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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

FOR THE PLAINTIFF:

GARZA REGAN AND ASSOCIATES PC  
BY: JOHN R. GARZA, ESQUIRE  
17 W Jefferson Street  
Suite 200  
Rockville, Maryland 20850  
(301) 340-8200

-and-

LIBERTY COUNSEL  
BY: HORATIO G. MIHET, ESQUIRE  
BY: ROGER K. GANNAM, ESQUIRE  
P.O. Box 540774  
Orlando, Florida 32854  
(407) 875-1776

OFFICIAL COURT REPORTER:  
Renee A. Ewing, RPR, RMR, CRR - (301) 344-3227

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

1 APPEARANCES (Continued):

2 FOR THE DEFENDANTS:

3 OFFICE OF THE ATTORNEY GENERAL  
4 DEPARTMENT OF HEALTH AND MENTAL HYGIENE  
5 BY: KATHLEEN A. ELLIS, ESQUIRE  
6 BY: BRETT E. FELTER, ESQUIRE  
7 300 W. Preston Street  
8 Room 302  
9 Baltimore, Maryland 21201  
10 (410) 767-1867

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1 THE COURT: Good morning.

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

3 THE COURT: Please be seated.

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. GARZA: I will, Your Honor.

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

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

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

21 MR. GANNAM: Yes, Your Honor.

22 THE COURT: Okay.

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

25 THE COURT: Everyone will get an opportunity. I know

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

4 MS. ELLIS: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

1 again.

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

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

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

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

19           MR. GANNAM: Thank you, Your Honor.

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

1 gender identity conflicts.

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

7           THE COURT: So are you abandoning your vagueness  
8 challenge?

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

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

1 of those things.

2 THE COURT: How does that make it vague?

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

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

25 So the vagueness comes from not knowing how the State of

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

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

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

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

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

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

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

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

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

23                 MS. ELLIS: Excuse me, Your Honor. Is there a way to  
24 --

25                 THE COURT: That one is not on?

1 MS. ELLIS: No.

2 THE COURT: Wait a minute.

3 MR. GANNAM: They are on here.

4 THE COURT: That one is on. The other counsel table  
5 is not. Mine is, and there is one -- we just need to make sure  
6 it's turned on.

7 MS. ELLIS: They are great when they work.

8 THE COURT: Every other monitor is on. I haven't  
9 looked at the jury box ones, but the witness stand is on.

10 THE DEPUTY CLERK: All of this was just checked last  
11 week, too.

12 MR. GARZA: Your Honor, the jury box is working, too.

13 THE COURT: Naturally, the one we need is --

14 MS. ELLIS: I'm happy to go sit in the jury box.

15 THE COURT: It's not coming on, Ms. Derro?

16 THE DEPUTY CLERK: No, it's not.

17 THE COURT: There is also -- the witness stand here  
18 also has one that's working, and we will call I.T. and get them  
19 down here as soon as possible, but if we can proceed, that's  
20 great.

21 MS. ELLIS: I'm sorry.

22 THE DEPUTY CLERK: We apologize.

23 THE COURT: Is the big monitor on over your shoulder?

24 MR. GANNAM: Yes.

25 THE COURT: Go ahead, Mr. Gannam.

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

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

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

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

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

1 because it's not something he does.

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

11 And then there is a -- another fundamental distinction  
12 that we want to point out, and that is voluntary versus forced  
13 change efforts. The APA talks about involuntary or coercive  
14 treatments which minors are forced to undergo against their  
15 will. It contrasts this with voluntary counseling, which a  
16 patient seeks and requests and willingly receives, and the APA  
17 encourages counselors to respect and observe the autonomy of  
18 clients, even minors, to request their own counseling or to  
19 direct their own counseling. This would be available at pages  
20 74 through 77 of the APA report.

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

1 that's not even possible.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Constitution.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MR. GANNAM: Not yet.

14 THE COURT: Thank you.

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

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

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

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

1 Otto. Are you going to deal with that?

2 MR. GANNAM: Absolutely.

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

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

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

16 First, our precedents have applied more deferential  
17 review to some laws that require professionals to disclose  
18 factual, non-controversial information in their commercial  
19 speech. Second, and this is what defendants here rely on in  
20 their preliminary injunction opposition, Document 25 at page  
21 14, Second, under our precedents, states may regulate  
22 professional conduct, even though that conduct incidentally  
23 involves speech, and it cites *Planned Parenthood of*  
24 *Southeastern Pennsylvania v. Casey* which was an abortion case  
25 that involved a required informed consent form. Clearly, the

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

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

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

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

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

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

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

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

25         What we have is counseling that takes place exclusively

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

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

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

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

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

24 THE COURT: Where did he get his definition?

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

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

3 THE COURT: What does it mean?

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

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

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

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

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

4 1308: Saying that limitations on writing and speaking  
5 are merely incidental to speech is like saying that limitations  
6 on walking and running are merely incidental to ambulation.  
7 Your Honor, that's exactly what we have here, a restriction on  
8 speaking that's not incidental to speech. It is speech.

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

14 As we will show next, the statute doesn't satisfy strict  
15 scrutiny because it discriminates on the basis of viewpoint  
16 first, or, alternatively, even if it's not viewpoint  
17 discriminatory, it certainly discriminates on the basis of  
18 content, and the defendants cannot prove the compelling  
19 interest that they would need to ban this kind of speech and SB  
20 1028 even if it could point to a compelling interest justifying  
21 it. It's not narrowly tailored to meet any compelling  
22 interest.

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

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

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

25         But if that same client tells the counselor that she

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 counseling but was accomplished through speech.

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

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

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

10          MS. ELLIS: Thank you.

11          MR. GANNAM: They were previously filed.

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

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

21           We have already talked about the -- the APA report.  
22 There are several more. But what we think that we have shown  
23 in our briefs and will -- we will try to recap today is not a  
24 single one of the dozen or so authorities that are cited in SB  
25 1028 itself contain any or refer to any study showing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 different for each.

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

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

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

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

25 Getting more specifically, the APA recognized as one of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25         So that's gender identity efforts.

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

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

14           Now, sexual orientation. We don't think the defendants  
15 fare any better here. Again, we will come back to the, sort of  
16 the magnum opus in the sexual orientation realm, and that's the  
17 2009 APA report. Again, this is the one that the other papers  
18 cite to and rely on to the extent that they cite or rely upon  
19 anything.

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

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

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

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

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

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

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

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

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

6 In our -- in our original moving papers, at Docket 2, on  
7 page 6 and 7, we put a sampling of all these statements  
8 together. I am not going to read them all here, but, you know,  
9 they are all there, Your Honor, and it's just over and over and  
10 over again. We can't draw any conclusions. We can't make any  
11 causal attributions. So we think that by looking to the  
12 various kind of anecdotal evidence that may appear within the  
13 2009 APA report, we think it's clearly the defendants who are  
14 being selective in trying to avoid the very clear conclusions  
15 that the APA report presents.

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

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

1 of banning the therapy that they want to study.

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

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

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

24 But even with that -- that clarification, the defendants  
25 didn't undertake in any sense to just ban aversive therapy.

1 They banned it all.

2       And just to, again, not to put too fine a point on it  
3 here, with respect to voluntary, non-aversive, speech-only  
4 counseling that adolescents seek out and willingly receive,  
5 such as what Mr. Doyle wants to provide, the APA simply had  
6 this to say: We found no empirical research on adolescents who  
7 request SOCE.

8       Again, Your Honor, this is the opposite of a consensus or  
9 strong showing.

10       Now, in this case, Your Honor, the defendants, in their  
11 opposition papers, they cite to another report that was  
12 identified in the text of the recitals of SB 1028, and that's  
13 the SAMHSA, or the Substance Abuse and Mental Health Services  
14 Administration report from October of 2015.

15       Now, the defendants attempt to use this report to sort of  
16 rescue the -- the lack of research that the APA report from  
17 2009 clearly says is -- is the state of the empirical record.  
18 But whatever else defendants say about the SAMHSA report, it  
19 says, and I don't have the slide, but it says, and I will  
20 provide a reference to the Court, There is no conclusion from  
21 the 2009 APA report that has changed. There has been nothing,  
22 no study that can change any of the conclusions from the 2009  
23 APA report.

24       So, we have just covered what lack of research the 2009  
25 APA report reveals. This SAMHSA report six years later, just

1 like the six-year later APA report on transgender persons, it  
2 affirms that 2009 APA report and the lack of empirical evidence  
3 that that report reveals.

4 So this SAMHSA report, although the defendants rely  
5 heavily on it in opposing preliminary injunction, it simply  
6 affirms what the 2009 APA report had already said.

