No. 19-2064

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

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**CHRISTOPHER DOYLE,**

*Plaintiff-Appellant*,

v.

**LAWRENCE HOGAN, JR.**, *et al.*

*Defendants-Appellees*.

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On Appeal from the United States District Court
for the District of Maryland
(Deborah K. Chasanow, District Judge)

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# BRIEF OF APPELLEES

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BRIAN E. FROSH
Attorney General of Maryland

KATHLEEN A. ELLIS
BRETT E. FELTER
Assistant Attorneys General
300 West Preston Street, Suite 302
Baltimore, Maryland 21201
(410) 767-1861
(410) 333-7894 (facsimile)

Attorneys for Appellees

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## JURISDICTIONAL STATEMENT

This appeal involves a First Amendment challenge to a Maryland law that prohibits mental health or child care practitioners from subjecting a minor client to a practice or treatment that seeks to change the child's sexual orientation or gender identity – so-called "conversion therapy." The plaintiff, Christopher Doyle, is a licensed clinical professional counselor who has an interest in the issue of conversion

therapy, though he claims not to engage in it himself. On January 18, 2019, he filed this action against the Governor of Maryland, Lawrence J. Hogan, Jr., and the Attorney General of Maryland, Brian E. Frosh, in their official capacities, challenging the constitutionality of § 1-212.1 of the Health Occupations Article of the Annotated Code of Maryland under both the federal and State constitutions and seeking a preliminary injunction against its enforcement. (J.A. 3-4.) The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367.

On August 1, 2019, the district court denied the Governor's and Attorney General's motion to dismiss Mr. Doyle's claims for lack of standing (J.A. 1042) and their assertion of Eleventh Amendment immunity (J.A. 1050), but granted their motion to dismiss Mr. Doyle's claim of third-party standing to assert the rights of his clients. (J.A. 1045.) On September 20, 2019, the district court granted the Governor's and the Attorney General's motion to dismiss Mr. Doyle's complaint for failure to state a claim and denied his motion for a preliminary injunction as moot. (J.A. 1283.) Mr. Doyle filed a timely notice of appeal on September 30, 2019. (J.A. 1284.) This Court has appellate jurisdiction under 28 U.S.C. § 1291.

## ISSUES PRESENTED FOR REVIEW,

1. Did the district court correctly conclude that the law at issue, because it regulates a health care professional's conduct in engaging in conversion therapy and not the professional's speech, is subject to intermediate scrutiny, furthers the

government's significant interest in protecting children, and is supported by evidence in the legislative record that conversion therapy presents a risk of harm to minors?

2. Did the district court correctly conclude that Mr. Doyle did not have standing to assert the rights of his clients, but err in finding that Mr. Doyle had standing to pursue this lawsuit in his individual capacity?

3. Did the district court err in finding that the Governor and Attorney General were not entitled to Eleventh Amendment immunity?

## STATEMENT OF THE CASE

### Procedural Background

Mr. Doyle filed this lawsuit against the Governor of Maryland and the Attorney General of Maryland, in their official capacities, alleging that § 1-212.1 of the Health Occupations Article of the Annotated Code of Maryland violated the United States and Maryland Constitutions. (J.A. 3.) For relief, Mr. Doyle sought damages and a preliminary and permanent injunction against the law's enforcement. (J.A. 52-55.) On March 8, 2019, the Governor and Attorney General moved to dismiss the complaint for lack of standing, as barred by the Eleventh Amendment, and for failure to state a claim, and filed a memorandum in opposition to Mr. Doyle's motion for a preliminary injunction. (J.A. 5.)

The parties exchanged written discovery in March, and each side took one deposition. Mr. Doyle filed a motion to compel the Governor and Attorney General to produce a properly prepared Rule 30(b)(6) witness and asked the district court to overrule the witness' assertion of legislative privilege. (J.A. 7.) In a memorandum opinion dated August 1, 2019, the district court denied Mr. Doyle's motion to compel (J.A. 1031), granted the Governor's and Attorney General's motion to dismiss Mr. Doyle's claims asserted on behalf of his clients (J.A. 1045) and his claims for damages (J.A. 1048), denied the Governor's and Attorney General's motion to dismiss Mr. Doyle's claims for lack of standing (J.A. 1042), and rejected their assertion of Eleventh Amendment immunity (J.A. 1050).

The district court held a hearing on Mr. Doyle's motion for a preliminary injunction and the Governor's and Attorney General's motion to dismiss the complaint for failure to state a claim on August 5, 2019. (J.A. 9.) In an opinion and order dated September 20, 2019, the district court granted the Governor's and Attorney General's motion to dismiss and denied Mr. Doyle's motion for a preliminary injunction as moot. (J.A. 1283.) Mr. Doyle timely filed his notice of appeal on September 30, 2019. (J.A. 1284.)

## Factual Background

### Section 1-212.1 of the Health Occupations Article

In 2018, the Maryland General Assembly passed, and the Governor signed, Senate Bill 1028, which added § 1-212.1 to Maryland's Health Occupations Article. (J.A. 57-62.) § 1-212.1 prohibits a mental health or child care provider from "engag[ing] in conversion therapy with an individual who is a minor." Md. Code Ann., Health Occ. § 1-212.1(b). The statute defines conversion therapy as "a practice or treatment by a mental health or child care practitioner that seeks to change an individual's sexual orientation or gender identity." *Id.* § 1-212.1(a)(2)(i). Any licensed or certified health care professional who violates the prohibition is subject to discipline for unprofessional conduct by the professional's licensing board. *See id.* § 1-212.1(c).

Section 1-212.1 applies only to mental health or child care practitioners licensed or certified under Titles 14, 17, 18, 19, or 20 of the Health Occupations Article and any other practitioner licensed or certified under the Health Occupations Article to provide counseling. *Id.* § 1-212.1(a)(3). The provision only applies to those individuals acting in their professional capacity and does not apply to pastoral or religious counseling as long as the counselor is not acting under a State health care professional license. (J.A. 340-41.)

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

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

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

**The Legislative Record on the Risks of Conversion Therapy**

The legislation that enacted § 1-212.1 was accompanied by a well-developed record of the risk of harm from conversion therapy. The preamble to Senate Bill 1028 recognizes that "being lesbian, gay, bisexual, or transgender (LGBT) . . . is not a disease, a disorder, or an illness" and cites to the statements of ten professional organizations critical of conversion therapy. (J.A. 57.) The preamble concludes by

asserting Maryland's "compelling interest in protecting the physical and psychological well-being of minors, including LGBT youth, and in protecting minors against exposure to serious harm caused by sexual orientation change efforts." (J.A. 60.)

The preamble also cites to the report of the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation and numerous other statements from major health professional organizations. (J.A. 57-60.) The task force undertook a comprehensive review of available peer-reviewed literature regarding conversion therapy and concluded that no methodologically sound research demonstrated conversion therapy's efficacy in changing adults' sexual orientation. Although there were no available studies on the effect of conversion therapy on children, the task force found that adults' accounts of their experiences of conversion therapy as minors suggest that many were harmed. (J.A. 73.) The task force concluded,

> [E]fforts to change sexual orientation are unlikely to be successful and involved some risk of harm, contrary to the claims of SOCE [sexual orientation change effort] practitioners and advocates. . . . [T]he appropriate application of affirmative therapeutic interventions for those who seek SOCE involves therapist acceptance, support and understanding of clients and the facilitation of clients' active coping, social support, and identity exploration and development, *without imposing a specific sexual orientation outcome*.

(J.A. 69 (emphasis added).)

