No. 19-2064

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients,
Plaintiff - Appellant,
v.
LAWRENCE J. HOGAN, JR., Governor of the State of Maryland,
in his official capacity;
BRIAN E. FROSH, Attorney General of the State of Maryland,
in his official capacity,
Defendants - Appellees

On Appeal from the United States District Court
for the District of Maryland
In Case No. 1:19-cv-00190-DKC before the Honorable Deborah K. Chasanow

BRIEF OF PLAINTIFF - APPELLANT

John R. Garza (Md. 8212010150)
GARZA LAW FIRM, P.A.
Garza Building
17 W. Jefferson Street, Suite 100
Rockville, Maryland 20850
(301) 340-8200 ext. 100
jgarza@garzanet.com

Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
Daniel Schmid (Va. 84415)
LIBERTY COUNSEL
P.O. Box 540774
Orlando, FL 32854
(407) 875-1776
court@LC.org

Attorneys for Plaintiff-Appellant

DISCLOSURE

Pursuant to Rule 26.1, Fed. R. App. P., and Local Rule 26.1, Plaintiff-Appellant CHRISTOPHER DOYLE, LPC, LCPC, individually and on behalf of his clients, makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?.....NO

2. Does party/amicus have any parent corporations? .....NO

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? .....NO

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? .....NO

5. Is party a trade association?.....NO

6. Does this case arise out of a bankruptcy proceeding?.....NO

DATED this November 25, 2019

/s/ Roger K.Gannam
Roger K. Gannam
Attorney for Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 in this appeal of a final order of the district court disposing of all Plaintiff-Appellant's claims, entered on September 20, 2019. Plaintiff-Appellant timely filed his notice of appeal on September 30, 2019. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1367.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Whether the district court erred in:

1. Dismissing Plaintiff-Appellant Christopher Doyle's complaint;

2. Denying Doyle's motion for preliminary injunction;

3. Holding Doyle does not possess standing to assert, on behalf of his minor clients, a claim for violation of their First Amendment rights to receive information;

4. Holding SB 1028, the Maryland statute banning so-called "conversion therapy," does not violate Doyle's First Amendment right to Freedom of Speech;

5. Holding SB 1028 is not an unconstitutional content-based speech restriction subject to strict scrutiny;

6. Holding SB 1028 satisfies narrow tailoring under intermediate scrutiny;

7. Failing to hold SB 1028 is an unconstitutional viewpoint-based speech restriction;

8. Holding SB 1028 is not unconstitutionally vague;

9. Failing to hold SB 1028 is an unconstitutional prior restraint.

STATEMENT OF THE CASE

I. INTRODUCTION.

Plaintiff-Appellant Christopher Doyle, LPC, LCPC, sued Defendants-Appellees (collectively, "Maryland" or the "State"), to challenge the constitutionality of Maryland's statute banning so-called "conversion therapy"[1] for minors. The speech ban completely forecloses Doyle's provision of **speech-only** counseling to minor clients who voluntarily seek help to reduce or eliminate *unwanted* same-sex attractions or behaviors, or sexual or gender identity conflicts. The ban violates Doyle's First Amendment rights by chilling and abridging his free speech, resulting in ongoing and irreparable harm each day it remains in effect. This Court should reverse the district court's dismissal of Doyle's claims and the denial of the preliminary injunction, and remand with instructions to enter a preliminary injunction against Maryland's enforcement of the statute.

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[1] The statute refers to "conversion therapy," but that is not a term used by professional counselors. The statute uses the term for purely derisive political purposes. In this brief we use "talk therapy," which best describes what counselors actually do.

II. STATEMENT OF FACTS.

A. Verified Complaint Allegations.

1. Christopher Doyle and His Voluntary Talk Therapy Practice for Minors with Sexual and Gender Identity Conflicts.

Doyle is a psychotherapist licensed in Maryland as a clinical professional counselor. (JA15.) Doyle has devoted most of his career to providing counseling to young people and their parents seeking help for unwanted same-sex attractions. (JA30-31.) Doyle is subject to both compulsory regulations and voluntary guidelines requiring safe and ethical practices, with client direction and informed consent. (JA23-26.)

Talk therapy, which is speech, is what Doyle uses in his counseling with minors. (JA33.) Doyle helps clients by talking to them about whatever they want to discuss, including but not limited to stressors, anxiety, depression, goals, objectives in seeking counseling, and, if they desire, their unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts. (JA33.) Doyle uses speech and standard psychological practices to help clients understand and identify anxiety, distress, or confusion regarding their attractions, behaviors, or identities and to help each client formulate the method of counseling most beneficial for that client. (JA33-34.) Through the use of standard talk therapy to resolve traumatic experiences and

stressors, clients' unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts can dissipate or resolve. (JA33.)

Doyle does not begin counseling with any predetermined outcome goals; rather, he facilitates and assists with the goals each client identifies and sets. (JA34.) Doyle does not coerce any client to engage in counseling, but respects each client's right of self-determination and treats each client with unconditional positive respect. (JA32.) Doyle does not engage in aversive[2] techniques, nor is he aware of any practitioner who does with clients seeking to reduce or eliminate unwanted attractions, behaviors, or identity conflicts. (JA33.)

If a client seeks help from Doyle to reduce, eliminate, or resolve unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts, Doyle provides the client with an informed consent form and requires the client to review and sign it prior to commencing counseling. (JA32.) The form outlines the counseling (which Doyle identifies as "Sexual/Gender Identity Affirming Therapy"), explains the nature of such counseling, including the fact that some therapists do not believe sexual orientation or gender identity can or should be changed, and informs the client of the potential benefits and risks associated with counseling. (JA32.) The form quotes research both from the 2009 APA Report[3] and

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2 *See infra* Pt. II.A.3.b.

3 *See infra* Pt. II.A.3.a

from the 2009 research overview of the National Association for Research and Therapy of Homosexuality (NARTH), titled "What Research Shows," which summarizes decades of research on the efficacy of counseling to eliminate, reduce, or resolve unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts. (JA32.)

Doyle's minor clients who experience distress or family conflict resulting from same-sex attractions or behaviors, or sexual or gender identity conflicts, do not always desire to reduce or eliminate those attractions, behaviors, or identity conflicts. (JA34.) In these cases, Doyle focuses on helping the family heal wounds or frustrations, and helping parents to work on loving and accepting the minor client despite any challenges arising from the minor's attractions, behaviors, or identity conflicts. (JA34.)

Doyle's counseling is not premised on the notion that homosexuality is an illness, defect, or shortcoming needing a "cure." (JA35.) Doyle does not seek to "cure" clients of same-sex attractions, but only to assist clients with their stated desires and objectives in counseling, which sometimes include reducing or eliminating unwanted same-sex attractions. (JA35.) In most cases, Doyle's clients do not identify as "homosexual" or "gay" or "lesbian," but rather believe they are heterosexual and experiencing conflicts with their heterosexual identities due to traumatic or other experiences that have caused unwanted same-sex attractions or

behaviors, and seek to eliminate the attractions or behaviors leading to their anxiety or distress. (JA25, JA35-36.)

Doyle is counseling five minor clients with unwanted same-sex attractions or sexual or gender identity conflicts, and roughly a dozen families with minor children who are consulting him regarding their children's unwanted same-sex attractions or sexual or gender identity conflicts, who have been seeing improvement and progress toward their therapeutic goals. (JA31.) These minor clients will suffer significant adverse mental health consequences if they are required to halt their counseling, potentially including anxiety, depression, and suicidal ideation. (JA31.)

2. SB 1028: Maryland's So-Called "Conversion Therapy" Ban.

Maryland enacted Senate Bill 1028 ("SB 1028"), effective October 1, 2018 as § 1-212.1 of the Health Occupations Article of the Maryland Code, to ban so-called "conversion therapy" for minors in Maryland. (JA16-17.) The counseling ban provides, in pertinent part:

> (A) (1) IN THIS SECTION, THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED:
>
> (2) (I) "CONVERSION THERAPY" MEANS A PRACTICE OR TREATMENT BY A MENTAL HEALTH OR CHILD CARE PRACTITIONER THAT SEEKS TO CHANGE AN INDIVIDUAL'S SEXUAL ORIENTATION OR GENDER IDENTITY.
>
> (II) "CONVERSION THERAPY" INCLUDES ANY EFFORT TO CHANGE THE BEHAVIORAL EXPRESSION OF AN INDIVIDUAL'S SEXUAL ORIENTATION, CHANGE GENDER

EXPRESSION, OR ELIMINATE OR REDUCE SEXUAL OR ROMANTIC ATTRACTIONS OR FEELINGS TOWARD INDIVIDUALS OF THE SAME GENDER.

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

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

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

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

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

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

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

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

(JA16-17, JA61-62.)

The voluntary talk therapy Doyle provides to help his minor clients achieve their own goals of reducing, eliminating, or resolving unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts, is prohibited in Maryland by SB 1028. (JA36.) The counseling ban subjects Doyle to fines and disciplinary action for engaging in such counseling. (JA61-62.)