7 So, all of this, Your Honor, is to show that the -- the  
8 compelling interest prong cannot be satisfied. There is no  
9 record of evidence in Maryland from SOCE or conversion therapy,  
10 and there is certainly no empirical record or concrete evidence  
11 of any kind of actual harm that can be shown to be caused by  
12 conversion therapy even in the documents cited in the -- in the  
13 statute itself.

14 But forgetting all that for the moment and assuming that  
15 some compelling interest could be established, there still is  
16 no narrow tailoring here, and the narrow tailoring requires the  
17 State to actually consider less restrictive alternatives than  
18 the total ban that was enacted. And here, Your Honor, I think  
19 we can just say that there is no such narrow tailoring in the  
20 record of SB 1028.

21 The -- the -- to meet the requirement of narrow  
22 tailoring, the government has to demonstrate that alternative  
23 measures that burden substantially less speech would fail to --  
24 to serve the government's interests, not simply that it's  
25 easier just to ban the whole thing. They would have to show

1 that they actually tried and failed with other less restrictive  
2 alternatives or that alternatives were closely examined and  
3 ruled out for good reason.

4         Now, here, Your Honor, we think the defendants have --  
5 have failed utterly as the legislative record includes no  
6 evidence whatsoever -- and we discussed this in our reply  
7 brief, it's our first brief we filed on this after the benefit  
8 of the discovery -- but what is shown from the record is there  
9 was no attempt whatsoever to consider something less  
10 restrictive. In fact, there were six amendments that were  
11 proposed at various times, three in the House of Delegates,  
12 three in the Senate, all of which were simply voted down  
13 without a debate or discussion whatsoever.

14         Now, one of them might have given the defendants some  
15 narrow tailoring traction because it would have changed the  
16 language to ban only abusive or coercive therapies, but it was  
17 just voted down with no discussion whatsoever. So there is no  
18 record here of the State of Maryland engaging in any critical  
19 thought or any discussion of something less restrictive than a  
20 total ban that might work.

21         What's interesting, Your Honor, is, although this didn't  
22 happen in connection with SB 1028 that went into effect in  
23 2018, it did happen in 2014. This is Exhibit 15 to the  
24 deposition of the 30(b)(6) representative. It was filed at  
25 69-15. This is an article that was revealed from the

1 legislative record. And what it tells us is that in 2014, a  
2 delegate had proposed a conversion therapy bill much like SB  
3 1028, but, at the time and with the -- the blessing of the --  
4 the equality -- or Maryland equality at the time who was the  
5 proponent of the bill, they withdrew it. And the reason why  
6 they withdrew it is they said the existing regulatory scheme,  
7 the existing Occupational or Health Occupation Boards already  
8 have a sufficient complaint procedure in place to receive  
9 complaints of unethical or improper conduct by a licensed  
10 professional.

11 And then the article reveals, in this joint statement  
12 from this delegate and from this organization, that they were  
13 going to put their efforts into just letting people know that  
14 the complaint process is there and it's all you need if you  
15 have a minor who is harmed by a licensed professional.

16 Now, what the -- the discovery record also shows from the  
17 -- the State's designee is that the process in 2014 was no  
18 different the day before SB 1028 went into law; in other words,  
19 whatever satisfied the -- the proponents of the conversion  
20 therapy ban in 2014 was still the case, was still the complaint  
21 scheme, and, in fact, nothing has changed since SB 1028 was  
22 enacted. The same ability to make a complaint against a  
23 licensed professional for unprofessional or unethical or  
24 fraudulent conduct, whatever harm someone may feel or perceive  
25 from -- from what we would call conversion therapy or SOCE,

1 they have always been able to make a complaint for that.

2 And so this, again, shows the -- the failure of narrow  
3 tailoring because another way to satisfy narrow tailoring is to  
4 show that -- that the -- the State looked at existing laws or  
5 existing ways to address whatever harm they want to address and  
6 fully utilized it.

7 Well, there has been, again, no legislative record of a  
8 -- of a complaint in that intervening period from 2014 through  
9 2018. There has been no change in the procedure for filing a  
10 complaint. There is simply no reason to think that it was  
11 necessary in 2018 when there had been no complaints in the  
12 public record since 2014.

13 So I close with this, Your Honor --

14 THE COURT: Who would file the complaint if the  
15 parents wanted the child to receive this kind of therapy?

16 MR. GANNAM: Who would file the complaint? Well, any  
17 member of the public, according to the testimony, could file a  
18 complaint. So if someone else found out about it -- but I  
19 would say the same thing is the case under SB 1028, who would  
20 file the complaint if a professional were to provide --

21 THE COURT: That's not the question I have asked. I  
22 mean, you are saying the absence of complaints shows something  
23 between 2014 and the enactment of the statute. You have just  
24 argued that that shows something.

25 MR. GANNAM: Yes, Your Honor.

1 THE COURT: And I am asking: If it's a parent  
2 coercing a child to get SOCE, who would file the complaint?

3 MR. GANNAM: I think it's a good question and I think  
4 it's depends on the individual case. At some point, that child  
5 is not going to be a child anymore.

6 THE COURT: Well, between 2014 and 2018, we only have  
7 four years. Yes, that if -- okay. All right.

8 MR. GANNAM: So, Your Honor, a couple of more  
9 thoughts on the state of the -- of the law right now.

10 The defendants cite to the *Otto* case out of south Florida  
11 where Judge Rosenberg decided that the -- the nearly identical  
12 conversion therapy ban -- bans in Boca Raton and Palm Beach  
13 County, although were arguably content-based restrictions on  
14 speech, nevertheless were subject to some lesser scrutiny.  
15 And, you know, it's our submission that -- that the *Otto* Court  
16 essentially made it up, calling this treatment therapy or  
17 treatment speech or trying to regulate this speech or allowing  
18 regulation of the speech according to its function.

19 But the mistake that the *Otto* Court made was citing to  
20 the Supreme Court's *O'Brien* case where speech was categorized  
21 according to its function because the *Holder v. Humanitarian*  
22 *Law Project* says that that doesn't provide the rule on a  
23 content-based restriction on speech. So the *Holder* Court  
24 specifically rejected the very rationale that the *Otto* Court --  
25 that the *Otto* Court applied, and, therefore, we don't think

1 that that *Otto* decision can be relied on.

2 We think the *Otto* Court did exactly what *NIFLA* said you  
3 can't do, which is simply label something as speech,  
4 professional speech or something, other kind of speech, and  
5 then apply different rules. That's why *NIFLA* abrogated *Pickup*  
6 and *King* because they tried to apply different rules to speech  
7 based on who was saying it.

8 So, what the *Otto* Court did, we don't think that is  
9 reasonable.

10 Now, since *NIFLA*, there have actually been two Courts  
11 that have considered a conversion therapy ban like the one in  
12 Maryland. The first one was actually in the Tampa case of  
13 *Vazzo v. City of Tampa*. We attached this magistrate's report  
14 and recommendation to our reply that we just filed, Your Honor.  
15 This was actually the first decision to come out. It came out  
16 before *Otto*. And in this case, the magistrate judge, Judge  
17 Sansone, concluded that in light of *NIFLA*, there is no question  
18 that this was a content-based restriction on speech and that  
19 strict scrutiny must apply. And in the report and  
20 recommendation, Judge Sansone concluded that the -- the  
21 conversion therapy ordinance, Tampa's ordinance should be  
22 enjoined to the extent it prohibits voluntary, non-aversive  
23 talk therapy.

24 And so Judge Sansone saw that that distinction was  
25 important, that if there is some potential harm or perhaps

1 greater correlation of harm from aversive or coercive  
2 techniques, then that doesn't mean that you can just ban it all  
3 and so that it should be enjoined to the extent it applied to  
4 non-aversive and voluntary techniques.

5 We think the *Vazzo* case --

6 THE COURT: Where is that now? Has the district  
7 judge adopted that? I am assuming exceptions were taken?

8 MR. GANNAM: Objections were filed. A district judge  
9 has yet to address them. So the magistrate's report and  
10 recommendation is still subject to the district judge's review,  
11 absolutely. But I think it's important to point out two Courts  
12 have decided, and we have sort of a split decision here, we  
13 think that the better reasoned case is the *Vazzo* report and  
14 recommendation and not the *Otto* decision for the reasons that I  
15 have explained.

16 So, at this point, Your Honor, I think that concludes --

17 THE COURT: Did you say there were two decisions  
18 since *NIFLA*? Or you mean *Otto* and this one?

19 MR. GANNAM: *Otto* and *Vazzo*, yes, Your Honor.

20 That is the -- that is the basis for our likelihood of  
21 success on the -- the content-based restriction on speech or  
22 viewpoint-based restriction on speech. We think that the State  
23 cannot carry its constitutional burden for SB 1028 to be  
24 upheld.

