the appropriate balance between the states' police powers and individual rights[]" when evaluating "conduct regulations that incidentally impact speech." *Stein*, 922 F.3d at 209.

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> procedure is ever sought, offered, or performed. If a covered facility does provide medical procedures, the notice provides no information about the risks or benefits of those procedures.

*Becerra*, 138 S.Ct. at 2373. However, the Court's holding did not proscribe a finding that conversion therapy qualifies as professional conduct.

Consequently, intermediate scrutiny is the appropriate standard of review.

"To survive intermediate scrutiny, the defendant must show 'a substantial state interest' and a solution that is 'sufficiently drawn' to protect that interest." *Id.* (quoting *Becerra*, 138 S.Ct. at 2375). As the Supreme Court of the United States has recognized, states have at least a substantial interest in protecting the health and safety of minors. *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors."); *New York v. Ferber*, 458 U.S. 747, 757 (1982) ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens.") (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)) (internal quotation marks omitted).

Next, Defendants must demonstrate that "the statute directly advances [the] substantial government interest[.]" *Sorrell*, 564 U.S. at 572. Intermediate scrutiny specifically "requires the government to produce evidence that a challenged regulation materially advances" the state's interest in protecting minors "by redressing past harms or preventing future ones." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002) (quoting *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 356 (4th

Cir. 2001)) (internal quotation marks omitted). Maryland's decision to ban the administration of conversion therapy on minors is bolstered by research indicating that conversion therapy is likely harmful to minors. The legislation relies on the findings and statements of professional organizations to conclude that conversion therapy has negative effects on minors. In addition to the American Psychological Association Task Force findings, some of the most compelling evidence includes:

> (1) American Psychiatric Association statement that "[i]n the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there is such research available, the American Psychiatric Association recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm[.]"
>
> (2) American School Counselor Association position paper stating that "[i]t is not the role of the professional school counselor to attempt to change a student's sexual orientation or gender identity" and that "[p]rofessional school counselors do not support efforts by licensed mental health professionals to change a student's sexual orientation or gender as these practices have been proven ineffective and harmful[.]"
>
> (3) American Academy of Child and Adolescent Psychiatry article stating that "[c]linicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful . . . such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important

> protective factors against suicidal ideation and attempts."
>
> (4) American Association of Sexuality Educators, Counselors, and Therapists statement that "[r]eparative therapy (for minors, in particular) is often forced or nonconsensual,[] has been proven harmful to minors,[] and that there is no scientific evidence supporting the success of these interventions[.]"

(ECF No. 1-1, at 2-4). These sources indicate that conducting conversion therapy on minors could potentially harm their emotional and physical well-being and, thus, prohibiting the practice of conversion therapy on minors would abate the harmful outcomes caused by conversion therapy. Thus, § 1-212.1 directly advances Maryland's goal of protecting minors.

Plaintiff argues that Defendants cannot meet their burden to prove that the harm § 1-212.1 alleviates is "real, not merely conjectural." (ECF No. 2, at 32 (quoting *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994))). Plaintiff also points out that the Maryland legislature overlooked "relevant perspectives" in drawing the conclusion that conversion therapy is harmful to minors. (ECF No. 1 ¶¶ 42-52). However, as recognized in *Otto*, courts "have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'" *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555

(2001) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)) (internal quotation marks omitted). Additionally, "[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, particularly when this community has spoken with such urgency and solidarity on the subject." *King*, 767 F.3d at 238. Because the evidence provided in the legislation is more than adequate to indicate the potentially harmful effects of conducting conversion therapy on minors and conclude that prohibiting conversion therapy on minors would mitigate those effects, Plaintiff's arguments to the contrary fail to show that § 1-212.1 does not advance Maryland's goal of protecting minors.

Finally, "intermediate scrutiny does indeed require the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary[.]" *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015). "[T]he regulation need not be the least restrictive means available, '[b]ut [Maryland] still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *Id.* at 230 (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)) (first alteration in original).

Plaintiff argues that "Defendants [] cannot meet their . . . burden of showing that [§ 1-212.1] is the least restrictive means for advancing Maryland's purported interests or that the statute is otherwise narrowly tailored." (ECF No. 2, at 35). However, the scope of § 1-212.1 is limited. The statute only prohibits conversion therapy when it is conducted *by* licensed practitioners *on* minors. Additionally, the statute prohibits only speech uttered in the process of conducting conversion therapy. As stated above when analyzing whether the speech prohibited by § 1-212.1 is conduct, because the statute allows licensed practitioners to express their views about and recommend conversion therapy to their minor clients, it regulates only the speech necessary to advance Maryland's goal of protecting minors.[2]

During the motions hearing, Plaintiff added to his argument that § 1-212.1 is not narrowly tailored, asserting that the statute fails to differentiate between voluntary and forced change efforts. However, children under the age of 16 do not have capacity to consent to psychological treatment. MD. CODE ANN.,

[2] Plaintiff adds that § 1-212.1 is "wildly underinclusive, further undermining any notion of narrow tailoring[]" because it "regulates only licensed professionals, necessarily excluding conversion therapy offered by unlicensed religious counselors and clergy." (ECF No. 2, at 36-37) (internal quotations omitted). However, Maryland will not be punished for "leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive." *Williams-Yulee v. Fla. Bar*, 135 S.Ct. 1656, 1670 (2015). Thus, Plaintiff's argument is without merit.

HEALTH—GEN. § 20-102 (2017); MD. CODE ANN., HEALTH—GEN. § 20-104(b)(1) (2015). Children over the age of 16 do not possess "the capacity to refuse consultation, diagnosis, or treatment for a mental or emotional disorder for which a parent, guardian, or custodian of the minor has given consent." *Id.*, § 20-104(b)(2). Because Maryland law prevents minors from consenting to therapy in many circumstances, it is difficult to conceive how § 1-212.1 could be modified to allow voluntary conversion therapy while complying with Maryland consent laws and achieving Maryland's goal of protecting minors. Thus, Plaintiff has not offered a viable alternative to § 1-212.1 that would achieve the narrowing effect he desires. *See King*, 767 F.3d at 240 ("As [p]laintiffs have offered no other suggestion as to how the New Jersey legislature could achieve its interests in a less restrictive manner, we conclude that [the conversion therapy prohibition] is sufficiently tailored to survive intermediate scrutiny.").

Accordingly, Plaintiff has failed to state a free speech claim upon which relief can be granted because § 1-212.1 would survive a constitutional challenge under intermediate scrutiny.

**C. Free Exercise**

Plaintiff alleges that § 1-212.1 infringes his First Amendment right to free exercise of religion under the First Amendment. Specifically, he states that § 1-212.1 targets his "sincerely held religious beliefs regarding human nature, gender,

ethics, morality, and counseling to eliminate, reduce, or resolve unwanted same-sex attractions, behaviors, or identity" by prohibiting him from "offering . . . counseling that is consistent with [those] religious beliefs." (ECF No. 1, at 34).

Defendants argue that Plaintiff fails to state a claim for violation of his rights under the First Amendment Free Exercise clause. (ECF No. 26-1, at 14). Defendants argue that, because § 1-212.1 does not specifically or implicitly target Plaintiff's sincerely held religious beliefs, the statute requires only rational basis review. (*Id.*, at 15). Defendants conclude that "Count III should be dismissed[]" because "[t]here can be no doubt [] the state of Maryland has a legitimate interest in protecting minors from harmful conduct. (*Id.*, at 15-16).

In response, Plaintiff states that Defendants' argument "do[es] not overcome the well-pleaded allegations of [Plaintiff]'s [c]omplaint, which are presumed true on a motion to dismiss." (ECF No. 47, at 14). Plaintiff adds that he "has alleged, and is entitled to adduce evidence at trial to prove, that [§ 1-212.1] was motivated by animus and displays hostility towards the religious convictions of [Plaintiff.]" (*Id.*) Plaintiff states that § 1-212.1 "constitutes an impermissible religious gerrymander[,]" because it "targets substantially similar conduct but unevenly proscribes the conduct purporting to cause the harm[.]" (*Id.*, at 16) (internal citation and quotation marks

omitted). Thus, "Defendants' contentions are contradicted by . . . [Plaintiff's] [c]omplaint" and "it is premature and improper to determine motives or the government's purpose for enacting a law" at this juncture. (*Id.*, at 16-17).

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof." U.S. Const., amend. I. The First Amendment does not, however, provide absolute protection to engage in religiously motivated conduct. *McCarthy v. Hornbeck*, 590 F.Supp. 936, 939 (D.Md. 1984) ("Analysis of a free exercise claim begins with recognition of the fundamental proposition that the freedom to hold religious beliefs is absolute, whereas the freedom to act on those beliefs is not."). "[A] neutral, generally applicable law does not offend the Free Exercise Clause, even if the law has an incidental effect on religious practice." *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 654 (4th Cir. 1995) (citing *Emp't Div., Dep't of Human Ress. v. Smith*, 494 U.S. 872, 878-79 (1990)).

"[A] law lacks neutrality if it 'targets religious beliefs' or if its 'object . . . is to infringe upon or restrict practices because of their religious motivation.'" *Abdus-Shahid v. Mayor of Balt.*, 674 F.App'x 267, 271 (4th Cir. 2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)) (internal marks omitted). Section 1-212.1 prohibits all licensed practitioners from engaging in conversion therapy without

mention of or regard for their religion. Thus, the statute is, at a minimum, facially neutral. *Id.* at 272 (stating that the policy in question was facially neutral because it "is silent as to religion or religious practice").

As applied, Plaintiff has failed to provide facts indicating that the "object of [§ 1-212.1] was to burden practices because of their religious motivation." *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 561 (4th Cir. 2013). Plaintiff's bare conclusion that § 1-212.1 displays hostility towards his religious convictions is not enough, acting alone, to state a claim that § 1-212.1 violates his free exercise rights. To the extent Plaintiff argues that § 1-212.1 is not generally applicable because it allows non-licensed individuals to provide conversion therapy counseling, his argument is misguided. The statute's allowance for conversion therapy by non-licensed individuals has no bearing on Plaintiff's rights under the Free Exercise clause and is not indicative of Plaintiff's contention that § 1-212.1 implicitly suppresses religious beliefs. Thus, § 1-212.1 is also generally applicable. Because § 1-212.1 is a neutral law of general applicability, it triggers and, based on the intermediate scrutiny already applied above, withstands rational basis review. Accordingly, Plaintiff's claim that § 1-212.1 violates his right to free exercise of religion will be dismissed.

**D. Vagueness**

Defendants next attack Plaintiff's claims that § 1-212.1 is unconstitutionally vague, arguing that the statute is clear because 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." (ECF No. 25, at 21). Defendants add that Plaintiff's purported familiarity with and eagerness to practice conversion therapy also indicates his ability to understand the meaning of § 1-212.1. (*Id.*, at 22).

Plaintiff argues that § 1-212.1, "on its face and as applied, is impermissibly vague [because] it requires licensed professionals . . . and government officials . . . to guess at [its] meaning and differ as to [its] application." (ECF No. 1 ¶ 206). Plaintiff argued at the motions hearing that § 1-212.1 is vague in four specific ways. First, the statute simply bans all conversion therapy without differentiating between different types of therapy such as aversive and non-aversive. Second, the statute fails to differentiate between different therapy change goals such as converting sexual orientation versus converting gender identity. Third, the statute does not recognize the difference between voluntary and coerced conversion therapy. Finally, the statute does not clarify whether conversion therapy, as codified,

encompasses sex orientation change efforts that originate with the client.

Plaintiff's vagueness arguments rely, in part, on his argument that § 1-212.1 regulates speech. "A more stringent vagueness test should apply[]" when a regulation "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). However, "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on a less stringent, as applied, basis. *Johnson v. United States*, 135 S.Ct. 2551, 2580 (2015) (*quoting United States v. Mazurie*, 419 U.S. 544, 550 (1975)); *see also Guardian Plans Inc. v. Teague*, 870 F.2d 123, 125 (4th Cir. 1989) ("[I]n challenges to statutes which do not implicate first amendment rights, 'a party who engages in conduct clearly proscribed by a statute cannot complain of the vagueness of that statute as applied to others.'" (quoting *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989))). In light of the finding that § 1-212.1 regulates conduct, only Plaintiff's as applied void for vagueness challenge will be evaluated here.

Voiding a statute for vagueness is an extraordinary remedy. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A regulation may be deemed impermissibly vague if it "fails to provide people of ordinary intelligence a reasonable opportunity

to understand what conduct it prohibits." *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*, 491 U.S. at 794.

Here, the statutory language does not require Plaintiff to make an "untethered, subjective judgment[]" about the conduct it prohibits. *Humanitarian Law Project*, 561 U.S. at 21. Although, as Plaintiff argues, sexual orientation and gender identity may be fluid labels that can fluctuate for a single client, § 1-212.1 defines the prohibited therapy in a way that regardless permits Plaintiff's compliance with the statute. As for Plaintiff's specific arguments, § 1-212.1's definition of conversion therapy encompasses *any* effort to change an individual's sexual orientation or gender expression. Thus, the statute prohibits both aversive and non-aversive therapy, or any kind of therapy meant to change an individual's sexual orientation or gender expression. Similarly, the statute's definition of conversion therapy indicates that all such therapy is prohibited, regardless of whether the desired change goal originates with the patient or with the therapist. Finally, the definition also indicates an outright ban on conversion therapy regardless of whether the therapy is voluntary. Plaintiff's specific vagueness arguments do not dispute the statute's clarity, but focus instead on the breadth of conversion therapy as defined by the statute. However, as

already recognized, the statute is narrowly tailored and thus Plaintiff's arguments are without consequence.

During the motions hearing, Plaintiff relied on a number of hypothetical scenarios to demonstrate § 1-212.1's purported vagueness. However, because Plaintiff's First Amendment rights are not implicated here, speculative applications of § 1-212.1 cannot form an additional basis for evaluating the purported vagueness of § 1-212.1. *See, e.g., Humanitarian Law Project*, 561 U.S. at 19 (stating that the United States Court of Appeals for the Ninth Circuit wrongfully "considered the statute's application to facts not before it" when considering whether a statute is vague only on an as applied basis).

**E. Maryland Constitutional Claims**

Plaintiff's remaining claims arise under the Maryland Constitution, and there is no independent basis for federal jurisdiction. Under 28 U.S.C. § 1367(c)(3), the court may decline to exercise supplemental jurisdiction over state law claims if the court "has dismissed all claims over which it has original jurisdiction[.]" *Bigg Wolf Disc. Video Movie Sales, Inc. v. Montgomery County*, 256 F.Supp.2d 385, 400-01 (D.Md. 2003). In *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966), the Supreme Court cautioned that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading

of applicable law." Thus, if "federal claims are dismissed before trial . . . state claims should be dismissed as well." *Id.*; *see also Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 617 (4th Cir. 2001) ("[W]e conclude that under the authority of 28 U.S.C. § 1367(c)[] . . . a district court has inherent power to dismiss the case[] . . . provided the conditions set forth in § 1367(c) for declining to exercise supplemental jurisdiction have been met.").

