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, and BRIAN E. FROSH, Attorney General of
the State of Maryland, in his official capacity,
Defendants-Appellants.

Appeal from the United States District Court for the District of Maryland
The Honorable Deborah A. Chasanow, No. 1:19-cv-00190-DKC

BRIEF OF *AMICI CURIAE* FREESTATE JUSTICE, INC., NATIONAL CENTER FOR LESBIAN RIGHTS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS, AND HUMAN RIGHTS CAMPAIGN IN SUPPORT OF DEFENDANTS-APPELLEES

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Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2064 Caption: Doyle v. Hogan, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

FreeState Justice, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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

2. Does party/amicus have any parent corporations? ☐YES ☑NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐YES ☑NO
If yes, identify all such owners:

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? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: December 20, 2019

Counsel for: FreeState Justice, Inc.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to FRAP 26.1 and Local Rule 26.1,

National Center for Lesbian Rights
(name of party/amicus)

who is amicus curaie, makes the following disclosure:
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Signature: /s/ Christopher F. Stoll Date: December 23, 2019

Counsel for: National Center for Lesbian Rights

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Lambda Legal Defense and Education Fund, Inc.
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/ Omar Gonzalez-Pagan Date: December 20, 2019

Counsel for: Lambda Legal

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Pursuant to FRAP 26.1 and Local Rule 26.1,

GLBTQ Legal Advocates & Defenders
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: /s/jennifer levi Date: 12/23/2019

Counsel for: GLAD

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No. 19-2064 Caption: Doyle v. Hogan, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Human Rights Campaign
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Signature: s/ Sarah Warbelow Date: 12/20/2019

Counsel for: Human Rights Campaign

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

FreeState Justice, Inc. is Maryland's statewide advocacy non-profit that seeks to improve the lives of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people in Maryland. As a legal advocacy organization, FreeState Justice seeks to improve the lives of low-income LGBTQ Marylanders by combining direct legal services with education and outreach to ensure that the LGBTQ community in Maryland receives fair treatment in the law and society. In keeping with its mission, FreeState Justice played an integral role in advocating for the passage and subsequent enactment in 2018 of Maryland's Youth Mental Health Protection Act, Md. Code. Ann., Health Occ. § 1-212.1, which prohibits mental health or child care practitioners from engaging in so-called "conversion therapy" with any individual who is a minor. Indeed, the community FreeState Justice serves includes some of the very Maryland residents who are most in need of the protections the Section 1-212.1 provides, including LGBTQ children at risk of being subjected to conversion therapy and their parents.

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[1] Counsel for the parties have not authored this brief in whole or in part. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amici curiae contributed money that was intended to fund preparing or submitting the brief.

The **National Center for Lesbian Rights** ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving statutory, constitutional, and civil rights.

In particular, NCLR has supported the enactment of narrowly tailored laws and regulations that protect minors from the practice of conversion therapy by licensed therapists. NCLR represented intervenor parties and amici curiae in Third and Ninth Circuit cases that have upheld these laws against constitutional challenges. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert. denied*, 573 U.S. 945 (2014), *and cert. denied sub nom. Pickup v. Newsom*, No. 18-1244, 139 S. Ct. 2622 (2019); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2093 (2017); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015), *and cert. denied sub nom. King v. Murphy*, 139 S. Ct. 1567 (2019); *Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015), *cert. denied* sub nom. *Doe v. Christie*, 136 S. Ct. 1155 (2016).

Founded in 1973, **Lambda Legal Defense and Education Fund, Inc.** ("Lambda Legal") is the nation's oldest and largest non-profit legal organization

committed to achieving full recognition of the civil rights of LGBTQ people, and people living with HIV through impact litigation, education, and public policy work. For over 45 years, Lambda Legal has served as counsel of record or *amicus curiae* in seminal cases regarding the rights of LGBTQ people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). Of special relevance here, Lambda Legal has supported efforts to protect LGBTQ youth from the harmful effects of "conversion therapy" and has served as counsel for *amici curiae* in cases upholding state laws regulating this so-called practice as constitutional. *See, e.g.*, *Pickup*, 740 F.3d 1208; *Welch*, 834 F.3d 1041; *King*, 767 F.3d 216.