The task force also reviewed the academic literature on conversion therapy and explained that, although the research conducted from 1999 to 2007 did not meet methodological standards that would permit conclusions about efficacy or safety of the practice, studies conducted from 1969 to 1978 showed it was "uncommon" for conversion therapy to result in "enduring change to an individual's sexual orientation." (J.A. 72.) The task force found no evidence "that providing SOCE to children or adolescents has an impact on adult sexual orientation" or "that teaching or reinforcing stereotyped gender-normative behavior in childhood or adolescence can alter sexual orientation." (J.A. 74.) The task force noted, however, that it did find "some evidence to indicate that individuals experienced harm from SOCE," (J.A. 73), and that conversion therapy with children and adolescents could increase the patient's self-stigma and minority stress (J.A. 74). After discussing in greater detail the findings of the literature review for children and adolescents, (J.A. 141-50), the task force recommended that mental health practitioners provide treatments that "support children and youth in identity exploration and development *without seeking predetermined outcomes*." (J.A. 150 (emphasis added).)

There is also no peer-reviewed literature that supports the efficacy of conversion therapy with gender minority youth, but reports and studies have raised concerns regarding the ethics of conversion therapy as well as its potential for harm. *See* Substance Abuse and Mental Health Services Administration, "Ending

Conversion Therapy: Supporting and Affirming LGBTQ Youth," HHS Publication No. (SMA) 15-4928, Rockville, MD: SAMHSA, 2015 ("SAMHSA Report") at 26, available at https://store.samhsa.gov/system/files/sma15-4928.pdf (citing Byne, W. *et al.*, "Report of the APA Task Force on treatment of gender identity disorder," *American Journal of Psychiatry*, Supp. 1-35 (2013); Coleman, E., *et al.*, "Standards of care for the health of transsexual, transgender, and gender nonconforming people (7 ed., Vol. 13, pp. 165-232): International Journal of Transgenderism; Minter, S. "Supporting transgender children: new legal, social, and medical approaches," *J. Homosex.*, 59(3), 422-33 (2012); Wallace, R., & Russell, H. "Attachment and shame in gender-nonconforming children and their families: toward a theoretical framework for evaluating clinical interventions," *Int. J. Transgenderism*, 14(3), 113-26 (2013)). (J.A. 293.) Accordingly, the SAMHSA Report also concludes that conversion therapy to change a youth's gender identity or expression is inappropriate. (J.A. 293.)

The other reports cited in the preamble to the legislation provided additional reasons for the legislature to support Senate Bill 1028. The American Academy of Pediatrics 1993 Statement on Homosexuality stated, "Therapy directed specifically at changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." (J.A. 513.) The American Academy of Child & Adolescent Psychiatry stated,

"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." (J.A. 547.) Finally, the American Psychiatric Association stated that "[p]sychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is questionable" and, unless the efficacy of such therapies can be established, "APA recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm." (J.A. 518.)

Written testimony presented to the committees in both houses of the Maryland General Assembly provided additional evidence of the harm from conversion therapy and reasons why the legislature should enact the measure. For example, the Maryland Nurses Association, quoting *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians*, Ann. Intern. Med. Published Online (2015), pointed out that "[y]outh who are subject to conversion therapy show higher rates of depression, suicide, substance abuse, and higher rates of HIV and STIs transmission." (J.A. 348.) The statement from Free State Justice provided data about the rates of attempted suicide, drug abuse, and depression among LGBTQ youth, especially those experiencing family rejection. (J.A. 472-73.)

The evidence before the legislature also included statements from patients and practitioners about conversion therapy and the damage it causes:

- "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." (J.A. 399.)

- "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." (J.A. 488.)

- A pediatrician testified about a patient who was "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." (J.A. 394.)

Other witnesses - including parents - also expressed their desire to protect children from the risks involved in conversion therapy. (J.A. 348, 427-31.)

**The Appellant**

The appellant, Christopher Doyle, is a counselor licensed in Maryland as a clinical professional counselor. (J.A. 15.). Aside from his license, he has minimal contacts with the State of Maryland. He is the Executive Director of the Institute for Healthy Families in Manassas, Virginia and has a counseling practice there. (J.A. 30.) He also is a therapist at Patrick Henry College in Purcellville, Virginia and the founder of Northern Virginia Christian Counseling in Manassas, Virginia. (J.A. 878.) He has no practice locations in Maryland. (J.A. 881.) At the time of his

deposition in March 2019, he had two minor clients who lived in Maryland and had had only a total of five minor clients in the two years preceding the filing of this lawsuit. (J.A. 854-55, 908-09.)

In addition to his minimal contacts with the State of Maryland, Mr. Doyle does not engage in the practice of conversion therapy. For example, Mr. Doyle's informed consent form, updated January 1, 2016, provides as follows:

> To participate in psychotherapy and/or coaching sessions with Christopher Doyle, LCPC, LPC please read and sign this Informed Consent. Your signature constitutes an understanding and acceptance of all terms mentioned.
>
> * * *
>
> 6. I understand that Christopher Doyle and the Institute for Healthy Families does not practice reparative therapy, reorientation therapy, conversion therapy, or any type of sexual orientation change effort (SOCE) therapy.

(J.A. 859.) Mr. Doyle updated this form in May 2017 (J.A. 863) and May 2018 (J.A. 867). Both updates contained the language quoted above.

In his deposition, Mr. Doyle confirmed that he does not consider the work that he does to qualify as any of the therapies listed in paragraph 6 of his informed consent form, all of which he defined broadly as seeking to change an individual's sexual orientation from homosexual to heterosexual. (J.A. 885-92.) Instead, he described his counseling practice

> as sexual and gender affirming therapy, and what I explain to clients is that they're in the driver's seat, that I'm not imposing a goal on their work. I have a duty and a right to my clients to work with what they

> want to work on, and clients that may be open to sexual fluidity or change, I'm open to that goal.

(J.A. 891.) He went on to explain that he did not start work with a client with a pre-determined goal as, for example, Joseph Nicolosi, an advocate of reparative therapy, did. (J.A. 892.)

Mr. Doyle acknowledged that § 1-212.1 applies only to minors (J.A. 922) and testified that minors represent only 10-15% of his practice (J.A. 960). He conceded that there is at least anecdotal evidence of harm from conversion therapy (J.A. 944-45), and stated that he agrees with the precept "First, do no harm" (J.A. 951). Mr. Doyle also acknowledged that "the state . . . has a legal obligation to try to protect minors from harm . . . ." (J.A. 923.)

He understands that, in Maryland, minors under age sixteen cannot consent to mental health treatment and that minors aged sixteen and seventeen cannot refuse mental health treatment to which their parents or guardians consent. (J.A. 918.) He accepts minor clients who do not want to change their sexual orientation or gender identity, even though their parents may want them to change. (J.A. 960.) In such situations, he "will attempt to persuade the parents to not put pressure on their children and educate them on how better parenting practices would be and how to avoid harming their child . . . ." (J.A. 961.) Mr. Doyle asserted that he "never tolerated any coercion or manipulation of a minor in the therapeutic process." (J.A. 855, 918-19.) If a minor client does not want to participate in therapy with him,

even though the child's parents or guardians want the child to participate, Mr. Doyle informs the parents or guardians that he cannot continue treating the child and provides an appropriate referral. (J.A. 919-20.)

**The Appellees**

Lawrence J. Hogan, Jr. is the Governor of Maryland (J.A. 15) and is generally responsible for executing the laws of the State of Maryland, Md. Const., Art. II, §§ 1, 9; Md. Code Ann., State Gov't § 3-302. The Governor appoints the Secretary of Health, Md. Code Ann., Health-Gen'l § 2-102(a), as well as the members of the Board of Professional Counselors and Therapists (the "Board"), Health Occ. § 17-202(a). The Secretary of Health serves at the pleasure of the Governor, Health-Gen'l § 2-102(b), but the Governor may remove Board members only for incompetence, misconduct, neglect of duty, or failure to attend Board meetings, Health Occ. § 17-202(e). Neither the Governor nor the Secretary has any specific authority to enforce the statute involved in this case against Mr. Doyle.