25 We discussed vagueness briefly, Your Honor. That is also

1 one of our claims, that it is unconstitutionally vague because  
2 of the position that you will put professionals in and the  
3 enforcement authorities in as to deciding whether --

4 THE COURT: With a facial challenge, doesn't the  
5 Court have to find that it would be improper in all of its  
6 applications, and haven't you said, if it applies only to  
7 aversive therapy, that it would be arguably constitutional?

8 MR. GANNAM: Well, I think that's a -- a prior  
9 restraint concept, that -- that we have to show that it's  
10 unconstitutional in all cases.

11 THE COURT: I mean, is there -- you have pled both on  
12 its face and as applied.

13 MR. GANNAM: That's correct, Your Honor.

14 THE COURT: And, of course, I look first at applied  
15 because if it -- if you get the injunction against that, that's  
16 where I stop, right, but I guess what I am asking: Didn't you  
17 start this whole argument by saying that if it were aversion  
18 therapy, you wouldn't -- if it were limited to aversion  
19 therapy, you wouldn't be here?

20 MR. GANNAM: That's a standing issue because our  
21 client doesn't practice aversive therapy.

22 THE COURT: I understand that. But doesn't that also  
23 apply, to some extent, in the facial challenge area?

24 MR. GANNAM: I am just reminded by my co-counsel that  
25 in our brief, we did cite the cases in the -- where the Supreme

1 Court has said that in the case of prior restraint, which we  
2 have argued that SB 1028 is as well, we don't have to show that  
3 it's unconstitutional in all applications in order to make a  
4 facial challenge.

5 So that's a -- that's a little different from the  
6 challenge based on the -- the First Amendment infringement for  
7 being a content-based restriction on speech.

8 So, in that respect, for the prior restraint challenge,  
9 it isn't necessary to be unconstitutional in all applications.  
10 For the Court's question, I think, as to our, sort of our  
11 primary First Amendment challenge, I think that, as we are here  
12 today arguing against the application of Mr. Doyle, it is more  
13 in the as applied realm than facial challenge.

14 THE COURT: Okay.

15 MR. GANNAM: With that, Your Honor, I would like to  
16 just reserve some time for rebuttal if possible, and I will  
17 give up the podium to the defense.

18 THE COURT: Why don't we take a stretch break and try  
19 to keep it to ten minutes.

20 (Recess taken from 10:55 a.m. 11:12 a.m.)

21 THE COURT: Please be seated.

22 MS. ELLIS: May it please the Court. Before I start  
23 my presentation, Your Honor, I have given you a binder with, at  
24 the risk of overwhelming the Court, but it is the documents  
25 that I will be referring to today so they are in one place, and

1 I would also like to offer an exhibit which has been provided  
2 to my opposing counsel. It's -- it has quotes from many of  
3 those documents and tells the Court where they come from, and I  
4 thought that might be helpful.

5 Your Honor, children are vulnerable cohorts uniquely  
6 susceptible to various forms of mistreatment. The protection  
7 is of the utmost importance to all involved in governance and  
8 the administration of justice. Consequently, numerous policies  
9 at both the federal and state level have been implemented to  
10 protect the safety and well-being of children.

11 That's the opening paragraph, Your Honor, of a recent  
12 Maryland Court of Appeals opinion, *Romero v. Perez*, 208 A.3d  
13 903. Coincidentally, it was issued a few days before this  
14 hearing was originally scheduled, and it echos similar  
15 sentiments that are -- have been in the Supreme Court cases  
16 going back at least 75 years to *Prince v. Massachusetts*, in *FCC*  
17 *vs. Pacifica Foundation*, *New York v. Ferber*, *Sable*  
18 *Communications vs. FCC*, all of which recognize the importance  
19 and the government's compelling interest in protecting physical  
20 and psychological well-being of minors even when constitutional  
21 rights like free speech, or, as in the case of *Prince*, free  
22 exercise of religion are at issue.

23 And I would submit that these -- these words certainly  
24 apply here. The Maryland General Assembly, as you can see from  
25 the -- I think it's attachment one to the -- the plaintiff's

1 complaint, Document 1-1, in the preamble, it expresses its  
2 concern for the well-being of Maryland children and prohibits a  
3 particular kind of treatment, conversion therapy, when  
4 practiced on those children.

5         And in the defendants' view, that, contrary to  
6 Mr. Gannam's view that he spent much time talking about today,  
7 that doesn't violate the First Amendment to the Constitution,  
8 and Mr. Doyle is not entitled to a preliminary injunction.

9         I'd first like to talk a little bit about the  
10 interpretation of the statute that Mr. Gannam has advocated.

11         The statute, I would submit, clearly only regulates the  
12 behavior of the therapist. It is in the Health Occupations  
13 article, an article of the Maryland Code that regulates the  
14 numerous professions, I think there is 20 of them now, or 21  
15 that it regulates in specific articles. It defines a violation  
16 of the statute as unprofessional conduct that subjects a  
17 licensed healthcare practitioner to discipline by the board  
18 that licenses it. Nothing in the statute that I can see would  
19 suggest that it would apply -- that it would make it illegal  
20 for a client to ask for help.

21         And I would submit that the way that the statute reads in  
22 connection with the, all of the sources that are cited in the  
23 preamble, that it prohibits licensed mental health  
24 practitioners from engaging in therapy with a client with the  
25 therapist's goal of changing that client's sexual orientation

1 or gender identity.

2 Many of the examples in the -- that Mr. Gannam raised and  
3 his quibbles with the statute focused on A1 -- I'm sorry,  
4 (a)(2) little double "I" where it says conversion therapy  
5 includes certain things. Well, includes is a word that the  
6 General Assembly uses by way of illustration, not by way of  
7 limitation. So it certainly does not exclude some of the  
8 examples that -- that Mr. Gannam raised.

9 But, more importantly, we have to start first with (a)(2)  
10 little "I" (1) means -- conversion therapy means a practice or  
11 treatment by a mental health or childcare practitioner that  
12 seeks to change an individual's sexual orientation or gender  
13 identity.

14 Now, Mr. Gannam spent a lot of time contending that the  
15 -- the State cannot show a compelling interest and that there  
16 is no evidence of harm, but it would be helpful to start with  
17 the case law about evidence and harm.

18 So the cases say, over and over, that we have permitted  
19 litigants to justify speech restrictions by reference to  
20 studies and anecdotes pertaining to different locales all  
21 together, or even in a case applying strict scrutiny to justify  
22 restrictions based solely on history, consensus, and simple  
23 common sense, although many folks say there is nothing simple  
24 about common sense. But that, for example, Your Honor, is from  
25 *Lorillard Tobacco Company vs. Reilly*, 533 U.S. 525 at -- I am

1 not seeing the page immediately.

2 But it is also the same, similar sentiment statements in  
3 *Florida Bar v. Went For It*, 515 U.S. 618, *Burson v. Freeman*,  
4 504 U.S. 191, and perhaps most importantly in *FCC vs. Fox*  
5 *Television Stations*, there are some propositions for which  
6 scant empirical evidence can be marshalled, and the harmful  
7 effect of broadcast profanity on children is one of them. One  
8 cannot demand a multi-year controlled study in which some  
9 children are intentionally exposed to indecent broadcasts and  
10 insulated from all other indecency and others are shielded from  
11 indecency. And I would submit that that is at 556 U.S. 502 at  
12 519.

13 I would suggest, Your Honor, you submit -- you substitute  
14 conversion therapy for broadcast indecency, and this -- that  
15 quote applies perfectly to this case.

16 So what kinds of harm are there in the record? Well,  
17 before I -- before I get to -- Mr. Gannam repeatedly talked  
18 about no empirical evidence of harm. As the *FCC vs. Fox*  
19 *Television* quote: Evidence is we don't have to have a  
20 multi-year study showing harm to conclude that there might be a  
21 reason to prohibit this type of therapy for children.

22 There is evidence in all of the reports cited that harm  
23 has been reported by recipients of such services, and because  
24 of that, there are concerns about continuing to provide  
25 conversion therapy. And, again, conversion therapy, a -- the

1 beginning of therapy with a preconceived notion of what the  
2 outcome is. We want to change somebody's sexual orientation or  
3 gender identity without regard to anything else, whether it's  
4 effective or safe.

5         So if you -- the -- some of the quotes are listed on the  
6 exhibit that I gave you beginning with the APA task force, A  
7 systematic review of the peer-reviewed literature on sexual  
8 orientation change efforts concluded that efforts to change  
9 sexual orientation are unlikely to be successful and -- and  
10 this is the crucial part, involve some risk of harm.

11         At page 4, There is currently no evidence that teaching  
12 or reinforcing stereotyped gender normative behavior in  
13 childhood or adolescence can alter sexual orientation. We have  
14 concerns that such interventions may increase self-stigma and  
15 minority stress and ultimately increase the distress of  
16 children in adolescence.

