UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

CATHOLIC CHARITIES OF JACKSON, LENAWEE AND HILLSDALE COUNTIES, et al.,

Plaintiffs,

v.

GRETCHEN WHITMER, in her official capacity as Governor of Michigan, et al.,

Defendants.

Civil No. 1:24-cv-00718-JMB-SJB

BRIEF OF AMICI CURIAE WASHINGTON, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, AND WISCONSIN IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INUNCTION

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I. INTERESTS OF AMICI CURIAE

Washington, California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Wisconsin (Amici States) submit this amici brief in support of Defendants. Amici States have a strong interest in this case as they are among the over twenty-five states that have exercised their police power to prohibit or restrict the practice of conversion therapy on minors by state-licensed professionals, including counselors and therapists.

Amici States have strong interests in regulating the practice of health care, including care relating to mental health, within their boundaries to protect public health and safety. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975); *Watson v. Maryland*, 218 U.S. 173, 176 (1910). Amici States seek to protect their long-standing authority to regulate the practice of health care, including care relating to mental health, within their boundaries. Amici States additionally share compelling interests in protecting the health, safety, and well-being of children and youth from dangerous and ineffective practices, and in affirming the dignity and equal worth and treatment of LGBTQI+ minors. Amici States seek to safeguard their authority to prevent a practice from being provided to minors under the auspices of a state-issued license that extensive evidence shows to be ineffective and harmful, that all leading professional medical organizations agree is inappropriate, and that accordingly falls below prevailing standards of care. Amici States thus share significant interests in ensuring the appropriate application of the First Amendment to professional conduct regulations, like Michigan’s law challenged in this case.

II. SUMMARY OF ARGUMENT

Conversion therapy, also referred to as sexual orientation and gender identity change efforts or reparative therapy, encompasses a range of interventions directed at the specific

outcomes of changing a person's sexual orientation or gender identity.[1] Like many of the Amici States, Michigan prohibits licensed mental health practitioners from practicing conversion therapy on minors. *See* H.B. 4616, H.B. 4617, 102nd Leg., Reg. Sess. (Mich. 2023) (*codified at* Mich. Comp. Laws §§ 330.1901a, 330.1100a(20)) (referred to in this brief as HB 4616). In so doing, Michigan appropriately relied on the evidence-based professional consensus that conversion therapy falls below the standard of care for mental health practitioners because it is not a safe or effective treatment for any condition and puts minors at risk of serious harms, including increased risks of suicidality and depression. At issue in this case is whether Michigan validly exercised its police power to regulate professional conduct that falls below well-accepted medical standards of care. Plaintiffs are the Catholic Charities of Jackson, Lenawee, and Hillsdale, a religious ministry that employs licensed counselors, and Emily McJones, a licensed counselor. PageID.128. Plaintiffs contend that because words are used to deliver mental health treatment, HB 4616 violates their First Amendment right to free speech.[2]

The Court should reject Plaintiffs' position and deny their request to preliminarily enjoin Michigan's HB 4616 for at least three reasons. First, the First Amendment's free speech clause does not provide a blank check for health professionals to operate below the standard of care, nor

[1] Interventions may include aversive physical therapies, such as electric shock treatment or the use of nausea-inducing drugs, as well as non-aversive therapies, which may incorporate approaches such as psychoanalysis and counseling. *See* Am. Psych. Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 22, 31 (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf.