SB 1028 will prevent Doyle's clients from continuing to progress in their self- and individually-determined courses of counseling for unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts, and from continuing to receive such counseling in accordance with their sincerely held religious beliefs. (JA31-32, JA38-39.) SB 1028 will also prevent Doyle and other Maryland professionals from providing such voluntary counseling in the future because the counseling ban requires all professionals to stop providing or to decline to provide such counseling. (JA38.)

Doyle's minor clients face substantial obstacles to challenging SB 1028 in court, including their fear of embarrassment, stigmatization, and opprobrium from publicly disclosing not only their needs and desires to receive mental health counseling in general, but also their needs and desires to receive specifically counseling that involves intimate details of their development, growth, and sexuality, and that the State of Maryland officially abhors. (JA39.)

3. SB 1028 Is Not Supported by the Sources It Cites or Any Legitimate Evidence of Harm.

a. The Sources Cited by SB 1028 Contain No Empirical Evidence of Harm.

SB 1028 recites no legitimate evidence of harm caused by voluntary counseling for unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts. (JA17-21.) The sources cited in the Preamble of SB 1028 (collectively, the "Sources") comprise the 2009 *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (the "APA Report") and accompanying APA Resolution, and twelve position documents of various organizations that neither supplement, update, or otherwise augment the factual and empirical content of the APA Report.[4] (JA17-18; JA57-60; JA63-200; JA511-621.)

The APA Report does not use the political term "conversion therapy" like SB 1028, but instead uses "the term sexual orientation change efforts (SOCE) to

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[4] The Sources were properly before the district court on Maryland's motion to dismiss because the APA Report and Resolution were attached to the complaint (JA63-200); and the other Sources were attached to Maryland's motion to dismiss (JA511-621), were "'integral to and explicitly relied on in the complaint,'" and their authenticity is not challenged. *See Zak v. Chelsea Therapeutics Intern., Ltd.*, 780 F.3d 597, 606-07 (4th Cir. 2015); *see also Gordon v. CIGNA Corp.*, No. GJH-17-2835, 2018 WL 3375099, at *2 (D. Md. July 11, 2018) ("The Fourth Circuit has previously cited with approval . . . the proposition that 'a document is integral to the complaint where the complaint relies heavily upon its terms and effect.'").

describe methods (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches) that aim to change a person's same-sex sexual orientation to other-sex, regardless of whether mental health professionals or lay individuals (including religious professionals, religious leaders, social groups, and other lay networks, such as self-help groups) are involved." (JA82.)

The APA Report discloses up front, and repeatedly throughout, that there is no empirical or other research supporting **any conclusions** regarding either efficacy **or harm** from SOCE, especially in children and adolescents:

> **[T]here is a dearth of scientifically sound research on the safety of SOCE**. Early and recent research **studies provide no clear indication of the prevalence of harmful outcomes** among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. **Thus, we cannot conclude how likely it is that harm will occur from SOCE**.

(JA112 (emphasis added); *see also* JA73 ("[T]he recent SOCE research **cannot provide conclusions** regarding efficacy or safety…."), JA76 ("The research on SOCE **has not adequately assessed** efficacy and safety."), JA107 ("These [recent] studies all use designs that **do not permit cause-and-effect attributions to be made**."), JA112 ("[T]he recent studies **do not provide valid causal evidence** of the efficacy of SOCE **or of its harm**…."), JA112 ("[T]he nature of these studies **precludes causal attributions** for harm or benefit to SOCE…."), JA142 ("**There**

is a lack of published research on SOCE among children."), JA143 ("**We found no empirical research on adolescents who request SOCE**…."), JA160 ("**We concluded that research on SOCE…has not answered basic questions of whether it is safe or effective and for whom**."), JA161 ("**[S]exual orientation issues in children are virtually unexamined**.") (all emphases added).) None of the other Sources adds anything to the empirical record found to be lacking in the APA Report.

b. The APA Report Discloses Anecdotal Evidence of Benefits, and More Benefits Perceived by Religious Individuals.

Given the lack of empirical research on the outcomes of SOCE, the task force preparing the APA Report looked to participants' perceptions of SOCE, "in order to examine what may be perceived as being helpful or detrimental by such individuals, **distinct from a scientific evaluation of the efficacy or harm**…." (JA119 (emphasis added).) The review did not rank evidence of one outcome over the other. "[S]ome recent studies document that there are people who perceive that they have been harmed through SOCE, just as **other recent studies document that there are people who perceive that they have benefited from it**." (JA112 (emphasis added) (citations omitted).)

Indeed, the task force found several reported benefits of SOCE perceived by participants: "(a) a place to discuss their conflicts; (b) cognitive frameworks that

permitted them to reevaluate their sexual orientation identity, attractions, and selves in ways that lessened shame and distress and increased self-esteem; (c) social support and role models; and (d) **strategies for living consistently with their religious faith and community**." (JA119 (emphasis added) (citations omitted).)

The APA Report explained the term "sexual orientation identity," as used in its reporting of perceived benefits of SOCE (and elsewhere in the Report), as follows:

> Recent studies of participants who have sought SOCE **do not adequately distinguish between sexual orientation and sexual orientation identity**. We concluded that the failure to distinguish these aspects of human sexuality has led SOCE research to obscure what actually can or cannot change in human sexuality. . . . **[S]ome individuals modified their sexual orientation identity . . . and other aspects of sexuality** (e.g., values and behavior). . . . **[I]ndividuals, through participating in SOCE, became skilled in ignoring or tolerating their same-sex attractions. Some individuals reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity**.

(JA73 (emphasis added).)

The task force also observed that perceptions of harm may correlate specifically to "aversion techniques." (JA111 ("Early research on efforts to change sexual orientation focused heavily on interventions that include **aversion** techniques. Many of these Studies did not set out to investigate harm. Nonetheless, these studies provide some suggestion that harm can occur from **aversive** efforts to

change sexual orientation." (emphasis added)).) The Report gives examples of aversion treatments:

> Behavior therapists tried a variety of aversion treatments, such as inducing nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts. Other examples of aversive behavioral treatments included . . . shame aversion . . . .

(JA92.)

The task force also found that individuals' religious beliefs shape their experiences and outcomes:

> [P]eople whose motivation to change was strongly influenced by their Christian beliefs and convictions were **more likely to perceive themselves as having a heterosexual sexual orientation after their efforts. . . . Some . . . concluded that they had altered their sexual orientation, although they continued to have same-sex sexual attractions.**

(JA120 (emphasis added) (citations omitted).) "The participants had multiple endpoints, including LGB identity, 'ex-gay' identity, no sexual orientation identity, and a unique self-identity." (JA120.) **"Further, the findings suggest that some participants may have reconceptualized their *sexual orientation identity* as heterosexual . . . ."** (JA120 (bold emphasis added).)

c. The APA Report Commends a Client-Directed Approach to Therapy for Clients with Unwanted Same-Sex Attractions, Commends More Research on Voluntary SOCE, and Condemns Only Coercive Therapies.

For adults desiring "**to change their sexual orientation** or their behavioral expression of their sexual orientation, or both," the APA reported that "adults perceive a benefit when they are provided with **client-centered**…approaches" involving "identity exploration and development," "**respect for the client's values, beliefs, and needs**," and "permission and opportunity to explore a wide range of options…**without prioritizing a particular outcome**." (JA74.) The task force elaborated:

> Given that there is diversity in how individuals define and express their sexual orientation identity, an affirmative approach is supportive of clients' identity development **without an a priori treatment goal** concerning how clients identify or live out their sexual orientation or spiritual beliefs. This type of therapy…can be helpful to those who accept, reject, or are ambivalent about their same-sex attractions. **The treatment does not differ, although the outcome of the client's pathway to a sexual orientation identity does**.

(JA74-75 (emphasis added).) "For instance, the existing research indicates that possible outcomes of sexual orientation identity exploration **for those distressed by their sexual orientation** may be: LGB identities[,] **Heterosexual sexual**

orientation identity[,] Disidentifying from LGB identities[, or] Not specifying an identity." (JA130-31 (emphasis added) (citations omitted).)

A key finding from the task force's review "is that those *who participate in SOCE, **regardless of the intentions of these treatments**, and those who resolve their distress through other means, **may evolve during the course of their treatment in such areas as self-awareness, self-concept, and identity***." (JA136 (bold emphasis added); JA131 ("Given . . . that many scholars have found that **both religious identity and sexual orientation identity evolve**, it is important for LMHP [Licensed Mental Health Professionals] to explore the development of religious identity and sexual orientation identity." (emphasis added) (citations omitted)).)