17         Studies indicate that experience of self-stigma, such as  
18 self-stigma, shame, isolation and rejection, lack of emotional  
19 support, and some other things played a role in creating  
20 distress in individuals.

21         On page 642 of the APA report, a page that Mr. Gannam was  
22 reading from, it also says, in addition to his citations to it,  
23 Some recent studies document that there are people who perceive  
24 that they have been harmed through SOCE. Among those studies  
25 reporting on the perceptions of harm, the reported negative

1 social and emotional consequences include self reports of  
2 anger, anxiety, confusion, depression, grief, guilt,  
3 hopelessness, deteriorated relationships with family, loss of  
4 social support, loss of faith, poor self image, social  
5 isolation, intimacy difficulties, intrusive imagery, and  
6 suicidal ideation, self hatred, and sexual dysfunction.

7         So there is perceptions of people who have gone through,  
8 have been subjected to conversion therapy that they have been  
9 harmed by that. The APA documents it throughout the --  
10 throughout its report.

11         The SAMHSA report also talks about the damage from  
12 conversion therapy. The SAMHSA report is a 25 -- Document  
13 25-2, and on the -- the -- I think it's the third page of the  
14 exhibit that I handed to the Court are various -- some of the  
15 quotes from that report. Interventions aimed at a fixed  
16 outcome, including those aimed at changing gender identity,  
17 gender expression, and sexual orientation are coercive, can be  
18 harmful, and should not be a part of behavioral health  
19 treatment. Lesbian, gay, and bisexual orientations are normal  
20 variations of human sexuality and are not mental disorders.  
21 Treatment seeking to change an individual's sexual orientation  
22 is not indicated.

23         In addition, and then on page 26, In addition to a lack  
24 of evidence for the efficacy of conversion therapy with gender  
25 minority youth, there are concerns about the ethics of this

1 practice as well as the practice's potential for harm. The  
2 potential harms are suggested by clinicians' observations that  
3 the behavioral issues and psychological distress of many  
4 children in adolescence with gender dysphoria improves markedly  
5 when their gender identities are affirmed through social and/or  
6 medical transition.

7         Again, more evidence of harm, and that was -- the SAMHSA  
8 report was mentioned by several -- several of the individuals  
9 and organizations that submitted written and oral testimony  
10 before -- before the legislature.

11         There are also exhibits, and these are either in 25-5,  
12 which is the House Bill file, or 25-7, which is the Senate Bill  
13 file, some of them are in both. The Maryland Nurse's  
14 Association statement, Exhibit 5, says, In opposition. It  
15 should say, In support of HB902, youth who are subject to  
16 conversion therapy show higher rates of depression, suicide,  
17 substance abuse, and higher rates of HIV and STIS transmission,  
18 and cites a policy physician paper from the American College of  
19 Physicians.

20         There are documents from two practitioners in Maryland, a  
21 therapist who says, I have personally treated people who  
22 identify as survivors of conversion therapy and I can attest  
23 that it can take years to overcome the traumatic violation of  
24 trust that this type of therapy represents. That's Document --  
25 ECF Document 25-7 at 56, a statement from Kate MacShane who is

1 a licensed clinical social worker.

2 THE COURT: Just for clarification, would any of this  
3 -- well, did she limit it to the aversive therapy as opposed to  
4 the talk?

5 MS. ELLIS: No.

6 THE COURT: So you don't know?

7 MS. ELLIS: No. Her testimony does not indicate any  
8 -- any such limitation.

9 And -- and I don't -- the SAMHSA report and the APA  
10 report don't limit it to aversive therapy. They -- the  
11 conversion therapy, efforts to change sexual orientation or  
12 gender identity in the SAMHSA report says they are all coercive  
13 and they may be harmful.

14 The other practitioner is a pediatrician who says that  
15 she has -- has had patients with gender identity issues and who  
16 -- patients whose parents have wanted them to change their  
17 sexual orientation. And she talks about -- in her letter, she  
18 talks about one of her patients was a young man sent to summer  
19 camp for conversion therapy only to leave camp with his self  
20 esteem damaged immensely and other patients who have committed  
21 suicide because they didn't receive the positive support they  
22 needed.

23 There is other documents in the record showing evidence  
24 of harm. A statement from The Trevor Project, Document 25-5 at  
25 page 63, and that was also -- that was submitted in, both in

1 support of the House and Senate Bills, I am a survivor of the  
2 dangerous and discredited idea that a therapist could change my  
3 sexual orientation or gender identity. Although some may say  
4 that conversion therapy should be allowed as a choice, I simply  
5 reply that I never chose the therapy my family subjected me to  
6 during my formative years as a child.

7         The writer of that letter also goes on to explain that  
8 The Trevor Project -- one of the things that The Trevor Project  
9 does is operate a hotline, and in the year prior to his  
10 submitting that letter, The Trevor Project had been contacted  
11 by over 1200 Maryland youth considering suicide and needing  
12 someone to speak to when they feel alone and scared.

13         So I submit that certainly there was evidence in the  
14 record similar to what the Supreme Court has said is sufficient  
15 evidence to support efforts to protect children.

16         I would also point out that the guidelines from which  
17 Mr. Gannam spoke, read, and also had a slide conveniently, his  
18 presentation, he conveniently omitted the middle part of the --  
19 the paragraph, which is found at 67-1 at page 11, Consensus  
20 does not exist regarding whether this approach encouraging  
21 children to embrace their given bodies and align with their  
22 assigned gender roles, consensus does not exist whether this  
23 approach may provide benefit or may cause harm or lead to  
24 psychosocial adversities.

25         When addressing psychological interventions for children

1 and adolescents, the World Professional Association for  
2 Transgender Health Standards of Care identify interventions  
3 aimed at trying to change gender identity and expression to  
4 become more congruent with sex assigned at birth as unethical.

5         And, finally, a study that FreeState Justice attached to  
6 its amicus brief, it's a document at 28-2, an article about --  
7 or a report of a study of the effects of patient-initiated  
8 sexual orientation change efforts with LGBT adolescents. And  
9 what the study found was that adolescents who have been the  
10 subject of efforts to change their sexual orientation during  
11 adolescence, whether they were initiated -- only the patient --  
12 parent-initiated efforts or whether that was -- also included  
13 efforts either from a therapist or a religious leader, any of  
14 those efforts were associated with more negative mental health  
15 problems for young adults. They were more likely to have  
16 suicidal thoughts and to report suicidal attempts and higher  
17 levels of depression.

18         Trend analyses confirmed that parental attempts to change  
19 adolescents' sexual orientation are significantly associated  
20 with negative health outcomes in young adulthood and that those  
21 problems are worse for young adults who experienced SOCE that  
22 included external conversion efforts during adolescence,  
23 external conversion efforts being those from therapists or a  
24 religious leader.

25         I would submit, Your Honor, that that -- all of this that

1 I have just gone through demonstrates the reason that the  
2 legislature felt compelled to act and certainly demonstrate  
3 harm, that it is appropriate for the legislature to have acted  
4 on in order to protect youth in Maryland. And I think it's  
5 important to recognize that the statute really limits only one  
6 particular kind or the -- the statute is a limited restriction.  
7 It does not say to anybody who believes that conversion therapy  
8 is a good thing, it doesn't say you can't talk about it. It  
9 doesn't say you can't take public positions. It doesn't apply  
10 to adults. It applies to children, people under the age of 18,  
11 and the treatment that is provided by some mental health care  
12 practitioners.

13 Mr. Gannam also objects to the State's argument that this  
14 is conduct. It's treatment. I mean, it happens to be  
15 treatment that is provided through speech, both the client and  
16 the therapist. But it is treatment. If the State -- well,  
17 *NIFLA* says that the State may regulate treatment, may regulate  
18 healthcare professionals, and this is yet one more regulation  
19 of a fairly extensively regulated area of occupations. And if  
20 we can't -- if the State cannot say you cannot do a treatment,  
21 a type of mental health treatment that is harmful because it's  
22 speech, that's, you know, pretty much going to eliminate the  
23 ability of the State to regulate mental healthcare  
24 practitioners. And I think the -- the FreeState Justice brief  
25 goes through all of the types of regulations that that would

1 implicate if, in fact, that were the -- determined to be the  
2 law. I believe that's Document, yes, it's 28-1. And if you  
3 look at page 10, it lists the numerous kinds of regulations  
4 that might be of -- of -- just of professional counselors,  
5 that's what Mr. Doyle is, that might be at risk if one could  
6 not regulate the speech of mental health practitioners as the  
7 Court is -- or as the legislature has sought to do in this  
8 case.

9         So, I would submit that all of this, the evidence of harm  
10 that -- reports of harm that I have just reviewed with the  
11 Court are exactly the kinds of evidence of harm that the Court  
12 was looking for and accepting in the cases that I cited to you,  
13 it comes from a wide variety of organizations, some recipients  
14 of conversion therapy.