Because Plaintiff's free speech and free exercise claims, over which the court has original jurisdiction, will be dismissed for failure to state a claim, the court declines to exercise supplemental jurisdiction over the remaining state law claims and they will be dismissed without prejudice.

**II. Conclusion**

For the foregoing reasons, Defendant's motion to dismiss will be granted and Plaintiff's motion for preliminary injunction will be denied as moot. A separate order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

| | | |
|---|---|---|
| CHRISTOPHER DOYLE, LPC, LCPC, Individually and on behalf of his clients | : | |
| v. | : | Civil Action No. DKC 19-0190 |
| LAWRENCE JOSEPH HOGAN, JR., et al. | : | |

**ORDER**

For the reasons stated in the foregoing Memorandum Opinion, it is this 20th day of September, 2019, by the United States District Court for the District of Maryland, ORDERED that:

1. The motion for preliminary injunction filed by Plaintiff Christopher Doyle (ECF No. 2) BE, and the same hereby IS, DENIED as moot;

2. The motion to dismiss filed by Defendants Lawrence J. Hogan, Jr. and Brian E. Frosh (ECF No. 26) BE, and the same hereby IS, GRANTED;

3. Plaintiff Christopher Doyle's complaint BE, and the same hereby IS, DISMISSED; and

4. The clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

/s/
DEBORAH K. CHASANOW
United States District Judge

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MARYLAND**

| | | |
|---|---|---|
| CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients, | ) | |
| Plaintiff, | ) | Civil Action No. 1:19-cv-00190-DKC |
| v. | ) | **INJUNCTIVE RELIEF SOUGHT** |
| LAWRENCE J. HOGAN, JR., etc., et al., | ) | |
| Defendants. | ) | |

**NOTICE OF APPEAL**

Notice is hereby given that Plaintiff, CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients, hereby appeals to the United States Court of Appeals for the Fourth Circuit from this Court's Order entered on September 20, 2019 (ECF No. 78), granting Defendants' motion to dismiss (ECF No. 26) and denying as moot Plaintiff's motion for preliminary injunction (ECF No. 2).

Respectfully submitted,

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(signed by Roger K. Gannam
with permission of John R. Garza)
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been filed this September 30, 2019, through the Court's ECF system, which will send a notice of electronic filing to all parties and counsel of record, including the following:

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

**Roger Gannam**

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**U.S. District Court**

**District of Maryland**

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**Case Number:** 1:19-cv-00190-DKC
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**Document Number:** 81

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**1:19-cv-00190-DKC Notice has been electronically mailed to:**

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01717730bb4ab09c71493f69b66775716760febd76a12815a8b070efd4e52]]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

SOUTHERN DIVISION

| | | |
|---|---|---|
| CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients, | ) | CIVIL ACTION NO. DKC-19-190 |
| Plaintiff, | ) | |
| v. | ) | |
| LAWRENCE J. HOGAN, JR., et al., | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DEBORAH K. CHASANOW
UNITED STATES DISTRICT JUDGE
AUGUST 5, 2019; 9:28 A.M.
GREENBELT, MARYLAND

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***COMPUTER-AIDED TRANSCRIPTION OF STENOTYPE NOTES***

APPEARANCES (Continued):

FOR THE DEFENDANTS:

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DEPARTMENT OF HEALTH AND MENTAL HYGIENE
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BY: BRETT E. FELTER, ESQUIRE
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---

THE COURT: Good morning.

(Counsel reply, "Good morning, Your Honor.")

THE COURT: Please be seated.

THE DEPUTY CLERK: The matter now pending before the Court is Civil Case No. DKC-19-190, *Christopher Doyle vs. Lawrence Joseph Hogan, Jr., et al.* The matter now comes before the Court for a preliminary injunction hearing.

THE COURT: No. It's a hearing on the motion to dismiss.

THE DEPUTY CLERK: Counsel, please identify yourselves for the record.

MR. GARZA: Good morning, Your Honor. John Garza, local counsel for the plaintiff.

MR. GANNAM: Good morning, Your Honor. Roger Gannam for the plaintiff.

MR. MIHET: And good morning, Your Honor. Horatio Mihet for the plaintiff.

MS. ELLIS: Good morning, Your Honor. Kathlee Ellis for the defendants.

MR. FELTER: And good morning, Your Honor. Brett Felter also for the defendants.

THE COURT: I believe you have an excerpt from our Local Rule that was waiting for you this morning on counsel table.

As a result of that, I have not looked at anything filed

after 4:00 p.m. last Thursday. If you think any of that is critical to the position you are espousing today, you may refer to it, but I have not looked at it.

Mr. Garza, your role as local counsel, you can explain all of this to Mr. Gannam.

MR. GARZA: I will, Your Honor.

THE COURT: Okay. I know the clerk announced this was a hearing on a motion for preliminary injunction, and, indeed, that's what we scheduled initially. There is a motion to dismiss that's pending. I understand that the burdens are different, the showings are different on the two. Likelihood of success on the merits is different than a motion to dismiss in its entirety, but I think both will focus on the merits of the plaintiff's claim and I think we can discuss them together. So I -- that's why I say it's on the motion to dismiss as well as the preliminary injunction matter.

So, I have read the papers. I am still working with them. I have some thoughts, but I am not ready to share them all with you.

But, Mr. Gannam, are you going to speak?

MR. GANNAM: Yes, Your Honor.

THE COURT: Okay.

MR. GANNAM: Allow me just a moment to connect my computer at the podium.

THE COURT: Everyone will get an opportunity. I know

you would go first on the motion to dismiss. They go first on the other. We will just hear from everybody fully without standing on too much ceremony.

MS. ELLIS: Thank you, Your Honor.

MR. GANNAM: May it please the Court, Roger Gannam for the plaintiff, Chris Doyle.

Your Honor, we are here today, as Your Honor has announced, on the motion for summary judgment -- excuse me, motion for preliminary injunction filed by the plaintiff as well as the motion to dismiss filed by defendants.

As the issues overlap, I plan to address primarily the motion for preliminary injunction matters during my presentation, however, of course, we will answer the Court's questions. I would also ask that, after finishing my time, if I have an opportunity to -- for some rebuttal to whatever arguments the defendants make today?

THE COURT: Yeah. I suggest focusing on likelihood of success on the merits and answering the motion to dismiss is really what we are here for. The other aspects of preliminary injunction, obviously, are important, but only if you can show likelihood of success on the merits. So that's what I really need to hear about today.

MR. GANNAM: Yes, Your Honor. Thank you.

Just to give Your Honor the lay of the land for what we predict will, as far as the time will take, we agreed with

defendants' counsel that there would be no need for live witnesses, so we will be arguing from the written record that has been put on file, understanding the Court's warning, caution that not everything has been reviewed by the Court so far. But to whatever extent possible --

THE COURT: Are you telling me you had agreement between counsel to submit what was submitted Friday and over the weekend?

MR. GANNAM: No, Your Honor. That's not what I am suggesting.

The -- as far as the exhibits that we filed late yesterday and into the early morning today, we had notified defendants' counsel that those would be the exhibits we would be filing, and I will just take responsibility for filing those things late.

The reply that we filed, Your Honor, was -- it was something that wasn't scheduled previously when we had several scheduling conversations with the Court as far as the reply in support of our motion for preliminary injunction. At one time, it was scheduled, but after some scheduling conferences with the Court, that fell off.

We were hoping to have the benefit of whatever the Court's ruling was on the discovery matter that was pending, and so that's the only reason I can offer for waiting so late, Your Honor, but my apologies, and I won't let that happen

again.

We plan to walk the Court through the evidentiary record that we have, and it should take approximately a presentation of about upwards of two hours is what we would expect. We could -- there is a lot to go through even though we don't have witnesses, Your Honor, and that's -- I just wanted to let you know up front that's what we plan to do. Of course, we will take the Court's direction if that needs to be adjusted.

THE COURT: What does the defense intend without yet hearing what they are presenting?

MS. ELLIS: Your Honor, yesterday, trying, going through my presentation, without questions, it took a little less than an hour, so I would expect that it's about an hour depending, of course, on what additional responses there are to Mr. Gannam's presentation.

THE COURT: All right. I have a pretrial conference at 3:30 this afternoon, so I think we are probably okay to proceed as counsel had anticipated.

MR. GANNAM: Thank you, Your Honor.

So, Your Honor, we are here because the State of Maryland, in our view, has invaded the offices of Mr. Doyle as a licensed professional counselor and has banned what he and other counselors like him want to do, and, that is, to have the ability to speak to their clients in the way that they want to regarding the potentially unwanted same-sex attractions or

gender identity conflicts.

But what we are talking about in terms of Mr. Doyle's practice is completely voluntary and client directed, and, yet, the State of Maryland, in its ban through SB 1028, has banned that talk therapy practice by the plain language of the statute.

THE COURT: So are you abandoning your vagueness challenge?

MR. GANNAM: No, Your Honor. The vagueness aspect of the challenge -- the plain language tells us that only -- that any effort to change the -- any effort -- any therapy, the purpose of which or any effort to change same-sex attractions or behaviors or gender expressions or anything along those lines is prohibited. What the statute does not do is identify whose effort is relevant; in other words, does it have to be an effort or a predetermined outcome by the counselor or the client's effort, if it's the client's desire to work on those matters or explore the potential for change, is there a violation if the therapist simply facilitates and goes along with what the client requests?

It's our view that because the statute does not differentiate, it says simply any effort, that -- that counselors, therapists must be -- must understand that to mean that they can't even facilitate the client's desire to -- to seek or to explore the possibility of change or fluidity in any

of those things.

THE COURT: How does that make it vague?

MR. GANNAM: The vagueness, Your Honor, comes in the detail of what is sexual orientation and what is gender identity. And just if I can give an example, if a change of some lessening, for example, of same-sex attraction occurs, has a change in sexual orientation occur or is there some amount of change permissible between two polls of heterosexual, homosexual, or between heterosexual and bisexual, whatever the case may be, but if a client wants to work on some lessening of those attractions, there is no guidance in the statute itself to tell us what amount of change would be considered a -- an attempt to change sexual orientation as opposed to simply trying to help a client achieve some level of change that they are seeking.

We think that that's where the vagueness comes in here, Your Honor, is the therapist, I think, must assume that all of it is off limits and that's because of the way the statute is written. But there is -- the professional counselor, like Mr. Doyle, and I think this shows in the verified complaint, would tell you that there is not a -- it's not just a black and white change from one sexual orientation to another. He wants to help clients achieve some change or explore fluidity within the, you know, within a sexual orientation identity.

So the vagueness comes from not knowing how the State of

Maryland is going to enforce this -- this statute against counselors, again, whether that -- whether they have to -- whether it's only the -- the attempts or the predetermined goals of the therapists that are relevant or if a therapist simply facilitating the client's goals would be considered to have violated the statute.

And then, secondly, within a sexual orientation identity of heterosexual or homosexual or bisexual, if a client asks for help in reducing attractions, is some amount of change that's sought, is it always going to be considered an attempt to change sexual orientation? These things are not identified or defined within the text of SB 1028, and, therefore, we think that's where the vagueness comes in.

What we really want to focus on today, Your Honor, and getting to the -- the likelihood of success on the merit and the main thrust of our claim is that the -- the State of Maryland lacked the constitutionally required compelling interests to -- to enact a statute like this and certainly didn't engage in the constitutionally required narrow tailoring that it must in order for it to be upheld because it is, I think we can show certainly a content-based restriction on speech and not simply a regulation of professional conduct as urged by the defendants.

And so we think that because the defendants cannot meet their burden of proving that SB 1028 can survive strict

scrutiny, we are asking the Court today to enjoin the statute and restore the plaintiff's First Amendment liberties.

So I want to begin with a few clarifications about the various types of SOCE or conversion therapy counseling that are in view.

First of all, we have the ordinance here that bans it all. It says this is conversion therapy and says it's all banned regardless of whether it's voluntary or coercive, and another category would be whether it is aversive or non-aversive.

An aversive therapy, Your Honor, is a therapy that -- it's conduct based and it's based on a stimulus paired with some undesirable behavior in attempts to reduce or eliminate that behavior.

I put up a slide here from the 2009 APA report. This is filed in this case as Plaintiff's Deposition Exhibit 17. It's also been filed elsewhere on the docket, Your Honor, but this specifically comes from 69-17. That would be from within the group of documents that were filed just before the hearing that Your Honor has not reviewed. This 2009 APA report has been discussed by both sides and appears in the record all over the place as well.

MS. ELLIS: Excuse me, Your Honor. Is there a way to --

THE COURT: That one is not on?

MS. ELLIS: No.
THE COURT: Wait a minute.
MR. GANNAM: They are on here.
THE COURT: That one is on. The other counsel table is not. Mine is, and there is one -- we just need to make sure it's turned on.
MS. ELLIS: They are great when they work.
THE COURT: Every other monitor is on. I haven't looked at the jury box ones, but the witness stand is on.
THE DEPUTY CLERK: All of this was just checked last week, too.
MR. GARZA: Your Honor, the jury box is working, too.
THE COURT: Naturally, the one we need is --
MS. ELLIS: I'm happy to go sit in the jury box.
THE COURT: It's not coming on, Ms. Derro?
THE DEPUTY CLERK: No, it's not.
THE COURT: There is also -- the witness stand here also has one that's working, and we will call I.T. and get them down here as soon as possible, but if we can proceed, that's great.
MS. ELLIS: I'm sorry.
THE DEPUTY CLERK: We apologize.
THE COURT: Is the big monitor on over your shoulder?
MR. GANNAM: Yes.
THE COURT: Go ahead, Mr. Gannam.

MR. GANNAM: So, Your Honor, this -- this slide comes from the APA report. The formal name is the American Psychological Association 2009 Task Force Report and Appropriate Therapeutic Responses to Sexual Orientation.

And this is from page 22 where it explains aversion treatments. It reads, "Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis, providing electric shocks, or having the individual snap an elastic band around the wrist when the individual became aroused to same same-sex erotic images or thoughts." This is an example of what we mean by aversive therapies.

On the other hand, Your Honor, we have non-aversive therapy, which is simply talk therapy, therapy carried out entirely and exclusively through speech. The client talks, the doctor listens, or there is a conversation. The doctor may empathize or ask questions or simply talk to the client through the client's goals that the client has set for his or herself.

The evidence in this case is undisputed that all Mr. Doyle does is non-aversive talk therapy. He does not provide aversive therapy. He does not want to provide aversive therapy. And he doesn't know of anyone who provides aversive therapy, let alone in Maryland.