The task force identifies the **same essential framework "for children and adolescents** who present a desire to change either their sexual orientation or the behavioral expression of their sexual orientation, or both, or whose parent or guardian expresses a desire for the minor to change."[5] (JA75 (emphasis added).) Specifically, for children and youth, "[s]ervices . . . should support and respect age-appropriate issues of **self-determination**; services should also be provided in the least restrictive setting that is clinically possible and should maximize self-determination. At a minimum, **the assent of the youth should be obtained,**

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[5] The APA Report defines "*adolescents* as individuals between the ages of 12 and 18 and children as individuals under age 12." (JA141.)

including whenever possible a developmentally appropriate informed consent to treatment." (JA75 (emphasis added).)

The task force also highlighted the ethical importance of client self-determination, encompassing "the ability to seek treatment, consent to treatment, and refuse treatment. **The informed consent process is one of the ways by which self-determination is maximized in psychotherapy**." (JA138 (emphasis added); JA75-76 ("LMHP **maximize self-determination** by . . . providing effective psychotherapy that explores the client's assumptions and goals, without preconditions on the outcome [and] **permitting the client to decide the ultimate goal of how to self-identify and live out her or his sexual orientation**. . . . [T]herapy that increases the client's ability to cope, understand, acknowledge, and integrate sexual orientation concerns into **a self-chosen life** is the measured approach.").)

The task force viewed the concept of self-determination as equally important for minors: "It is now recognized that **adolescents are cognitively able to participate in some health care treatment decisions**, and such participation is helpful. [The APA] encourage[s] professionals to seek the assent of minor clients for treatment." (JA144 (emphasis added) (citations omitted).)

In light of this strong self-determination ethic regarding youth, the task force "recommend[ed] that when it comes to treatment that purports to have an impact on

sexual orientation, LMHP assess the adolescent's ability to understand treatment options, provide developmentally appropriate informed consent to treatment, and, at a minimum, obtain the youth's assent to treatment." (JA149.) "**[F]or children and adolescents who present a desire to change their sexual orientation or their behavioral expression of their sexual orientation, or both, or whose guardian expresses a desire for the minor to change," the task force recommended "approaches [that] support children and youth in identity exploration and development without seeking predetermined outcomes.**" (JA149-150 (emphasis added).) "LMHP should strive to maximize autonomous decision making and self-determination and avoid coercive and involuntary treatments."[6] (JA146.) "The use of inpatient and residential treatments for SOCE is inconsistent with the recommendations of the field." (JA144.)

Apart from recommending against coercive, involuntary, and residential treatments, the task force **did not recommend the end of SOCE**. Rather, without empirical evidence of SOCE efficacy or harm, the task force merely recommended that clients not be lead to **expect** a change in sexual orientation through SOCE.

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[6] The APA Report defines "*coercive treatments* as practices that compel or manipulate a child or adolescent to submit to treatment through the use of threats, intimidation, trickery, or some other form of pressure or force." (JA141.) It defines "*involuntary treatment* as that which is performed without the individual's consent or assent and which may be contrary to his or her expressed wishes." (JA141.)

(JA136.) Indeed, the task force cited literature expressly **cautioning against declining SOCE** therapy for a client who requests it.

> LMHP who turn down a client's request for SOCE at the onset of treatment without exploring and understanding the many reasons why the client may wish to change may instill hopelessness in the client, who already may feel at a loss about viable options. . . . **[B]efore coming to a conclusion regarding treatment goals, LMHP should seek to validate the client's wish to reduce suffering and normalize the conflicts at the root of distress**, as well as create a therapeutic alliance that recognizes the issues important to the client.

(JA125-26 (emphasis added) (citation omitted).)

The task force also called for more research on SOCE. (JA160 ("Any future research should conform to best-practice standards for the design of efficacy research. Additionally, **research into harm and safety is essential**."), JA161 ("**Future research** will have to better account for the motivations and beliefs of participants in SOCE.").)

Given the absence of empirical evidence on SOCE outcomes, and the emphasis on client-centered approaches, the task force recommended that choosing SOCE counseling be given to the discretion of licensed mental health providers (LMHP) under the APA Ethics Code:

> **LMHP assess the risk of harm, weigh that risk with the potential benefits, and communicate this to clients through informed consent procedures** that aspire to provide the client with an understanding of potential risks and benefits that are accurate and unbiased. . . .

> In weighing the harm and benefit of SOCE, **LMHP can review with clients the evidence presented in this report**. Research on harm from SOCE is limited, and some of the research that exists suffers from methodological limitations that make **broad and definitive conclusions difficult**. . . .

(JA137 (emphasis added) (citations omitted).)

d. The APA Report Specifically Calls for Therapists to Respect and Consider the Religious Values of Individuals Desiring Therapy.

The APA task force highlighted the particular stress experienced by individuals of conservative religious faiths who "struggle to live life congruently with their religious beliefs," and that this stress "had mental health consequences." (JA116-17.) "Some conservatively religious individuals felt a need to change their sexual orientation because of the positive benefits that some individuals found from religion. . . ." (JA117.) Thus, the task force "proposed an approach that respects religious values and welcomes all of the client's actual and potential identities by exploring conflicts and identities without preconceived outcomes. **This approach does not prioritize one identity over another and may aide a client in creating a sexual orientation identity with religious values**." (JA137 (emphasis added).)

e. The APA Report Excludes Gender Identity Change Efforts Altogether, Which Similarly Lack Empirical Research.

The APA Report addressed only sexual orientation: "Due to our charge, we limited our review to sexual orientation and **did not address gender identity**. . . ." (JA79 (emphasis added).) But another Source cited by SB 1028, The American Academy of Child and Adolescent Psychiatry (AACAP) Committee on Quality Issues, *Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents* [hereinafter "AACAP Statement"] (JA526-569), points to the same lack of empirical research on the outcomes of gender identity change efforts:

> Different clinical approaches have been advocated for childhood gender discordance. **Proposed goals of treatment include reducing the desire to be the other sex**, decreasing social ostracism, and reducing psychiatric comorbidity. **There have been no randomized controlled trials of any treatment**. . . .

(JA548 (emphasis added) (footnote omitted).) Also:

> **Given the lack of empirical evidence** from randomized, controlled trials of the efficacy of treatment aimed at eliminating gender discordance, the potential risks of treatment, and longitudinal evidence that gender discordance persists in only a small minority of untreated cases arising in childhood, **further research is needed** on predictors of persistence and desistence of childhood gender discordance as well as the long-term risks and benefits of intervention. . . .

(JA549 (emphasis added).)

As with the APA Report, the AACAP Statement leaves discretion with the licensed professional to make an informed decision, with the patient, about the most appropriate treatment. (JA549 ("As an ethical guide to treatment, 'the clinician has an obligation to inform parents about the state of the empiric database'...." (footnote omitted), JA553-53 ("The ultimate judgment regarding the care of a particular patient must be made by the clinician in light of all of the circumstances presented by the patient and that patient's family, the diagnostic and treatment options available, and other available resources.").)

B. Facts Developed for Preliminary Injunction.

1. The APA Report Stands Uncontradicted in Exposing the Absence of Any Empirical Evidence of Harm from "Conversion Therapy."

The 2015 report, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, by the federal Substance Abuse and Mental Health Services Administration [hereinafter the "SAMHSA Report"] (JA260-335), which was produced by Maryland in opposition to Doyle's preliminary injunction motion, confirms the conclusions of the 2009 APA Report: "**No new studies have been published that would change the conclusions reached in the APA Taskforce's 2009 review**." (JA292 (emphasis added).)

2. Discovery Confirms the Lack of Empirical Research on Gender Identity Change Efforts.

The APA itself more recently addressed issues of gender identity and minors which were not included in the APA Report in its 2015 *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People* [hereinafter "APA TGNC Guidelines"] (JA1051-1083). These later Guidelines explain, "The constructs of gender identity and sexual orientation are theoretically and clinically distinct, even though professionals and nonprofessionals frequently conflate them." (JA1054.) Nonetheless, the APA recognized the same absence of research on gender identity change in children: "Due to the evidence that not all children persist in a TGNC identity into adolescence or adulthood, and because **no approach to working with TGNC children has been adequately, empirically validated**, consensus does not exist regarding best practice with prepubertal children." (JA1061 (emphasis added).) One distinct approach recognized by the APA "to address gender identity concerns in children" is an approach where "children are encouraged to embrace their given bodies and to align with their assigned gender roles." (JA1061) And again, calling for more research, the APA concludes, "**It is hoped that future research** will offer improved guidance in this area of practice." (JA1061 (emphasis added) (citation omitted).)

Notwithstanding the APA's call for future research, however, the APA expressly sanctioned as **imperative** allowing a minor who has selected a gender identity different from his or her biological sex to choose to return:

> Emphasizing to parents the importance of allowing their child the freedom **to return to a gender identity that aligns with sex assigned at birth** or another gender identity at any point **cannot be overstated**, particularly given the research that suggests that not all young gender nonconforming children will ultimately express a gender identity different from that assigned at birth.

(JA1062 (emphasis added).)