15         I'm sorry. One I forgot to mention, the -- there is a  
16 four- or five-page letter from Matthew Shurka that details,  
17 it's 25-5 at, I believe it's 90 through 94, that details his  
18 experience with conversion therapy and the, I think it's fair  
19 to say the miseries that he perceives it to have caused him.  
20 He submitted written testimony, but he also testified in person  
21 before the legislature.

22         There is also reports from some practitioners in Maryland  
23 about the harmful nature of it. And all of these, there is  
24 studies, there is reports from practitioners and from  
25 recipients of service and various position statements from a

1 wide variety of professional organizations are just the kind of  
2 evidence that the Court has accepted in other cases that  
3 justify restrictions on speech or restrictions on conduct,  
4 whichever the Court decides to view it as. They certainly all  
5 support the notion that conversion therapy may be harmful to  
6 minors, and, thus, is a legitimate source of regulation by the  
7 legislature.

8           In addition to what I have just talked about, there is a  
9 -- a publication that's -- a joint publication by the Human  
10 Rights Campaign and the American Academy of Pediatrics and the  
11 American Academy of Osteopathic Pediatricians, I believe, which  
12 also -- it was -- it was one of those late filings. It's  
13 certainly a -- a paper that would be -- that is easily  
14 discovered on Google. It's available online through the Human  
15 Rights Campaign.

16           At page 12 of that article, Discouraging or shaming a  
17 child's gender identity or expression harms the child's social  
18 emotional health well-being and may have lifelong consequences.  
19 This is -- it's a paper, I'm sorry I didn't give you the title,  
20 Supporting and Caring for Transgender Children. The paper  
21 acknowledges that there is a lot to learn in this area, but  
22 says, There is evidence that both reparative therapy and  
23 delaying of transition, even a social transition, can have  
24 serious negative consequences for children.

25           And in discussing on the next page, 13, in discussing

1 conversion therapy, There is no scientific evidence that  
2 reparative therapy, which is another word for -- term for  
3 conversion therapy, helps with gender dysphoria or prevents  
4 children from becoming transgender adults; instead, experts and  
5 professional organizations believe that it inflicts lasting  
6 damage on children.

7         So, as I said, put all together, I think that fairly it  
8 is -- not fairly, it is overwhelming, there is an awful lot of  
9 evidence out there that, at the very least, it may cause, but  
10 it -- people perceive that they have been harmed by this type  
11 of therapy, and the legislature acted on both the perceptions  
12 by the individuals and the statements and the review of  
13 literature from respected organizations that there was no  
14 evidence of efficacy, and there was -- there were many, many  
15 reports of harm justifying its ban in Section 1-212.1 of the  
16 Health Occupations article.

17         I would submit, Your Honor, that this is clearly conduct.  
18 It's treatment. I think that we have covered that in our  
19 papers. The Ninth Circuit in *Pickup* certainly considered it to  
20 be conduct. And that case, the Supreme Court didn't see fit to  
21 review that case either the first time or after *NIFLA*  
22 criticized its use, the Ninth Circuit's use of professional  
23 conduct.

24         I would suggest that the alleged abrogation of *Pickup* and  
25 *King* is overstated. Certainly, the Court in *NIFLA* said, We

1 don't like the label "professional speech" and called out those  
2 cases, but, as Mr. Mihet acknowledged, neither *Pickup* nor *King*,  
3 despite efforts to get the -- the mandate recalled, neither  
4 mandate was recalled by the Ninth or the Third Circuit, and the  
5 Supreme Court again denied review of those cases.

6 But, you know, the Court, even if it is speech -- even if  
7 Mr. Gannam is correct, it is speech and it has to meet strict  
8 scrutiny, it survives that scrutiny. There is a compelling  
9 interest. I have given you all of the -- the -- the -- the  
10 cases that support that in the interests of protecting  
11 children. There is harm caused by this practice that the  
12 legislature has banned. We have just gone through all of that.

13 And as for narrow tailoring, if you decide that a  
14 treatment is harmful, what other alternative is there but to  
15 prohibit that treatment?

16 The -- the plaintiff suggests that while you should  
17 distinguish between aversive and non-aversive, but SAMHSA says  
18 it's all coercive, it's all harmful. The APA says, Go into  
19 therapy with a predetermined outcome, it's bad, it's harmful.  
20 So that's not really a distinction that works. They say, Well,  
21 only prohibit involuntary treatment, but under Maryland law,  
22 children under 16 cannot consent to mental health treatment,  
23 and even though children or youth, adolescents, 16 and 17 are  
24 allowed to consent to their own mental health treatment, they  
25 can't object if the parent consents for them. So there is

1 really no voluntary treatment. There is no way to determine  
2 whether treatment is voluntary.

3         And I think we also all know that, however reluctantly,  
4 teenagers frequently do what their parents tell them to do.  
5 They go to get treatment because they are dependent on their  
6 parents in many ways, and that's what I am sure we all did as  
7 we were growing up. Our parents may disagree, but...

8         I think that is -- that's the nature of parent/child  
9 relationship especially when you are teenagers.

10         I applaud Mr. Doyle, assuming that he is telling us  
11 accurately that he doesn't do therapy with children who object  
12 to being there, that's good. I am glad. But it is -- it's  
13 still the case that the children don't really have the -- the  
14 ability to object and not participate in therapy if their  
15 parents want them to.

16         Informed consent has, which is one of the other supposed  
17 more narrowed -- ways to narrowly tailor the statute like this,  
18 informed consent has the same deficits as saying only  
19 involuntary counseling. I mean, first of all, you have to have  
20 informed consent to treat anybody unless it's an emergency, but  
21 for the same reasons that I have just gone through about  
22 voluntary and involuntary, a child under 16 can't sign the  
23 consent and can't object if the parent signs the informed  
24 consent.

25         Mr. Gannam also pointed to the 2014 legislative effort

1 that the newspaper article that he showed you said was  
2 withdrawn because the regulatory process could take care of it.  
3 Well, according to the Mental Health Association of Maryland  
4 who submitted this testimony, and it's Document 25-5 at page  
5 42, a similar bill was introduced during the 2014 legislative  
6 session with the belief that this issue could be resolved  
7 through regulatory actions; however, the practice persists and  
8 it is harming Maryland's youth. The current process allows  
9 minors or their advocates to file a complaint with the State's  
10 Health Occupation Board, but this remedy is insufficient to  
11 protect youth from treatment that discourages them from feeling  
12 comfortable about their sexual orientation.

13         And I would say there are no published orders from any of  
14 the Health Occupations Boards that regulate various kinds of  
15 counselors dealing with conversion therapy, that -- and the  
16 only part of -- the only part of the process that's public is  
17 the -- is the final order from the complaint.

18         So we don't have any assurance that that -- we have -- we  
19 have testimony before the legislature that the -- that the  
20 deference to the regulatory process wasn't sufficient, wasn't  
21 working, and we don't -- we don't have any published orders, so  
22 there has been nobody disciplined, as far as we know, for that  
23 -- for that.

24         So whatever standard of review the Court decides to  
25 employ, I think the statute survives.

1 I believe that it -- it's, for all the reasons in our  
2 papers and in the FreeState Justice's brief, it's a legitimate  
3 argument that this is conduct, but I found the *Otto* decision  
4 particularly thoughtful. I think the -- the judge really  
5 struggled to find the correct, in her view, path forward in  
6 this difficult area, and that the intermediate scrutiny perhaps  
7 is the best -- is the best alternative. It balances speech  
8 issues, speech -- recognition that there is a speech element to  
9 this with the recognition that the State can regulate  
10 practitioners, and that includes practitioners of talk therapy.

11 The *Vazzo* magistrate's report I thought was particularly  
12 unhelpful. And I understand why the plaintiffs like it because  
13 it came to the result they want, but I did not think that there  
14 was a particularly reasoned analysis of all of the issues,  
15 while I was very struck and impressed by the judge in *Otto*, and  
16 not simply because I liked the conclusion. I thought that she  
17 did a -- a very good job of looking at all of the issues and  
18 trying to figure out the -- the way forward.

19 In addition to deciding or to demonstrating a likelihood  
20 of success on the merits, as you know, the plaintiffs also have  
21 to show a likelihood of irreparable harm and the balance of the  
22 equities in their favor, in his favor, and that the public  
23 interest serves -- an injunction is in the public interest. I  
24 think I would suggest, Your Honor, that irreparable harm, a  
25 showing on irreparable harm is especially problematic for

1 Mr. Doyle. The delay in filing suit, nine months -- more than  
2 nine months after the statute was past, three-and-a-half months  
3 after the law went into effect, and then the further four-month  
4 delay of not going forward with the originally scheduled --  
5 originally scheduled preliminary injunction hearing I think  
6 also contributes to showing that there was -- there is delay in  
7 pursuing rights, and that that delay, in and of itself, I would  
8 suggest is enough to deny the preliminary injunction.