Brian E. Frosh is the Attorney General of Maryland (J.A. 15) and has general charge of the State's legal business, State Gov't § 6-106(a). Article V, § 3 of the Maryland Constitution lists the Attorney General's responsibilities; the list does not include authority to make decisions regarding the administrative prosecution of violations of the State's health occupations licensing laws. Similarly, neither § 6-106 of the State Government Article nor any provision of the Health Occupations

Article authorizes the Attorney General to make decisions about administrative prosecution of violations of the State's health occupations licensing statutes. Instead, that authority rests with the Board. *See* Health Occ. §§ 1-212.1, 17-509.

## SUMMARY OF ARGUMENT

The court correctly determined that Maryland's prohibition on the practice of conversion therapy does not infringe Mr. Doyle's right to free speech. Because the law prohibits only conduct and has only an incidental effect on speech, it is evaluated under either rational basis or intermediate scrutiny. It survives analysis under both levels of scrutiny because Maryland has a significant interest in protecting children, the prohibition on conversion therapy reasonably furthers that interest, and the prohibition does not burden more speech than necessary.

The Court need not reach the merits of Mr. Doyle's constitutional challenge, however, because he lacks standing to pursue this lawsuit, either through the assertion of his own rights or those of his patients. Based on his deposition testimony and the consent forms that he uses, Mr. Doyle and his clients understand that he does not engage in conversion therapy. Furthermore, he has not demonstrated any threat to his continued practice as a licensed professional counselor in Maryland. Thus, he thus has not established an Article III injury-in-fact. He also has not demonstrated that his clients are unable to pursue their own claims and thus that he should be allowed to pursue claims on their behalf.

Even if Mr. Doyle had standing, he sued the wrong defendants. The Governor and the Attorney General are protected by Eleventh Amendment immunity because they do not have any special responsibility for enforcing § 1-212.1. The district court's conclusion that immunity does not apply because the statute "does not explicitly prohibit" them from overseeing enforcement cannot be squared with this Court's precedents, which establish that a general duty to ensure that the laws are carried out - even in the absence of the prohibition the district court required - is insufficient to satisfy *Ex parte Young*. These alternative grounds also support affirmance of the district court's dismissal of this case.

## ARGUMENT

"Children are a vulnerable cohort, uniquely susceptible to various forms of mistreatment. Their protection is of the utmost importance to all involved in governance and the administration of justice." *Romero v. Perez*, 205 A.3d 903, 904 (Md. 2019). In 2018, the Maryland General Assembly and the Governor took action to protect Maryland children from the harm caused by conversion therapy by enacting Senate Bill 1028 to prohibit the treatment of minors with conversion therapy. Although it erred in concluding that Mr. Doyle had standing to pursue this lawsuit and that the Governor and Attorney General were proper defendants, the district court correctly determined that Senate Bill 1028 survived Mr. Doyle's constitutional challenge.

## I. THE STANDARD OF REVIEW

This Court reviews de novo the district court's denial of the Governor's and Attorney General's motion to dismiss for lack of standing, *Davison v. Randall*, 912 F.3d 666, 677 (4th Cir. 2019), its denial of their assertion of Eleventh Amendment immunity, *Pense v. Maryland Department of Public Safety and Correctional Services*, 926 F.3d 97 (4th Cir. 2019), and its grant of their motion to dismiss for failure to state a claim, *Doe v. Meron*, 929 F.3d 153, 163 (4th Cir. 2019). This Court may affirm the dismissal on any basis supported by the record. *See Moore v. Frazier*, 941 F.3d 717, 725 (4th Cir. 2019). The court reviews for abuse of discretion the district court's denial of Mr. Doyle's motion for a preliminary injunction as moot. *Di Biase v. SPX Corp.*, 872 F.3d 224, 229 (4th Cir. 2017).

## II. THE DISTRICT COURT PROPERLY DISMISSED MR. DOYLE'S COMPLAINT FOR FAILURE TO STATE A CLAIM FOR VIOLATION OF THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT.

### A. The District Court Properly Found that Section 1-212.1 Regulates Conduct, Not Speech, and Survives Intermediate Scrutiny.

"States may regulate professional conduct, even though that conduct incidentally involves speech." *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"). Courts have long acknowledged that a state may subject the practice of health care providers to reasonable regulation, even when that regulation may implicate the provider's First Amendment rights. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992). In

this case, Maryland has chosen to regulate the practice of licensed mental health and childcare practitioners by prohibiting a form of treatment that the legislature has determined to be harmful to minors. That choice regulates conduct, not speech, and is properly subject only to rational basis review. *See Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014).

Section 1-212.1 is nearly identical to the California law that the Ninth Circuit upheld in *Pickup*:

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

*Id*. Because the California statute only regulated treatment, while leaving providers free to discuss and make recommendations regarding conversion therapy, the statute had only an incidental effect on speech and would be constitutional as long as it bore a rational relationship to a legitimate state interest. *Id.* at 1231.

There can be no doubt that the State of Maryland has a legitimate interest in protecting minors from harmful conduct. *E.g.*, *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). There also can be no dispute that the legislature determined, in passing § 1-212.1, that conversion therapy harmed minors. (J.A. 57-60.) And the documents cited in the law's preamble, as well as the

testimony before the legislative committees, establish a consensus that there is a risk of harm to minors from conversion therapy. No more is required to uphold the constitutionality of § 1-212.1.

Mr. Doyle misconstrues *NIFLA* in arguing that the law is subject to strict scrutiny. True, the Court in *NIFLA* did state that it "has not recognized 'professional speech' as a separate category of speech," and it noted that speech does not become "unprotected merely because it is uttered by 'professionals.'" 138 S. Ct. at 2371-72. But the district court here did not find - and the Governor and the Attorney General did not argue - that § 1-212.1 is subject to lesser scrutiny because it regulates "professional speech." Rather, the district court found that conversion therapy is *conduct* and thus, any law regulating it that incidentally affects speech, like § 1-212.1, is subject to intermediate scrutiny. The district court itself noted that Mr. Doyle was "misconstru[ing] the Court's findings in" *NIFLA*, which "abrogated *King* and *Pickup* . . . only on the ground that professional speech is not a separate category of speech for purposes of reviewing a content-based speech regulation." (J.A. 1267 n.1.)

In fact, *NIFLA* provides support for the district court's finding that § 1-212.1 regulates conduct rather than protected speech. As the Court recognized in that case, "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372. Although "drawing the line between

speech and conduct can be difficult, [the] Court's precedents have long drawn it." *Id.* at 2373. Thus, in *NIFLA*, the Court found that a California law regulated speech, and not conduct, because the notice that it required licensed crisis pregnancy centers to provide "does not facilitate informed consent [and] is not tied to a procedure at all." *Id.* at 2373-74. By contrast, in *Planned Parenthood of Southeastern Pa. v. Casey*, the Court found that a Pennsylvania law regulated the conduct of the physician, and not speech, by requiring that a physician provide certain informed consent before performing an abortion. The Court observed that, "for constitutional purposes, [the consent requirement was] no different from a requirement that a doctor give certain specific information about any medical procedure"; it regulated speech "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." 505 U.S. at 884.

Section 1-212.1 does not simply regulate speech as *part of* the practice of medicine. To the extent that it regulates speech at all, it regulates speech that *is* the practice of medicine. The district court was correct to review the law under, at most, the intermediate scrutiny standard. *See, e.g.*, *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 208–09 (4th Cir. 2019) (noting that, after *NIFLA*, this Court could

"say with some confidence that the standard for conduct-regulating laws can't be greater than intermediate scrutiny.")