The 2015 SAMHSA Report submitted by Maryland contains nothing to update or refute the absence of empirical validation of any approach to working with minors revealed in the 2015 APA TGNC Guidelines. Nonetheless, the SAMHSA Report submitted by Maryland indicates irreversible cross-sex hormone treatments or surgical removal of tissue are the options "[f]or **pubertal and post-pubertal adolescents**, if physical gender transition . . . is being considered . . . ." The SAMHSA Report endorses entrusting consideration of these "transition" options, "including the effects on behavioral health disorders, cognitive and emotional development, and **potentially irreversible effects on physical health, fertility, and sexual health** . . . to the adolescent and parents or guardians." (JA281 (emphasis added).)

A research scientist favorably cited in the AACAP Statement, Heino F. L. Meyer-Bahlburg, positively advances treatment to assist children in fading "cross-

gender identity" by the time they reach adolescence in his 2002 *Gender Identity Disorder in Young Boys: A Parent- and Peer-Based Treatment Protocol* [hereinafter "Meyer-Bahlburg"] (JA1084-1100). He concludes, "We expect that we can diminish these problems if we are able to speed up the fading of the cross-gender identity which will typically happen in any case." (JA1085 (cited by AACAP Statement at JA566); *see also* Meyer-Bahlburg at JA1092 ("The specific goals we have for the boy are to develop a positive relationship with the father (or a father figure), positive relationships with other boys, gender-typical skills and habits, to fit into the male peer group or at least into a part of it, and to feel good about being a boy.").)

3. Maryland Neither Had Nor Considered Any Empirical Evidence of Harm from "Conversion Therapy."

The legislative record of SB 1028 contains no contradiction or even discussion of the APA Report's conclusions that there is no empirical evidence of harm from SOCE. (JA831-34.) Maryland had no empirical or concrete evidence allowing Maryland to determine the risk of any of the purported harms from "conversion therapy" rehearsed by SB 1028,[7] and Maryland could not determine

[7] The only alleged allegation of harm offered by the SB 1028 Sources is in the context of "family rejection," but Maryland specifically admitted SB 1028 is not supported by any Source linking its banned "conversion therapy" with the "family rejection" described in its recitals. (JA1216.)

"the relative risk of bad outcomes from what's defined as conversion therapy as compared to bad outcomes from therapy in general." (JA824-27.)

4. Maryland Received No Complaints or Evidence of Harm from "Conversion Therapy" in Maryland When Considering Enactment of Its Counseling Ban.

Maryland identified the universe of documents comprising the legislative record of SB 1028. (JA1111; JA664-69.) These documents neither contain nor identify any complaint or evidence of harm from voluntary counseling received by minors in Maryland for unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts.

5. Maryland Did Not Consider Any Less Restrictive Alternatives to Its Counseling Ban.

The SB 1028 legislative record contains no evidence that the legislature considered any alternative to SB 1028's speech restrictions. (JA708-09, JA713, JA715-16, JA722-28; JA1110-1127; JA1175-1181.) The legislative record also contains no reasons for the rejection of several proposed amendments, including one that would have limited SB 1028's ban to "abusive" or "coercive" therapies. (JA734-752; JA1144-1156; JA1169-1174.)

Maryland lawmakers had considered a "conversion therapy" ban in 2014, but the sponsor withdrew the bill, with the blessing of amicus FreeState Justice, Inc.'s predecessor (JA626-28), because "patients who feel they have been harmed by

'conversion' or 'reparative' therapy **already have avenues to complain to state health occupation boards**," and "**the existing regulatory framework provides a precise tool to protect minors** . . . ." (JA785-792; JA1208-1209 (emphasis added).) There has been no change in the state health occupations regulatory scheme since 2014 that would have made health regulators less accessible to minors at the time SB 1028 was enacted. (JA785-792.) There is no record evidence of a complaint, or of an alleged harmful experience with "conversion therapy" that was excluded from the complaint process, from 2014's abandoned "conversion therapy" bill to SB 1028's enactment.

III. PROCEDURAL HISTORY AND ORDER ON APPEAL.

Doyle filed suit on January 18, 2019, on behalf of himself and his minor clients, seeking declaratory relief, preliminary and permanent injunctive relief, and damages. (JA11-56.) Doyle's five-count verified complaint alleges that SB 1028 violates (Count I) Doyle's First Amendment right to freedom of speech, (Count II) his minor clients' First Amendment rights to receive information, (Count III) Doyle's First Amendment right to free exercise of religion, (Count IV) Doyle's right to liberty of speech under the Maryland Constitution, and (Count V) Doyle's right to free exercise and enjoyment of religion under the Maryland constitution. (JA39-56.) Doyle simultaneously moved for a preliminary injunction against enforcement of SB 1028 based on his First Amendment freedom of speech claim (Count I),

showing that the statute, both facially and as applied, unconstitutionally restricts Doyle's protected speech on the basis of viewpoint, unconstitutionally restricts Doyle's protected speech on the basis of content, is an unconstitutional prior restraint, and is unconstitutionally vague. (JA231-247.)

After discovery, briefing, and a hearing (JA3-10 (Docket ## 2, 24 (disc. order), 25, 26, 28 (amicus br.), 31 (amicus br.), 53, 58, 71, 72 (hr'g mins.), the district court issued a Memorandum Opinion (JA1258-1282, the "Opinion") and Order (JA1283) on September 20, 2019, granting Maryland's motion to dismiss Doyle's complaint, and denying Doyle's preliminary injunction motion as moot. The court dismissed Doyle's First Amendment freedom of speech and free exercise claims (Counts I, II) for failure to state a claim, his minor clients' First Amendment right to receive information claims (Count II) for lack of standing, and Doyle's Maryland state law claims (Counts IV, V) without prejudice due to the court's declining to exercise supplemental jurisdiction after dismissing the federal claims. (JA1042-45; JA1260-1282; JA1283.) Doyle filed his Notice of Appeal (JA1284-85) on September 30, 2019.

SUMMARY OF THE ARGUMENT

SB 1028 is unconstitutional because it restricts the speech of licensed counselors based on content and viewpoint. The statute bans speech-only counseling for minors who voluntarily seek it, wanting help with reducing, eliminating, or

resolving unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts.

SB 1028 is an unconstitutional viewpoint-based speech restriction as a matter of law because it prohibits counseling speech from a viewpoint that affirms the potential benefits of client change goals and facilitates client change efforts, while endorsing speech that opposes change goals. SB 1028 is also an unconstitutional content-based speech restriction under any standard because the indisputable absence of empirical evidence of the purported "conversion therapy" harms claimed by Maryland negates any compelling or other legitimate interest that could justify the speech ban, and there was no consideration by Maryland of protections offered by existing laws or other less speech-restrictive alternatives.

SB 1028 is also unconstitutionally vague because determining where counseling speech crosses the line—from speech about change to speech to effect change—is impossible for professionals and regulators alike. SB 1028 is an unconstitutional prior restraint because counselors must refrain from all speech on the prohibited subjects to avoid violating the statute.

The district court erroneously dismissed Doyle's complaint and denied his preliminary injunction motion based on a resurrected version of the "professional speech" doctrine abrogated by the Supreme Court in *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018). This Court should correct the district

court's error, reverse the dismissal of Doyle's complaint, and remand for entry of the preliminary injunction against enforcement of SB 1028 that the district court denied.

ARGUMENT

I. STANDARD OF REVIEW.

This Court recently explained the standards of review applicable in this case:

> This Court reviews de novo a dismissal under Federal Rule of Civil Procedure 12(b)(6). In conducting such a review, we assume all well-pleaded facts are true and draw all reasonable inferences in favor of the plaintiff. Viewing the complaint in that light, a plaintiff must plead sufficient factual matter to state a claim to relief that is plausible on its face. . . . And we review de novo a district court's rulings on the constitutionality of statutory provisions. Lastly, we review the denial of a preliminary injunction for abuse of discretion. In so doing, we review factual findings for clear error and assess legal conclusions de novo.

Fusaro v. Cogan, 930 F.3d 241, 247-48 (4th Cir. 2019) (citations and internal quotation marks omitted). Under these standards, Doyle is entitled to reversal of the district court's order, and remand for entry of a preliminary injunction.

II. THE DISMISSAL OF DOYLE'S COMPLAINT SHOULD BE REVERSED BECAUSE DOYLE STATED PLAUSIBLE FIRST AMENDMENT CLAIMS.

A. Doyle Stated a Free Speech Claim Because SB 1028 Infringes the Protected Speech of Licensed Professionals.

1. Binding Supreme Court Precedent Forecloses the District Court's Labeling of Doyle's Speech as "Conduct" to Reduce Its Constitutional Protection.

Doyle sufficiently stated a free speech claim in Count I of his complaint on grounds of viewpoint and content discrimination, vagueness, and prior restraint. (JA39-52.) The district court dismissed the claim only after relabeling the counseling speech prohibited by SB 1028 as "professional conduct," and then finding the statute satisfied lessened constitutional scrutiny. (JA1264-1274.) In so doing, however, the district court played a labeling game proscribed by the Supreme Court in a line of cases culminating in *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) [hereinafter "*NIFLA*"].