And, candidly, if aversive therapy alone had been banned, we wouldn't be here because Mr. Doyle wouldn't be -- wouldn't have brought this suit or even had standing to bring this suit

because it's not something he does.

Another critical distinction is even though the term as developed, SOCE, or sexual orientation change efforts conversion therapy, there is a critical difference between sexual orientation and gender identity as categories. They are often lumped in together. But it's important, and throughout today, we will point out some differences, particularly in the -- in the research, that there are some fundamental distinctions between what's available and what we know about sexual orientation change and gender identity change.

And then there is a -- another fundamental distinction that we want to point out, and that is voluntary versus forced change efforts. The APA talks about involuntary or coercive treatments which minors are forced to undergo against their will. It contrasts this with voluntary counseling, which a patient seeks and requests and willingly receives, and the APA encourages counselors to respect and observe the autonomy of clients, even minors, to request their own counseling or to direct their own counseling. This would be available at pages 74 through 77 of the APA report.

Once again, in this case, the evidence is undisputed that Mr. Doyle only wants to provide voluntary therapy. He would not want to provide any counseling that is coerced by parents or a guardian or in any way try to provide therapy to a client who does not want to be there. I think he would even say that

that's not even possible.

Again, if the defendants -- if Maryland had only banned coercive or involuntary therapies, we wouldn't be here because Mr. Doyle wouldn't have standing to challenge it.

So now that we have covered kind of what the distinctions are, we want to -- to talk about the speech therapy, the talk therapy that Mr. Doyle does want to engage in, and we believe he is prohibited by SB 1028 from doing it.

First, if we simply look at the verified complaint filed at Document 1, we could summarize paragraphs 104 through 122 to say that Mr. Doyle provides only non-aversive talk therapy exclusively through speech. Mr. Doyle provides only counseling to minor clients who seek, request, and voluntarily assent to talking with Mr. Doyle. Mr. Doyle does not impose his own preconceived goals and desires on any client. Mr. Doyle does not condemn homosexuality or treat it as a disease or something to be cured.

Mr. Doyle simply listens to and supports his clients whose unwanted same-sex attraction or gender conflicts cause them distress. And Mr. Doyle conducts only client-centered, client-directed counseling, and only seeks to assist clients with their own goals and desires.

Now, for some clients, this includes the desire to reduce or eliminate unwanted same-sex attractions or confusion about their gender identity or the desire to conform their behaviors

to their own concept of self and to their religious and moral convictions.

Critically, Mr. Doyle's counseling is not some form of practice or procedure. It's not a -- a mechanical off-the-shelf solution for any particular client. There is no flipping of a switch or operating a device or anything like that. It's simply talking and listening. And it's -- and every interaction is different. So there is no off-the-shelf conversion therapy treatment. There is no out-of-the-box conversion therapy treatment. All of it is -- is client directed and it's individual for each client and it always only consists of speech.

So when the defendants in this case or the Amicus try to argue that Mr. Doyle is not engaged in speech but some form of conduct, there is really no evidence of that whatsoever. His practice consists entirely of speech. And his -- his counseling is not merely incidental to speech, it is speech, and we will see that that's critical in this case.

So now I want to look at the -- the ordinance -- sorry, the statute itself, SB 1028. As already indicated, it doesn't draw any distinction between voluntary, of course, counseling, or between aversive or non-aversive counseling. It simply bans all of it, all sexual orientation or gender identity change counseling.

It also, as I alluded to before, it doesn't differentiate

between whose goal it is to -- to change sexual orientation or gender identity or even the related expressions or behaviors. It simply makes illegal any effort to make changes of behaviors or attractions. And if the intent is on the part of the counselor, it's illegal, and we believe if the intent is on the part of the client, it is also illegal even if the -- the counselor simply is trying to facilitate the client's own goals.

As Your Honor is aware, the discovery -- one of the discovery disputes in this case was the plaintiff's desire to -- to seek an answer from the defendants as to how they would interpret and enforce the statute. And as we pointed out to the Court, those questions were met with an assertion of the legislative privilege, so we don't believe the defendants can offer some interpretation other than what it simply says and that it means any effort is made illegal.

Now, as we proceed, Your Honor, I want to say a few things about the burdens of proof that are in this case. In our briefs, we show that a pair of Supreme Court cases, *Gonzales* and *Ashcroft*, dictate the burdens of proof at the preliminary injunction stage match the burdens at trial. Therefore, just as at trial, once the First Amendment claim is made, the burden shifts to the government, the defendants in this case, of proving their compelling interest and narrow tailoring in order for the statute to be upheld under the

Constitution.

So, therefore, it's not the plaintiff's burden today to demonstrate either the efficacy of SOCE or that SOCE counseling is not harmful. The burden is on the defendants to establish the -- their compelling interest by showing evidence of genuine harm, real evidence, concrete or empirical evidence of genuine harm in order to carry their burden.

In our reply brief -- I'm sorry, in our preliminary injunction brief filed at Document 2, page 25 through 26, we have covered five Supreme Court cases that -- *Janus, Turner Broadcasting, Edenfield, Landmark*, and *Sable Communications,* and one Fourth Circuit case, the *Giovani Carandola* case, that all together establish that the defendants must meet their burden, if they are going to meet it, with concrete evidence or empirical studies that demonstrate that the speech that they want to ban through SB 1028 actually causes the harms that they fear.

They need to establish much more than a simply correlative or hypothetical relationship between the banned speech and the feared harm.

So because this is a First Amendment case and we are dealing with the restrictions on speech, the defendants can't discharge their burden by pleading for legislative deference or merely claiming that SOCE is -- is harmful because someone said so or because some organizations have taken the position that

it's harmful or even -- or even risky. Instead, the defendants have to bring concrete evidence or studies that demonstrate, and in Mr. Doyle's case, that voluntary, non-aversive SOCE counseling, the counseling that they have banned, causes sufficiently serious and unavoidable harms to justify the ban.

So before we -- I show the Court how the defendants have failed to meet this burden, I want to spend a couple of minutes on the defendants' efforts to avoid strict scrutiny in this case, or really any scrutiny with their professional conduct argument.

Now, to dispose of this main argument that was front and center in the defendants' opposition to preliminary injunction, this conduct argument, we only need to show the Court the case out of the Third Circuit, *King v. Governor of New Jersey.* Even though it comes from the Third Circuit, it was the Second Circuit Court of Appeals out of two to consider a ban like this. The first was picked up in California and then *King v. New Jersey* came along.

*King* involved an SOCE ban nearly identical to the one that Maryland enacted in SB 1028. But *King* certainly eviscerated the conduct argument that is asserted here. Here is a quote on the slide from *King* from page 224 of that opinion. It says: The parties agree that modern day SOCE therapy, and that practiced by plaintiffs in this case, is talk therapy that is administered wholly through verbal

communication. Though verbal communication is the quintessential form of speech, as that term is commonly understood, defendants argue that these particular communications are conduct and not speech for purposes of the First Amendment because they are merely the tool employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become conduct when they are used as a vehicle for mental health treatment.

What the *King* Court said is, No, we hold these communications are speech for purposes of the First Amendment. Defendants have not directed us to any authority from the Supreme Court or this Circuit that have characterized verbal or written communications as conduct based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*.

Continuing in the *King* opinion, there is several more places that drive this point home. "Given that the Supreme Court had no difficulty characterizing legal counseling as speech, we see no reason here to reach the counterintuitive conclusion that the verbal communications that occur during SOCE counseling are conduct."

Continuing: As we have explained, the argument that verbal communications become conduct when they are used to deliver professional services was rejected by *Humanitarian Law Project* or *Holder*. Further, the enterprise of labeling certain

verbal or written communications as speech and others conduct is unprincipled and susceptible to manipulation.

And just a few more, "To classify some communications as speech and others as conduct is to engage in nothing more than a labeling game."

"Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment."

"Thus, we conclude that the verbal communications that occur during SOCE counseling are not conduct, but rather speech for purposes of the First Amendment."

So, respectfully, Your Honor, defendants' argument that their nearly identical SOCE ordinance ban is only conduct and not speech simply doesn't have any merit in light of what we see in *King*.

Now, another thing that *King* got right, Your Honor, was that the -- the SOCE ban at issue there, and, therefore, the nearly identical -- nearly identical to SB 1028 here discriminates on the basis of content. Another set of quotes from *King:* We agree with plaintiffs that A3371, that was the New Jersey ban, discriminates on the basis of content.

It then goes on to say: We have little doubt in this conclusion. A3371, on its face, prohibits licensed counselors from speaking words with a particular content, that is, words that seek to change a person's sexual orientation. Thus, as in *Humanitarian Law Project*, plaintiffs want to speak to minor

clients, and whether they may do so under the statute depends on what they say.

So this -- this primary authority, one of the few Circuit Courts of Appeal that have considered an SOCE ban like Maryland, has concluded that the bans are content-based prohibitions on speech. Now, it's true that *King* veered off course, as the Supreme Court would later tell us in the *NIFLA* case, and that's in its next conclusion, that because the speech at issue was that of licensed professionals, the content-based restriction would not survive strict scrutiny because, according to the *King* Court, not all content-based instructions must satisfy strict scrutiny.

But the Supreme Court has since corrected *King's* error twice, first in *Reed*, where the Supreme Court held unequivocally that all content-based restrictions must survive strict scrutiny without exception, and then most recently, at the end of the 2018 term, in *NIFLA*, where the Supreme Court specifically abrogated *King* and the California case *Pickup* by name, and held that there is no such thing as a lesser First Amendment standard applicable to the speech of professionals.

That's where the Court simply says we don't have a professional speech doctrine in this Court.

To look at *NIFLA* specifically, we see this passage from page 2371, Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it

concluded that the notice regulates professional speech. Some courts of appeals have recognized professional speech as a separate category of speech that is subject to different rules. See, for example, *King* and *Pickup*; also *Moore King* out of the State of California -- I'm sorry, the Fourth Circuit.

These Courts define professionals as individuals who provide personalized services to clients and who are subject to a generally applicable licensing and regulatory regime. Professional speech is then defined as any speech by these individuals that is based on their expert knowledge and judgment or that is within the confines of the professional relationship.

So defined, these Courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. But this Court has not recognized professional speech as a separate category of speech. Speech is not unprotected merely because it is uttered by professionals.

So, Your Honor, there is no way to read the Supreme Court's holding in *NIFLA* other than an abrogation of *Pickup* and *King's* holdings and an emphatic rejection of the conduct argument here. The conduct argument that *Pickup* made was first displaced by *King* that says it's not conduct, it's speech, but it's professional speech. And the Supreme Court came along and said, No, that doesn't work either; it's simply speech. So the

conduct argument was sort of done away with two steps ago --

THE COURT: Has anything happened in New Jersey or California since in terms of litigation on the statutes?

MR. GANNAM: Not that we are aware of, Your Honor.

MR. MIHET: Your Honor, let me a make a quick point of correction. The plaintiffs in those cases attempted to revive the mandate that had been issued three or four years prior. The Courts have decided not to re-call the mandate not based on the merits of the *NIFLA* change in the law but based on the passage of time that had past.

THE COURT: So there had been no new challenges in those two states?

MR. GANNAM: Not yet.

THE COURT: Thank you.

MR. GANNAM: Your Honor, next slide, not to put too fine a point on it, but the good folks at Westlaw had recognized, to the extent they are reliable, that here *King v. Governor of New Jersey* is abrogated by *NIFLA*, the little red flag.

THE COURT: But you like parts of it that you say are not abrogated. Obviously, part of it was.

MR. GANNAM: Only the part where professional speech was applied to -- to different rules to -- to a content-based restriction, that's correct, Your Honor.

THE COURT: Understood. Then, of course, we have

*Otto*. Are you going to deal with that?

MR. GANNAM: Absolutely.

THE COURT: Has argument been set yet in the Eleventh Circuit on that?

MR. GANNAM: No, Your Honor. The case is fully briefed, but we have not been given an argument schedule yet.

So there is a part of *NIFLA* that the defendants here rely on, at least part of what I have just put up on the slide. *NIFLA* carved out a couple of -- a couple of areas of speech that are entitled to less protection. What it says is: This Court's precedents do not recognize such a tradition for a category called professional speech. The Court has afforded less protection for professional speech in two circumstances - neither of which turned on the fact that professionals were speaking.

First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, non-controversial information in their commercial speech. Second, and this is what defendants here rely on in their preliminary injunction opposition, Document 25 at page 14, Second, under our precedents, states may regulate professional conduct, even though that conduct incidentally involves speech, and it cites *Planned Parenthood of Southeastern Pennsylvania v. Casey* which was an abortion case that involved a required informed consent form. Clearly, the

procedure being regulated there was an abortion procedure, it wasn't speech, and the Court held that an informed consent requirement that accompanied that procedure was merely incidental speech, incidental to the procedure.

And it's not argued here, I don't think I need to spend too much time on the commercial speech aspect. Essentially, commercial speeches might be the -- the creating of a transaction between a professional and a prospective client may be the engagement agreement or agreeing to the terms or even advertising, something along those lines, but once the professional engages in the profession, whatever advice is being given, that's no longer commercial speech, it's simply speech under the precedents.

So, the -- the exception that the defendants rely on here, the professional conduct exception, is important to point out because defendants do place reliance on it. I am going back to the *NIFLA* passage here.

First, the Supreme Court clearly says that this scenario, like the first, did not turn on the fact that professionals were speaking; instead, it turned on what the professionals were doing. In other words, actual true conduct isn't speech and it could be regulated without strict scrutiny even if that conduct incidentally involved speech. The Court, as I said, gave the example of an abortion procedure regulated in the *Casey* case. But indisputably, abortion was the conduct being

regulated, and the incidental speech was just the informed consent.

So the Supreme Court did not say that defendants could take professional speech and label it as professional conduct to avoid strict scrutiny. It would simply turn *NIFLA* on its head. But that's really what the defendants are seeking to do here. They say that because Mr. Doyle is a professional who's speaking during SOCE counseling, that counseling is conduct. But clearly that analysis and argument turns precisely on the fact that a professional is speaking, which is exactly the opposite of what the Supreme Court is saying in *NIFLA.*

Now, here, as was the case in *King*, the undisputed facts are that plaintiff's voluntary SOCE counseling takes place exclusively through speech and so there is no conduct with incidental effects on speech. There is only speech.

Now, the situation might be different, for example, if Mr. Doyle engaged in aversive therapy, which, as we have seen, does not -- does involve conduct. So if plaintiffs, for example, were employing shock therapy while telling his patients, I am now connecting you to the machine and turning it on, how do you feel?, well, then the defendants could ban the shock therapy as conduct even though there was an incidental speech component to it. But that's certainly not what we have here.

What we have is counseling that takes place exclusively

through speech without any conduct count component, and this is undisputed from the verified complaint.