The court in *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019), *appeal filed*, No. 19-10604 (11th Cir. Feb. 14, 2019) - the only other court to rule on a First Amendment challenge to a law regulating conversion therapy since the Supreme Court decided *NIFLA*[1] - agreed that strict scrutiny does not apply to professional conduct laws like § 1-212.1. It stated that "applying intermediate scrutiny to medical treatments that are effectuated through speech would strike the appropriate balance between recognizing that doctors maintain some freedom of speech within their offices, and acknowledging that treatments may be subject to significant regulation under the government's police powers." *Id*. at 1256.

The court also noted that applying intermediate scrutiny to an ordinance similar to § 1-212.1 was consistent with the historic understandings of the First Amendment, which has as its purpose "'to preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail.'" *Id.* at 1257 (quoting *McCullen v.*

[1] Mr. Doyle argues that the Middle District of Florida, in *Vazzo v. City of Tampa*, No. 8:17-cv-2896 –T-02AAS, 2019 WL 4919302 (M.D. Fla. Oct. 4, 2019), *appeal filed,* No. 14387 (11th Cir. Nov. 1, 2019), was the "first court to consider a 'conversion therapy' ban after *NIFLA*." Brief of Plaintiff-Appellant ("Br.") at 35. As Mr. Doyle later notes, however, the portion of the magistrate's Report and Recommendation that analyzed the application of the Free Speech Clause to the conversion therapy law was not adopted by the district court, which entered summary judgment for the plaintiffs on state preemption grounds. *Id.* at 36 n.10.

*Coakley*, 573 U.S. 464, 477 (2014) (quoting *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984))). In cases like this one, the court concluded that the "[p]laintiffs' words serve a function; their words constitute an act of therapy with their minor clients." *Id.* That quality "makes [the] plaintiffs' speech different from the protected dialogues in *Wollschlaeger* [*v. Governor of Florida*, 848 F.3d 1293 (11th Cir. 2017)] and *NIFLA*, and from highly protected, political speech in the metaphoric or literal "public square." *Id.* Indeed, as the court noted,

> [t]he public marketplace of ideas is not limited in any way. What is limited, is the therapy (delivered through speech and/or conduct) by a licensed practitioner to his or her minor patient, within the confines of a therapeutic relationship. In the context of the relationship between a minor and his or her therapist, there is *no* competitive marketplace of ideas to infringe upon.

*Id.* at 1257-58. Because professional conduct regulations like § 1-212.1 do not infringe upon the marketplace of ideas, intermediate scrutiny is "consistent with the justifications for and principles of the First Amendment." *Id.* at 1258.

The analysis in *Otto* is equally applicable here, and the district court was correct to find that the Maryland law withstands the intermediate level of review. The statute furthers a significant governmental interest and does not burden more speech than necessary in doing so. *See Reynolds v. Middleton*, 779 F.3d 222, 228-29 (4th Cir. 2015). The legislature's interest in protecting minors is significant; the ban on the practice of conversion therapy with minors furthers that interest; and the ban does not burden more speech than necessary. It prohibits only the therapy that

the legislature found to be harmful and affects only certain licensed health care providers and the treatment that they provide to minors. It does not limit Mr. Doyle's right to advocate for conversion therapy or a repeal of the statute; it does not limit Mr. Doyle's ability to engage in conversion therapy with adults; and it does not limit Mr. Doyle's right to express and discuss his views about conversion therapy with his clients.

In fact, the State's interest in protecting children is compelling enough, and the restrictions of § 1-212.1 so narrowly drawn, that the district court's decision should be affirmed even if strict scrutiny applied, as Mr. Doyle argues. Br. at 38-39. First, § 1-212.1 is not content-based. It does not limit what Mr. Doyle or other licensed practitioners may say to their minor clients; it only limits the objective of the therapy that licensed practitioners provide. *See* Health Occ. §§ 1-212.1(a)(2)(i), (b) (defining conversion therapy as "a practice or treatment that seeks to change an individual's sexual orientation or gender identity" and prohibiting certain licensed practitioners from engaging in that practice).

Second, the legislature identified the State's compelling interest in passing § 1-212.1: "protecting the physical and psychological well-being of minors, including LGBT youth, and . . . protecting minors against exposure to serious harm caused by sexual orientation change efforts." (J.A. 60.) The Supreme Court has repeatedly recognized that "[t]here is a compelling interest in protecting the physical and

psychological well-being of minors." *Sable Communications*, 492 U.S. at 115; *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling." (internal citation omitted)); *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978) (government's interest in well-being of its youth justifies special treatment of indecent broadcasting).

Mr. Doyle disputes the State of Maryland's compelling interest in protecting minors by attacking the report of the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation and insisting that the State must produce peer-reviewed studies demonstrating harm to meet its burden. *See* Br. at 39-41. As a result, Mr. Doyle highlights the caveats in the task force's report, but ignores its overall conclusion that conversion therapy involves a risk of harm to minors. He also ignores the conclusion in both the task force report and the SAMHSA Report that therapy and support should be provided without imposing a predetermined outcome. And his argument ignores the admonition in the 2000 statement from the American Psychiatric Association "to first, do no harm." (J.A. 518.) Most importantly, he ignores the limitation in § 1-212.1 itself: Its prohibition on the practice of conversion therapy is limited to minor clients.

In any event, courts allow "litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, 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). Furthermore, "[l]egislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject," *id.*, and to make choices in the face of medical or scientific uncertainty, *see Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

Against this body of law, Mr. Doyle seems to suggest that a state legislature could only regulate conversion therapy if it undertook double-blind empirical studies that intentionally subjected minors to a practice that a clear professional consensus regards as harmful. *See* Br. at 9-11, 24-25. A state, however, does not have to expose minors to harm, including self-hatred and suicidal ideation, in order to study the prevalence of that harm. *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 519 (2009) ("There are some propositions for which scant empirical evidence can be marshaled, and the harmful effect of broadcast profanity on children is one of them. One cannot demand a multiyear controlled study, in which some children are intentionally exposed to indecent broadcasts . . . and others are shielded from all indecency."). In fact, the court in *Otto* rejected just such a notion, concluding that "Plaintiffs cannot demand a multiyear controlled study in which

some minors, even those who would voluntarily seek [conversion therapy], are subjected to [conversion therapy] and some are not." 353 F. Supp. 3d at 1263.

Finally, § 1-212.1 is narrowly tailored to address the State's compelling interest in protecting children. The statute only bars the practice of conversion therapy with minors, and it only applies to certain licensed mental health and child care practitioners. *See* Health Occ. § 1-212.1(b). To the extent that the statute can be said to regulate speech, it does not reach any speech other than the *use* of speech to practice conversion therapy with minors. And the statute is the least restrictive means of promoting the State's compelling interest. Requiring that participation in conversion therapy be voluntary, *see* Br. at 46, does not fulfill the State's compelling interest, as minors generally cannot consent to treatment or object to treatment to which their parents consent.[2] *See* 80 Md. Op. Att'y Gen. 62, 64-65 (1995) (health care providers generally must obtain parents' consent before treating minors); 79 Md. Op. Att'y Gen. 244, 252 (1994) ("[M]inors are generally considered legally

[2] Section 20-104(b) of the Health-General Article does allow a 16- or 17-year-old to consent to mental health treatment, but it does not allow that minor to refuse treatment to which the minor's parent consents. Mr. Doyle suggests that the legislature could "amend or even repeal any Maryland statute affecting the state's legal age of consent for mental health treatment, or enact a new statute," Br. at 48, but he points to no precedent that requires a state to change other generally applicable laws in an attempt to enact the least restrictive regulation. And, as noted below, the Governor and the Attorney General - the parties sued by Mr. Doyle - have no authority to amend, repeal, or enact statutes.

incompetent for purposes of medical decision-making."). Requiring informed consent for participation in conversion therapy, *see* Br. at 46-47, is simply a variation of the suggestion that only voluntary participation be permitted and thus, does not protect minors.