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders** (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has successfully advocated for laws to protect LGBTQ youth against conversion therapy throughout New England and has collaborated with partner organizations across the country to ensure that youth are not subjected to those harmful practices.

The **Human Rights Campaign** ("HRC") is the largest national lesbian, gay, bisexual, and transgender advocacy organization. HRC envisions an America where

lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. HRC has engaged in extensive law and policy work, educational efforts, and advocacy at the state and national levels about "conversion therapy" and the importance of protecting youth from this dangerous and discredited practice.

BACKGROUND

Maryland's Youth Mental Health Protection Act, codified as Md. Code. Ann., Health Occ. § 1-212.1 (hereinafter, "Section 1-212.1"), is based on the consensus of the nation's leading medical and mental health organizations that efforts to change a minor's sexual orientation or gender identity are ineffective, unethical, and unsafe. In 2009, the American Psychological Association surveyed then-existing scientific literature in a report entitled "Appropriate Therapeutic Responses to Sexual Orientation." *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (Aug. 5, 2009) (hereinafter, "APA Report"). (JA63-200.) The APA Report concluded that "sexual orientation change efforts" (SOCE) are not only ineffective, but put patients—and especially minors—at risk of serious long-term harms. The APA's conclusions included the following:

- **The APA Report recognized that "conversion therapy" is another commonly used term for SOCE:** "[W]e use the term sexual orientation change efforts (SOCE) to 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[.]" APA Report at 2 n.**; *id.* at 93-117 (citing references on "conversion therapy"), available at https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.[2]

- **The APA Report found that conversion therapy for minors is ineffective:** "We found no empirical evidence that providing any type of therapy in childhood can alter adult same-sex sexual orientation." (JA149.)

- **The APA Report concluded that the available research demonstrated evidence of harm from conversion therapy:** "[S]cientific evidence shows that SOCE is not likely to produce its intended outcomes and can produce harm for some of its participants." (JA153.)

- **The APA Report cited recent studies documenting harm from "non-aversive" techniques:** With respect to recent studies, "the reported negative social and emotional consequences include self-reports of anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction." (JA112.)

- **The APA Report concluded that licensed mental health providers <u>should not engage in sexual orientation change efforts with minors under any circumstances</u>, <u>regardless of whether techniques are aversive or non-aversive, and including for "children and adolescents who present a desire to change their sexual orientation"</u>**: "We recommend that LMHP provide multiculturally competent and client-centered therapies to children, adolescents, and their families *rather than SOCE*. . . . These approaches would support children and youth in identity exploration and development *without seeking predetermined outcomes*." (JA149-50 (emphasis added).)

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[2] Conversion therapy is also known as "reparative" or "reorientation" therapy. These terms are commonly used in the relevant research literature and by the country's leading medical and mental health organizations to refer to therapeutic attempts to change sexual orientation or gender identity. Each of these terms appears in the statements of medical and mental health organization relied on by the Legislature in enacting § 1-212.1. (JA57-60.)

- **The APA Report concluded that conversion therapy offers no unique benefits.** "The positive experiences clients report in SOCE are not unique," and "the benefits reported by participants in SOCE may be achieved through treatment approaches that do not attempt to change sexual orientation." (JA138; *see also* JA123.)

- **The APA Report concluded that conversion therapy could not be justified by invoking client autonomy or self-determination.** "We believe that simply providing SOCE to clients who request it does not necessarily increase self-determination but rather abdicates the responsibility of LMHP [licensed mental health professionals] to provide competent assessment and interventions that have the potential for benefit with a limited risk of harm." (JA139.)

In 2015, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services conducted an updated survey of existing research on conversion therapy and published a report and recommendations based on "consensus statements developed by experts in the field after a careful review of existing research, professional health association reports and summaries, and expert clinical guidance." (JA268.) The report found "none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation." *Id*. It concluded: "Interventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of behavioral health treatment." *Id*.

Other medical and mental health organizations that have reached similar conclusions include: the American Medical Association, American Psychiatric Association, American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, American College of Physicians, National Association of Social Workers, American Psychoanalytic Association, American Counseling Association, American School Counselor Association, and Pan American Health Organization. (JA 57-60.)