So trying to label speech-only counseling as conduct, the defendants really fall right into that labeling game that the *King* Court prohibited and derided as unprincipled.

Now, I am going to point out something here, Your Honor, and it's, in fact, Your Honor clearly perceived this in the recent order on the discovery matter and preliminarily on the most to dismiss, and that is the apparent disconnect between what Mr. Doyle calls conversion therapy and SOCE counseling and what the State of Maryland calls those things.

And this is important because, as I think the exhibits that are put forth by the defendants will show, Mr. Doyle used an informed consent form well before Maryland's statute was enacted. And he says quite clearly in that informed consent form, I don't practice conversion therapy; I don't practice SOCE counseling. However, he said that, as he said at his deposition, as he understood those terms.

And so when the State of Maryland defined conversion therapy to include any and all efforts to change behaviors or any and all efforts to change desires or attractions, it went beyond what Mr. Doyle understood those terms to mean, and that's why we have --

THE COURT: Where did he get his definition?

MR. GANNAM: Just from -- he -- he acquired his

definition, or absorbed it, whatever you want to say, just from his -- his years as a practitioner.

THE COURT: What does it mean?

MR. GANNAM: I would have to find the -- in his deposition, but he -- he looks at those things as being conversion therapy or SOCE, essentially, Your Honor, as having a predetermined outcome in mind. In other words, I am a therapist and I hold myself out to change your sexual orientation, or I am a therapist and I hold myself out to change your gender identity and that's what I want you to come see me for. That's not what Mr. Doyle does.

Mr. Doyle calls his practice sexual and gender identity affirming therapy. That's what he calls it. That may not be how other people would define those terms.

I just wanted to point that out because there clearly is some differing use of the terms "conversion therapy." We are focused here today on how the statute defines conversion therapy because that's what we believe is unconstitutional.

Getting back to the defendants' argument on conduct, the defendants certainly rely on the earliest SOCE case from a Circuit Court, and that's the *Pickup* case from California. It's cited prominently in their opposition to preliminary injunction. But the en banc Eleventh Circuit has made it quite clear that it disapproved of *Pickup*'s conclusion that conduct was involved. In the slide, it says, from the *Wollschlaeger*

case, page 1309, There are serious doubts about whether *Pickup* was correctly decided. As noted earlier, characterizing speech as conduct is a dubious constitutional enterprise.

1308: Saying that limitations on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation. Your Honor, that's exactly what we have here, a restriction on speaking that's not incidental to speech. It is speech.

So, at the end of the day, when we combine the clear teachings and import of *NIFLA, Reed, Wollschlaeger*, even *King*, the only conclusion is that Maryland's SB 1028 bans speech and not conduct on the basis of its content, and as a result, it must be subjected to strict scrutiny.

As we will show next, the statute doesn't satisfy strict scrutiny because it discriminates on the basis of viewpoint first, or, alternatively, even if it's not viewpoint discriminatory, it certainly discriminates on the basis of content, and the defendants cannot prove the compelling interest that they would need to ban this kind of speech and SB 1028 even if it could point to a compelling interest justifying it. It's not narrowly tailored to meet any compelling interest.

Now, first, I want to go to the viewpoint discrimination issue. We think that this is obvious from the ordinance, the viewpoint discrimination. On the slide is the first several

subsections from SB 1028. It defines conversion therapy, what it is, and what it includes. And we see here in -- in Roman numeral II that conversion therapy includes any effort to change the behavioral expression of an individual's sexual orientation, change gender expression, or eliminate or reduce the sexual or romantic attractions or feelings towards individuals of the same gender.

It bans the attempts to change or reduce attractions towards someone of the same gender, but it doesn't ban the same regarding feelings or attractions towards individuals of the same gender or sex. And we think an example illustrates the problem. So if we had a 17-year-old girl who was a minor and would be subject to the statute, who has been in a committed, same-sex relationship for a couple of years, comes in for counseling, and says, I am worried that I may not be gay or lesbian anymore, lately, I felt attracted to the opposite sex, to boys, but I have invested a lot of time and effort into a relationship with my girlfriend, we have planned to get married when we turn 18, we want to adopt children, we plan on going to the same college with many of our friends, I really want this relationship to work out, please help me increase my romantic feelings or attractions towards my same-sex partner, we don't see any way that that would be disallowed under SB 1028 by its plain language.

But if that same client tells the counselor that she

wants to -- she wants help to end her same-sex relationship and to decrease her same-sex sexual attractions towards her girlfriend because she wants to -- to date a boy or to achieve motherhood biologically with a husband, that kind of counseling, reducing or eliminating attractions towards the same sex in favor of the opposite sex, that would be disallowed by the plain language here.

So we think that is viewpoint discriminatory. It only allows change in one direction. It disallows it in the other direction.

Now, it also does not ban reducing feelings or attractions towards individuals of the opposite sex. Here is another example. Suppose we have a 17-year-old girl again who is bisexual as her sexual orientation. She comes to a counselor, and says, I want to be able to develop long-term committed relationship with someone and I can't because I am attracted to both sexes, I would like assistance in reducing my attractions to the opposite sex, boys, so that I can develop lifelong relationship with the same-sex or a girl, we think, under the statute, that would be permitted.

But if that same bisexual girl says she wants to -- assistance in developing a lifelong relationship with a boy and to reduce her feelings for girls, that would be banned.

So, again, this seems to be a one-way street, and we think that makes it classic viewpoint discrimination.

If that's the case, there is no second step in the analysis. Viewpoint discrimination is unconstitutional, as we have shown in pages 20 to 22 of our preliminary injunction brief at Docket 2, the ordinance would be per se unconstitutional under the authority *Sorrell*, *Rosenberger*, and *Velazquez*. *Velazquez* was the case of the legal aid firm that was engaged in efforts to not only assist people in navigating welfare laws but wanted to reform or challenge the welfare laws as well, and there was a condition on their ability to participate in a government program that said you can help people navigate the welfare laws, but you can't challenge them, and that was ruled a viewpoint discriminatory requirement and unconstitutional.

So that's where we are, Your Honor, at this point. We think that we could stop with viewpoint discrimination and say it's unconstitutional because there really is not an additional step. However, if the Court finds or holds that it's not viewpoint discriminatory, we think the statute should still be enjoined because it cannot satisfy the narrow tailoring test under strict scrutiny or really any level of scrutiny, but we think strict scrutiny must apply.

First, with the compelling interest that's required, the defendants can't demonstrate a need to ban voluntary, non-aversive SOCE counseling that minors seek, request, and willingly receive.

It's clear in this case that the legislative record contains no evidence of any complaint or harm from SOCE of any kind in the State of Maryland. That's the first test of whether there is a compelling interest: Is there some record of harm occurring from it? The entire public legislative record is on file with the Court, and we submit there is nothing in there that identifies an actual occurrence of a minor being harmed by voluntary, non-aversive SOCE counseling in the State of Maryland. In fact, we think there are only vague references to SOCE counseling or conversion therapy in the legislative record, and not a single one that identifies a time, place, and person, and certainly nothing that identifies an actual therapy session or course of therapy, what was involved, and how did someone perceive it to be harmful?

So we think the first problem for establishing a compelling interest is that there is simply no record of harm to Marylanders, to any minor in the State of Maryland from receiving what's been defined by the statute as conversion therapy or SOCE counseling.

Now, I will commend to the Court a set of documents that come from or are identified by the defendants in their interrogatory answers. This particular slide comes from a document just filed at 69-3. It was Exhibit 3 to plaintiff's deposition of the defendants' 30(b)(6) witness. It's just the Interrogatory Responses No. 1 from the defendants.

The interrogatory asks for each complaint in the legislative record of SB 1028 that a minor was harmed by any SOCE counseling provided within the State of Maryland, identify the person making the complaint, the date of the complaint, the nature of the conduct and harm alleged in the complaint, the person receiving the complaint, the persons allegedly providing the SOCE counseling, the location of the SOCE counseling, the date of the SOCE counseling, the nature of the SOCE counseling, and the person allegedly harmed.

And following some objections, the defendants respond, in the response about halfway down, it says, Without waiving these objections, see, and five documents are identified by their Bates numbers.

Now, these documents have been compiled into one deposition exhibit itself, and it's Exhibit 12, Plaintiff's Exhibit 12 on file now at 69-12, and at the deposition of the defendants' 30(b)(6) witness. These documents -- this exhibit was identified as the five documents that are referenced here. And I will claim to the Court that a review of those documents, that the defendants say these are the ones that show where we received evidence or a complaint of harm from SOCE counseling, and you won't find it in there.

There is simply vague, ambiguous references to SOCE counseling, but nothing specific, certainly nothing that could show that a minor was harmed from voluntary, non-aversive SOCE

counseling but was accomplished through speech.

So, again, the first problem with the compelling interest is there is no harm in the record, no harm can be shown in Maryland from the kind of counseling that Mr. Doyle wants to practice.

MS. ELLIS: Excuse me, Roger. Do you have copies of those exhibits that you filed yesterday?

MR. GANNAM: I do not have hard copies. They are only online.

MS. ELLIS: Thank you.

MR. GANNAM: They were previously filed.

MS. ELLIS: I understand. You are referring to them now and I don't have them because I couldn't print them this morning.

MR. GANNAM: Now, Your Honor, the next problem with the compelling interest prong for the defendants is the -- the supposed research or scientific consensuses, I think they even refer to it, that is, consists of the various position statements and studies that are recited in the recitals of the statute itself.

We have already talked about the -- the APA report. There are several more. But what we think that we have shown in our briefs and will -- we will try to recap today is not a single one of the dozen or so authorities that are cited in SB 1028 itself contain any or refer to any study showing

scientifically or empirically that any kind of SOCE counseling, let alone non-aversive voluntary kind, actually causes harm. In fact, we think the research shows the opposite.

So what we -- what we see instead when we really look at these studies or these position statements is that the claims of harm are inconclusive or they are simply matters of opinion that don't have any backup or citation behind them.

This kind of evidence, anecdotal, conjectural, simply matters of opinion, or -- or statements of position is not enough effort to satisfy the -- the compelling interest burden when there is a content-based restriction on speech involved.

I am going to start this walk through the research with, specifically with gender identity change efforts because these are -- should be looked at separately from sexual orientation change efforts. And that's not my opinion. That's what the APA report itself says. And we think that the research here actually refutes claims of harm for -- based on attempts to -- to change gender identity expressions or behaviors.

But so we are clear, SB 1028 does not differentiate between the two. It bans not only sexual orientation change efforts but also gender identity change efforts. Both are considered in the definition of conversion therapy.

So, thus, the SB 1028 would prohibit a counselor from -- from helping a boy, for example, who shows interest in what some people may consider typical girl activities. A counselor

would not be able to help this boy to be comfortable with his own biological body, simply with being a boy, under the SB 1028 if that involved attempts to change behaviors or if that was interpreted to mean you are attempting to change an identity.

The statute also would prohibit a counselor from assisting an adolescent girl who has taken on or affirmed a male gender identity but wants to change her identity back to being a girl to match her biological body. This would be prohibited by SB 1028, but, as I will show you, the science rejects that kind of prohibition.

So, here we want to show, again, one of the main authorities in SB 1028 is the APA report. Here is the cover of the 2009 APA report. All of the other position papers that are in SB 1028 either cite and rely heavily on the APA report or don't cite anything.

As the title, itself, suggests there, it's appropriate therapeutic responses to sexual orientation.

It specifically and expressly excludes gender identity change efforts. On page 9 of the APA report, it reads, "Due to our charge, we limited our review to sexual orientation and did not address gender identity, because the final report of another task force, the APA task force on gender identity and gender variance, was forthcoming."

So we see here that this APA report, which seems to be the most relied on document in the statute, specifically

excludes gender identity from its view. So this report doesn't say anything about gender identity change efforts, and that means none of the other position statements that rely on this APA report could themselves extrapolate any evidence of harm regarding gender identity.

Now, the APA, in a subsequent publication in 2015, some six years later, did address the subject of gender identity change efforts. This document was filed at 67-1. This document was also cited in our original moving papers for preliminary injunction. This is the "Guidelines for Psychological Practice with Transgender and Gender Nonconforming People." This is an APA publication from 2015. And this is important because six years after the 2009 APA report, we see this. Under "Guideline 2: Psychologists understand that gender identity and sexual orientation are distinct but interrelated constructs."

"Rationale: The constructs of gender identity and sexual orientation are theoretically and clinically distinct, even though professionals and non-professionals frequently conflate them."

Certainly, we could say it's the case here that SB 1028 has done so by calling attempts to change either conversion therapy.

So because of this conflation is why I am taking the time to sort of separate them out and show why the research is

different for each.

In this 2015 APA publication, it -- the APA recognized specifically the absence of research on gender identity change in children, which is quite different from the defendants' claims that there is some kind of consensus or strong research supporting SB 1028.

For example, this next slide comes from page 842 of the APA publication. It says: Due to the evidence that not all children persist in a transgender or gender non-conforming -- that's what "TGNC" stands for -- Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because no approach to working with TGNC children has been adequately, empirically validated, consensus does not exist regarding the best practice with prepubertal children.

There is two important aspects of that statement. First, no approach to working with TGNC children has been adequately empirically validated. If we stop right there, it answers the question about whether SB 1028 has any scientific basis behind banning efforts to change aspects of gender identity.

But then it goes on to say, Consensus does not exist regarding best practice specifically with prepubertal children. This statement is about as strong as it gets that there is no empirical evidence to support a ban like SB 1028.

Getting more specifically, the APA recognized as one of

the distinct approaches to address gender identity concerns in children is an approach where, and we can see in the -- the slide here, children are encouraged to embrace their given bodies and align with their assigned gender roles. And then calling for more research, the APA concludes, at the bottom of the slide, It is hoped that future research will offer improved guidance in this area of practice.

Notwithstanding the APA's hope in 2015 for more research on this because there isn't any, the State of Maryland banned this recognized practice of working with a child to help the child embrace, if it's a boy, his biological identity, or if it's a girl, her biological identity.

Then if we move forward, notwithstanding the -- the APA's call for future research, it carved out something as imperative in terms of allowing a minor freedom and with respect to gender identity. And that is this statement here from the same document at page 843: Emphasizing to parents the importance of allowing their child the freedom to return to a gender identity that aligns with sex assigned at birth or another gender identity at any point cannot be overstated, particularly given the research that suggests that not all young gender non-conforming children will ultimately express a gender identity different from that assigned at birth.

Now, the Court may recall the example I gave earlier where a teenage girl had adopted a male identity for a period

of time, identified as a male, but decided she wanted to return to her -- her biological identity, and sought counseling for that. In that example, SB 1028 says that that's illegal. That would be an attempt, an effort to change gender identity, and, yet, the APA document here says it's imperative that children remain free to change at any time, even if it's means going back to a previous gender identity.