Finally, limiting the ban to so-called aversive therapy, *see* Br. at 46, also does not adequately protect minors. Both the APA Task Force Report and the SAMHSA Report emphasize the importance of providing supportive therapy, without a predetermined outcome, to avoid the risk of harm from conversion therapy. (J.A. 69, 150; J.A. 277.) Only banning the harmful treatment for minors adequately serves the State's compelling interest in protecting minors.[3]

### B. The District Court Correctly Found that Section 1-212.1 Is Not Viewpoint-Based, Is Not Constitutionally Vague, and Is Not a Prior Restraint.

The district court correctly concluded that § 1-212.1 does not discriminate based on viewpoint. As the court in *Otto* found, "the alleged viewpoint discrimination against those who believe that it is possible to change a person's

[3] Mr. Doyle continues to argue that § 1-212.1 is not narrowly tailored because it's "wildly underinclusive," in that it applies only to certain licensed practitioners and not to unlicensed religious counselors and clergy. Br. at 49. But Maryland does not license and regulate religious counselors and clergy, and the licensing boards that enforce § 1-212.1 do not have jurisdiction over religious counselors. In any event, courts "will not punish [a government] for leaving open more, rather than fewer, avenues of expression." *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 452 (2015).

sexual orientation or attractions is not distinguishable from the subject matter being regulated." 353 F. Supp. 3d at 1268.

> The ordinances may be construed to be content-discriminatory, because they may prohibit speech based on the ideas, or the message that it conveys. But, "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists."

*Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)).

In this case, the State chose to regulate conversion therapy because of the harm or potential harm in the treatment, not because of the speaker's viewpoint or beliefs about conversion therapy, homosexuality, or human attraction more generally.[4] Section 1-212.1, like the law at issue in *Otto*, does not indicate a preference between heterosexual or homosexual individuals seeking to change their sexual orientation one way or the other. It regulates the practices of licensed medical providers in trying to change a minor's sexual orientation or gender identity. As noted above,

[4] Mr. Doyle argues that § 1-212.1 "further defines its byword 'conversion therapy' to prohibit talk therapy that helps a client 'eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same gender." Br. at 37 (emphasis removed). Section 1-212.1, however, defines "conversion therapy" as "a practice or treatment by a mental health or child care practitioner that seeks to change an individual's sexual orientation or gender identity" that "*includes* any effort to . . . eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender." Health Occ. § 1-212.1(a)(2)(i)-(ii) (emphasis added). Identifying one type of conversion therapy does not nullify the general definition of "conversion therapy" or mean other types of conversion therapy are *not* included.

the *practice* is what is regulated, not any particular viewpoint. *See Otto*, 353 F. Supp. 3d at 1268-69.

Nor is § 1-212.1 unconstitutionally vague. As the district court found, § 1-212.1 "does not require Plaintiff to make an 'untethered, subjective judgment[]' about the conduct it prohibits." (J.A. 1280.) A law is impermissibly vague only if it does not provide a person of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, or if it authorizes or encourages arbitrary and discriminatory enforcement. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). A statute is not unconstitutionally vague if "it is clear what the [the statute] as a whole prohibits." *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972).

There is no mystery about what § 1-212.1 prohibits. It prohibits certain licensed practitioners from seeking to change a minor's sexual orientation or gender identity; it defines the practice of conversion therapy by certain licensed practitioners as unprofessional conduct; and it subjects offending practitioners to discipline by their licensing board. It is hard to believe that a licensed practitioner who claims to support the practice of conversion therapy or sexual orientation change efforts would not understand the meaning of § 1-212.1. *See Pickup*, 740 F.3d at 1234.

Finally, § 1-212.1 is not an unconstitutional prior restraint on Mr. Doyle's ability to speak. "The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis and quotation marks omitted). Prior restraints are typically found in licensing and permitting schemes that allow government to allow or forbid speech in advance. *See, e.g.*, *id*. (internal citation omitted); *American Entertainers, L.L.C. v. City of Rocky Mount, N. Carolina*, 888 F.3d 707, 720 (4th Cir. 2018). In this respect, a prior restraint must be distinguished from a sanction for *past* speech. *See Alexander*, 509 U.S. at 553-54 (stating that "our decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments"). Section 1-212.1 does not establish a permit or licensing scheme that enables the government to allow or forbid speech in advance, but rather penalizes providers who are found to have practiced conversion therapy. Nor does it operate as a "[t]otal speech prohibition," as Mr. Doyle claims. Br. at 51. As noted above and found by the district court, no speech is prohibited by § 1-212.1. The district court correctly found that § 1-212.1 is not a prior restraint.

### C. Because the District Court Properly Dismissed Mr. Doyle's Complaint, Its Decision to Deny a Preliminary Injunction Should Be Upheld.

Mr. Doyle's final argument is that the district court's denial of a preliminary injunction should be overturned and this Court should remand with a mandate to issue a preliminary junction. Br. at 59. As fully set forth above, the district court's dismissal of Mr. Doyle's complaint for failure to state a claim clearly indicates that Mr. Doyle could not meet the first requirement for issuance of a preliminary injunction – the likelihood of success on the merits.

Because the district court ruled against Mr. Doyle on the merits, it had no reason to address irreparable harm, the balance of equities, or the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). But even turning to those factors, Mr. Doyle has not shown how a statute that restricts his conduct as a medical professional will irreparably harm his First Amendment rights, and the potentially significant harm to children from conversion therapy tips the balance of equities against Mr. Doyle and shows that an injunction would not be in the public interest. But in the unlikely event that this Court were to reverse the district court's dismissal of Mr. Doyle's complaint, the appropriate relief would be limited to remanding to the district court for the opportunity to rule on the preliminary injunction.

## III. MR. DOYLE LACKS STANDING TO BRING THIS SUIT EITHER ON BEHALF OF HIS MINOR CLIENTS OR ON HIS OWN.

This Court may also affirm the district court's dismissal of Mr. Doyle's complaint on alternative grounds for lack of standing. The district court correctly concluded that Mr. Doyle could not assert his clients' purported constitutional claims. To be entitled to assert such claims, a plaintiff must demonstrate, among other things, "a hindrance to the third party's ability to protect his or her own interests." *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002). "Generalized statements" about obstacles and stigma are not sufficient. *See id.* ("[W]e cannot simply assume that every disabled or chronically ill person is incapable of asserting his or her own claims."); *King v. Governor of New Jersey*, 767 F.3d 216, 244 (3d Cir. 2014) (allegation that patients do not want to disclose that they are in therapy not sufficient to confer third party standing); *Otto*, 353 F. Supp. 3d at 1246-47 (general statements about fear of stigma and disclosure of details about therapy not sufficient to confer third party standing).

In his complaint, Mr. Doyle made only generalized statements about obstacles and stigma:

> 142. Plaintiff's minor clients face substantial obstacles in bringing the claims herein, including their fear of embarrassment, stigmatization, and opprobrium from publicly disclosing not only their needs and desires to receive specifically counseling that involves intimate details of their development, growth, and sexuality, and that the State of Maryland officially abhors.

(J.A. 39.) These allegations are virtually identical to those dismissed as insufficient in *King* and *Otto* - two other conversion therapy cases. Furthermore, Mr. Doyle does not explain why a pseudonymous filing would not adequately protect his clients from stigma and an invasion of privacy as it did in *Pickup*, 740 F.3d at 1208, 1224, and *Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015). Mr. Doyle's only response is that courts frequently have allowed health care professionals to assert the rights of their patients. Br. at 52-53. While that may be true in other contexts, no court has done so in a case challenging the constitutionality of conversion therapy restrictions. The district court correctly concluded that Mr. Doyle could not assert the claims of his clients.