[2] This brief principally discusses Plaintiffs' free speech claim, but Amici States agree with Michigan that this Court should also reject Plaintiffs' free exercise and due process claims. Michigan's law makes no reference to religion. Mich. Comp. Laws § 330.1901a. Moreover, the law is not "specifically directed at religious practice," nor is religious exercise "otherwise its object." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 526 (2022) (cleaned up). And HB 4616 is not vague because "the terms of the statute provide a clear, dividing line: whether change is the object." *Tingley v. Ferguson*, 47 F.4th 1055, 1090 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023).

does it immunize mental health treatments from regulation. Rather, First Amendment jurisprudence has consistently held that states may regulate professional conduct, even if that regulation incidentally impacts speech. Second, states have a long history of establishing and regulating professional standards of care. Prohibiting licensed healthcare professionals from providing conversion therapy, a health "treatment" resoundingly found to fall below standards of care because it is ineffective and harmful, is consistent with this tradition and does not run afoul of the First Amendment. Third, a contrary conclusion would likely lead to significant consequences for states' authority to regulate professional practices within their borders. For these reasons and more, the Court should deny Plaintiffs' motion for a preliminary injunction.

III. ARGUMENT

A. States Across the Country Have Similarly Protected Children and Youth from a Harmful and Discredited Practice that Falls Below Medical Standards of Care

Michigan's HB 4616 is not an outlier. Over twenty-five other states and the District of Columbia have similar legislation or executive orders prohibiting or restricting licensed healthcare professionals from providing conversion therapy for minors.[3] *See* Exec. Order No. 2023-13 (Ariz. 2023); S.B. 1172 (Cal. 2012); H.B. 19-1129 (Colo. 2019); Substitute H.B. 6695 (Conn. 2017); S.B. 65 (Del. 2018); B20-0501 (D.C. 2014); S.B. 270 (Haw. 2018), H.B. 664 (Haw. 2019); H.B. 0217 (Ill. 2015); L.D. 1025 (Me. 2019); S.B. 1028 (Md. 2018); H.B. 140 (Mass. 2019); Third Engrossed H.F. 16 (Minn. 2023); S.B. 201 (Nev. 2017); H.B. 587 (N.H. 2018); Assemb. B. 3371 (N.J. 2013); S.B. 121 (N.M. 2017); S.B. 1046 (N.Y. 2019); Exec. Order No. 97 (N.C. 2019); N.D. Admin. Code § 75.5-02.06.1; H.B. 2307 (Or. 2015); Exec. Order No. 2022-02 (Penn. 2022)

[3] These laws and orders are provided in the Addendum.

and Pennsylvania State Board Statements of Policy;[4] Substitute H.B. 5277 (R.I. 2017); H.B. 228 (Utah 2023); S.B. 132 (Vt. 2016); H.B. 386 (Va. 2020); S.B. 5722 (Wash. 2018); Exec. Order No. 122 (Wis. 2021); and Wis. Admin. Code MPSW § 20.02(25).

States took these actions under their authority to regulate health professions to protect children and youth from a "treatment" that—as demonstrated by extensive evidence and the consensus view of leading medical professional organizations—is not therapeutic under established medical standards but, rather, poses a significant risk of harm. Such actions fall comfortably within states' authorities to regulate professions, protect children, and protect public health and welfare generally. *See Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 451 (1954).

1. States considered ample evidence of the inefficacy and harms of conversion therapy in prohibiting it for children and youth

In enacting these laws, States relied on well-documented evidence demonstrating that conversion "therapy" for children and youth causes substantial mental and physical harms and falls below accepted standards of medical care. The overwhelming scientific and professional consensus is that conversion therapy is ineffective and harmful, and so should not be provided by licensed healthcare professionals as a form of treatment. This conclusion also applies to non-aversive, non-physical conversion therapy, which can cause serious harms including emotional trauma, depression, anxiety, suicidality, and self-hatred. *See* Am. Psych. Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to*

[4] Five state boards have additionally adopted Statements of Policy opposing the use of conversion therapy on minors in Pennsylvania. *See* Commonwealth of Pennsylvania, *Shapiro Administration Announces Five State Boards Have Adopted New Policies Making Clear That Conversion Therapy on LGBTQ+ Minors is Harmful and Unprofessional* (May 2, 2024), https://www.pa.gov/en/governor/newsroom/2024-press-releases/shapiro-administration-announces-five-state-boards-have-adopted-.html.