9       The issue of vagueness and I think the standard for  
10 whether something is vague is whether a reasonable person  
11 subject to the statute would understand it. I would suggest  
12 that -- that it's hard for a therapist who has clients sign  
13 informed consents and has had for several years and testifies  
14 that he doesn't perform conversion therapy, he doesn't go into  
15 -- into a therapy session with a preconceived notion of what he  
16 wants to get out of it, he -- he practices client-centered  
17 therapy, I think it's a little incredible that he would claim  
18 that he doesn't understand what the statute prohibits, and I  
19 would suggest that the -- the prior restraint claim is equally  
20 meritless. The prior restraint doctrine prohibits an order  
21 preventing speech in the -- in the future. Speech hasn't --  
22 the communication hasn't occurred.

23       In this case, if the communication may occur, somebody  
24 complains to the, in Mr. Doyle's case, the Board of  
25 Professional Counselors and Therapists in Maryland, and the

1 board investigates and makes a decision about charges, there is  
2 a hearing, and then there is a final board order, that's  
3 certainly not prior restraint. That's only taking action after  
4 a complaint, an investigation, and a hearing with all of the  
5 due process rights attendant to those hearings.

6 With respect to the motion to dismiss, unless -- with  
7 respect to particular issues, unless the Court has questions  
8 with respect to particular issues, I'd rest on the papers.

9 I would urge the Court to reconsider its conclusions  
10 about the Eleventh Amendment. I think the *Gilmore* case from  
11 the Fourth Circuit, *Waste Management Holdings v. Gilmore*, 252  
12 F.3d 316, and the *Weigel vs. Maryland* case from this Court, 950  
13 F.Supp.2d 811, both make clear that there has to be a special  
14 duty to enforce the statute at issue.

15 The Attorney General has nothing to do with enforcing  
16 this particular statute, or, indeed, most statutes. He  
17 represents the agencies in connection with enforcement of  
18 statutes. He is charged with defending statutes, which  
19 obviously is why I am here today, but he doesn't enforce  
20 particular statutes. He doesn't have the statutory authority  
21 to do that.

22 And with respect to the governor, yes, there is a general  
23 obligation in the Executive Branch for the top executive to see  
24 that the laws are enforced, but the statute in this case  
25 specifically gives the authority to enforce the statute to the

1 various boards that license and therefore discipline the  
2 various healthcare professionals.

3 Another provision of Title I of the Health Occupations  
4 Article, 1-203(a) I believe, prohibits the Secretary of  
5 Health -- as you may know, the boards are independent boards  
6 placed in the -- in the Department of Health and there is  
7 frequently a somewhat fraught relationship between the  
8 department and the secretary, but 1-203(a) specifically  
9 provides that the secretary does not have the authority to make  
10 decisions for the boards in areas especially committed to them  
11 by law.

12 So the statute here says, Board, you can discipline a  
13 mental health practitioner for violating this Statute 1-212.1,  
14 so that's committed to the boards by law. The secretary cannot  
15 approve, disapprove, modify a decision that the -- that the  
16 board makes, and so I would say that the governor can't either  
17 because the governor would act through the secretary. The  
18 secretary can't change the -- and that is certainly the current  
19 practice and the understanding of the way in which the board's  
20 disciplinary decisions are made and who has the authority to --  
21 to question them, and it's -- the board makes them, they are  
22 subject to judicial review, and it's under the Administrative  
23 Procedures Act, so I would ask you to reconsider your  
24 conclusion that that -- that the --

25 THE COURT: Who should be the defendant? Just the

1 State?

2 MS. ELLIS: No. I would think, Your Honor, for  
3 Mr. Doyle, it would be the Board of Professional -- of  
4 Professional Counselors and Therapists.

5 THE COURT: They are not the ones who enacted this?  
6 Do they have to justify it?

7 MS. ELLIS: But they are the ones who are charged  
8 with enforcing it.

9 THE COURT: Okay.

10 MS. ELLIS: For licensed professional counselors and  
11 therapists.

12 I would -- I would also submit, for all of the reasons in  
13 our reply memo, that Mr. Doyle doesn't have standing. He does  
14 not, according to him, do conversion therapy. And, I mean, I  
15 understand he claims not to understand the -- the statute, but  
16 I think a very easy reading of the statute is the only thing it  
17 precludes is the kind of conversion therapy that is referenced  
18 in all of the documents listed in the preamble that we have  
19 been talking about here today, therapy that starts out with the  
20 preconceived notion that it is for the purpose of changing  
21 somebody's sexual orientation or gender identity.

22 So unless you have further questions, I would urge you to  
23 grant the motion to dismiss and deny Mr. Doyle's request for  
24 preliminary injunction.

25 Thank you.

1 THE COURT: Mr. Gannam.

2 MR. GANNAM: Thank you, Your Honor. I will attempt  
3 to be succinct. I will begin sort of at the end. We would,  
4 likewise, regarding the motion to dismiss, rely on our papers  
5 that we filed, other than to make one point, and, that is, that  
6 under the Eleventh Amendment immunity issue, we think that it  
7 would be simply a matter of unnecessary delay to dismiss the  
8 current defendants only to have Mr. Doyle sue other Executive  
9 Branch personnel. We think that we have demonstrated that the  
10 Attorney General and governor have a sufficient connection to  
11 the enforcement of this -- this ban, that they are proper  
12 defendants here, and that requiring a licensed professional  
13 like Mr. Doyle to sue every member, for example, of the  
14 Professional Licensing Board would seem to be forcing the issue  
15 too far.

16 Also, moving a little bit backwards, the irreparable harm  
17 issue, it's *Elrod v. Burns* is the Supreme Court case that says,  
18 when you have violations of First Amendment rights, the  
19 irreparable harm prong is presumed, and none of the cases cited  
20 by the defendants overcome that presumption, certainly not the  
21 two cited in their opposition to our motion for preliminary  
22 injunction. Incidentally, that precise issue is covered in  
23 Document 71, our reply that we have just recently filed.

24 The U.S. Supreme Court case cited for the idea that we  
25 don't have to subject kids to bad things before regulating

1 them, you know, that was a case involving what the Supreme  
2 Court called excretory speech which is at the fringe of the  
3 First Amendment. We certainly aren't dealing with that here,  
4 but the issue about children being uniquely vulnerable, no one  
5 doubts that, but that's why the children need the freedom, the  
6 -- the very ethic of self-determination is throughout the APA,  
7 2009 APA report, and just like the passage we read from the APA  
8 Transgender Guidelines, children, adolescents must be given the  
9 freedom to explore or even return to a former gender identity.  
10 They call that imperative. We can not overemphasize that.

11         So, it's true, children might be uniquely vulnerable, but  
12 the Constitution does trust parents and does trust the First  
13 Amendment to help us resolve issues like this. For example,  
14 the issue of the compelling interest of the State of Maryland  
15 to protect children, well, no one would -- would dispute that  
16 there is a very -- a very compelling interest to protect  
17 children, but in the 11th Circuit *Wollschlaeger* case, the Court  
18 pointed out that you can't simply assert an interest at a very  
19 high level of generality and say that that satisfies your  
20 compelling interest burden.

21         What *Wollschlaeger* said is that holding -- holding that a  
22 provision of a Florida statute that prohibits physicians speech  
23 about gun ownership, the Eleventh Circuit said that the  
24 proposed government interests at an abstract level of  
25 generality are not enough to justify restricting the speech of

1 doctors and medical professionals on a certain subject.

2         So we go back to this issue of, sure, protecting children  
3 is important, but what's the compelling interest to ban SOCE or  
4 conversion therapy involving children? And the point that --  
5 made by the defendant, Ms. Ellis, is that, well, if you could  
6 just say that, unless you have an empirical study, you can't  
7 regulate speech, well, that's not what we are saying at all.  
8 Speech, of course, can be regulated, but the First Amendment  
9 imposes the balancing test and says you have to demonstrate  
10 your compelling interest first and your regulation has to be  
11 narrowly tailored.

12         The State of Maryland can't just assume conversion  
13 therapy is bad as the State has defined it, and then say, now  
14 we are entitled to regulate it. It still has to demonstrate,  
15 with the cases we cited, concrete empirical evidence of harm  
16 caused by conversion therapy in order to regulate it under the  
17 First Amendment.