The district court erred, however, in concluding that Mr. Doyle has standing to pursue this lawsuit on his own accord. To establish standing, Mr. Doyle must show an injury in fact either by demonstrating "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" and the existence of "a credible threat of prosecution thereunder," *Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018), or the self-censorship that occurs as a result of being chilled from exercising the right to free expression, *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). In determining whether Mr. Doyle made the required showing, the district court considers the allegations in the complaint as evidence of standing, but may consider evidence outside the pleadings without converting a

motion to dismiss into one for summary judgment. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Mr. Doyle did not meet that burden below.

The district court determined that Mr. Doyle demonstrated standing because he "'experienced a non-speculative and objectively reasonable chilling effect' due to § 1-212.1" (J.A. 1042), apparently based on the allegations in the complaint and his view that § 1-212.1 defines his work as conversion therapy (J.A. 1040-42). The district court's determination should be reversed because it conflicts with Mr. Doyle's deposition testimony, the consent forms that his clients sign, and the words of § 1-212.1.

Section 1-212.1 prohibits only the practice of conversion therapy with a minor. It defines conversion therapy as "a practice or treatment by a mental health or child care practitioner that seeks to change an individual's sexual orientation or gender identity" and excludes sexual or gender identity affirming practices. *See* Health Occ. §§ 1-212.1(a)(2)(1), (iii). According to Mr. Doyle, his practice is sexual and gender identity affirming (J.A. 891), and his clients both understand and agree that he does not practice "reparative therapy, reorientation therapy, conversion therapy, or any type of sexual orientation change effort therapy" (J.A. 859, 863, 867, 885-92). Given Mr. Doyle's testimony about his counseling practice, the language of the consent forms that he uses, and the terms of § 1-212.1, the evidence does not

support the conclusion that Mr. Doyle intends to engage in a course of conduct proscribed by the statute.

Nor has Mr. Doyle shown a credible threat of prosecution. He has not been the subject of complaints to the Maryland Board of Professional Counselors and Therapists (the "Board"), and his only communications with the Board occurred in connection with renewing his license. (J.A. 882-84.) Unlike the plaintiff in *Cooksey v. Futrell*, the Board has not threatened disciplinary action against Mr. Doyle, suggested that he modify his practice in any respect, or taken any other action against him. (J.A. 882-84.) And, also unlike the plaintiff in *Cooksey*, Mr. Doyle has not engaged in self-censorship; according to his interrogatory answers and deposition testimony, he still is providing therapy to clients in Maryland.

Mr. Doyle's "keen interest in the issue" of conversion therapy and his strong feelings on the topic are insufficient to establish Article III standing. *See Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017). The allegations in his complaint and his discovery responses do not show "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute" or the existence of "a credible threat of prosecution thereunder." *Kenny*, 885 F.3d at 288. Thus, the Court thus should affirm the district court's dismissal of the complaint on alternative grounds for lack of standing.

## IV. THE ELEVENTH AMENDMENT PROTECTS THE GOVERNOR AND THE ATTORNEY GENERAL FROM SUIT.

Mr. Doyle sued the Governor and the Attorney General, in their official capacities, for injunctive and declaratory relief. Neither has the responsibility to enforce § 1-212.1 and, thus, both are immune from federal suit under the Eleventh Amendment. The district court's contrary conclusion should be reversed and its dismissal of Mr. Doyle's complaint affirmed on this alternative ground.

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It generally bars suits in federal court against an unconsenting state and any governmental units that are arms of the state. *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 329 (4th Cir. 2001). Suits against state officials in their official capacity are also barred unless the suit falls into an exception recognized in *Ex parte Young*, 209 U.S. 123 (1908). *Id.*

*Ex parte Young* provides a limited exception to Eleventh Amendment immunity for suits against state officials for prospective or declaratory relief for ongoing violations of federal law. 209 U.S. at 159-60. For the exception to apply, the state officials must have "some duty in regard to the enforcement of the laws of the state" and must "threaten and [be] about to commence proceedings against

parties affected [by] an unconstitutional act." *Id*. at 155-56. In other words, the official being sued must have a "special relation" to the challenged statute. *Id.* at 157.

The requirement of a special relation serves "as a measure of *proximity to* and *responsibility for* the challenged state action." *South Carolina Wildlife Federation v. Limehouse*, 549 F.3d 324, 333 (4th Cir. 2008). It "is not met when an official merely possesses '[g]eneral authority to enforce the laws of the state.'" *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir. 2010) (quoting *Limehouse*, 549 F.3d at 332-33). Thus, "[t]he mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a state statute." *Waste Management*, 252 F.3d at 331 (internal quotation marks and citation omitted). Similarly, a state Attorney General's responsibility to provide legal advice and representation to government officials does not make the Attorney General a proper defendant in a suit challenging the constitutionality of a state statute. *See McBurney*, 616 F.3d at 399-401.

In his complaint, Mr. Doyle alleged only that the Governor is "responsible for executing the laws of the State of Maryland" and that the Attorney General is "charged with enforcement of the laws of the State of Maryland." (J.A. 15.) Mr. Doyle did not, and could not, allege a specific role that either the Governor or Attorney General plays in executing or enforcing the standard of practice set forth

in § 1-212.1. Thus, the pleading in this case is not sufficient to meet the "special relation" requirement of the *Ex parte Young* exception to Eleventh Amendment immunity, and the Governor and Attorney General retain their Eleventh Amendment immunity. *See, e.g.*, *McBurney*, 616 F.3d at 401 (Attorney General retained immunity because he had no specific enforcement authority for Virginia Freedom of Information Act and authority to issue advisory opinions did not establish a special relationship); *Waste Management*, 252 F.3d at 331 (Governor has only a general duty to enforce the laws of Virginia, not a specific duty to enforce the challenged statutes; thus he retains his Eleventh Amendment immunity); *Weigel v. Maryland*, 950 F. Supp. 2d 811, 832 (D. Md. 2013) (Governor and Attorney General had general duty to enforce and protect Maryland law, not specific duty to enforce court decision; thus, they retain their Eleventh Amendment immunity"); *Pickup v. Brown*, No. 2:12-cv-02497-KJM-EFB, 2016 WL 4192406, at *3-4 (E.D. Cal. Aug. 9, 2016) (Governor has general duty to execute California law, but not a specific duty to enforce or implement California's conversion therapy ban; thus, he retains his Eleventh Amendment immunity).

Mr. Doyle could not allege that either the Governor or the Attorney General has a special relation to enforcement of § 1-212.1 because the provision expressly confers enforcement power on the professional boards: "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*." Health Occ. § 1-212.1(c) (emphasis added). The district court acknowledged that § 1-212.1(c) "awards the statute's disciplinary and regulatory maintenance to specific bodies" (J.A. 1049), but found it significant that "the statute does not explicitly prohibit oversight by the Maryland governor and attorney general" (*id.*). The lack of an express prohibition, combined with the Governor's and Attorney General's general authority, led the court to conclude that the the Governor and Attorney General had "failed to demonstrate that issuing an injunction against them would be ineffective at prohibiting enforcement of § 1-212.1." (J.A. 1049-50.)

The failure to prohibit oversight does not create the special relation required under *Ex parte Young* and this Court's decisions. First and foremost, a statute rarely - if ever - prohibits a governor or attorney general from playing a role in its enforcement, and the undersigned counsel are not aware of any Maryland statute that takes that extraordinary step. Because statutes rarely *prohibit* action by the Governor or the Attorney General, the effect of the district court's ruling is to make their general authority sufficient to establish the "special relation" required by *Ex parte Young*, a result that cannot be squared with this Court's Eleventh Amendment jurisprudence. *See McBurney*, 616 F.3d at 399 (*Ex parte Young* exception requires

a "special relation" between official and statute); *Waste Management*, 252 F.3d at 331 (same).