Sexual Orientation (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf. Indeed, all major professional health associations have advocated against and repudiated the use of conversion therapy on minors because it is ineffective and increases the risk of suicidality and lifelong mental illness in its attempt to "cure" a person's sexuality or gender identity. *See Tingley*, 47 F.4th at 1064. Based on the extensive evidence and professional consensus that conversion therapy is ineffective and harmful, and therefore not consistent with medical standards of care, many states have enacted laws or policies preventing it from being provided to youth by practitioners operating under the imprimatur of a state license.

California was the first state to enact legislation prohibiting licensed professionals from practicing conversion therapy on children and youth. In enacting Senate Bill 1172, the California legislature "relied on the well-documented, prevailing opinion of the medical and psychological community that [conversion therapy] has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it." *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2014), *abrogated in part by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) (*NIFLA*) (describing the passage of Senate Bill 1172). The legislature relied on extensive expert opinion that conversion therapy was neither effective nor safe, including position statements, articles, and reports from the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization. *Id.* at 1224. Based on these materials, the legislature concluded that conversion therapy "can pose critical health risks to lesbian, gay, and bisexual people"; is "based on developmental theories whose

scientific validity is questionable"; is "against fundamental principles of psychoanalytic treatment and often result[s] in substantial psychological pain by reinforcing damaging internalized attitudes"; and "lack[s] medical justification and represent[s] a serious threat to the health and well-being of affected people," among numerous other findings. 2012 Cal. Legis. Serv. ch. 835, §§ 1(b), (d), (j), and (l). California also noted its "compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." *Id.* at § 1(n).

New Jersey relied on a similar body of evidence when it enacted Assembly Bill A3371 just a year later. 2013 N.J. Sess. Law Serv. ch. 150; *King v. Governor of New Jersey*, 767 F.3d 216, 221–22 (3d Cir. 2014), *abrogated in part by NIFLA*, 585 U.S. 755. The New Jersey legislature similarly noted "numerous legislative findings" regarding the ineffectiveness and harmful impact of conversion therapy. *Id.* (discussing A3371). In hearings on the bill, legislators heard "horror stories" of conversion therapy, including from a woman who testified that she underwent electric shocks and was given drugs to induce vomiting at age 14 at a conversion therapy camp. Jim Melwert, *New Jersey Gov. Christie Signing Ban on 'Gay Conversion' Therapy*, CBS News, Aug. 19, 2013, https://www.cbsnews.com/philadelphia/news/new-jersey-gov-chris-christie-to-sign-ban-on-gay-conversion-therapy/. In signing the bill into law, then-Governor Chris Christie stated that "on issues of medical treatment for children we must look to experts in the field" and that the "American Psychological Association has found that efforts to change sexual orientation can pose critical health risks including, but not limited to, depression, substance abuse, social withdrawal, decreased self-esteem and suicidal thoughts." *Governor's Statement Upon Signing Assembly Bill No. 3371* (Aug. 19, 2013), https://pub.njleg.state.nj.us/Bills/2012/A3500/3371_G1.

PDF. Governor Christie concluded that "exposing children to these health risks without clear evidence of benefits that outweigh these serious risks is not appropriate." *Id.*

Washington State's legislature likewise "considered evidence that demonstrated a 'scientifically credible proof of harm' to minors from conversion therapy." *Tingley*, 47 F.4th at 1078 (quoting *Pickup*, 740 F.3d at 1232). Washington legislators were aware of the "fair amount of evidence that conversion therapy is associated with negative health outcomes such as depression, self-stigma, cognitive and emotional dissonance, emotional distress, and negative self-image" and legislators "relied on the fact that every major medical and mental health organization' has uniformly rejected aversive and non-aversive conversion therapy as unsafe and inefficacious." *Id.* (cleaned up).