So, Maryland banned something that the APA expressly cautioned must be -- kids must be allowed to continue to do. They must have the freedom to do it.

Other sources cited by the defendants and SB 1028 itself also confirm the lack of empirical research on the outcomes of gender identity change efforts.

For example, the Journal of the American Academy of Child and Adolescent Psychiatry filed by defendants as an exhibit to their opposition to preliminary injunction at 25-14, this, from the American Academy of Child and Adolescent Psychiatry, or AACAP is the acronym, it says that in its -- in this document, that different clinical approaches have been advocated for a child with gender discordance. Proposed goals of treatment include reducing the desire to be the other sex is number one, decreasing social ostracism, and reducing psychiatric comorbidity. There have been no randomized, controlled trials of any treatment.

So, here in a document actually cited by SB 1028, it says

that one approach that it mentions, it doesn't say should be banned or that we disapprove it, it says that one approach is simply trying to reduce the desire to be the other sex. That would match up with SB 1028 as attempts to change gender identity expressions or gender behaviors, and then, of course, it says, There have been no randomized, controlled trials of any treatment. I think that has to be read as there is no empirical evidence as to the efficacy or safety of any treatment in this area.

So because this is cited by the -- the statute itself, I think we have to take it seriously and ask, How can SB 1028 say that this supports the ban of gender identity change efforts?

The next slide from the same document says: Recent treatment strategies based upon uncontrolled case series have been described that focus on parent guidance and peer group interaction. One seeks to hasten desistance of gender discordance in boys through eclectic interventions such as behavioral and milieu techniques, parent guidance, and school consultation aimed at encouraging positive relationships with father and male peers, gender typical skills, and increased maternal support for male role-taking and independence.

Again, we see this given as an example of one approach to working with children who face a gender identity conflict or gender discord is to help them be comfortable with their biological sex, and this uses the term "hasten desistance." As

I said earlier, from the APA document, because we don't know which kids who experience some level of gender discord or gender conflict, we don't know how many of them will persist with that after puberty, it's important here that one approach is to simply encourage them to be satisfied with their biological sex.

One more from the same document: Given the lack of empirical evidence from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood, further research is needed on predictors of persistence and desistance of childhood gender discordance, as well as the long-term risks and benefits of intervention before any treatment to eliminate gender discordance can be endorsed.

I think this is the exact opposite of consensus or a strong support from the -- from the documents cited in SB 1028 for the ban that SB 1028 enacts.

Now, one of the studies cited in the AACAP document at footnote 100 of the document is by a professor of clinical psychiatry at Columbia University by the name of Heino Meyer-Bahlburg. His study, Gender Identity Disorder in Young Boys: A Parent and Peer-Based Treatment Protocol, again, this was cited in the AACAP document that's listed in the recitals

of SB 1028, this is filed at 67-2 a little earlier last week, and in this study, we see that Dr. Meyer-Bahlburg, who, you know, at Columbia University, certainly not an unknown or fringe school, and Professional Bahlburg himself is frequently lauded and awarded recognition from the LGBT organizations for his work in studying transgender issues. It's not an ideologue on the side of any particular group. He describes great success that he's had in helping young boys desist a female gender identity and become comfortable with their biological male bodies by doing the very same thing that defendants have banned here, and that is talk therapy with boys and their parents aimed at increasing male influences and male expressions so that the boys become comfortable with being boys.

The results in Dr. Meyer-Bahlburg's study says, Treatment of the gender identity disorder, GID, was terminated in most cases when the goals were fully reached. Ten of the 11 cases showed such marked improvement; only one did not and was, therefore, judged to be unsuccessful.

Now, candidly, Your Honor, it's a good thing Dr. Meyer-Bahlburg works in New York City and not in Maryland because he would be shut down by the occupational boards here for doing this kind of research that's cited in the very papers that SB 1028 relies on.

So that's gender identity efforts.

Now let's switch to the research, or, we submit, lack of research supporting the ban on sexual orientation change efforts.

Before I leave -- before I leave the gender identity issue, we think the State here has clearly mischaracterized the state of the research in its own supporting documents that are cited in the statute. When the American Psychological Association, or APA, and AACAP conclude that no research existed and called for additional research on various treatment modalities, to conclude that that supports a ban in SB 1028 just simply doesn't make any sense, and it certainly doesn't rise to the level of a compelling interest that's needed to satisfy constitutional scrutiny.

Now, sexual orientation. We don't think the defendants fare any better here. Again, we will come back to the, sort of the magnum opus in the sexual orientation realm, and that's the 2009 APA report. Again, this is the one that the other papers cite to and rely on to the extent that they cite or rely upon anything.

Now, this APA report makes it clear repeatedly that you can't draw any conclusions with respect to claims of harm from any type of SOCE let alone voluntary, non-aversive SOCE counseling.

Page 42 of the report: We conclude that there is a dearth of scientifically sound research on the safety of SOCE.

A dearth of research is the opposite of a strong support or consensus.

Same page: Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so.

Continuing: Thus, we cannot conclude how likely it is that harm will occur from SOCE.

The nature of these studies precludes causal attributions for harm or benefit to SOCE.

Continuing, pages 90 and 91 of the report, "We concluded that research on SOCE (psychotherapy, mutual self-help groups, religious techniques) has not answered basic questions of whether it is safe or effective and for whom. Any future research should conform to best-practice standards for the design of efficacy research. Additionally, research into harm and safety is essential. Certain key issues are worth highlighting. Future research must use methods that are prospective and longitudinal, allow for conclusions about cause and effect to be confidently drawn, and employ sampling methods that allow proper generalization."

So we think the defendants have accused the plaintiff of selectivity in drawing quotes out of the 2009 APA report, but

the truth is it's repeated throughout the APA report disclaimer, or after disclaimer about the quality of the evidence, and, essentially, that there is no empirical evidence, no conclusions can be drawn about harm or efficacy of SOCE, certainly not in any kind of scientific way.

In our -- in our original moving papers, at Docket 2, on page 6 and 7, we put a sampling of all these statements together. I am not going to read them all here, but, you know, they are all there, Your Honor, and it's just over and over and over again. We can't draw any conclusions. We can't make any causal attributions. So we think that by looking to the various kind of anecdotal evidence that may appear within the 2009 APA report, we think it's clearly the defendants who are being selective in trying to avoid the very clear conclusions that the APA report presents.

If, at any point, the defendants even, you know, try to do that today, we simply would ask that the defendants point to some harm that someone reported where -- where the, you know, some causal connection or some study or some evidence that support causation when the APA says that we can't tell and that there is no such causal connections that can be made.

What the APA report concluded, essentially, was that there is no evidence of benefit or harm that can be attributed to SOCE because of the lack of empirical studies, and the APA called for those studies to be conducted, which is the opposite

of banning the therapy that they want to study.

Now, the defendants have simply just accepted the first premise of the APA. They claim that there is no evidence of benefits. But the defendants want to reject the second premise of the APA, which is they are simply -- the defendants are simply willing to accept isolated reports of harm that the APA says cannot be causally attributed to SOCE. So, the defendants can't have it both ways. If the evidence of benefits is not credible, then the evidence of harm can't be credible either.

And, again, as I have already said, instead of heeding the APA's repeated calls for additional research, Maryland has simply banned it, and we don't think that's supportable at all by the APA report.

Now, there is another interesting feature of the APA report, and it notes that isolated reports of SOCE harm about which a causal conclusion cannot be drawn were coming from studies of aversive techniques. So on page 41, we see, in this reports of harm, the "Early Studies" heading here, it says: Early research on efforts to change sexual orientation focused heavily on interventions that include aversion techniques. Many of these studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that harm can occur from aversive efforts to change sexual orientation.

But even with that -- that clarification, the defendants didn't undertake in any sense to just ban aversive therapy.

They banned it all.

And just to, again, not to put too fine a point on it here, with respect to voluntary, non-aversive, speech-only counseling that adolescents seek out and willingly receive, such as what Mr. Doyle wants to provide, the APA simply had this to say: We found no empirical research on adolescents who request SOCE.

Again, Your Honor, this is the opposite of a consensus or strong showing.

Now, in this case, Your Honor, the defendants, in their opposition papers, they cite to another report that was identified in the text of the recitals of SB 1028, and that's the SAMHSA, or the Substance Abuse and Mental Health Services Administration report from October of 2015.

Now, the defendants attempt to use this report to sort of rescue the -- the lack of research that the APA report from 2009 clearly says is -- is the state of the empirical record. But whatever else defendants say about the SAMHSA report, it says, and I don't have the slide, but it says, and I will provide a reference to the Court, There is no conclusion from the 2009 APA report that has changed. There has been nothing, no study that can change any of the conclusions from the 2009 APA report.

So, we have just covered what lack of research the 2009 APA report reveals. This SAMHSA report six years later, just

like the six-year later APA report on transgender persons, it affirms that 2009 APA report and the lack of empirical evidence that that report reveals.

So this SAMHSA report, although the defendants rely heavily on it in opposing preliminary injunction, it simply affirms what the 2009 APA report had already said.

So, all of this, Your Honor, is to show that the -- the compelling interest prong cannot be satisfied. There is no record of evidence in Maryland from SOCE or conversion therapy, and there is certainly no empirical record or concrete evidence of any kind of actual harm that can be shown to be caused by conversion therapy even in the documents cited in the -- in the statute itself.

But forgetting all that for the moment and assuming that some compelling interest could be established, there still is no narrow tailoring here, and the narrow tailoring requires the State to actually consider less restrictive alternatives than the total ban that was enacted. And here, Your Honor, I think we can just say that there is no such narrow tailoring in the record of SB 1028.

The -- the -- to meet the requirement of narrow tailoring, the government has to demonstrate that alternative measures that burden substantially less speech would fail to -- to serve the government's interests, not simply that it's easier just to ban the whole thing. They would have to show

that they actually tried and failed with other less restrictive alternatives or that alternatives were closely examined and ruled out for good reason.

Now, here, Your Honor, we think the defendants have -- have failed utterly as the legislative record includes no evidence whatsoever -- and we discussed this in our reply brief, it's our first brief we filed on this after the benefit of the discovery -- but what is shown from the record is there was no attempt whatsoever to consider something less restrictive. In fact, there were six amendments that were proposed at various times, three in the House of Delegates, three in the Senate, all of which were simply voted down without a debate or discussion whatsoever.

Now, one of them might have given the defendants some narrow tailoring traction because it would have changed the language to ban only abusive or coercive therapies, but it was just voted down with no discussion whatsoever. So there is no record here of the State of Maryland engaging in any critical thought or any discussion of something less restrictive than a total ban that might work.

What's interesting, Your Honor, is, although this didn't happen in connection with SB 1028 that went into effect in 2018, it did happen in 2014. This is Exhibit 15 to the deposition of the 30(b)(6) representative. It was filed at 69-15. This is an article that was revealed from the

legislative record. And what it tells us is that in 2014, a delegate had proposed a conversion therapy bill much like SB 1028, but, at the time and with the -- the blessing of the -- the equality -- or Maryland equality at the time who was the proponent of the bill, they withdrew it. And the reason why they withdrew it is they said the existing regulatory scheme, the existing Occupational or Health Occupation Boards already have a sufficient complaint procedure in place to receive complaints of unethical or improper conduct by a licensed professional.

And then the article reveals, in this joint statement from this delegate and from this organization, that they were going to put their efforts into just letting people know that the complaint process is there and it's all you need if you have a minor who is harmed by a licensed professional.

Now, what the -- the discovery record also shows from the -- the State's designee is that the process in 2014 was no different the day before SB 1028 went into law; in other words, whatever satisfied the -- the proponents of the conversion therapy ban in 2014 was still the case, was still the complaint scheme, and, in fact, nothing has changed since SB 1028 was enacted. The same ability to make a complaint against a licensed professional for unprofessional or unethical or fraudulent conduct, whatever harm someone may feel or perceive from -- from what we would call conversion therapy or SOCE,

they have always been able to make a complaint for that.

And so this, again, shows the -- the failure of narrow tailoring because another way to satisfy narrow tailoring is to show that -- that the -- the State looked at existing laws or existing ways to address whatever harm they want to address and fully utilized it.

Well, there has been, again, no legislative record of a -- of a complaint in that intervening period from 2014 through 2018. There has been no change in the procedure for filing a complaint. There is simply no reason to think that it was necessary in 2018 when there had been no complaints in the public record since 2014.

So I close with this, Your Honor --

THE COURT: Who would file the complaint if the parents wanted the child to receive this kind of therapy?

MR. GANNAM: Who would file the complaint? Well, any member of the public, according to the testimony, could file a complaint. So if someone else found out about it -- but I would say the same thing is the case under SB 1028, who would file the complaint if a professional were to provide --

THE COURT: That's not the question I have asked. I mean, you are saying the absence of complaints shows something between 2014 and the enactment of the statute. You have just argued that that shows something.

MR. GANNAM: Yes, Your Honor.

THE COURT: And I am asking: If it's a parent coercing a child to get SOCE, who would file the complaint?

MR. GANNAM: I think it's a good question and I think it's depends on the individual case. At some point, that child is not going to be a child anymore.

THE COURT: Well, between 2014 and 2018, we only have four years. Yes, that if -- okay. All right.

MR. GANNAM: So, Your Honor, a couple of more thoughts on the state of the -- of the law right now.

The defendants cite to the *Otto* case out of south Florida where Judge Rosenberg decided that the -- the nearly identical conversion therapy ban -- bans in Boca Raton and Palm Beach County, although were arguably content-based restrictions on speech, nevertheless were subject to some lesser scrutiny. And, you know, it's our submission that -- that the *Otto* Court essentially made it up, calling this treatment therapy or treatment speech or trying to regulate this speech or allowing regulation of the speech according to its function.

But the mistake that the *Otto* Court made was citing to the Supreme Court's *O'Brien* case where speech was categorized according to its function because the *Holder v. Humanitarian Law Project* says that that doesn't provide the rule on a content-based restriction on speech. So the *Holder* Court specifically rejected the very rationale that the *Otto* Court -- that the *Otto* Court applied, and, therefore, we don't think

that that *Otto* decision can be relied on.

We think the *Otto* Court did exactly what *NIFLA* said you can't do, which is simply label something as speech, professional speech or something, other kind of speech, and then apply different rules. That's why *NIFLA* abrogated *Pickup* and *King* because they tried to apply different rules to speech based on who was saying it.

So, what the *Otto* Court did, we don't think that is reasonable.

Now, since *NIFLA,* there have actually been two Courts that have considered a conversion therapy ban like the one in Maryland. The first one was actually in the Tampa case of *Vazzo v. City of Tampa*. We attached this magistrate's report and recommendation to our reply that we just filed, Your Honor. This was actually the first decision to come out. It came out before *Otto*. And in this case, the magistrate judge, Judge Sansone, concluded that in light of *NIFLA,* there is no question that this was a content-based restriction on speech and that strict scrutiny must apply. And in the report and recommendation, Judge Sansone concluded that the -- the conversion therapy ordinance, Tampa's ordinance should be enjoined to the extent it prohibits voluntary, non-aversive talk therapy.