Second, although the Governor, as the district court pointed out, does have general supervisory authority over the Maryland Department of Health (J.A. 1049), the Secretary of Health has no authority over disciplinary decisions made by the various health occupations licensing boards. *See* Health Occ. § 1-203(a) (providing that the Secretary does not have "the power to disapprove or modify any decision or determination that a board or commission established under this article makes under authority specifically delegated by law to the board or commission"). Because § 1-212.1(c) specifically delegates enforcement authority to the professional boards, the Secretary, and through him the Governor, does not have any role in the statute's enforcement.

Similarly, the Attorney General has no special connection to § 1-212.1. "[T]he Attorney General of Maryland has only such powers as are vested in him by the Constitution of Maryland and the various enactments of the General Assembly of Maryland." *State ex rel. Attorney General v. Burning Tree Club, Inc.*, 481 A.2d 785, 797 (Md. 1984). Section 1-212.1 of the Health Occupations Article makes no mention of enforcement by the Attorney General. Similarly, neither the Maryland Constitution nor any other provision of law authorizes the Attorney General - rather than a licensing board - to enforce the disciplinary provisions of the various practice

acts. *See, e.g.*, Md. Const., Art. V, § 3 (listing the Attorney General's responsibilities). Instead, the Attorney General's only connection to enforcement of the statute is through his general responsibility to take "charge of the legal business of the State." State Gov't § 6-106(a). As with the Governor, that general authority does not satisfy this Court's precedents on what satisfies the "special relation" required by *Ex parte Young*.

The statute authorizes the Board of Professional Counselors and Therapists to enforce the provisions of § 1-212.1 with respect to its licensee, Christopher Doyle. Neither the Governor nor the Attorney General has such authority, and therefore neither has not lost his Eleventh Amendment immunity from the suit filed by Mr. Doyle. This Court should reverse the district court's denial of the Governor's and the Attorney General's immunity and affirm the dismissal of Mr. Doyle's complaint on the alternative ground that it is barred by the Eleventh Amendment.

## CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

BRIAN E. FROSH
Attorney General of Maryland

/s/ Kathleen A. Ellis

KATHLEEN A. ELLIS
BRETT E. FELTER
Assistant Attorneys General
300 West Preston Street, Suite 302
Baltimore, Maryland 21201
(410) 767-1861
(410) 333-7894 (facsimile)

Attorneys for the Appellees

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9270 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

/s/ Kathleen A. Ellis
_____
Kathleen A. Ellis

## PERTINENT PROVISIONS

### Constitution of the United States

### Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

### Maryland Constitution

**Article II, § 1. Executive power vested in Governor; term of office; when ineligible to succeed himself.**

The executive power of the State shall be vested in a Governor, whose term of office shall commence on the third Wednesday of January next ensuing his election, and continue for four years, and until his successor shall have qualified; and a person who has served two consecutive popular elective terms of office as Governor shall be ineligible to succeed himself as Governor for the term immediately following the second of said two consecutive popular elective terms.

**Article II, § 9. Governor to take care that laws are faithfully executed.**

He shall take care that the Laws are faithfully executed.

**Article V, § 3. Powers and duties of Attorney-General; compensation; Governor not to employ additional counsel unless authorized by legislature.**

(a) The Attorney General shall:

(1) Prosecute and defend on the part of the State all cases pending in the appellate courts of the State, in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested, except those criminal appeals otherwise prescribed by the General Assembly.

(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General

Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.

(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State.

(4) Give his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject.

(b) The Attorney General shall have and perform any other duties and possess any other powers, and appoint the number of deputies or assistants, as the General Assembly from time to time may prescribe by law.

(c) The Attorney General shall receive for his services the annual salary as the General Assembly from time to time may prescribe by law, but he may not receive any fees, perquisites or rewards whatever, in addition to his salary, for the performance of any official duty.

(d) The Governor may not employ any additional counsel, in any case whatever, unless authorized by the General Assembly.

**Annotated Code of Maryland**

**Md. Code Ann., Health Occupations § 1-203. Powers of Secretary**

(a) Except as provided in subsection (c) of this section, the power of the Secretary over plans, proposals, and projects of units in the Department does not include the power to disapprove or modify any decision or determination that a board or commission established under this article makes under authority specifically delegated by law to the board or commission.

(b) The power of the Secretary to transfer staff or functions of units in the Department does not apply to any staff of a board or commission, established under this article, or to any functions that pertain to licensing, disciplinary, or enforcement authority, or to any other authority specifically delegated by law to a board or commission.

(c)(1) Notwithstanding §§ 8-205(b)(5) and 8-205.1 of the State Government Article and except as provided in subsection (d) of this section, the Secretary and the Office of Administrative Hearings, in consultation with stakeholders and other interested parties, shall adopt regulations for the supervision of each board or commission that is composed in whole or in part of individuals participating in the occupation or profession regulated by the board or commission, including the review by the Office of Administrative Hearings described under this subsection, in order to:

(i) Prevent unreasonable anticompetitive actions by the board or commission; and

(ii) Determine whether the actions of the board or commission further a clearly articulated State policy to displace competition in the regulated market.

(2) In accordance with regulations adopted under this subsection, the Office of Administrative Hearings:

(i) Shall review a decision or action of a board or commission that is referred to the Office in order to determine whether the decision or action furthers a clearly articulated State policy to displace competition in the regulated market;

(ii) May not approve a decision or action of a board or commission that does not further a clearly articulated State policy to displace competition in the regulated market; and

(iii) In conjunction with the Office of the Attorney General, shall establish a process:

1. By which the Office of Administrative Hearings reviews decisions or actions of a board or commission;

2. That is independent of the process by which the Office of Administrative Hearings hears adjudicated, contested cases; and

3. That includes:

A. The types of decisions or actions of a board or commission that may be referred to the Office of Administrative Hearings for review;

B. Qualifications and specialized training requirements for administrative law judges conducting reviews as required under this subsection;

C. Checks for identification and management of potential conflicts when the Office of Administrative Hearings conducts a contested case hearing in accordance with Title 10, Subtitle 2 of the State Government Article; and

D. Appropriate standards and guidelines for conducting reviews as required under this subsection.

(3) A board or commission may not implement a decision or a final action of the board or commission until after the Office of Administrative Hearings has conducted the review required under this subsection.

(4) The process specified under paragraph (2)(iii) of this subsection shall require the Office of Administrative Hearings to:

(i) Review the merits of the decision or action of a board or commission;

(ii) Assess whether the decision or action furthers a clearly articulated State policy to displace competition in the regulated market; and

(iii) Issue expeditiously a written decision approving, disapproving, or modifying the decision or action or remanding the decision or action back to the board or commission for further review.

(5) The decision or action implemented by a board or commission shall comply with the written decision of the Office of Administrative Hearings.

(6) The Office of Administrative Hearings may not authorize an administrative law judge to review the decision or action if the judge is appointed by, under the oversight of, or a member of a board or commission whose action is the subject of review.

(7) Each board or commission shall be responsible for the costs associated with the review by the Office of Administrative Hearings of decisions or actions of the respective board or commission.

(d) Subsection (c) of this section does not apply to:

(1) A decision or determination of a board or commission concerning ministerial acts;

(2) The internal operations of a board or commission;

(3) Investigations;

(4) Charges; and

(5) As it relates to an individual regulated by a board or commission:

(i) Consent orders; and

(ii) Letters of surrender.

**Md. Code Ann., Health Occupations § 1-212.1. Conversion therapy**

(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.

**Md. Code Ann., Health Occupations § 17-202. Board members**

(a)(1) The Board consists of 13 members appointed by the Governor with the advice of the Secretary.