By the time Michigan's Legislature considered HB 4616 in 2023, evidence had grown further still, confirming the medical consensus that conversion therapy risks grave harms to children and teens. For example, in 2015, the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration stated that the professional consensus was that "conversion therapy efforts are inappropriate," and 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." U.S Dep't of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin. (SAMHSA), *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 3, 11 (Oct. 2015), https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf.

In 2020, a peer-reviewed study found that conversion interventions performed on LGBT minors were associated with depression, suicidal thoughts, suicide attempts, less educational

achievement, and lower weekly income. Caitlin Ryan, et al., *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. OF HOMOSEXUALITY 159 (2020), https://doi.org/10.1080/00918369.2018.1538407. That study also found that lesbian, gay, and bisexual minors who had been subjected to conversion efforts had attempted suicide at a rate nearly three times higher than other lesbian, gay, and bisexual minors. *Id.* at 168. For transgender and gender-nonconforming youth, conversion therapy posed an even greater risk of harm; another peer-reviewed study found that more than 60% of transgender minors subjected to conversion therapy before age 10 attempted suicide. Jack L. Turban, et al., *Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults*, 77 JAMA PSYCHIATRY 68, 74 (2020), doi:10.1001/jamapsychiatry.2019.2285.

And in March 2023, the U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration emphatically stated that sexual orientation and gender identity "change efforts in children and adolescents are harmful and should *never* be provided." SAMHSA, *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth* 8 (2023), https://store.samhsa.gov/sites/default/files/pep22-03-12-001.pdf (emphasis added). Instead, effective therapeutic approaches provided by health professionals "support youth in identity exploration and development without seeking predetermined outcomes related to sexual orientation, gender identity, or gender expression." *Id.* at 51.

B. The First Amendment Does Not Exempt Mental Health Professionals from Following Standards of Care

Plaintiffs maintains that the First Amendment right to free speech allows them to engage in a practice that harms minors simply because that practice is implemented with words. *See* PageID.139–42. Not so. Though the practice of medicine often requires spoken or written word,

prohibiting a particular practice from being offered as a treatment by licensed healthcare professionals does not violate the right to free speech. A decision to the contrary would allow mental health professionals to circumvent the professional standard of care and limit states' powers to regulate licensed professionals. *See Tingley*, 47 F.4th at 1077–78.

1. States have broad authority to regulate professional conduct consistent with the First Amendment

States bear a special responsibility for maintaining standards among licensed professionals in order to protect the public from substandard care. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). It is well-settled that "[l]ongstanding torts for professional malpractice . . . 'fall within the traditional purview of state regulation of professional conduct[ ]' " without running afoul of the First Amendment. *NIFLA*, 585 U.S. at 769 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Likewise, " 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language . . . .' " *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). Thus, the Supreme Court has approved of regulations preventing attorneys from soliciting new clients in-person, *id.* at 457–58, and professional malpractice laws, *NAACP*, 371 U.S. at 438.

These principles extend to the doctor-patient relationship and counselor-client relationship. "Most, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment." *Pickup*, 740 F.3d at 1229. Accordingly, states may lawfully regulate professional conduct by health care providers, even if it incidentally impacts their speech. The Supreme Court has approved, for example, state informed consent laws that required speech specific to abortions. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's*

Health Org., 597 U.S. 215 (2022). The Supreme Court in *NIFLA* re-emphasized that regulations facilitating informed consent to medical treatments are permissible. 585 U.S. at 769–70; *see also id.* at 768 ("States may regulate professional conduct, even though that conduct incidentally involves speech."). It follows that the First Amendment does not deprive the states of authority to regulate the medical treatment itself, so long as states otherwise act within our Constitution's constraints, including due process and equal protection of the laws.

2. Courts have upheld state regulations of medical practices against First Amendment challenges

Courts around the country have had several occasions to uphold laws regulating medical practice in the face of First Amendment challenges.