In 2018, citing the Ninth and Third Circuits that labeled virtually identical counseling bans as "professional speech," the Supreme Court in *NIFLA* expressly rejected the "professional speech" doctrine. The Supreme Court could not be more clear in rejecting professional speech in the precise case as before this Court:

> "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," or that is "within the confines of [the] professional relationship." So defined, these

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

138 S. Ct. at 2371-72 (alterations in original) (citations omitted) (abrogating *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (Cal. counseling ban), *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (N.J. counseling ban), and *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560 (4th Cir. 2013)). *NIFLA*'s express abrogation of the doctrine necessarily rejected both *King*'s labeling of its counseling ban as a regulation of "professional speech" subject only to intermediate scrutiny, *see* 767 F.3d at 233, and *Pickup*'s labeling of a SOCE ban as "conduct" subject only to rational basis review, *see* 740 F.3d 1208, 1229, 1231—in each case because they "except[ed] professional speech from the rule that content-based regulations of speech are subject to strict scrutiny."[8] *See NIFLA*, 138 S. Ct. at 2371-72.

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[8] Even the Third Circuit in *King* rejected *Pickup*'s stridency for the "conduct" label: "We disagree, and hold that the verbal communication that occurs during SOCE counseling is speech." 767 F.3d at 224. "Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are 'conduct.'" *Id.* at 225.

Even before *NIFLA*, the Supreme Court had solidified full protection for the speech of professionals in *Holder*. There, a former judge and a physician challenged a statute prohibiting provision of "'material support or resources'" to foreign terrorist organizations. 561 U.S. at 7-8, 10. The plaintiffs wanted to provide support to the non-terroristic activities of two such organizations, "the PKK and LTTE, in the form of . . . legal training, and political advocacy . . . ." 561 U.S. at 10. The Court rejected the plaintiffs' claim that the statute banned pure political speech because plaintiffs remained free to speak and write about the PKK and LTTE. *Id.* at 25-26. The Court also rejected, however, the government's argument that the statute prohibited only "conduct, not speech," "and only incidentally burdens expression." 561 U.S. at 26. The Court reasoned,

> [the statute] regulates speech on the basis of its content. **Plaintiffs want to speak** to the PKK and LTTE, **and whether they may do so under [the statute] depends on what they say**. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge" . . . then it is barred.

Id. at 27 (emphasis added).

The government in *Holder* (evocative of the district court here) nevertheless argued that intermediate scrutiny should apply to the Court's First Amendment review of the statute "because it *generally* functions as a regulation of conduct." *Id.* at 27. But the Supreme Court rejected that argument, too, because even though the statute "may be described as directed at conduct, . . . as applied to plaintiffs the

conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. In concluding that strict scrutiny applied, the Court reasoned,

> The First Amendment issue before us is more refined than either plaintiffs or the Government would have it. It is not whether the Government may prohibit pure political speech, or may prohibit material support in the form of conduct. It is instead **whether the Government may prohibit what plaintiffs want to do—**provide material support to the PKK and LTTE **in the form of speech**.

Id. at 28.

The *Holder* Court's analysis is controlling here. First, the issue here can be framed nearly identically to the issue in *Holder*: whether Maryland may prohibit what Doyle wants to do—provide sexual and gender identity counseling "in the form of speech." Second, as in *Holder*, Doyle wants to use his speech to impart skills requested by his minor clients (reducing or eliminating unwanted attractions, behaviors, identity conflicts) or communicate advice derived from his specialized knowledge. Third, as in *Holder*, SB 1028 ostensibly allows Doyle to write and speak about SOCE, and to advocate its benefits; but that is irrelevant, as in *Holder*, to the question before this Court: whether Maryland may prohibit Doyle from providing counseling in the form of speech.

Holder eviscerates the district court's rationalization that SB 1028 does not regulate speech because it ostensibly allows Doyle to talk **about** and **recommend** "conversion therapy." (JA1266, JA1273.) To be sure, the district court's reasoning

is precisely this Court's formulation of the "professional speech" doctrine abrogated by *NIFLA*:

> Thus, the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary. Professional speech analysis applies in the former context . . . but not in the latter.

Moore-King, 708 F.3d at 569, *abrogated by NIFLA*, 138 S. Ct. at 2371-72.

2. This Court's Pre-*NIFLA* Precedents Do Not Support the District Court's Conduct Label as a Matter of Law.

The district court resurrected the 'conduct-not-speech' labeling concept from *Pickup* by citing to two pre-*NIFLA* decisions from this Court. (JA1264-67.) In *Stuart v. Camnitz* this Court cited *Pickup* for the proposition: "When the First Amendment rights of a professional are at stake, the stringency of review thus slides 'along a continuum' form 'public dialog' on one end to 'regulation of professional *conduct*' on the other." 774 F.3d 238, 248 (4th Cir. 2014) (quoting *Pickup*, 740 F.3d at 1227, 1229). Then, in *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Balt.*, this Court cited *Stuart* for the same proposition. 879 F.3d 101, 109 (4th Cir. 2018). But after *NIFLA*, this sliding-scale-of-scrutiny concept from *Pickup*

cannot be used to label professionals' counseling speech as conduct to reduce its constitutional protection.[9]

3. The First Court to Consider a "Conversion Therapy" Ban After *NIFLA* Held It an Unconstitutional Restriction on Speech That Should Be Enjoined.

The first court to consider a "conversion therapy" ban after *NIFLA* concluded the City of Tampa, Florida's ban (substantively identical to SB 1028) was a content-based speech restriction, and applied strict scrutiny to hold the ban unconstitutional under *NIFLA*. (JA1238-1244 (magistrate's Report and Recommendation).) The

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[9] This Court should also reject the district court's alternative reliance on the "treatment" speech label applied by the Southern District of Florida in *Otto v. Boca Raton*, 353 F. Supp. 3d 1237 (S.D. Fla. 2019) (denying preliminary injunction against city and county "conversion therapy" bans). (JA1267.) The *Otto* court downgraded the counselors' speech based on the "function" of the speech:

> This case presents facts in which speech is not always expressive, and thus warrants less scrutiny. *Cf. [United States v.] O'Brien*, 391 U.S. 367 (1968). Plaintiffs' words serve a function; their words constitute an act of therapy with their minor clients, which makes Plaintiffs' speech different from the protected dialogues in *Wollschlaeger* [*v. Florida*, 848 F.3d 1293 (11th Cir. 2017)] and *NIFLA*, and from highly protected, political speech in the metaphoric or literal "public square."

353 F. Supp. 3d at 1257. In *Holder*, however, the Supreme Court rejected this very rationale, holding, "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech." 561 U.S. at 28.

magistrate recommended that Tampa's unconstitutional ban be enjoined.[10] (JA1245-46.)

B. SB 1028 Unconstitutionally Infringes Doyle's Free Speech on the Basis of Viewpoint.

The district did not address Doyle's claim that SB 1028 unconstitutionally restricts speech on the basis of viewpoint. (JA39-40.) "'[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *see also, e.g. Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 536-39, 547-49 (2001) (invalidating attorney grant funding law as viewpoint discriminatory because it prohibited funding for providing particular "advice or

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[10] The district judge did not adopt or reject the magistrate's recommendation; instead the judge invoked constitutional avoidance and entered summary judgment invalidating Tampa's counseling ban on state preemption grounds, though he made extensive factual findings—based on admissions of **Tampa's experts, including the Chair of the APA Task Force that wrote the 2009 APA Report**—that gutted the assumptions and purported justification for Tampa's ban. *See Vazzo v. City of Tampa*, No. 8:17-cv-2896-T-02AAS, 2019 WL 4919302, at *13-14 (M.D. Fla. Oct. 4, 2019) (*e.g.*, "One cannot quantify or put a percentage on the increased risk from conversion therapy, as compared to other therapy."). Tampa has appealed to the Eleventh Circuit.

argumentation" and thereby excluded "vital theories and ideas" from representation); *Conant v. Walters*, 309 F.3d 629, 633, 636-38 (9th Cir. 2002) (invalidating as viewpoint discriminatory law punishing doctors for communicating particular viewpoint regarding medical marijuana use, recognizing "integral component of the practice of medicine is the communication between a doctor and a patient" and doctors "must be able to speak frankly and openly to patients"); *Columbia Union Coll. v. Clarke*, 159 F.3d 151, 156 (4th Cir. 1998) (holding Maryland infringed private college's speech by denying funding based on religious viewpoint).

SB 1028 is classic viewpoint discrimination. *SB 1028 prohibits "**any effort to change**" a person's sexual orientation or gender identity, but it exempts any and all counseling that "**does not seek to change**" a person's sexual orientation or gender identity*. (JA61.) SB 1028 further defines its byword "conversion therapy" to prohibit talk therapy that helps a client "eliminate or reduce sexual or romantic attractions or feelings **toward individuals of the same gender**." (JA61 (emphasis added).) When the client seeks a counselor to change unwanted same-sex attraction, behaviors, or identity, SB 1028 prohibits the counselor from speaking; but if the client wants only affirmation and does not seek change the counselor can speak. *The statute thus allows the subject matter of sexual orientation and gender identity, but it bans any viewpoint respecting change*. More specifically, it prohibits counseling

speech from the viewpoint that emerging same-sex attraction or cross-gender identity can be reduced or eliminated to the benefit of a client who wants such counseling, but permits—for the same client—counseling speech from a viewpoint communicating "support, and . . . facilitation" toward the emerging same-sex attractions or cross-gender identity. (JA61.) There can be no question that SB 1028 discriminates against the viewpoint disfavored by Maryland.