Subsequent research has only further strengthened these conclusions. A recent peer-reviewed study found that lesbian, gay, and bisexual adolescents subjected to conversion therapy were nearly three times more likely to attempt suicide and experience serious depression than other LGBT youth. In fact, more than *60 percent* of young adults who had been subjected to conversion therapy as minors reported attempting suicide. *See* Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGB Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. Homosexuality 159 (2020), *available at* https://doi.org/10.1080/00918369.2018.1538407.

With respect to transgender youth, a recent cross-sectional study of 27,715 transgender adults found that "recalled exposure to gender identity conversion efforts was significantly associated with increased odds of severe psychological distress during the previous month and lifetime suicide attempts compared with

transgender adults who had discussed gender identity with a professional but who were not exposed to conversion efforts." Jack L. Turban et al., *Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults*, JAMA Psychiatry (Sept. 11, 2019), *available at* https://doi.org/10.1001/jamapsychiatry.2019.2285. This risk was even greater for transgender adults reporting identity conversion efforts before the age of 10, who were four times more likely to experience suicide attempts than other transgender individuals. *See id.*

The National Institutes of Health list suicide as the second leading cause of death for youth between the ages of 10 and 24. *See* Nat'l Inst. of Mental Health, *Suicide, available at* https://www.nimh.nih.gov/health/statistics/suicide.shtml (last accessed Dec. 19, 2019). According to a 2018 survey of existing research, sexual minority youth are more than three times more likely to have attempted suicide than heterosexual youth. *See* Ester de Giacomo et al., *Estimating the Risk of Attempted Suicide Among Sexual Minority Youths: A Systematic Review and Meta-Analysis*, *JAMA Pediatrics* (Dec. 2018), at E3, *available at* https://perma.cc/53Y3-B4LS.

In light of this evidence, Maryland has a compelling interest in protecting youth from a dangerous medical treatment that provides no therapeutic benefits and that increases the rate of attempted suicide by three times among a population that already is at high risk of suicidality.

ARGUMENT

Under Fourth Circuit precedent, Section 1-212.1, like other professional regulations of harmful conduct that incidentally affect some professional speech, is subject to intermediate scrutiny. *See Capital Associated Indus., Inc. v. Stein,* 922 F.3d 198, 209 (4th Cir. 2019). In fact, the harms caused by conversion therapy are so great, the medical consensus recognizing those harms is so strong, and the statute is so narrowly-tailored to protect minors from those harms, Section 1-212.1 would survive not only the required intermediate scrutiny, but even strict scrutiny.

I. *NIFLA* CONFIRMS THAT STATES MAY REGULATE MEDICAL TREATMENT TO PROTECT PUBLIC HEALTH AND SAFETY.

In *National Institute of Family and Life Advocates ("NIFLA") v. Becerra*, 138 S. Ct. 2361, 2373 (2018), the Supreme Court invalidated a California law requiring licensed pregnancy clinics to notify women that California provides free or low-cost services including abortion and requiring unlicensed clinics to notify women that California has not licensed them to provide medical services. 138 S. Ct. at 2368. In doing so, the Court expressly reaffirmed the settled proposition that governments may protect patients from harm by regulating medical treatments provided by licensed health care practitioners: "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech . . . and professionals are no exception to this rule." Id. at 2373. *NIFLA* confirmed that states may regulate medical practice to protect patients from harm,

even when doing so restricts some speech that is "part of the practice of medicine." Id. at 2373.

The Court explained that California's pregnancy clinic law triggered heightened scrutiny because its required disclosures were "not tied to a [medical] procedure" and instead "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." The law therefore directly regulated speech as such and improperly "compel[led] individuals to speak a particular message." *Id.* at 2371.

The Court contrasted these untethered speech requirements with the informed consent requirement upheld in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992), which "regulated speech only as part of the *practice* of medicine." *NIFLA*, 138 S. Ct. at 2373 (emphasis in original). Here, like the regulation in *Casey*, the Maryland law is limited to the performance of a specific medical treatment—the practice by licensed therapists of conversion therapy for minors. The statute is narrow, applying only to the actual provision of that dangerous and discredited treatment. It exempts all speech between therapists and their clients that is not part of the provision of that specific treatment, including the

expression of opinions and recommendations concerning sexual orientation, gender identity, conversion therapy, or any other subject.