For example, in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (*NAAP*), the Ninth Circuit concluded that a state law that required health practitioners to have certain training to practice within the state did not run afoul of the First Amendment. 228 F.3d 1043, 1054 (9th Cir. 2000). The court reasoned that because the key component of psychoanalysis is "'the treatment of emotional suffering and depression, *not* speech[,]'" the challenged licensing regulations were related to conduct, not speech. *Id.* The court further concluded that "[i]t is properly within the state's police power to regulate and license professions, especially when public health concerns are affected." *Id.* The court specifically noted that "the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency." *Id.* (quoting *Thomas v. Collins*, 323 U.S. 516, 544 (1945)); *see also Conant v. Walters*, 309 F.3d 629, 634–37 (9th Cir. 2002) (distinguishing between laws prohibiting doctors from treating patients with marijuana—conduct the government could regulate—from prohibiting doctors from simply

speaking about or recommending marijuana outside of the provision of treatment—speech the government could not regulate).

Similarly, in *Pickup* and *Tingley*, the Ninth Circuit upheld California and Washington laws materially similar to HB 4616 challenged here. The Ninth Circuit reasoned that laws prohibiting licensed professionals from practicing conversion therapy on minors regulated professional conduct and had only an incidental impact on speech. *Pickup*, 740 F.3d at 1227–29. The court concluded that mental health counselors and therapists are not entitled to special First Amendment protections merely because their practice involves spoken word. *See Tingley*, 47 F.4th at 1077.

Other courts have similarly concluded that states may lawfully regulate professional conduct without running afoul of the First Amendment, even if that regulation incidentally impacts speech. For example, in *EMW Women's Surgical Center, P.S.C. v. Beshear*, the Sixth Circuit upheld a state law requiring that abortion providers make certain statements to patients before procedures as a lawful regulation of medical practice with incidental impact on speech. 920 F.3d 421, 429–32 (6th Cir. 2019). The court relied on *NIFLA* to explain that regulations of professional conduct that incidentally burden speech receive lesser scrutiny. *Id.* at 428. Likewise, in *Del Castillo v. Secretary, Florida Department of Health*, the Eleventh Circuit applied *NIFLA* and upheld a state law requiring licensure of dieticians against a free speech challenge as a regulation of professional conduct, although the dietician's practice involved communication of nutrition and diet advice via spoken word. 26 F.4th 1214, 1216 (11th Cir.), *cert. denied sub nom. Del Castillo v. Ladapo*, 143 S. Ct. 486 (2022).

3. Michigan's law is a lawful regulation of professional conduct

Michigan's HB 4616 is a lawful regulation of professional conduct that is rationally related to a legitimate government interest.

Michigan's law targets conduct that only incidentally impacts speech. Amici States agree with Plaintiffs that a state cannot relabel disfavored speech as "conduct" in order to make an end-run around the First Amendment. *See* PageID.153 (quoting *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020)). But health care—including mental health treatment like talk therapy—necessarily involves the use of speech and the verbal exchange of words as part of treatment. *See Tingley*, 47 F.4th at 1082 ("What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment."). Meaning, the use of words as a course of treatment does not automatically trigger heightened First Amendment scrutiny. *See Casey*, 505 U.S. at 884 ("To be sure, the physician's First Amendment rights not to speak are implicated [by an informed consent statute] . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]" (citation omitted)).

Michigan's law generally regulates the practices of mental health practitioners like therapists, counselors, and psychologists to ensure that they abide by professional standards of care. *See, e.g.*, Mich. Comp. Laws §§ 330.1901 (stating that no mental health practitioner is authorized to practice outside of their area of training); 333.16221 (detailing prohibited activities that fall outside the standards of professional practice). HB 4616 is just one part of this scheme, making it unprofessional conduct for mental health professionals to engage in conversion therapy with a minor patient. Mich. Comp. Laws §§ 330.1100a(20) (defining "conversion therapy"); 330.1901a. (prohibiting mental health professionals from engaging in conversion therapy with their minor clients). HB 4616 does not prevent mental health care providers from communicating with the public about conversion therapy or expressing their personal views to minor patients about conversion therapy, sexual orientation, or gender identity. Rather, it restricts only professional

conduct that consists of practicing conversion therapy and only incidentally impacts speech. *See Ohralik*, 436 U.S. at 456; *Tingley*, 47 F.4th at 1077.