And so Judge Sansone saw that that distinction was important, that if there is some potential harm or perhaps

greater correlation of harm from aversive or coercive techniques, then that doesn't mean that you can just ban it all and so that it should be enjoined to the extent it applied to non-aversive and voluntary techniques.

We think the *Vazzo* case --

THE COURT: Where is that now? Has the district judge adopted that? I am assuming exceptions were taken?

MR. GANNAM: Objections were filed. A district judge has yet to address them. So the magistrate's report and recommendation is still subject to the district judge's review, absolutely. But I think it's important to point out two Courts have decided, and we have sort of a split decision here, we think that the better reasoned case is the *Vazzo* report and recommendation and not the *Otto* decision for the reasons that I have explained.

So, at this point, Your Honor, I think that concludes --

THE COURT: Did you say there were two decisions since *NIFLA*? Or you mean *Otto* and this one?

MR. GANNAM: *Otto* and *Vazzo*, yes, Your Honor.

That is the -- that is the basis for our likelihood of success on the -- the content-based restriction on speech or viewpoint-based restriction on speech. We think that the State cannot carry its constitutional burden for SB 1028 to be upheld.

We discussed vagueness briefly, Your Honor. That is also

one of our claims, that it is unconstitutionally vague because of the position that you will put professionals in and the enforcement authorities in as to deciding whether --

THE COURT: With a facial challenge, doesn't the Court have to find that it would be improper in all of its applications, and haven't you said, if it applies only to aversive therapy, that it would be arguably constitutional?

MR. GANNAM: Well, I think that's a -- a prior restraint concept, that -- that we have to show that it's unconstitutional in all cases.

THE COURT: I mean, is there -- you have pled both on its face and as applied.

MR. GANNAM: That's correct, Your Honor.

THE COURT: And, of course, I look first at applied because if it -- if you get the injunction against that, that's where I stop, right, but I guess what I am asking: Didn't you start this whole argument by saying that if it were aversion therapy, you wouldn't -- if it were limited to aversion therapy, you wouldn't be here?

MR. GANNAM: That's a standing issue because our client doesn't practice aversive therapy.

THE COURT: I understand that. But doesn't that also apply, to some extent, in the facial challenge area?

MR. GANNAM: I am just reminded by my co-counsel that in our brief, we did cite the cases in the -- where the Supreme

Court has said that in the case of prior restraint, which we have argued that SB 1028 is as well, we don't have to show that it's unconstitutional in all applications in order to make a facial challenge.

So that's a -- that's a little different from the challenge based on the -- the First Amendment infringement for being a content-based restriction on speech.

So, in that respect, for the prior restraint challenge, it isn't necessary to be unconstitutional in all applications. For the Court's question, I think, as to our, sort of our primary First Amendment challenge, I think that, as we are here today arguing against the application of Mr. Doyle, it is more in the as applied realm than facial challenge.

THE COURT: Okay.

MR. GANNAM: With that, Your Honor, I would like to just reserve some time for rebuttal if possible, and I will give up the podium to the defense.

THE COURT: Why don't we take a stretch break and try to keep it to ten minutes.

(Recess taken from 10:55 a.m. 11:12 a.m.)

THE COURT: Please be seated.

MS. ELLIS: May it please the Court. Before I start my presentation, Your Honor, I have given you a binder with, at the risk of overwhelming the Court, but it is the documents that I will be referring to today so they are in one place, and

I would also like to offer an exhibit which has been provided to my opposing counsel. It's -- it has quotes from many of those documents and tells the Court where they come from, and I thought that might be helpful.

Your Honor, children are vulnerable cohorts uniquely susceptible to various forms of mistreatment. The protection is of the upmost importance to all involved in governance and the administration of justice. Consequently, numerous policies at both the federal and state level have been implemented to protect the safety and well-being of children.

That's the opening paragraph, Your Honor, of a recent Maryland Court of Appeals opinion, *Romero v. Perez*, 208 A.3d 903. Coincidently, it was issued a few days before this hearing was originally scheduled, and it echos similar sentiments that are -- have been in the Supreme Court cases going back at least 75 years to *Prince v. Massachusetts*, in *FCC vs. Pacifica Foundation*, *New York v. Ferber*, *Sable Communications vs. FCC*, all of which recognize the importance and the government's compelling interest in protecting physical and psychological well-being of minors even when constitutional rights like free speech, or, as in the case of *Prince*, free exercise of religion are at issue.

And I would submit that these -- these words certainly apply here. The Maryland General Assembly, as you can see from the -- I think it's attachment one to the -- the plaintiff's

complaint, Document 1-1, in the preamble, it expresses its concern for the well-being of Maryland children and prohibits a particular kind of treatment, conversion therapy, when practiced on those children.

And in the defendants' view, that, contrary to Mr. Gannam's view that he spent much time talking about today, that doesn't violate the First Amendment to the Constitution, and Mr. Doyle is not entitled to a preliminary injunction.

I'd first like to talk a little bit about the interpretation of the statute that Mr. Gannam has advocated.

The statute, I would submit, clearly only regulates the behavior of the therapist. It is in the Health Occupations article, an article of the Maryland Code that regulates the numerous professions, I think there is 20 of them now, or 21 that it regulates in specific articles. It defines a violation of the statute as unprofessional conduct that subjects a licensed healthcare practitioner to discipline by the board that licenses it. Nothing in the statute that I can see would suggest that it would apply -- that it would make it illegal for a client to ask for help.

And I would submit that the way that the statute reads in connection with the, all of the sources that are cited in the preamble, that it prohibits licensed mental health practitioners from engaging in therapy with a client with the therapist's goal of changing that client's sexual orientation

or gender identity.

Many of the examples in the -- that Mr. Gannam raised and his quibbles with the statute focused on A1 -- I'm sorry, (a)(2) little double "I" where it says conversion therapy includes certain things. Well, includes is a word that the General Assembly uses by way of illustration, not by way of limitation. So it certainly does not exclude some of the examples that -- that Mr. Gannam raised.

But, more importantly, we have to start first with (a)(2) little "I" (1) means -- conversion therapy means a practice or treatment by a mental health or childcare practitioner that seeks to change an individual's sexual orientation or gender identity.

Now, Mr. Gannam spent a lot of time contending that the -- the State cannot show a compelling interest and that there is no evidence of harm, but it would be helpful to start with the case law about evidence and harm.

So the cases say, over and over, that we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales all together, or even in a case applying strict scrutiny to justify restrictions based solely on history, consensus, and simple common sense, although many folks say there is nothing simple about common sense. But that, for example, Your Honor, is from *Lorillard Tobacco Company vs. Reilly*, 533 U.S. 525 at -- I am

not seeing the page immediately.

But it is also the same, similar sentiment statements in *Florida Bar v. Went For It*, 515 U.S. 618, *Burson v. Freeman*, 504 U.S. 191, and perhaps most importantly in *FCC vs. Fox Television Stations*, there are some propositions for which scant empirical evidence can be marshalled, and the harmful effect of broadcast profanity on children is one of them. One cannot the demand a multi-year controlled study in which some children are intentionally exposed to indecent broadcasts and insulated from all other indecency and others are shielded from indecency. And I would submit that that is at 556 U.S. 502 at 519.

I would suggest, Your Honor, you submit -- you substitute conversion therapy for broadcast indecency, and this -- that quote applies perfectly to this case.

So what kinds of harm are there in the record? Well, before I -- before I get to -- Mr. Gannam repeatedly talked about no empirical evidence of harm. As the *FCC vs. Fox Television* quote: Evidence is we don't have to have a multi-year study showing harm to conclude that there might be a reason to prohibit this type of therapy for children.

There is evidence in all of the reports cited that harm has been reported by recipients of such services, and because of that, there are concerns about continuing to provide conversion therapy. And, again, conversion therapy, a -- the

beginning of therapy with a preconceived notion of what the outcome is. We want to change somebody's sexual orientation or gender identity without regard to anything else, whether it's effective or safe.

So if you -- the -- some of the quotes are listed on the exhibit that I gave you beginning with the APA task force, A systematic review of the peer-reviewed literature on sexual orientation change efforts concluded that efforts to change sexual orientation are unlikely to be successful and -- and this is the crucial part, involve some risk of harm.

At page 4, There is currently no evidence that teaching or reinforcing stereotyped gender normative behavior in childhood or adolescence can alter sexual orientation. We have concerns that such interventions may increase self-stigma and minority stress and ultimately increase the distress of children in adolescence.

Studies indicate that experience of self-stigma, such as self-stigma, shame, isolation and rejection, lack of emotional support, and some other things played a role in creating distress in individuals.

On page 642 of the APA report, a page that Mr. Gannam was reading from, it also says, in addition to his citations to it, Some recent studies document that there are people who perceive that they have been harmed through SOCE. Among those studies reporting on the perceptions of harm, the reported negative

social and emotional consequences include self reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self image, social isolation, intimacy difficulties, intrusive imagery, and suicidal ideation, self hatred, and sexual dysfunction.

So there is perceptions of people who have gone through, have been subjected to conversion therapy that they have been harmed by that. The APA documents it throughout the -- throughout its report.

The SAMHSA report also talks about the damage from conversion therapy. The SAMHSA report is a 25 -- Document 25-2, and on the -- the -- I think it's the third page of the exhibit that I handed to the Court are various -- some of the quotes from that report. Interventions aimed at a fixed outcome, 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 treatment. Lesbian, gay, and bisexual orientations are normal variations of human sexuality and are not mental disorders. Treatment seeking to change an individual's sexual orientation is not indicated.

In addition, and then on page 26, In addition to a lack of evidence for the efficacy of conversion therapy with gender minority youth, there are concerns about the ethics of this

practice as well as the practice's potential for harm. The potential harms are suggested by clinicians' observations that the behavioral issues and psychological distress of many children in adolescence with gender dysphoria improves markedly when their gender identities are affirmed through social and/or medical transition.

Again, more evidence of harm, and that was -- the SAMHSA report was mentioned by several -- several of the individuals and organizations that submitted written and oral testimony before -- before the legislature.

There are also exhibits, and these are either in 25-5, which is the House Bill file, or 25-7, which is the Senate Bill file, some of them are in both. The Maryland Nurse's Association statement, Exhibit 5, says, In opposition. It should say, In support of HB902, youth who are subject to conversion therapy show higher rates of depression, suicide, substance abuse, and higher rates of HIV and STIS transmission, and cites a policy physician paper from the American College of Physicians.

There are documents from two practitioners in Maryland, a therapist who says, I have personally treated people who identify as survivors of conversion therapy and I can attest that it can take years to overcome the traumatic violation of trust that this type of therapy represents. That's Document -- ECF Document 25-7 at 56, a statement from Kate MacShane who is

a licensed clinical social worker.

THE COURT: Just for clarification, would any of this -- well, did she limit it to the aversive therapy as opposed to the talk?

MS. ELLIS: No.

THE COURT: So you don't know?

MS. ELLIS: No. Her testimony does not indicate any -- any such limitation.

And -- and I don't -- the SAMHSA report and the APA report don't limit it to aversive therapy. They -- the conversion therapy, efforts to change sexual orientation or gender identity in the SAMHSA report says they are all coercive and they may be harmful.

The other practitioner is a pediatrician who says that she has -- has had patients with gender identity issues and who -- patients whose parents have wanted them to change their sexual orientation. And she talks about -- in her letter, she talks about one of her patients was a young man sent to summer camp for conversion therapy only to leave camp with his self esteem damaged immensely and other patients who have committed suicide because they didn't receive the positive support they needed.

There is other documents in the record showing evidence of harm. A statement from The Trevor Project, Document 25-5 at page 63, and that was also -- that was submitted in, both in

support of the House and Senate Bills, I am a survivor of the dangerous and discredited idea that a therapist could change my sexual orientation or gender identity. Although some may say that conversion therapy should be allowed as a choice, I simply reply that I never chose the therapy my family subjected me to during my formative years as a child.

The writer of that letter also goes on to explain that The Trevor Project -- one of the things that The Trevor Project does is operate a hotline, and in the year prior to his submitting that letter, The Trevor Project had been contacted by over 1200 Maryland youth considering suicide and needing someone to speak to when they feel alone and scared.

So I submit that certainly there was evidence in the record similar to what the Supreme Court has said is sufficient evidence to support efforts to protect children.

I would also point out that the guidelines from which Mr. Gannam spoke, read, and also had a slide conveniently, his presentation, he conveniently omitted the middle part of the -- the paragraph, which is found at 67-1 at page 11, Consensus does not exist regarding whether this approach encouraging children to embrace their given bodies and align with their assigned gender roles, consensus does not exist whether this approach may provide benefit or may cause harm or lead to psychosocial adversities.

When addressing psychological interventions for children

and adolescents, the World Professional Association for Transgender Health Standards of Care identify interventions aimed at trying to change gender identity and expression to become more congruent with sex assigned at birth as unethical.

And, finally, a study that FreeState Justice attached to its amicus brief, it's a document at 28-2, an article about -- or a report of a study of the effects of patient-initiated sexual orientation change efforts with LGBT adolescents. And what the study found was that adolescents who have been the subject of efforts to change their sexual orientation during adolescence, whether they were initiated -- only the patient -- parent-initiated efforts or whether that was -- also included efforts either from a therapist or a religious leader, any of those efforts were associated with more negative mental health problems for young adults. They were more likely to have suicidal thoughts and to report suicidal attempts and higher levels of depression.

Trend analyses confirmed that parental attempts to change adolescents' sexual orientation are significantly associated with negative health outcomes in young adulthood and that those problems are worse for young adults who experienced SOCE that included external conversion efforts during adolescence, external conversion efforts being those from therapists or a religious leader.

I would submit, Your Honor, that that -- all of this that

I have just gone through demonstrates the reason that the legislature felt compelled to act and certainly demonstrate harm, that it is appropriate for the legislature to have acted on in order to protect youth in Maryland. And I think it's important to recognize that the statute really limits only one particular kind or the -- the statute is a limited restriction. It does not say to anybody who believes that conversion therapy is a good thing, it doesn't say you can't talk about it. It doesn't say you can't take public positions. It doesn't apply to adults. It applies to children, people under the age of 18, and the treatment that is provided by some mental health care practitioners.