II. AS A REGULATION OF PROFESSIONAL CONDUCT WITH RESPECT TO THE PERFORMANCE OF A PARTICULAR MEDICAL TREATMENT, SECTION 1-212.1 IS SUBJECT, AT MOST, TO INTERMEDIATE SCRUTINY.

Laws enacted pursuant to a state or locality's police power generally are entitled to "a presumption of legislative validity." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). "A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as 'any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.'" *Accountants' Soc'y of Va. v. Bowman,* 860 F.2d 602, 604 (4th Cir. 1988) (quoting *Underhill Assoc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982)) (upholding statute prohibiting unlicensed accountants from using terms such as "generally accepted accounting standards" in financial reports).

To be sure, regulations of medical professionals may implicate the First Amendment "when the government tries to control public discourse through the regulation of a profession," such as by limiting "public discussion and commentary." *Nat'l Ass'n for Advancement of Multijurisdiction Prac. v. Lynch*, 826 F.3d 191, 196 (4th Cir. 2016) (citation and internal quotation marks omitted). "When the First Amendment rights of a professional are at stake, the stringency of review thus slides

'along a continuum' from 'public dialogue' on one end to 'regulation of professional *conduct*' on the other." *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)) (emphasis in original). "Because the state has a strong interest in supervising the ethics and competence of those professions to which it lends its imprimatur, this sliding-scale review applies to traditional occupations, such as medicine or accounting, which are subject to comprehensive state licensing, accreditation, or disciplinary schemes." *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 879 F.3d 101, 109 (4th Cir. 2018).

Like the Supreme Court in *NIFLA*, this Court has recognized the critical "distinction between professional speech and professional conduct when deciding on the appropriate level of scrutiny to apply to regulations of the medical profession." *Stuart*, 774 F.3d at 248. In *Stuart*, for example, the Court struck down a law that required physicians to perform an ultrasound while displaying the resulting images and describing the fetus to women seeking abortions. The court concluded that on the "continuum" of professional regulations, such a law must be regarded as an instance of content-based compelled speech requiring at least intermediate scrutiny. *Id.* at 245. In so concluding, the panel emphasized the "extraordinary" nature of the compelled disclosures, which were "intended to convey not the risks and benefits of the medical procedure to the patient's own

health, but rather the full weight of the state's moral condemnation" of the patient's decision to seek abortion. *Id.* at 254, 255. The compelled disclosures were not related to patient health and safety, but were entirely "ideological": "[t]he state freely admit[ted] that the purpose and anticipated effect . . . [was] to convince women seeking abortions to change their minds or reassess their decisions." *Id.* at 246. "[F]ar from promoting the psychological health of women," this compelled speech "risk[ed] the infliction of psychological harm" on women. *Id.* at 253.

Most recently, this Court considered the impact of *NIFLA* on these precedents and held that regulations of professional conduct that incidentally impact speech are subject, at most, to intermediate scrutiny. *Capital Associated Indus.*, 922 F.3d at 208-09. Reviewing the relevant Supreme Court precedents, the Court noted that "[e]ven laws that implicate speech quite directly, such as laws requiring doctors—through spoken words—to obtain informed consent from patients before an abortion have not been subjected to strict scrutiny." *Id.* at 309 (citing *Casey*, 505 U.S. at 884). In light of these precedents, the Court concluded that subjecting professional conduct regulations to intermediate scrutiny "strikes the appropriate balance between the states' police powers and individual rights." *Id.* Applying this standard, the Court upheld a North Carolina law prohibiting corporations from engaging in the practice of law.