Cases outside of the medical practice realm are not to the contrary. *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), for example, examined a federal statute that prohibited providing material support or resources, including "expert advice or assistance," to designated terrorist organizations. The Court held that although a statute "may be described as directed at conduct," strict scrutiny applied as to the plaintiffs because "the conduct triggering coverage under the statute consist[ed] of communicating a message[,]" *id*. at 28, about how to resolve disputes peacefully, *id*. at 36–37. This holding does not support Plaintiffs' challenge to Michigan's law or otherwise invalidate the state regulation of health care treatments. A more comparable analogy would be if a state attempted to prohibit a mental health counselor from "communicating a message" outside of a therapy session, such as expressing the counselor's personal views on conversion therapy. But HB 4616 explicitly does *not* do those things. *See* Mich. Comp. Laws § 330.1100a(20) (defining what conversion therapy is and is not).

Applying the long-settled standard for regulating professional conduct, Michigan's statute is lawful because it regulates professional conduct that only incidentally impacts speech and is rational. Michigan's law is rationally related to the legitimate government interest of protecting the mental and physical health of children and youth and in regulating the mental-health profession. The medical consensus is that conversion therapy is neither effective nor safe for the treatment of any mental health condition and should never be used on minors. *Supra* pp. 4–8. The decision to codify the standard of care and ensure that licensed healthcare professionals are not providing a treatment that falls below standards of care and actively causes harm is rationally

related to the legitimate interest of protecting the health and safety of patients. *See Tingley*, 47 F.4th at 1077–79.

Under Plaintiffs' view, acts of unprofessional conduct—like the practice of conversion therapy—should be subject to the highest level of constitutional protection. *See* PageID.138. But this would essentially render professionals whose treatments use words immune from any regulation or oversight. This Court should reject such an extreme and harmful conclusion.

C. States Have a Long and Recognized History of Regulating Health Care Provider Conduct

As discussed above, in *NIFLA*, the Supreme Court reaffirmed that laws that regulate speech "'as part of the *practice* of medicine'" are lawful. 585 U.S. at 770 (quoting *Casey*, 505 U.S. at 884). The Court specifically noted that "longstanding" historical practices supported this conclusion, including informed consent laws and torts for professional malpractice. *Id.* at 769. The Court explained that while its precedents do not support a free-floating exemption for any and all regulation of professional speech, the Court considers whether a particular law falls within such a "tradition" of regulation. *See id.* at 768–69; *Tingley*, 47 F.4th at 1080 ("There is a long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders." (applying standard derived from *NIFLA*, 585 U.S. at 767)).

States that restrict the practice of conversion therapy by licensed professionals on children do so in accordance with their power to regulate medical practice; to enforce professional standards; and to protect their residents from harm, fraud, discrimination, and abuse. "From time immemorial," states have exercised this power to protect public health and safety and to enact standards for obtaining and maintaining a professional license, without running afoul of the

Constitution. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).[5] Regulation of conduct that affects public health is a core area of traditional state concern. *See Gonzales v. Oregon*, 546 U.S. 243, 270–71 (2006); *Watson*, 218 U.S. at 176 (explaining that "[i]t is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health[,]" and acknowledging that "[t]here is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine[ ]").

Michigan's HB 4616 is part of a long tradition of states regulating the provision of medical treatment consistent with the First Amendment.