18         Now, the issue of whose conduct is at issue here, and the  
19 point was made that clearly it's the conduct of the therapist  
20 in view in SB 1028, well, we agree with that, but that doesn't  
21 answer the question. The question is when the client presents  
22 and say, I want you to help me work on reducing same-sex  
23 attractions that I don't want or that conflict with my  
24 religious views, or I want you to help me lessen certain gender  
25 expressions or behaviors because I want to return to a former

1 gender identity, the -- the counselor faces a decision: Do I  
2 accept and facilitate what the client is asking me for, or do I  
3 turn that client away and tell them no?

4 Certainly, the therapist's conduct is involved in that  
5 decision, and the question is: Does SB 1028 carve that out and  
6 say that if the client requests it, then the therapist can go  
7 along it? I don't think the defendant has said that.

8 If the defendants are saying that, I think that should be  
9 clear on the record, that someone like Mr. Doyle may follow the  
10 lead of the client who requests those things, but I don't think  
11 that, up to this point, the State has said that unequivocally,  
12 and I would stand to be corrected if that's the case.

13 The case law about anecdotes and studies from other  
14 locales cited by the defense, in our reply, on pages 9 and 10  
15 at Document 71, we address the fact that those are not First  
16 Amendment cases similar to this one where a content-based  
17 regulation of speech is involved.

18 Now, in Mr. Doyle's testimony in his deposition, this is  
19 filed at Document 58-1, beginning at page 142, line 5, he's  
20 asked, "Is there any evidence, anecdotal or empirical, that  
21 harm may result from psychotherapy or counseling that is  
22 outside of the context of sexual orientation or gender identity  
23 change efforts?"

24 "ANSWER: Yeah. There is evidence.

25 "QUESTION: What do you understand that evidence to

1 be?

2 "ANSWER: Roughly that all clients have between five-  
3 and ten-percent risk of basically feeling harm or not achieving  
4 their goals or feeling worse after the counseling started, and  
5 that goes across all types of counseling, not simply efforts to  
6 resolve or reduce same-sex attractions.

7 "QUESTION: To your understanding, is the evidence  
8 you just described anecdotal or empirical?

9 "ANSWER: Empirical."

10 This is important because all therapy poses a risk of  
11 harm. All therapy may harm someone or someone may perceive  
12 harm from it. But the testimony in this case, and we cover  
13 this in Document 71 at page 11, is that the State confirmed on  
14 the record, through its 30(b)(6) representative, that Maryland  
15 could not determine how much more likely harm from what it  
16 defines as conversion therapy is to occur as compared to  
17 psychotherapy in general.

18 Without being able to say that this causes more harm than  
19 psychotherapy in general, there can't be a compelling interest  
20 to ban it and not ban all psychotherapy. Simply having a risk  
21 of harm is not enough to satisfy the compelling interest here.  
22 All therapy poses some risk of harm.

23 Now, the issue of the -- the several documents cited by  
24 the defendants about people's stories about how conversion  
25 therapy is harmful, that's the -- the set of documents

1 essentially that I commended to the Court earlier as  
2 Plaintiff's Exhibit 12, filed at 69-12, where, if you read  
3 them, it's all vague references to something that they call  
4 conversion therapy. They never describe who provided it, what  
5 exactly was involved, or why they thought it was harmful. And  
6 in the case with The Trevor Project representative, who wrote  
7 the letter, had said very clearly it was coerced by his  
8 parents.

9 Well, the State of Maryland can ban coerced therapy by  
10 parents. The State of Maryland can say that -- can relieve the  
11 ability of a minor to object to parent-directed therapy because  
12 the State of Maryland, the State's legislature establishes the  
13 legal age of consent requirements for all kinds of medical  
14 treatment and has already decided to lower that age below age  
15 18 for some kinds of mental health treatment.

16 The same legislature that enacted SB 1028 could change or  
17 alter the age of consent laws however it wanted to to  
18 accommodate the First Amendment interests involved here.  
19 That's the definition of narrow tailoring.

20 Now, the Ryan Study that was covered in one of the, I  
21 believe it was the FreeState amicus brief, we pointed out in  
22 our opposition that that study, the 2018 Ryan study came out  
23 after SB 1028 was enacted. It says quite clearly that no  
24 causal connections or claims can be made from its data. It  
25 cannot be -- it can broaden to the population as a whole. And,

1 by definition, the people involved in that study currently  
2 today, as adults, self-identify as members of the LGBT  
3 community. It necessarily excludes by design anyone who may  
4 have received something called conversion therapy or SOCE and  
5 do not identify as a member of the LGBT community. Those  
6 people are far more likely to indicate some benefit than people  
7 who said I received conversion therapy; I still identify as  
8 LGBT. Of course, that population is going to have higher  
9 incidences of dissatisfaction with it, but the main problem  
10 with that study is that it says no causal claims can be made  
11 from it.

12 The next point I want to make is that the -- I promised  
13 the Court that I would point out in the SAMHSA report the  
14 statement regarding -- excuse me. I was just trying to go to  
15 the overhead here. This is filed at Document 25-2 filed by  
16 defendants, and this is on page, of the report, it's page 25,  
17 ECF 33. This is the portion of the SAMHSA report that affirms  
18 that no new studies have been published that would change the  
19 conclusions reached in the APA task force's 2009 review.

20 Again, this is important because that 2009 review says  
21 there is no empirical evidence. We can't draw any conclusions  
22 about -- about harm. And I would just reiterate that it is the  
23 burden of the defendants to prove that this is harmful. It's  
24 not the burden of the plaintiff to prove that it is effective.

25 Your Honor, I am just trying to be concise and not to

1 repeat myself.

2           The importance of -- of this issue of who may -- the  
3 importance of the issue of when a client presents and requests  
4 something called conversion therapy or requests help that could  
5 fit the definition of conversion therapy was pointed out in our  
6 -- our moving papers, Document 2 on page 15. There, we cite  
7 from the 2009 APA report where it says: Licensed mental health  
8 providers who turn down a client's request -- and by the way,  
9 this is from page 56 of the APA report -- Licensed mental  
10 health providers who turn down a client's request for SOCE at  
11 the onset of treatment without exploring and understanding the  
12 many reasons why the client may wish to change may instill  
13 hopelessness in the client who already may feel at a loss about  
14 viable options. Before coming to a conclusion regarding  
15 treatment goals, licensed mental health professionals should  
16 seek to validate the client's wish to reduce suffering and  
17 normalize the conflicts at the root of distress as well as  
18 create a therapeutic alliance that recognizes the issues  
19 important to the client.

20           Well, this presents a really big problem for a therapist  
21 like Mr. Doyle. We hear the defendant say he should not go  
22 into that therapeutic alliance with a predetermined or a priori  
23 treatment goal of changing someone's sexual orientation or  
24 gender identity, but what if the client presents to him? The  
25 APA is telling him, Well, don't say no. Explore what the

1 client wants. See if you can help them eliminate distress, but  
2 don't make them feel hopeless by saying, No, what you want  
3 isn't allowed.

4 And, yet, we haven't heard the defense say that he is  
5 allowed to affirm or accommodate or facilitate that client's  
6 goal because the statute says any effort to change these things  
7 is illegal, and we realize that's focusing on Mr. Doyle's  
8 conduct, but once he says yes to a client who requests it, he  
9 is -- he is the one who is at risk of -- of his license because  
10 he is the therapist subject to SB 1028.

11 So we don't argue that SB 1028 makes it illegal for a  
12 minor to seek treatment as if they could be held liable under  
13 the statute, but what we are saying is that the -- even if the  
14 focus is on the therapist, the question is, How can a therapist  
15 accommodate and say yes to what the client requests? If the  
16 client requests SOCE and the APA says you should -- you should  
17 not dismiss them out of hand for doing that, the statute  
18 doesn't seem to leave room to do that because it says any  
19 efforts are prohibited.

20 The -- pardon me, Your Honor.

21 I don't think that in all of the presentation from  
22 Ms. Ellis, that there was anything to refute the -- the  
23 differentiation of gender identity change efforts and the lack  
24 of evidence on that issue. Certainly, the -- the SAMHSA report  
25 makes some positional statements about, you know, what it

1 thinks, what SAMHSA thinks of this kind of therapy, but it  
2 certainly didn't add to the empirical record or show that there  
3 is any research to support, one way or the other, any  
4 particular treatment for children and adolescents who identify  
5 with gender identity conflicts.

6         The Court asked a question earlier, and then I have had  
7 an opportunity to ponder, and, that is, Who makes the complaint  
8 if a parent asks the child or wants a child to go to this kind  
9 of therapy?, and I think that in the -- in the culture we live  
10 in now, I think there are numerous people, friends, neighbors,  
11 school guidance counselors, other adults in the child's life,  
12 organizations like The Trevor Project who receive these phone  
13 calls, there are many organizations that exist to support  
14 children and youth who identify as LGBT. I don't think that we  
15 can assume that these children would have no access to make a  
16 complaint if they believe that they were being harmed. There  
17 are numerous ways and numerous other adults, you know, anyone  
18 that this child knows who could file this complaint. It does  
19 not have to be the child, him or herself, and it doesn't always  
20 have to be a parent. But when we have -- we have, you know,  
21 laws that -- that say what parents' role is in the mental  
22 health treatment of children.