Section 1-212.1 is like the law upheld in *Capital Associated Industries* and unlike the law invalidated in *Stuart*. As two federal courts of appeals have recognized in upholding laws similar to Section 1-212.1, the purpose of legislation protecting minors from the discredited practice of conversion therapy is entirely based on the need to protect the health and well-being of minors and firmly grounded in the broad professional consensus that conversion therapy is ineffective, harmful, and unethical. These laws' sole purpose and effect is to prevent minor patients from being subjected to an unsafe treatment that puts minors at risk of life-threatening harm while providing no therapeutic benefits, not to restrict therapists' speech or compel communication of the government's preferred message. *See Pickup*, 740 F.3d at 1230 ("Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, [conversion therapy], we conclude that any effect it may have on free speech interests is merely incidental"); *King v. Governor of N.J.*, 767 F.3d 216, 237 (3d Cir. 2014) ("The New Jersey legislature has targeted [conversion therapy] counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients."); *see also Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1256 (S.D. Fla. 2019) (concluding that conversion therapy ordinance was much closer to the regulations upheld in *Casey* than those invalidated in *NIFLA*).

Like the conversion therapy laws in California, New Jersey, and the City of Boca Raton, Florida, all of which federal courts have upheld, Section 1-212.1 does not compel any speech or prevent therapists from expressing their opinion on any topic. Section 1-212.1 only prevents licensed therapists from subjecting minor patients to a specific course of medical treatment that has been overwhelmingly rejected by the medical community as dangerous and ineffective for minors. "The public marketplace of ideas is not limited in any way. What *is* limited, is the therapy (delivered through speech and/or conduct) by a licensed practitioner to his or her minor patient, within the confines of a therapeutic relationship." *Otto*, 353 F. Supp. 3d at 1257-58.

Section 1-212.1 therefore is properly understood as a conduct regulation with at most an incidental impact on speech. Like the challenged regulation in *Casey*, which "regulated speech only as part of the *practice* of medicine," *NIFLA*, 138 S. Ct. at 2373, Section 1-212.1 prohibits only the *practice* of conversion therapy. To the extent speech is implicated at all, it is only because in mental health therapy, speech ordinarily is "the *manner* of delivering the treatment. [Therapists] are essentially writing a prescription for a treatment that will be carried out verbally." *Otto*, 353 F. Supp. 3d, at 1256 (emphasis in original). In imposing that restriction on the conduct of licensed therapists, Section 1-212.1 exempts speech between therapists and their clients that is not part of the provision of that specific treatment

to minors. The statute does not prohibit mental health professionals from publicly or privately stating a belief in the efficacy or propriety of conversion therapy for minors or adults, or from publicly or privately stating religious or other beliefs about LGBT people. It does not require mental health professionals to make any affirmative statements at all, whether about conversion therapy or any other subject. And it does not apply to the conduct of individuals not operating under a state license.

III. PLAINTIFF'S ARGUMENT THAT SECTION 1-212.1 IS SUBJECT TO STRICT SCRUTINY WOULD CALL INTO QUESTION THE VALIDITY OF NUMEROUS WELL-ESTABLISHED REGULATIONS OF MENTAL HEALTH PROFESSIONALS.

Plaintiff's argument that the Court should treat Section 1-212.1 as a content or viewpoint-based speech restriction would gut the well-established authority of state governments to regulate licensed practitioners in order to protect public health and safety. Taken to its logical end, this approach would mean that virtually *any* regulation of professional counseling must withstand strict scrutiny, since virtually all such counseling consists largely or exclusively of speech. That approach would jeopardize many important existing regulations. For example, current Maryland regulations prohibit licensed therapists from:

- representing to the public that they possess a license or certification to practice a type of counseling or therapy that they do not possess, Md. Code Ann., Health Occ. § 17-601, 17-603;

- practicing outside "the boundaries of a counselor's competence, based on education, training, supervised experience, and professional credentials," Md. Code Regs. § 10.58.03.03(A)(1);

- failing to obtain "written authorization to provide counseling services for minors or other clients unable to give informed consent," *Id.* §10.58.03.04(A)(5);

- entering into "relationships that could compromise a counselor's objectivity or create a conflict of interest," *Id.* § 10.58.03.04(B)(3);

- failing to "[i]nform clients of the purposes, goals, techniques, procedures, limitations, potential risks, and benefits of services to be performed," *Id.* § 10.58.03.05(A)(1)(a);

- "[f]oster[ing] dependent counseling relationships," *Id.* § 10.58.03.05(A)(2)(d); or

- "represent[ing] to a client or individual in close personal contact with a client that sexual contact or activity by or with a counselor is consistent with or part of a client's therapy," *Id.* § 10.58.03.09 (F)(2).