(2) Of the 13 Board members:

(i) Four shall be licensed as clinical professional counselors;

(ii) Three shall be licensed as clinical marriage and family therapists;

(iii) Three shall be licensed as clinical alcohol and drug counselors;

(iv) One shall be licensed as a clinical professional art therapist; and

(v) Two shall be consumer members.

(3) The composition of the Board as to the race and sex of its members shall reflect the composition of the population of the State.

(4) The Governor shall appoint the counselors and therapists from a list submitted to the Governor by the Secretary. Any association representing professional counselors, marriage and family therapists, alcohol and drug counselors, or professional art therapists may submit recommendations for Board members to the Secretary.

(5) Two of the individuals appointed as a licensed clinical professional counselor member under paragraph (2)(i) of this subsection may not hold another credential issued by the Board.

(b) The consumer members of the Board:

(1) Shall be members of the general public;

(2) May not be or ever have been certified or licensed as a counselor or therapist or in training to become certified or licensed as a counselor or therapist;

(3) May not have a household member who is certified or licensed as a counselor or therapist or in training to become certified or licensed as a counselor or therapist;

(4) May not participate or ever have participated in a commercial or professional field related to professional counseling, marriage and family therapy, alcohol and drug counseling, or professional art therapy;

(5) May not have a household member who participates in a commercial or professional field related to professional counseling, marriage and family therapy, alcohol and drug counseling, or professional art therapy;

(6) May not have had within 2 years before appointment a substantial financial interest in a person regulated by the Board; and

(7) While members of the Board, may not have a substantial financial interest in a person regulated by the Board.

(c) Before taking office, each appointee to the Board shall take the oath required by Article I, § 9 of the Maryland Constitution.

(d)(1) The term of a member is 4 years.

(2) The terms of the members of the Board are staggered as required by the terms of the members of the Board serving on July 1, 1988.

(3) At the end of a term, a member continues to serve until a successor is appointed and qualifies.

(4) A member may not serve more than 2 consecutive full terms.

(5) To the extent practicable, the Governor shall fill any vacancy on the Board within 60 days of the date of the vacancy.

(e)(1) The Governor may remove a member for incompetency, misconduct, or neglect of duty.

(2) Upon the recommendation of the Secretary, the Governor may remove a member whom the Secretary finds to have been absent from 2 successive Board meetings without adequate reason.

**Md. Code Ann., Health Occupations § 17-509. Denial, suspension, or revocation of license**

Subject to the hearing provisions of § 17-511 of this subtitle, the Board, on the affirmative vote of a majority of its members then serving, may deny trainee status, a license, or a certificate to any applicant, place any trainee, licensee, or certificate holder on probation, reprimand any trainee, licensee, or certificate holder, or suspend , rescind, or revoke the status of any trainee, a license of any licensee, or a certificate of any certificate holder if the applicant, trainee, licensee, or certificate holder:

(1) Fraudulently or deceptively obtains or attempts to obtain trainee status, a license, or a certificate for the applicant, trainee, licensee, or certificate holder or for another;

(2) Habitually is intoxicated;

(3) Provides professional services:

(i) While under the influence of alcohol; or

(ii) While using any narcotic or controlled dangerous substance, as defined in § 5-101 of the Criminal Law Article, or other drug that is in excess of therapeutic amounts or without valid medical indication;

(4) Aids or abets an unauthorized individual in practicing clinical or nonclinical counseling or therapy or representing to be an alcohol and drug counselor, marriage and family therapist, professional counselor, or professional art therapist;

(5) Promotes the sale of drugs, devices, appliances, or goods to a patient so as to exploit the patient for financial gain;

(6) Willfully makes or files a false report or record in the practice of counseling or therapy;

(7) Makes a willful misrepresentation while counseling or providing therapy;

(8) Violates the code of ethics adopted by the Board;

(9) Knowingly violates any provision of this title;

(10) Is convicted of or pleads guilty or nolo contendere to a felony or a crime involving moral turpitude, whether or not any appeal or other proceeding is pending to have the conviction or plea set aside;

(11) Is professionally, physically, or mentally incompetent;

(12) Submits a false statement to collect a fee;

(13) Violates any rule or regulation adopted by the Board;

(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;

(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;

(16) Commits an act of immoral or unprofessional conduct in the practice of clinical or nonclinical counseling or therapy;

(17) Knowingly fails to report suspected child abuse in violation of § 5-704 of the Family Law Article;

(18) Fails to cooperate with a lawful investigation conducted by the Board; or

(19) Fails to submit to a criminal history records check in accordance with § 17-501.1 of this subtitle.

**Md. Code Ann., Health-General § 2-102. Secretary of Health; responsibilities**

(a) The head of the Department is the Secretary of Health, who shall be appointed by the Governor with the advice and consent of the Senate.

(b)(1) The Secretary serves at the pleasure of the Governor and is responsible directly to the Governor. The Secretary shall advise the Governor on all matters assigned to the Department and is responsible for carrying out the Governor's policies on these matters.

(2) The Secretary is responsible for the operation of the Department and shall establish guidelines and procedures to promote the orderly and efficient administration of the Department. The Secretary may establish, reorganize, or abolish areas of responsibility in the Department as necessary to fulfill the duties assigned to the Secretary.

(c) The Secretary is entitled to the salary provided in the State budget.

**Md. Code Ann., State Government § 3-302. Supervisory authority**

The Governor is the head of the Executive Branch of the State government and, except as otherwise provided by law, shall supervise and direct the officers and units in that Branch.

**Md. Code Ann., State Government § 6-106. State legal business**

(a) Except as otherwise provided in this section, the Attorney General has general charge of the legal business of the State.

(b) Unless a law expressly provides for a general counsel as the legal adviser and representative of the officer or unit, the Attorney General is the legal adviser of and shall represent and otherwise perform all of the legal work for each officer and unit of the State government.

(c) Notwithstanding any other section of law, an officer or unit of the State government may not employ or be represented by a legal adviser or counsel other than the Attorney General or a designee of the Attorney General, except that:

(1)(i) an officer or unit of the State government may employ or be represented by a legal adviser or counsel other than the Attorney General or the Attorney General's designee with prior approval of the Attorney General; and

(ii) the approval may be provided under § 6-105(b) or (c) of this subtitle, § 13-107 of the State Finance and Procurement Article, or other authority specified by the Attorney General;

(2) a State institution may employ counsel to represent the institution in a habeas corpus proceeding;

(3) a unit of the State government may employ counsel if:

(i) an investigation by an investigating committee of the General Assembly affects the unit;

(ii) the Attorney General represents both the investigating committee and the unit;

(iii) the Attorney General gives the Board of Public Works and the unit written notice that representation by the Attorney General involves or reasonably may involve a conflict of interest; and

(iv) the Board of Public Works approves the employment of counsel by the unit;

(4) the Office of the Public Defender may employ or be represented by a legal adviser or counsel other than the Attorney General or the Attorney General's designee; and

(5) unless otherwise agreed to by the Attorney General and the County Attorney for Montgomery County, the County Attorney for Montgomery County may represent the Montgomery County Department of Health and Human Services in a contested case under Title 10, Subtitle 2 of this article.

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

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| | * | |
| CHRISTOPH DOYLE, | * | |
| *Plaintiff-Appellant*, | | |
| v. | * | No. 19-2064 |
| LAWRENCE HOGAN, JR., *et al.* | * | |
| *Defendants-Appellees*. | * | |

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**CERTIFICATE OF SERVICE**

I certify that, on this 23rd day of December, 2019, the Brief of Appellees was filed electronically and served on counsel of record through the CM/ECF system.

/s/ Kathleen A. Ellis
_____
Kathleen A. Ellis