SB 1028 not only violates the free speech of counselors, it also violates the free speech of clients. It mandates the viewpoint of the government, disregarding the First Amendment to advance a political agenda, which *NIFLA* rejected. Moreover, it forces professional counselors to disregard and override the client's right of right of self-determination, eviscerating the core ethic of counseling and making the counselor an adversary who must refuse to help the client achieve the client's goal. The state of Maryland has no business micromanaging these private communications of counselors and clients. It is unprecedented and harmful to impose such a broad speech ban on a single viewpoint in the context of counseling.

C. SB 1028 Unconstitutionally Infringes Doyle's Free Speech on the Basis of Content.

1. SB 1028 Is a Presumptively Invalid Content-Based Restriction on Speech Which is Subject to Strict Scrutiny.

Even if not a viewpoint-based restriction, which it is, SB 1028 is certainly a content-based restriction on speech that is presumptively invalid and subject to strict

scrutiny. (*See supra* Argument Pt. II.A.) "Content-based laws—those that target speech on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 2228. *NIFLA* affirmed the "stringent standard" of *Reed*, and emphasized the speech of professionals is not "except[ed]…from the rule that content-based regulations of speech are subject to strict scrutiny. 138 S. Ct. at 2371.

2. Maryland Has the Burden of Proving the Constitutionality of SB 1028 by Satisfying Strict Scrutiny.

a. Maryland Must Prove Empirical or Concrete Evidence of Harm.

Where strict scrutiny applies to a challenged statute, as it does here, it is the government's burden "to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. And in this First Amendment context, the government is not entitled to deference in making speech-restrictive determinations. When "[a] speech-restrictive law with widespread impact" is at issue, "**the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a**

predicted harm justifies a particular impingement on First Amendment rights." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2472 (2018) (emphasis added). Here, because SB 1028 infringes upon the free speech rights of licensed professionals, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994); *see also Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (recognizing government regulation of professional speech not supportable by "mere speculation or conjecture"); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim . . . ."). This is so because "[d]eference to legislative findings cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Commc'ns*, 435 U.S. at 843.

Courts have not hesitated to invalidate laws that impose restrictions on speech based on supposition and conjecture, rather than empirical evidence. In *Edenfield v. Fane*, where the government sought to restrict the speech of licensed accountants, the government "presented no studies" and relied upon a record that "contain[ed] nothing more than a series of conclusory statements that add little if anything" to the government's effort to regulate certain speech. 507 U.S. 761, 771 (1993). Also, the government relied upon a report of an independent organization to bolster its claims

of harm, but the report there—exactly as the APA Report does in this case—admitted that it was "unaware of the existence of **any empirical data supporting the theories**" of alleged harm. *Id.* at 772 (emphasis added). Because of the lack of evidence of harm, the Supreme Court invalidated the restriction as a violation of the accountants' First Amendment rights. In *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989), the Supreme Court again confronted a record (like here) where there was nothing more than anecdote and suspicion of harm behind a total prohibition on the targeted speech. 492 U.S. at 129. There was no record evidence "aside from conclusory statements during the debates by proponents of the bill" and the record "contain[ed] no evidence" concerning the alleged effectiveness of other alternatives. *Id.* Because of that failure, the Supreme Court invalidated the ban. *Id.*[11]

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[11] The Eleventh Circuit, too, has invalidated laws regulating professional speech when the alleged harm purportedly being addressed was unsupported by concrete evidence. In *Mason v. Florida Bar*, 208 F.3d 952 (11th Cir. 2000), the government attempted to regulate the speech of attorneys, but "**presented no studies, nor empirical evidence of any sort** to suggest" that the harm they were positing was real, rather than merely conjectural. 208 F.3d at 957 (emphasis added). The Eleventh Circuit held that, to survive scrutiny, the government "has the burden . . . of producing **concrete evidence**" of the alleged harm prior to restricting the protected speech of licensed professionals. *Id.* at 958 (emphasis added). Indeed, it held that when there are "**glaring omissions in the record of identifiable harm**," the government has not satisfied "its burden to identify a genuine threat of danger." *Id.* (emphasis added).

b. Maryland Must Show That SB 1028 Was the Least Restrictive Means Available at the Time of Enactment.

Under strict scrutiny, Maryland must also demonstrate that SB 1028 is the least restrictive means of advancing Maryland's claimed governmental interests. *See Boos v. Berry*, 485 U.S. 312, 329 (1988) (explaining when content-based restrictions on speech are analyzed under strict scrutiny, a law "is not narrowly tailored [where] a less restrictive alternative is readily available"); *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (noting under "the most exacting scrutiny" applicable to content-based restrictions on speech, government must employ least restrictive alternative to pass narrow tailoring).

To satisfy the narrow tailoring prong of their strict scrutiny burden, Maryland must show that it "**seriously** undertook to address the problem with less intrusive tools readily available to it." *McCullen v. Coakley*, 134 S. Ct. 2518, 2539 (2014) (emphasis added). "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. Thus, Maryland "would have to show either that **substantially less-restrictive alternatives were tried and failed**, or that the **alternatives were closely examined and ruled out for good reason**." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016) (emphasis added); *see also Reynolds v. Middleton*, 779

F.3d 222, 231 (4th Cir. 2015) ("As the Court explained in *McCullen* . . . the burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem.").

3. There Is No Compelling or Other Sufficient Governmental Interest for SB 1028's Ban on Voluntary Talk Therapy.

Maryland cannot satisfy the strict scrutiny requirement of a compelling interest supporting SB 1028. The Preamble merely recites, "Maryland has a compelling interest in protecting the physical and psychological well-being of minors, including LGBT youth, and in protecting minors against exposure to serious harm caused by sexual orientation change efforts . . . ." (JA60.) This bald assertion of "serious harm" not only misrepresents the Sources in the preceding recitals, but also is insufficient as a matter of law to establish a compelling interest. As shown *supra* in the Statement of the Case ("Case," Pt. II.A.3.a, e), Maryland cannot show any empirical or concrete evidence of harm to justify SB 1028.[12] Whatever **general** interest Maryland may rightfully proclaim in the health and safety of minors in the state, Maryland has no legitimate—let alone compelling—interest in protecting

[12] The district court's statement that "Maryland's decision to ban the administration of conversion therapy on minors is bolstered by research indicating that conversion therapy **is likely harmful** to minors" (JA1270 (emphasis added)) cannot be squared with the record. (*See supra* Case Pt. II.A.3.a, e, Pt. II.B.1, 2.)

minors from the merely speculative narrative of harm crafted into position statements and uncritically adopted by the legislature.

In its *Wollschlaeger* decision holding that provisions of a Florida statute prohibiting physicians' speech about gun ownership did not satisfy even intermediate scrutiny, the *en banc* Eleventh Circuit explained that purported governmental interests "[a]t an abstract level of generality" are not enough to justify "restrict[ing] the speech of doctors and medical professionals on a certain subject." 848 F.3d at 1316. Thus, Florida's undoubted "substantial interest" in "regulat[ing] the medical profession in order to protect the public" was nonetheless not specific enough to justify a speech restriction on professionals where there was no evidence of a harm to be remedied beyond "six anecdotes." 848 F.3d at 1316. Maryland's SB 1028 legislative record is no better. (*See supra* Case Pt. II.A.3.a, e; Case Pt. II.B.3, 4.) Accordingly, Maryland cannot satisfy the interest prong of their narrow tailoring burden.

4. SB 1028 Is Not the Least Restrictive Means or Otherwise Narrowly Tailored.

Maryland also cannot meet its strict scrutiny burden of showing that SB 1028 is the least restrictive means for advancing its purported interests, or that the statute is otherwise narrowly tailored. Even if Maryland could conjure a compelling interest for SB 1028's ban on voluntary counseling, Maryland could not meet its burden of showing the statute is narrowly tailored. "It is not enough to show that the

Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Sable Commc'ns*, 492 U.S. at 126. "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'" *McCullen*, 573 U.S. at 486.

SB 1028 woefully fails narrow tailoring. It is not necessary to prevent harm (none has been established), and existing Maryland laws and regulations already prohibit practices that actually harm clients. (JA23-26.) These pre-existing, comprehensive provisions already protect minors, and carry legal sanctions for violators, without suppressing speech. Under *R.A.V. v. City of St. Paul*, if Maryland had content-neutral means of preventing the alleged harm, failing to employ those means demonstrates that SB 1028 is not narrowly tailored as a matter of law. 505 U.S. 377, 395 (1992).