Each of these provisions impacts speech between licensed counselors and their clients in the context of the counseling relationship, and under Plaintiff's approach, all of them would be subject to strict scrutiny. But no court has held that any professional regulation of counselors that may incidentally restrict the speech that occurs a counselor and client automatically triggers heightened scrutiny. To the contrary, courts routinely view such regulations as a legitimate exercise of the state's police power to protect health and safety.

Indeed, because licensed mental health professionals use speech as their medical treatment, under Plaintiff's logic, they could not be required to adhere to

any professional standards of ethics or care in performing any such treatment, unless those standards could survive strict scrutiny. That is not, and cannot be, the law. "Longstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.'" *NIFLA*, 138 S. Ct. at 2373 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963). Licensed therapists are routinely subjected to such standards of care, which have never been held to trigger special First Amendment scrutiny. *See, e.g., Figueiredo-Torres v. Nickel*, 584 A.2d 69, 73 (Md. App. 1991) (quoting *Horak v. Biris*, 474 N.E.2d 13, 17 (Ill. App. 1985)) (holding that the nature of the therapist-patient relationship "gives rise to a clear duty on the therapist's part to engage only in activity or conduct which is calculated to improve the patient's mental or emotional well-being, and to refrain from any activity or conduct which carries with it a foreseeable and unreasonable risk of mental or emotional harm to the patient").

IV. SECTION 1-212.1 EASILY SATISFIES INTERMEDIATE SCRUTINY.

"To survive intermediate scrutiny, the defendant must show "a substantial state interest" and a solution that is "sufficiently drawn" to protect that interest." *Capital Associated Indus.*, 922 F.3d at 209 (citing *NIFLA*, 138 S. Ct. at 2375). "[I]ntermediate scrutiny requires only a 'reasonable fit between the challenged regulation' and the state's interest—not the least restrictive means." *Id.* at 209-10 (quoting *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)). Indeed,

Section 1-212.1 would survive even strict scrutiny because it is "justified by a compelling interest and is narrowly drawn to serve that interest." *Brown v. Ent. Merch. Ass'n*, 564 U.S. 786, 799 (2011).

A. Maryland Has A Compelling Interest In Protecting Children From Harm.

Maryland enacted Section 1-212.1 to carry out its "compelling interest in protecting the physical and psychological well-being of minors." Dkt. 25-3 at 4. Governments have a compelling interest in the health and well-being of their citizens. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *Watson v. Md.*, 218 U.S. 173, 176 (1910).

Furthermore, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Mass.*, 321 U.S. 158, 168 (1944). Consequently, the Supreme Court "ha[s] sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionality protected rights." *N.Y. v. Ferber*, 458 U.S. 747, 757 (1982). That interest is unquestionably served here, where the government seeks to protect minors who are "especially vulnerable to [the] practices" barred by the Section 1-212.1. *King*, 767 F.3d at 238. Section 1-212.1 therefore advances a governmental interest that is "at least substantial." *Capital Associated Indus.*, 922 F.3d at 209.

In enacting Section 1.212.1, the legislature relied on a broad professional consensus that conversion therapy poses real dangers to Maryland's children. The detailed legislative findings summarize relevant research and the conclusions of well-known, reputable professional and scientific organizations that conversion therapy is highly correlated with depression, suicidality, substance abuse, and other serious harms. (JA57-60.) As discussed above, subsequent research and clinical experience have corroborated these risks for children.

Plaintiff complains that the research showing the harms of conversion therapy is not absolutely conclusive. But the First Amendment does not require governments to delay action to protect children from serious threats of harm until it possesses conclusive scientific proof, particularly when acquiring such proof would produce the very harm the government seeks to avoid. *See FCC v. Fox Television Stations*, 556 U.S. 502, 519 (2009). Responsible professionals stopped conducting double-blind studies on conversion therapy precisely because it was harmful, particularly to minors, and therefore would be unethical to attempt. (JA161.) *See also Otto*, 353 F. Supp. 3d at 1260 & n.12.