23         This consent idea that -- that is being promoted by the  
24 defendants here, the idea that informed consent isn't good  
25 enough for young people, if -- that's really an extreme

1 position that would require young people to never have a say in  
2 their mental health counseling. If it's not -- if they can't  
3 provide informed consent as a matter of policy, well, then,  
4 there would never be, you know, informed consent in any kind of  
5 mental health counseling.

6 But the APA report, as we point out in our reply, it  
7 specifically says that adolescents and children should be  
8 provided age appropriate informed consent. It even goes so far  
9 as to say that the informed consent should include the  
10 information in the APA report.

11 As the evidence shows, that is precisely what Mr. Doyle  
12 does, is he includes evidence from the APA report, he provides  
13 developmentally appropriate informed consent to the patients,  
14 along with their parents.

15 Mr. Doyle's practice looks a whole lot more like what the  
16 APA says it endorses than what Maryland says it causes harm.  
17 And, yet, Maryland's definition of conversion therapy, that, as  
18 we have established, doesn't match what Mr. Doyle thought was  
19 conversion therapy. Maryland's definition pulls what he does  
20 into the teeth of the statute and forbids him from doing it.

21 Finally, Your Honor, I will just close with this, it's  
22 not a surprise that the defendants like *Otto* and that the  
23 plaintiff likes *Vazzo*. Obviously, the results are much  
24 different. But I think it bears repeating that the idea that  
25 -- of categorizing speech by its function, that was a mistake

1 made by the *Otto* Court, and that can certainly be called a  
2 mistake under the *Holder v. Humanitarian Law Project*.

3 In that case, you had advocacy organizations and  
4 professionals, a former judge and a physician who wanted to  
5 help some organizations that were listed as terroristic  
6 organizations. And what the *Holder* Court said is, Look, you  
7 can't call this conduct. They want to provide legal advice.  
8 They want to provide their specialized knowledge to these  
9 groups to help them navigate legal channels. You can't call  
10 that conduct.

11 Now, to be fair, the *Holder* Court also said, We are also  
12 not going to call that, you know, pure political speech like  
13 your -- your quintessential First Amendment, you know, walking  
14 on a public sidewalk kind of political speech either, but it  
15 certainly is speech because we have to analyze the problem by  
16 what they want to do. They want to talk to members of these  
17 organizations that have been deemed terroristic, and the  
18 statute says they can't do that -- or whether they are able to  
19 do that depends on what they say.

20 The *Holder* Court, it was interesting, distinguished  
21 between their ability to sort of share general knowledge versus  
22 what was prohibited, which was sharing specific knowledge or  
23 imparting a skill. That fits very closely with what we have  
24 here. Maryland rule lawed the fact that the SB 1028 allows  
25 Mr. Doyle to talk about conversion therapy and allows him to

1 advocate publicly for conversion therapy, but that's just like  
2 allowing general speech under *Holder*.

3         What SB 1028 also does is it prohibits Mr. Doyle from  
4 sharing his specialized knowledge as a therapist or imparting  
5 particular skills to his clients who ask for it, skills for  
6 reducing same-sex attraction or skills for living in comfort  
7 with their biological sex.

8         The *Holder* Court said that you can't carve out the  
9 specialized knowledge in imparting skills and say that's  
10 conduct. It's still speech and it's still subject -- it's  
11 still a content-based speech restriction when you say no to  
12 that, and that's why the *Otto* Court made a mistake.

13         Otherwise, Your Honor, we will rely on our papers and the  
14 record already submitted.

15                 THE COURT: Anything else, Ms. Ellis?

16                 MS. ELLIS: Your Honor, I would move to strike the  
17 reply memorandum that was filed this morning. I think you have  
18 already indicated that you did not look at it, but it seems to  
19 me it should not be in the record. I certainly didn't have a  
20 chance to consider it and figure out whether there were  
21 responses that were needed either today or by asking the Court  
22 for leave to file a sur-reply.

23                 And other than that, I would rely on our papers. Thank  
24 you.

25                 MR. GANNAM: Your Honor, may I be heard on the

1 issue of reply? I understand why Ms. Ellis would like an  
2 opportunity to respond, and I think that's reasonable, and,  
3 likewise, I understand the reason for the Court's rule against  
4 the late filing.

5       As I did say earlier, in all honesty, we were hoping for  
6 the benefit of the discovery order, which did come out at the  
7 end of last week. We tried to file it quickly following that,  
8 but I would propose that if the Court is considering taking  
9 some action to make the situation equitable, simply that the --  
10 the State be allowed to file a sur-reply, or, if the Court  
11 would like to invite, you know, both sides to file some kind of  
12 post-hearing brief to make sure everyone gets to cover all the  
13 issues, but I don't think that striking the reply is called for  
14 under the circumstances, but I certainly understand why the  
15 State should get some equitable opportunity to respond to it.

16       THE COURT: Do you think there is anything in there  
17 you didn't mention today?

18       MR. GANNAM: Anything in the reply?

19       THE COURT: Mm-hmm.

20       MR. GANNAM: I am certain I didn't mention everything  
21 in it today, Your Honor. I did try to cover as much as I  
22 could, but, as I stand here, I can't tell you I covered every  
23 single point that was in it.

24       THE COURT: I am not going to predetermine this at  
25 the moment. Ms. Ellis, you obviously can, and I am sure will,

1 take the opportunity to review it. I am not ruling right now  
2 on that issue or anything else, so you certainly will have an  
3 opportunity to let me know if you think that it's an improper  
4 reply or if you think it raises something that you haven't  
5 already briefed otherwise and then let me know.

6 MS. ELLIS: Thank you, Your Honor.

7 THE COURT: The plaintiff doesn't mind if you file a  
8 sur-reply. I don't know that I would agree. I have --

9 MS. ELLIS: And I don't know that I would want to.

10 THE COURT: Would want to at all anyway.

11 MS. ELLIS: At all.

12 THE COURT: But, obviously, I am aware you didn't  
13 have an opportunity to review it, at least not in depth, if at  
14 all, before the hearing today. So, next time, Mr. Gannam, if  
15 something like this comes up, communication before you just  
16 unilaterally spend all that time doing what you did, you  
17 obviously had begun to prepare something ahead of time, is to  
18 contact counsel and the Court and figure out if it's  
19 appropriate or what.

20 It, frankly, wasn't -- I was preparing for this hearing,  
21 had contemplated maybe issuing a full decision, and when I  
22 decided I wasn't ready, I wanted to hear argument on the merits  
23 is when I issued the sort of intermediate decision telling you  
24 what I could. You should have known, when I didn't jump and  
25 grant your motion to compel, that you needed to operate as if

1 you were not going to get it in advance of this hearing, and  
2 that should have been done by Thursday at four rather than 1:35  
3 this morning.

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

5 THE COURT: All right. I am taking all of this under  
6 advisement. You will get a written decision as soon as I am  
7 comfortable.

8 The one thing I would ask -- although, with the wonder of  
9 electronic resources, I may have access to other Court  
10 decisions -- the one thing I do ask is if you become aware of  
11 another decision, whether at the trial or an appellate level  
12 before I issue my decision, that you let each other and me  
13 know. You don't have to tell me what it's all about, just  
14 notify me about any Court decisions that you think might be of  
15 interest.

16 All right?

17 MS. ELLIS: Thank you, Your Honor.

18 MR. GANNAM: Your Honor, housekeeping. May we file,  
19 or would it help the Court if we filed our slides from the  
20 PowerPoint today?

21 THE COURT: Well, you can because I have this little  
22 book from the defense if you want it, but I was reading them  
23 and watching them and making notes, so you don't have to, but  
24 if you want to do it, that's fine.

25 MR. GANNAM: Thank you, Your Honor.

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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

1  
2  
3 I, Renee A. Ewing, an Official Court Reporter for  
4 the United States District Court for the District of Maryland,  
5 do hereby certify that the foregoing is a true and correct  
6 transcript of the stenographically reported proceedings taken  
7 on the date and time previously stated in the above matter;  
8 that the testimony of witnesses and statements of the parties  
9 were correctly recorded in machine shorthand by me and  
10 thereafter transcribed under my supervision with computer-aided  
11 transcription to the best of my ability; and that I am neither  
12 of counsel nor kin to any party in said action, nor interested  
13 in the outcome thereof.

14  
15 Renee A Ewing

16 Renee A. Ewing, RPR, RMR, CRR  
17 Official Court Reporter  
18 October 2, 2019  
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