Mr. Gannam also objects to the State's argument that this is conduct. It's treatment. I mean, it happens to be treatment that is provided through speech, both the client and the therapist. But it is treatment. If the State -- well, *NIFLA* says that the State may regulate treatment, may regulate healthcare professionals, and this is yet one more regulation of a fairly extensively regulated area of occupations. And if we can't -- if the State cannot say you cannot do a treatment, a type of mental health treatment that is harmful because it's speech, that's, you know, pretty much going to eliminate the ability of the State to regulate mental healthcare practitioners. And I think the -- the FreeState Justice brief goes through all of the types of regulations that that would

implicate if, in fact, that were the -- determined to be the law. I believe that's Document, yes, it's 28-1. And if you look at page 10, it lists the numerous kinds of regulations that might be of -- of -- just of professional counselors, that's what Mr. Doyle is, that might be at risk if one could not regulate the speech of mental health practitioners as the Court is -- or as the legislature has sought to do in this case.

So, I would submit that all of this, the evidence of harm that -- reports of harm that I have just reviewed with the Court are exactly the kinds of evidence of harm that the Court was looking for and accepting in the cases that I cited to you, it comes from a wide variety of organizations, some recipients of conversion therapy.

I'm sorry. One I forgot to mention, the -- there is a four- or five-page letter from Matthew Shurka that details, it's 25-5 at, I believe it's 90 through 94, that details his experience with conversion therapy and the, I think it's fair to say the miseries that he perceives it to have caused him. He submitted written testimony, but he also testified in person before the legislature.

There is also reports from some practitioners in Maryland about the harmful nature of it. And all of these, there is studies, there is reports from practitioners and from recipients of service and various position statements from a

wide variety of professional organizations are just the kind of evidence that the Court has accepted in other cases that justify restrictions on speech or restrictions on conduct, whichever the Court decides to view it as. They certainly all support the notion that conversion therapy may be harmful to minors, and, thus, is a legitimate source of regulation by the legislature.

In addition to what I have just talked about, there is a -- a publication that's -- a joint publication by the Human Rights Campaign and the American Academy of Pediatrics and the American Academy of Osteopathic Pediatricians, I believe, which also -- it was -- it was one of those late filings. It's certainly a -- a paper that would be -- that is easily discovered on Google. It's available online through the Human Rights Campaign.

At page 12 of that article, Discouraging or shaming a child's gender identity or expression harms the child's social emotional health well-being and may have lifelong consequences. This is -- it's a paper, I'm sorry I didn't give you the title, Supporting and Caring for Transgender Children. The paper acknowledges that there is a lot to learn in this area, but says, There is evidence that both reparative therapy and delaying of transition, even a social transition, can have serious negative consequences for children.

And in discussing on the next page, 13, in discussing

conversion therapy, There is no scientific evidence that reparative therapy, which is another word for -- term for conversion therapy, helps with gender dysphoria or prevents children from becoming transgender adults; instead, experts and professional organizations believe that it inflicts lasting damage on children.

So, as I said, put all together, I think that fairly it is -- not fairly, it is overwhelming, there is an awful lot of evidence out there that, at the very least, it may cause, but it -- people perceive that they have been harmed by this type of therapy, and the legislature acted on both the perceptions by the individuals and the statements and the review of literature from respected organizations that there was no evidence of efficacy, and there was -- there were many, many reports of harm justifying its ban in Section 1-212.1 of the Health Occupations article.

I would submit, Your Honor, that this is clearly conduct. It's treatment. I think that we have covered that in our papers. The Ninth Circuit in *Pickup* certainly considered it to be conduct. And that case, the Supreme Court didn't see fit to review that case either the first time or after *NIFLA* criticized its use, the Ninth Circuit's use of professional conduct.

I would suggest that the alleged abrogation of *Pickup* and *King* is overstated. Certainly, the Court in *NIFLA* said, We

don't like the label "professional speech" and called out those cases, but, as Mr. Mihet acknowledged, neither *Pickup* nor *King*, despite efforts to get the -- the mandate recalled, neither mandate was recalled by the Ninth or the Third Circuit, and the Supreme Court again denied review of those cases.

But, you know, the Court, even if it is speech -- even if Mr. Gannam is correct, it is speech and it has to meet strict scrutiny, it survives that scrutiny. There is a compelling interest. I have given you all of the -- the -- the -- the cases that support that in the interests of protecting children. There is harm caused by this practice that the legislature has banned. We have just gone through all of that.

And as for narrow tailoring, if you decide that a treatment is harmful, what other alternative is there but to prohibit that treatment?

The -- the plaintiff suggests that while you should distinguish between aversive and non-aversive, but SAMHSA says it's all coercive, it's all harmful. The APA says, Go into therapy with a predetermined outcome, it's bad, it's harmful. So that's not really a distinction that works. They say, Well, only prohibit involuntary treatment, but under Maryland law, children under 16 cannot consent to mental health treatment, and even though children or youth, adolescents, 16 and 17 are allowed to consent to their own mental health treatment, they can't object if the parent consents for them. So there is

really no voluntary treatment. There is no way to determine whether treatment is voluntary.

And I think we also all know that, however reluctantly, teenagers frequently do what their parents tell them to do. They go to get treatment because they are dependent on their parents in many ways, and that's what I am sure we all did as we were growing up. Our parents may disagree, but...

I think that is -- that's the nature of parent/child relationship especially when you are teenagers.

I applaud Mr. Doyle, assuming that he is telling us accurately that he doesn't do therapy with children who object to being there, that's good. I am glad. But it is -- it's still the case that the children don't really have the -- the ability to object and not participate in therapy if their parents want them to.

Informed consent has, which is one of the other supposed more narrowed -- ways to narrowly tailor the statute like this, informed consent has the same deficits as saying only involuntary counseling. I mean, first of all, you have to have informed consent to treat anybody unless it's an emergency, but for the same reasons that I have just gone through about voluntary and involuntary, a child under 16 can't sign the consent and can't object if the parent signs the informed consent.

Mr. Gannam also pointed to the 2014 legislative effort

that the newspaper article that he showed you said was withdrawn because the regulatory process could take care of it. Well, according to the Mental Health Association of Maryland who submitted this testimony, and it's Document 25-5 at page 42, a similar bill was introduced during the 2014 legislative session with the belief that this issue could be resolved through regulatory actions; however, the practice persists and it is harming Maryland's youth. The current process allows minors or their advocates to file a complaint with the State's Health Occupation Board, but this remedy is insufficient to protect youth from treatment that discourages them from feeling comfortable about their sexual orientation.

And I would say there are no published orders from any of the Health Occupations Boards that regulate various kinds of counselors dealing with conversion therapy, that -- and the only part of -- the only part of the process that's public is the -- is the final order from the complaint.

So we don't have any assurance that that -- we have -- we have testimony before the legislature that the -- that the deference to the regulatory process wasn't sufficient, wasn't working, and we don't -- we don't have any published orders, so there has been nobody disciplined, as far as we know, for that -- for that.

So whatever standard of review the Court decides to employ, I think the statute survives.

I believe that it -- it's, for all the reasons in our papers and in the FreeState Justice's brief, it's a legitimate argument that this is conduct, but I found the *Otto* decision particularly thoughtful. I think the -- the judge really struggled to find the correct, in her view, path forward in this difficult area, and that the intermediate scrutiny perhaps is the best -- is the best alternative. It balances speech issues, speech -- recognition that there is a speech element to this with the recognition that the State can regulate practitioners, and that includes practitioners of talk therapy.

The *Vazzo* magistrate's report I thought was particularly unhelpful. And I understand why the plaintiffs like it because it came to the result they want, but I did not think that there was a particularly reasoned analysis of all of the issues, while I was very struck and impressed by the judge in *Otto*, and not simply because I liked the conclusion. I thought that she did a -- a very good job of looking at all of the issues and trying to figure out the -- the way forward.

In addition to deciding or to demonstrating a likelihood of success on the merits, as you know, the plaintiffs also have to show a likelihood of irreparable harm and the balance of the equities in their favor, in his favor, and that the public interest serves -- an injunction is in the public interest. I think I would suggest, Your Honor, that irreparable harm, a showing on irreparable harm is especially problematic for

Mr. Doyle. The delay in filing suit, nine months -- more than nine months after the statute was past, three-and-a-half months after the law went into effect, and then the further four-month delay of not going forward with the originally scheduled -- originally scheduled preliminary injunction hearing I think also contributes to showing that there was -- there is delay in pursuing rights, and that that delay, in and of itself, I would suggest is enough to deny the preliminary injunction.

The issue of vagueness and I think the standard for whether something is vague is whether a reasonable person subject to the statute would understand it. I would suggest that -- that it's hard for a therapist who has clients sign informed consents and has had for several years and testifies that he doesn't perform conversion therapy, he doesn't go into -- into a therapy session with a preconceived notion of what he wants to get out of it, he -- he practices client-centered therapy, I think it's a little incredible that he would claim that he doesn't understand what the statute prohibits, and I would suggest that the -- the prior restraint claim is equally meritless. The prior restraint doctrine prohibits an order preventing speech in the -- in the future. Speech hasn't -- the communication hasn't occurred.

In this case, if the communication may occur, somebody complains to the, in Mr. Doyle's case, the Board of Professional Counselors and Therapists in Maryland, and the

board investigates and makes a decision about charges, there is a hearing, and then there is a final board order, that's certainly not prior restraint. That's only taking action after a complaint, an investigation, and a hearing with all of the due process rights attendant to those hearings.

With respect to the motion to dismiss, unless -- with respect to particular issues, unless the Court has questions with respect to particular issues, I'd rest on the papers.

I would urge the Court to reconsider its conclusions about the Eleventh Amendment. I think the *Gilmore* case from the Fourth Circuit, *Waste Management Holdings v. Gilmore*, 252 F.3d 316, and the *Weigel vs. Maryland* case from this Court, 950 F.Supp.2d 811, both make clear that there has to be a special duty to enforce the statute at issue.

The Attorney General has nothing to do with enforcing this particular statute, or, indeed, most statutes. He represents the agencies in connection with enforcement of statutes. He is charged with defending statutes, which obviously is why I am here today, but he doesn't enforce particular statutes. He doesn't have the statutory authority to do that.

And with respect to the governor, yes, there is a general obligation in the Executive Branch for the top executive to see that the laws are enforced, but the statute in this case specifically gives the authority to enforce the statute to the

various boards that license and therefore discipline the various healthcare professionals.

Another provision of Title I of the Health Occupations Article, 1-203(a) I believe, prohibits the Secretary of Health -- as you may know, the boards are independent boards placed in the -- in the Department of Health and there is frequently a somewhat fraught relationship between the department and the secretary, but 1-203(a) specifically provides that the secretary does not have the authority to make decisions for the boards in areas especially committed to them by law.

So the statute here says, Board, you can discipline a mental health practitioner for violating this Statute 1-212.1, so that's committed to the boards by law. The secretary cannot approve, disapprove, modify a decision that the -- that the board makes, and so I would say that the governor can't either because the governor would act through the secretary. The secretary can't change the -- and that is certainly the current practice and the understanding of the way in which the board's disciplinary decisions are made and who has the authority to -- to question them, and it's -- the board makes them, they are subject to judicial review, and it's under the Administrative Procedures Act, so I would ask you to reconsider your conclusion that that -- that the --

THE COURT: Who should be the defendant? Just the

State?

MS. ELLIS: No. I would think, Your Honor, for Mr. Doyle, it would be the Board of Professional -- of Professional Counselors and Therapists.

THE COURT: They are not the ones who enacted this? Do they have to justify it?

MS. ELLIS: But they are the ones who are charged with enforcing it.

THE COURT: Okay.

MS. ELLIS: For licensed professional counselors and therapists.

I would -- I would also submit, for all of the reasons in our reply memo, that Mr. Doyle doesn't have standing. He does not, according to him, do conversion therapy. And, I mean, I understand he claims not to understand the -- the statute, but I think a very easy reading of the statute is the only thing it precludes is the kind of conversion therapy that is referenced in all of the documents listed in the preamble that we have been talking about here today, therapy that starts out with the preconceived notion that it is for the purpose of changing somebody's sexual orientation or gender identity.

So unless you have further questions, I would urge you to grant the motion to dismiss and deny Mr. Doyle's request for preliminary injunction.

Thank you.

THE COURT: Mr. Gannam.

MR. GANNAM: Thank you, Your Honor. I will attempt to be succinct. I will begin sort of at the end. We would, likewise, regarding the motion to dismiss, rely on our papers that we filed, other than to make one point, and, that is, that under the Eleventh Amendment immunity issue, we think that it would be simply a matter of unnecessary delay to dismiss the current defendants only to have Mr. Doyle sue other Executive Branch personnel. We think that we have demonstrated that the Attorney General and governor have a sufficient connection to the enforcement of this -- this ban, that they are proper defendants here, and that requiring a licensed professional like Mr. Doyle to sue every member, for example, of the Professional Licensing Board would seem to be forcing the issue too far.

Also, moving a little bit backwards, the irreparable harm issue, it's *Elrod v. Burns* is the Supreme Court case that says, when you have violations of First Amendment rights, the irreparable harm prong is presumed, and none of the cases cited by the defendants overcome that presumption, certainly not the two cited in their opposition to our motion for preliminary injunction. Incidentally, that precise issue is covered in Document 71, our reply that we have just recently filed.

The U.S. Supreme Court case cited for the idea that we don't have to subject kids to bad things before regulating

them, you know, that was a case involving what the Supreme Court called excretory speech which is at the fringe of the First Amendment. We certainly aren't dealing with that here, but the issue about children being uniquely vulnerable, no one doubts that, but that's why the children need the freedom, the -- the very ethic of self-determination is throughout the APA, 2009 APA report, and just like the passage we read from the APA Transgender Guidelines, children, adolescents must be given the freedom to explore or even return to a former gender identity. They call that imperative. We can not overemphasize that.

So, it's true, children might be uniquely vulnerable, but the Constitution does trust parents and does trust the First Amendment to help us resolve issues like this. For example, the issue of the compelling interest of the State of Maryland to protect children, well, no one would -- would dispute that there is a very -- a very compelling interest to protect children, but in the 11th Circuit *Wollschlaeger* case, the Court pointed out that you can't simply assert an interest at a very high level of generality and say that that satisfies your compelling interest burden.

What *Wollschlaeger* said is that holding -- holding that a provision of a Florida statute that prohibits physicians speech about gun ownership, the Eleventh Circuit said that the proposed government interests at an abstract level of generality are not enough to justify restricting the speech of

doctors and medical professionals on a certain subject.

So we go back to this issue of, sure, protecting children is important, but what's the compelling interest to ban SOCE or conversion therapy involving children? And the point that -- made by the defendant, Ms. Ellis, is that, well, if you could just say that, unless you have an empirical study, you can't regulate speech, well, that's not what we are saying at all. Speech, of course, can be regulated, but the First Amendment imposes the balancing test and says you have to demonstrate your compelling interest first and your regulation has to be narrowly tailored.