As an initial matter, SB 1028 was expressly conceived to promote "that being lesbian, gay, bisexual, or transgender (LGBT)…is not a disease, a disorder, or an illness." (JA57.) To achieve this ostensible end, however, Maryland employed the means of a speech ban prohibiting the counseling speech of professionals like Doyle who do not espouse a contrary view. (JA35.) Thus, SB 1028 is neither a close fit nor carefully tailored, and broadly sacrifices speech for efficiency.

Moreover, SB 1028 undermines several specific admonitions from the APA Report and related Sources. For example, SB 1028 requires therapists such as Doyle

to reject or cut off counseling with clients who express a desire to alleviate their conflicted sexual or gender identities, which directly contradicts the APA Report's admonition to explore a client's identity issues instead of declining them outright, and Maryland's compulsory ethical regulation not to abandon or neglect clients. (*See supra* Case Pt. II.A.3.C; Md. Code Regs. 10.58.03.05.A(2)(a).) Thus, SB 1028 prohibits counselors from assisting minors with change decisions even the APA expressly endorses, and otherwise creates instead of reducing harm identified by the APA and pre-existing Maryland law.

Furthermore, if Maryland is concerned with possible harms to minors from being subjected to counseling involuntarily or coercively, Maryland could have banned those practices without indiscriminately outlawing voluntary talk therapy for willing clients. Or Maryland could have banned aversive conduct such as electric shocks or elastic band wrist-snapping (s*ee supra* Case Pt. II.A.3.B) without infringing on speech rights.[13] Informed consent requirements would be still another less restrictive means to advance Maryland's purported interests. To be sure, when legislation virtually identical to SB 1028 was being debated in California, several

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[13] The district court's proposition that Doyle's counseling speech is not "less in the nature of conduct[] than aversive therapy" (JA1268) is not plausible as a matter of fact or law. *See Holder*, 561 U.S. at 27-28 (holding speech imparting skills or communicating advice is protected, rejecting government's argument that such support through speech is merely conduct).

mental health organizations recognized that such "legislation is attempting to undertake an unprecedented restriction on psychotherapy" and proposed informed consent language that would have been much more narrowly tailored than SB 1028's unprecedented intrusion into the relationship between counselor and willing client. (JA40, JA205.) And Doyle is already subject to both compulsory regulations and voluntary guidelines requiring safe and ethical practices, with client direction and informed consent. (*See supra* Case Pt. II.A.1; JA23-26.)

The district court's rejection of informed consent as a less speech-restrictive alternative Maryland could have employed is unjustified. (JA1273-74.) The court reasoned that informed consent for minors is unworkable because "in many circumstances" minors cannot **legally** consent to mental health treatment under Maryland statutory law. (JA1274.) This proves too much, however, because the district court's view directly undermines the **ethical** responsibility of therapists to respect client self-determination by utilizing "whenever possible a developmentally appropriate informed consent to treatment." (JA75; *see supra* Case Pt. II.A.3.c.) "**The informed consent process is one of the ways by which self-determination is maximized in psychotherapy**." (JA138 (emphasis added).) And, "[i]t is now recognized that **adolescents are cognitively able to participate in some health care treatment decisions**, and such participation is helpful." (JA144 (emphasis added).) Thus,

> We recommend that when it comes to treatment that purports to have an impact on sexual orientation, [counselors] assess the adolescent's ability to understand treatment options, **provide developmentally appropriate informed consent to treatment that is consistent with the adolescent's level of understanding**, and, at a minimum, obtain the youth's assent to treatment.

(JA149.) To be sure, Doyle approaches informed consent in the exact manner the APA recommends, even disclosing substantial information from the APA Report itself in his informed consent form. (*See* JA867; JA137 ("In weighing the harm and benefit of SOCE, [counselors] can review with clients the evidence presented in this report.").)

Moreover, the same Maryland legislature that enacted SB 1028 could amend or even repeal any Maryland statute affecting the state's legal age of consent for mental health treatment, or enact a new statute, such as the statute that already sets the age under eighteen for certain treatments. *See, e.g.*, Md. Code, Health-Gen. § 20-104(b)(1) ("A minor who is 16 years old or older has the same capacity as an adult to consent to consultation, diagnosis, and treatment of a mental or emotional disorder . . . ."); § 20-102(c) ("A minor has the same capacity as an adult to consent to" certain counseling); §20-102(d) ("A minor has the same capacity to consent" to certain psychological treatments if "the life or health of the minor would be affected adversely" by waiting). Binding precedent also teaches that minors have the capacity to consent to certain forms of medical and mental health treatments as a matter of

law. *See, e.g.*, *Planned Parenthood of Cent. Miss. v. Danforth*, 428 U.S. 52, 74-75 (1976) (holding "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority," and reasoning minors can consent to certain medical procedures).

Finally, if the purpose of SB 1028 is to protect minors from the purported harms of "conversion therapy," it is "'wildly underinclusive,'" further negating narrow tailoring. *See NIFLA*, 138 S. Ct. at 2376 (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 802 (2011)). The ban regulates only licensed professionals, necessarily excluding "conversion therapy" offered by unlicensed counselors. The APA Report is especially relevant here because, not only does it fail to present empirical evidence of harm from **any** kind of SOCE counseling, its non-empirical, anecdotal reporting of harm does not differentiate between SOCE from licensed professionals and SOCE from religious organizations or persons. (*See supra* Case Pt. II.A.3.a.) Thus, Maryland cannot justify the underinclusivity of SB 1028 on any claimed difference in harm between licensed SOCE and unlicensed religious SOCE, still further negating narrow tailoring.

D. SB 1028 Is Unconstitutionally Vague.

The district court wrongly dismissed Doyle's vagueness claim under a 'conduct' standard. (JA1279-1281.) But as a speech restriction SB 1028 is unconstitutionally vague.

A law is unconstitutionally vague and overbroad if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926). While all regulations must be reasonably clear, "laws which threaten to inhibit the exercise of constitutionally protected" expression must satisfy "a more stringent vagueness test." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); "Precision of regulation" is the touchstone of the First Amendment. *NAACP v. Button*, 371 U.S. 415, 435 (1963). Such a law must give "adequate warning of what activities it proscribes" and must "set out explicit standards for those who apply it." *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973).

SB 1028 does not fulfill either requirement and thus forces both mental health professionals and those enforcing the law to guess at its meaning and differ as to its application. Because sexual orientation and gender identity are fluid and changing concepts, licensed professionals are left to guess about what they are permitted to say to their clients who present with sexual or gender identity conflicts. (*See, e.g.*, JA72 (declaring "scientific fact" that "[s]ame-sex sexual attractions and behavior occur in the context of a variety of sexual orientations and sexual orientation identities, and **for some, sexual orientation identity (i.e., individual or group membership and affiliation, self-labeling) is fluid or has an indefinite outcome**."

(emphasis added)).) Similarly, enforcement officials cannot be certain at what point a counselor has crossed the line. This does not satisfy the stringent test required for the threat to Doyle's First Amendment rights. *See Vill. of Hoffman Estates*, 455 U.S. at 499.

E. SB 1028 Is an Unconstitutional Prior Restraint.

The district court also did not address Doyle's claim that SB 1028 is an unconstitutional prior restraint (JA39-42). Prior restraints against constitutionally protected speech are highly suspect and disfavored. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). "[A]ny system of prior restraints comes to this Court bearing the heavy presumption against its constitutional validity." *Bantham Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

Total speech prohibitions constitute prior restraints. *See 11126 Baltimore Blvd., Inc. v. Prince George's Cnty., Md.*, 58 F.3d 988, 994-95 (4th Cir. 1995) (distinguishing as prior restraint county ordinance prohibiting adult bookstores anywhere in county unless special exception obtained, from permissible ordinance restricting stores to only zoned locations), *abrogated on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004). As was true of the total ban on adult bookstores in *11126 Baltimore Blvd.*, SB 1028 goes beyond merely regulating the time and place of counseling speech to totally banning a category of

counseling speech with minors everywhere in the State, even if voluntarily sought. Such bans are subject to prior restraint analysis, and SB 1028 fails it.

Doyle must restrain his speech before it occurs because he does not and cannot know where the line is crossed from "change" to "affirming." What if the client wants to be "affirmed" that he or she can "change" unwanted attractions, behaviors, or identity? May Doyle speak? Who knows? In order not to violate the statute, Doyle must not speak because he is placed in a catch-22. This is a classic prior restraint.

F. Doyle Has Sufficiently Demonstrated Standing to Assert His Minor Clients' First Amendment Rights to Receive Information.

1. The Supreme Court and Fourth Circuit Have Recognized the Rights of Medical Providers to Assert Third-Party Claims on Behalf of Patients.