B. Section 1-212.1 Is Sufficiently Drawn To Advance Maryland's Compelling Interest.

Plaintiff contends that there are less restrictive alternatives to protect the mental health and well-being of Maryland youth than a prohibition of conversion therapy for minors. But because there are inherent, potentially deadly, dangers

whenever a licensed professional attempts to reach the fixed outcome of changing a minor's sexual orientation or gender identity, there are no practical alternatives to a prohibition on licensed mental health professionals performing such so-called therapy on minors. The "less restrictive alternatives" Plaintiff proposes would still allow minors to be exposed to the very physical and mental harms that are the subject of the medical literature cited by the legislature and that Section 1-212.1 seeks to prevent.

First, there is no way for the statute to prohibit only "coercive" and "involuntary" conversion therapy for minors. Conversion therapy is *inherently* coercive because it does not accommodate as a successful outcome any result other than conversion of the patient's sexual orientation or gender identity. And it is inherently involuntary for minors, who have no legal power or practical ability to refuse these efforts if their parents want them to be subjected to it.

As explained by the United States Department of Health and Human Services, the "Professional Consensus on Conversion Therapy with Minors" is that "[i]nterventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of behavioral health treatments." (JA279.) Simply put, the very nature of this

therapy—because its goal is a fixed and predetermined outcome—makes it coercive for minors.

Moreover, Maryland law generally does not allow children under the age of 18 to consent to their own medical treatment, leaving all such decisions in the hands of their parents. *See* Md. Code. Ann., Health-Gen. § 20-102. Although Maryland law permits minors aged 16 years or older to consent to treatment of a "mental or emotional disorder," being gay, lesbian, bisexual, or transgender is not a disorder, and in any event, even minors over 16 are not permitted to refuse treatment for which a parent, guardian, or custodian has given consent. *Id.* § 20-104(b). Given this reality, limiting the statute to instances of "involuntary" conversion therapy would be meaningless; virtually all such therapy is involuntary where minors are concerned, as a matter of law.

In sum, Maryland law provides no avenue by which minors of any age can effectively refuse or resist conversion therapy treatments wanted by their parents or other adult authorities. Indeed, in rejecting this form of treatment as unethical and unprofessional, professional organizations have recognized that any purported distinction between voluntary and involuntary treatment is meaningless in practice for minors. Minors are under the legal control of parents or guardians and thus cannot themselves decide to legally consent to, or refuse, medical care that could be

dangerous to them and that provides no potential benefits. *See also Otto*, 353 F. Supp. 3d at 1266.

For essentially the same reasons, the proposal that minors give "informed consent" before undergoing conversion therapy is not an acceptable alternative. As the Third Circuit noted in rejecting a similar argument, "[m]inors constitute an 'especially vulnerable population,' and may feel pressured to receive [conversion therapy] counseling by their families and their communities despite their fear of being harmed." *King*, 767 F.3d at 240 (quoting APA Report at 121); *see also* JA147 (noting that minors "are emotionally and financially dependent on adults."). Conversion therapy "is condemned by numerous professional organizations as contraindicated, harmful, and ineffective, because minors' 'immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'" *Otto*, 353 F. Supp. 3d at 1263 & n.13 (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444 (1990)).

Finally, restricting the statute only to so-called "aversive" treatments such as electroshock therapy would completely disregard the medical consensus that being subjected to non-aversive conversion therapy also puts minors at risk of depression, suicide, and other serious harms. (JA112, 149-50.) *See also Otto*, 353 F. Supp. 3d at 1267. Maryland has a compelling interest in protecting minors from that harm, just as it does with aversive methods.

CONCLUSION

For the reasons stated above, as well as those set forth in Defendants-Appellees' brief, *amici curiae* respectfully request that the Court affirm the judgment of the District Court.

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Respectfully submitted,

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1. This brief complies with the type-volume limitation, as provided in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because, exclusive of the exempted portions of the brief, the brief contains 5,313 words.

2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

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Dated: December 23, 2019

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on December 23, 2019.

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