The State of Maryland can't just assume conversion therapy is bad as the State has defined it, and then say, now we are entitled to regulate it. It still has to demonstrate, with the cases we cited, concrete empirical evidence of harm caused by conversion therapy in order to regulate it under the First Amendment.

Now, the issue of whose conduct is at issue here, and the point was made that clearly it's the conduct of the therapist in view in SB 1028, well, we agree with that, but that doesn't answer the question. The question is when the client presents and say, I want you to help me work on reducing same-sex attractions that I don't want or that conflict with my religious views, or I want you to help me lessen certain gender expressions or behaviors because I want to return to a former

gender identity, the -- the counselor faces a decision: Do I accept and facilitate what the client is asking me for, or do I turn that client away and tell them no?

Certainly, the therapist's conduct is involved in that decision, and the question is: Does SB 1028 carve that out and say that if the client requests it, then the therapist can go along it? I don't think the defendant has said that.

If the defendants are saying that, I think that should be clear on the record, that someone like Mr. Doyle may follow the lead of the client who requests those things, but I don't think that, up to this point, the State has said that unequivocally, and I would stand to be corrected if that's the case.

The case law about anecdotes and studies from other locales cited by the defense, in our reply, on pages 9 and 10 at Document 71, we address the fact that those are not First Amendment cases similar to this one where a content-based regulation of speech is involved.

Now, in Mr. Doyle's testimony in his deposition, this is filed at Document 58-1, beginning at page 142, line 5, he's asked, "Is there any evidence, anecdotal or empirical, that harm may result from psychotherapy or counseling that is outside of the context of sexual orientation or gender identity change efforts?"

"ANSWER: Yeah. There is evidence.

"QUESTION: What do you understand that evidence to

be?

"ANSWER: Roughly that all clients have between five- and ten-percent risk of basically feeling harm or not achieving their goals or feeling worse after the counseling started, and that goes across all types of counseling, not simply efforts to resolve or reduce same-sex attractions.

"QUESTION: To your understanding, is the evidence you just described anecdotal or empirical?

"ANSWER: Empirical."

This is important because all therapy poses a risk of harm. All therapy may harm someone or someone may perceive harm from it. But the testimony in this case, and we cover this in Document 71 at page 11, is that the State confirmed on the record, through its 30(b)(6) representative, that Maryland could not determine how much more likely harm from what it defines as conversion therapy is to occur as compared to psychotherapy in general.

Without being able to say that this causes more harm than psychotherapy in general, there can't be a compelling interest to ban it and not ban all psychotherapy. Simply having a risk of harm is not enough to satisfy the compelling interest here. All therapy poses some risk of harm.

Now, the issue of the -- the several documents cited by the defendants about people's stories about how conversion therapy is harmful, that's the -- the set of documents

essentially that I commended to the Court earlier as Plaintiff's Exhibit 12, filed at 69-12, where, if you read them, it's all vague references to something that they call conversion therapy. They never describe who provided it, what exactly was involved, or why they thought it was harmful. And in the case with The Trevor Project representative, who wrote the letter, had said very clearly it was coerced by his parents.

Well, the State of Maryland can ban coerced therapy by parents. The State of Maryland can say that -- can relieve the ability of a minor to object to parent-directed therapy because the State of Maryland, the State's legislature establishes the legal age of consent requirements for all kinds of medical treatment and has already decided to lower that age below age 18 for some kinds of mental health treatment.

The same legislature that enacted SB 1028 could change or alter the age of consent laws however it wanted to to accommodate the First Amendment interests involved here. That's the definition of narrow tailoring.

Now, the Ryan Study that was covered in one of the, I believe it was the FreeState amicus brief, we pointed out in our opposition that that study, the 2018 Ryan study came out after SB 1028 was enacted. It says quite clearly that no causal connections or claims can be made from its data. It cannot be -- it can broaden to the population as a whole. And,

by definition, the people involved in that study currently today, as adults, self-identify as members of the LGBT community. It necessarily excludes by design anyone who may have received something called conversion therapy or SOCE and do not identify as a member of the LBGT community. Those people are far more likely to indicate some benefit than people who said I received conversion therapy; I still identify as LGBT. Of course, that population is going to have higher incidences of dissatisfaction with it, but the main problem with that study is that it says no causal claims can be made from it.

The next point I want to make is that the -- I promised the Court that I would point out in the SAMHSA report the statement regarding -- excuse me. I was just trying to go to the overhead here. This is filed at Document 25-2 filed by defendants, and this is on page, of the report, it's page 25, ECF 33. This is the portion of the SAMHSA report that affirms that no new studies have been published that would change the conclusions reached in the APA task force's 2009 review.

Again, this is important because that 2009 review says there is no empirical evidence. We can't draw any conclusions about -- about harm. And I would just reiterate that it is the burden of the defendants to prove that this is harmful. It's not the burden of the plaintiff to prove that it is effective.

Your Honor, I am just trying to be concise and not to

repeat myself.

The importance of -- of this issue of who may -- the importance of the issue of when a client presents and requests something called conversion therapy or requests help that could fit the definition of conversion therapy was pointed out in our -- our moving papers, Document 2 on page 15. There, we cite from the 2009 APA report where it says: Licensed mental health providers who turn down a client's request -- and by the way, this is from page 56 of the APA report -- Licensed mental health providers who turn down a client's request for SOCE at the onset of treatment without exploring and understanding the many reasons why the client may wish to change may instill hopelessness in the client who already may feel at a loss about viable options. Before coming to a conclusion regarding treatment goals, licensed mental health professionals should seek to validate the client's wish to reduce suffering and normalize the conflicts at the root of distress as well as create a therapeutic alliance that recognizes the issues important to the client.

Well, this presents a really big problem for a therapist like Mr. Doyle. We hear the defendant say he should not go into that therapeutic alliance with a predetermined or a priori treatment goal of changing someone's sexual orientation or gender identity, but what if the client presents to him? The APA is telling him, Well, don't say no. Explore what the

client wants. See if you can help them eliminate distress, but don't make them feel hopeless by saying, No, what you want isn't allowed.

And, yet, we haven't heard the defense say that he is allowed to affirm or accommodate or facilitate that client's goal because the statute says any effort to change these things is illegal, and we realize that's focusing on Mr. Doyle's conduct, but once he says yes to a client who requests it, he is -- he is the one who is at risk of -- of his license because he is the therapist subject to SB 1028.

So we don't argue that SB 1028 makes it illegal for a minor to seek treatment as if they could be held liable under the statute, but what we are saying is that the -- even if the focus is on the therapist, the question is, How can a therapist accommodate and say yes to what the client requests? If the client requests SOCE and the APA says you should -- you should not dismiss them out of hand for doing that, the statute doesn't seem to leave room to do that because it says any efforts are prohibited.

The -- pardon me, Your Honor.

I don't think that in all of the presentation from Ms. Ellis, that there was anything to refute the -- the differentiation of gender identity change efforts and the lack of evidence on that issue. Certainly, the -- the SAMHSA report makes some positional statements about, you know, what it

thinks, what SAMHSA thinks of this kind of therapy, but it certainly didn't add to the empirical record or show that there is any research to support, one way or the other, any particular treatment for children and adolescents who identify with gender identity conflicts.

The Court asked a question earlier, and then I have had an opportunity to ponder, and, that is, Who makes the complaint if a parent asks the child or wants a child to go to this kind of therapy?, and I think that in the -- in the culture we live in now, I think there are numerous people, friends, neighbors, school guidance counselors, other adults in the child's life, organizations like The Trevor Project who receive these phone calls, there are many organizations that exist to support children and youth who identify as LGBT. I don't think that we can assume that these children would have no access to make a complaint if they believe that they were being harmed. There are numerous ways and numerous other adults, you know, anyone that this child knows who could file this complaint. It does not have to be the child, him or herself, and it doesn't always have to be a parent. But when we have -- we have, you know, laws that -- that say what parents' role is in the mental health treatment of children.

This consent idea that -- that is being promoted by the defendants here, the idea that informed consent isn't good enough for young people, if -- that's really an extreme

position that would require young people to never have a say in their mental health counseling. If it's not -- if they can't provide informed consent as a matter of policy, well, then, there would never be, you know, informed consent in any kind of mental health counseling.

But the APA report, as we point out in our reply, it specifically says that adolescents and children should be provided age appropriate informed consent. It even goes so far as to say that the informed consent should include the information in the APA report.

As the evidence shows, that is precisely what Mr. Doyle does, is he includes evidence from the APA report, he provides developmentally appropriate informed consent to the patients, along with their parents.

Mr. Doyle's practice looks a whole lot more like what the APA says it endorses than what Maryland says it causes harm. And, yet, Maryland's definition of conversion therapy, that, as we have established, doesn't match what Mr. Doyle thought was conversion therapy. Maryland's definition pulls what he does into the teeth of the statute and forbids him from doing it.

Finally, Your Honor, I will just close with this, it's not a surprise that the defendants like *Otto* and that the plaintiff likes *Vazzo*. Obviously, the results are much different. But I think it bears repeating that the idea that -- of categorizing speech by its function, that was a mistake

made by the *Otto* Court, and that can certainly be called a mistake under the *Holder* v. *Humanitarian Law Project*.

In that case, you had advocacy organizations and professionals, a former judge and a physician who wanted to help some organizations that were listed as terroristic organizations. And what the *Holder* Court said is, Look, you can't call this conduct. They want to provide legal advice. They want to provide their specialized knowledge to these groups to help them navigate legal channels. You can't call that conduct.

Now, to be fair, the *Holder* Court also said, We are also not going to call that, you know, pure political speech like your -- your quintessential First Amendment, you know, walking on a public sidewalk kind of political speech either, but it certainly is speech because we have to analyze the problem by what they want to do. They want to talk to members of these organizations that have been deemed terroristic, and the statute says they can't do that -- or whether they are able to do that depends on what they say.

The *Holder* Court, it was interesting, distinguished between their ability to sort of share general knowledge versus what was prohibited, which was sharing specific knowledge or imparting a skill. That fits very closely with what we have here. Maryland rule lawed the fact that the SB 1028 allows Mr. Doyle to talk about conversion therapy and allows him to

advocate publicly for conversion therapy, but that's just like allowing general speech under *Holder*.

What SB 1028 also does is it prohibits Mr. Doyle from sharing his specialized knowledge as a therapist or imparting particular skills to his clients who ask for it, skills for reducing same-sex attraction or skills for living in comfort with their biological sex.

The *Holder* Court said that you can't carve out the specialized knowledge in imparting skills and say that's conduct. It's still speech and it's still subject -- it's still a content-based speech restriction when you say no to that, and that's why the *Otto* Court made a mistake.

Otherwise, Your Honor, we will rely on our papers and the record already submitted.

THE COURT: Anything else, Ms. Ellis?

MS. ELLIS: Your Honor, I would move to strike the reply memorandum that was filed this morning. I think you have already indicated that you did not look at it, but it seems to me it should not be in the record. I certainly didn't have a chance to consider it and figure out whether there were responses that were needed either today or by asking the Court for leave to file a sur-reply.

And other than that, I would rely on our papers. Thank you.

MR. GANNAM: Your Honor, may I be been heard on the

issue of reply? I understand why Ms. Ellis would like an opportunity to respond, and I think that's reasonable, and, likewise, I understand the reason for the Court's rule against the late filing.

As I did say earlier, in all honesty, we were hoping for the benefit of the discovery order, which did come out at the end of last week. We tried to file it quickly following that, but I would propose that if the Court is considering taking some action to make the situation equitable, simply that the -- the State be allowed to file a sur-reply, or, if the Court would like to invite, you know, both sides to file some kind of post-hearing brief to make sure everyone gets to cover all the issues, but I don't think that striking the reply is called for under the circumstances, but I certainly understand why the State should get some equitable opportunity to respond to it.

THE COURT: Do you think there is anything in there you didn't mention today?

MR. GANNAM: Anything in the reply?

THE COURT: Mm-hmm.

MR. GANNAM: I am certain I didn't mention everything in it today, Your Honor. I did try to cover as much as I could, but, as I stand here, I can't tell you I covered every single point that was in it.

THE COURT: I am not going to predetermine this at the moment. Ms. Ellis, you obviously can, and I am sure will,

take the opportunity to review it. I am not ruling right now on that issue or anything else, so you certainly will have an opportunity to let me know if you think that it's an improper reply or if you think it raises something that you haven't already briefed otherwise and then let me know.

MS. ELLIS: Thank you, Your Honor.

THE COURT: The plaintiff doesn't mind if you file a sur-reply. I don't know that I would agree. I have --

MS. ELLIS: And I don't know that I would want to.

THE COURT: Would want to at all anyway.

MS. ELLIS: At all.

THE COURT: But, obviously, I am aware you didn't have an opportunity to review it, at least not in depth, if at all, before the hearing today. So, next time, Mr. Gannam, if something like this comes up, communication before you just unilaterally spend all that time doing what you did, you obviously had begun to prepare something ahead of time, is to contact counsel and the Court and figure out if it's appropriate or what.

It, frankly, wasn't -- I was preparing for this hearing, had contemplated maybe issuing a full decision, and when I decided I wasn't ready, I wanted to hear argument on the merits is when I issued the sort of intermediate decision telling you what I could. You should have known, when I didn't jump and grant your motion to compel, that you needed to operate as if

you were not going to get it in advance of this hearing, and that should have been done by Thursday at four rather than 1:35 this morning.

MR. GANNAM: Yes, Your Honor. Thank you.

THE COURT: All right. I am taking all of this under advisement. You will get a written decision as soon as I am comfortable.

The one thing I would ask -- although, with the wonder of electronic resources, I may have access to other Court decisions -- the one thing I do ask is if you become aware of another decision, whether at the trial or an appellate level before I issue my decision, that you let each other and me know. You don't have to tell me what it's all about, just notify me about any Court decisions that you think might be of interest.

All right?

MS. ELLIS: Thank you, Your Honor.

MR. GANNAM: Your Honor, housekeeping. May we file, or would it help the Court if we filed our slides from the PowerPoint today?

THE COURT: Well, you can because I have this little book from the defense if you want it, but I was reading them and watching them and making notes, so you don't have to, but if you want to do it, that's fine.

MR. GANNAM: Thank you, Your Honor.

THE COURT: Okay. All right. Thank you.

(The proceedings were concluded at 12:27 p.m.)

C E R T I F I C A T E

I, Renee A. Ewing, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that the foregoing is a true and correct transcript of the stenographically reported proceedings taken on the date and time previously stated in the above matter; that the testimony of witnesses and statements of the parties were correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription to the best of my ability; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

Renee A Ewing

Renee A. Ewing, RPR, RMR, CRR
Official Court Reporter
October 2, 2019

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**CERTIFICATE OF SERVICE**

I hereby certify that, on this November 26, 2019, a copy of the foregoing was electronically filed through the Court's CM/ECF system, which will effect service on the following counsel and parties of record:

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