The district court erroneously held Doyle has no standing to bring the claims of his minor clients for violation of the First Amendment right to receive information. (JA1044-45.) This Court should reverse because the Supreme Court and other federal courts have long recognized the rights of medical providers to bring constitutional challenges on behalf of their clients. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106 (1976); *Doe v. Bolton*, 410 U.S. 179 (1973); *Am. Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016) ("[A] physician or other professional may raise the *constitutional* rights . . . of his or her patients."); *Penn. Psychiatric Soc'y v. Green Springs Health Serv., Inc.*, 280 F.3d 278, 289 (3d Cir.

2002) ("Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights."); *Planned Parenthood Se., Inc. v. Bentley*, 951 F. Supp. 2d 1280, 1284 (M.D. Ala. 2013) ("[F]ederal courts routinely recognize an abortion provider's standing to assert the claims of its patients.")). Doyle's assertion of his clients' constitutional rights is consistent with Article III requirements because his clients' "enjoyment of the right [to receive the counseling they seek] is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114-15. As such, "the relationship between the litigant and the third party [is] such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Id.* at 115.

2. Doyle's Clients Face Obstacles to Their Ability to Litigate.

For a medical provider plaintiff to establish third-party standing on behalf of patients, the Fourth Circuit has recognized the "plaintiff must demonstrate: (1) an injury-in-fact; (2) a close relationship between herself and the person whose right she seeks to assert; and (3) a hindrance to the third party's ability to protect his or her own interests. *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 215 (4th Cir. 2002). Citing *Freilich*, the district court denied Doyle's third-party standing on the hindrance element alone. (Mem. Op. 65 26-27.)

The plaintiff in *Freilich*, however, "did not sufficiently allege a hindrance to her patients' ability to protect their own interests" and "fail[ed] to allege sufficient obstacles to the patients bringing suit themselves." 313 F.3d at 215. By contrast, Doyle has specifically alleged the obstacles faced by his minor clients. (JA39; *supra* Case Pt. II.A.2.) In a similar case, the Middle District of Florida upheld the third-party standing of state-licensed therapists, on behalf of their minor clients, to challenge the constitutionality of a municipal "conversion therapy" ban in *Vazzo v. City of Tampa*: "[G]iven the sensitive nature of SOCE counseling—which the amended complaint describes in detail—the plaintiffs sufficiently demonstrate the Tampa minor's privacy interest presents an obstacle to bringing claims on his or her own behalf." No. 8:17-CV-2896-T-02AAS, 2019 WL 1048294, at *4-5 (M.D. Fla. Jan. 30, 2019), *report and recommendation adopted by* 2019 WL 1040855 (M.D. Fla. Mar. 5, 2019); *see also Singleton*, 428 U.S. at 117 ("For one thing, [they] may be chilled from such assertion by a desire to protect the very privacy of [their] decision from the publicity of a court suit."); *Penn. Psychiatric Soc'y*, 280 F.3d at 290 ("The stigma associated with receiving mental health services presents a considerable deterrent to litigation."); *Aid for Women v. Foulston*, 441 F.3d 1101, 1114 (10th Cir. 1990) ("**[A]dolescents seeking health care related to sexuality or mental health care may be chilled from asserting their own rights by a desire**

to protect the very privacy of the care they seek from the publicity of a court suit." (emphasis added)).

The desire to keep private the intimate details associated with counseling for unwanted same-sex attractions or behaviors, or sexual or gender identity conflicts, is an obvious obstacle for Doyle's minor clients who desire vindication of their claims in court. The Court should allow Doyle to stand for his clients.

G. The District Court Should Have Granted Doyle Leave to Amend.

Doyle has sufficiently stated his claims for relief in Counts I through V of the Verified Complaint. Should the Court determine that Doyle's complaint is lacking in any respect, however, Doyle should be given the opportunity to amend. Rule 15 permits a party to amend his pleading and instructs that "[t]he court should **freely give leave** when justice so requires." Fed. R. Civ. P. 15(a)(2) (emphasis added). "This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006); *see also Ostrzenski v. Seigel*, 177 F.3d 245, 252 (4th Cir. 1999) ("[T]he district court should not have dismissed the complaint with prejudice without permitting [plaintiff] an opportunity to amend.")

III. THE DENIAL OF A PRELIMINARY INJUNCTION SHOULD BE REVERSED BECAUSE SB 1028 UNCONSTITUTIONALLY INFRINGES DOYLE'S SPEECH.

A. Doyle Has Shown the Preliminary Injunction Prerequisites, and Maryland Has the Burden of Proving the Constitutionality of SB 1028 Under the First Amendment.

In the Fourth Circuit, Doyle can obtain a preliminary injunction if he establishes "'[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013). Doyle satisfies these criteria and an injunction should issue.

Maryland face the much higher burden of proving that SB 1028 satisfies strict scrutiny. (*See supra* Argument Pt. II.C.2.) "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Thus, on a preliminary injunction motion, **the government**—not the movant—bears the burden of proof on narrow tailoring, because **the government** bears that burden at trial. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). Thus, Doyle "**must be deemed likely to prevail unless the government has shown** that . . . proposed less restrictive alternatives are less effective than enforcing the act." *Ashcroft*, 542 U.S. at 666 (emphasis added).

B. Doyle is Likely to Succeed on the Merits of His First Amendment Claims Because Maryland Cannot Satisfy Its Narrow Tailoring Burden.

Based on the allegations of his verified complaint, Doyle not only has sufficiently pleaded his First Amendment claims on grounds of viewpoint and content discrimination, vagueness, and prior restraint (*see supra* Argument Pt. I), but also has demonstrated a likelihood of success on his claims because Maryland has failed to produce evidence to satisfy its narrow tailoring burden under strict or any other level of constitutional scrutiny. Indeed, discovery in connection with Doyle's preliminary injunction motion only bolsters Doyle's likelihood of success on the merits:

- Additional research confirmed the lack of empirical evidence of harm caused by SOCE or gender identity change efforts, and revealed that SB 1028 directly undermines the APA imperative that minors be allowed to return to their biological gender after identifying as the other gender for a period of time, proving Maryland's failure to demonstrate a compelling or other governmental interest justifying SB 1028. (*See supra* Case II.B.1, 2.)

- Maryland admitted it never considered any empirical evidence of harm from "conversion therapy," and that the state had received no complaints or other evidence of harm from "conversion therapy" (*see supra* Case II.B.3,

4), undermining still further any claim of a legitimate governmental interest supporting SB 1028.

- Maryland admitted it did not consider any alternatives to SB 1020's speech ban, and that nothing in its regulatory scheme had changed since Maryland abandoned as unnecessary a "conversion therapy" ban in 2014 (s*ee supra* Case II.B.5), completing the record of Maryland's failure to carry its narrow tailoring burden.

C. Doyle Satisfies the Remaining Preliminary Injunction Requirements.

Given Doyle's likelihood of success on the merits of his constitutional challenges to SB 1028, the remaining preliminary injunction factors all weigh in his favor:

> [T]he Supreme Court has explained that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976). With respect to the harm that would befall if an injunction were put in place, [the government] is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which, on this record, is likely to be found unconstitutional. The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. Surely, upholding constitutional rights serves the public interest.

Newsom ex rel. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 261 (4th Cir. 2003).

D. This Court Should Mandate Entry of Doyle's Requested Preliminary Injunction on Remand Because the District Court Already Had the Opportunity to Consider the Applicable Factors.

This Court should resolve Doyle's preliminary injunction motion on appeal because the district court already had the first opportunity to perform the required constitutional review, which it mishandled, and Maryland already had the opportunity to produce evidence to meet its narrow tailoring burden, but failed. *Cf. Fusaro*, 930 F.3d at 263 (remanding for constitutional balancing where district court did not have first opportunity and Maryland did not have opportunity to articulate its case). Thus, the Court should remand with instructions to the district court to preliminarily enjoin SB 1028.

CONCLUSION

For the foregoing reasons, the district court's dismissal of Doyle's claims should be reversed, and the case remanded to the district court for entry of a preliminary injunction against enforcement of SB 1028.

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and 4th Cir. R. 34(a), Doyle respectfully requests that oral argument be permitted in this appeal because it would assist the Court in understanding and deciding the weighty constitutional issues presented by Maryland's statute which bans constitutionally protected speech.

Dated this November 25, 2019.

s/ Roger K. Gannam
Mathew D. Staver (Fla. 0701092)
Horatio G. Mihet (Fla. 026581)
Roger K. Gannam (Fla. 240450)
Daniel Schmid (Va. 84415)
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Phone: (407) 875-1776
E-mail: court@lc.org

Attorneys for Plaintiff-Appellant

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DATED this November 25, 2019

s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that, on this November 25, 2019, a copy of the foregoing was electronically filed through the Court's CM/ECF system, which will effect service on the following counsel and parties of record:

Kathleen A. Ellis
Brett E. Felter
Office of the Attorney General of Maryland
Suite 302, 300 West Preston Street
Baltimore, Maryland 21201
kathleen.ellis@maryland.gov
brett.felter@maryland.gov

Attorneys for Defendants-Appellees

s/ Roger K. Gannam
Roger K. Gannam
Attorney for Plaintiff-Appellant