D. Plaintiffs' Position that Health Care Treatment Modalities Using Speech Are Not Conduct-Based Would Lead to Dangerous Outcomes

States do not lose their power to regulate medical treatments "merely because those treatments are implemented through speech rather than through scalpel." *Tingley*, 47 F.4th at 1064. Accepting and upholding Plaintiffs' position that talk therapy cannot be regulated as a health care practice and is instead speech—the regulation of which must survive strict scrutiny—would deregulate this form of health care in practical effect, leaving children and adults unprotected from treatments that violate generally accepted standards of care.

1. State determinations that conversion therapy practiced on minors falls below the standard of care for health care providers comport with state disciplinary processes

Traditionally, state governments have exercised their power to regulate health care providers by setting minimum educational and professional standards for licensing. *Barsky*, 347

[5] State regulations on the practice of medicine predate the First Amendment, and in the late colonial and early independence periods, States passed a variety of licensing laws for doctors. *See* David A. Johnson & Humayun J. Chaudry, MEDICAL LICENSING AND DISCIPLINE IN AMERICA: A HISTORY OF THE FEDERATION OF STATE MEDICAL BOARDS 4 (2012); S. David Young, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 12 (1987).

U.S. at 451 ("[P]ractice is a privilege granted by the State under its substantially plenary power to fix the terms of admission."). States legislate the scope of practice and minimum "standard of care" for the profession and investigate and discipline providers whose practice falls outside the scope of their profession or below the standard of care. *See, e.g.*, Mich. Comp. Laws §§ 333.18101 (defining scope of practice for counselors); 333.18201 (defining scope of practice for psychologists); 333.18251 (defining scope of practice for applied behavior analysts). HB 4616 easily fits within this paradigm.

States may discipline licensed professionals operating within their borders for practicing below the standard of care. Many state laws regulating health care practices specify acts that fall below the standard of care, such as sexual misconduct, fraud or misrepresentation, conviction of a crime related to the profession, or betrayal of the practitioner-patient privilege. *See, e.g.*, Mich. Comp. Laws § 333.16221 (disciplinary grounds for health professionals). States may also discipline a health care provider for professional conduct that is incompetent, negligent, or rises to a level of malpractice that violates the standards for the profession. *See, e.g.*, *id.* § 333.16221(a) (health professionals subject to discipline for any practice that "impair[s] the ability to safely and skillfully engage in the practice of the health profession.").

Based on the consensus view of established medical organizations, over twenty-five states have codified the conclusion that the practice of conversion therapy on minors *always* falls below the standard of care for the mental health professions. This determination is based on voluminous studies demonstrating the practice's harms to children and the consensus of all leading medical and mental health organizations that conversion therapy should not be conducted on children. Accordingly, states may discipline providers for using conversion therapy on minors under states' general laws requiring providers to adhere to the standard of care, even in the absence of a specific

law prohibiting this practice. But by specifically identifying conversion therapy for children as a specific form of treatment that falls below the standard of care for mental health professions, states provide notice and clarity to practitioners that this treatment is against the law and increase efficiency for the state licensing disciplinary process.

Clear protections for minors are particularly important in the context of counseling, where children and youth often lack the degree of agency that adults have. The vast majority of children's counseling is initiated by parents or caregivers, with a counselor selected by the parent or caregiver. Anna M. de Haan et al., *A meta-analytic review on treatment dropout in child and adolescent outpatient mental health care*, 33 CLINICAL PSYCH. REV. 698 (2013), https://doi.org/10.1016/j.cpr.2013.04.005. Children may or may not have the right to consent to this care. Given the significant risk that a child could be placed into conversion therapy without their consent, and the documented risks of harm such treatment poses, states' decisions to prohibit conversion therapy for state-licensed professionals are of the utmost importance.

Plaintiffs' arguments misunderstand the scope of the role of a counselor and the responsibilities that accompany the privilege of being a state-licensed mental health practitioner. Michigan law defines psychotherapy to include the "diagnosis and treatment planning for mental and emotional disorders, and evaluation." Mich. Comp. Laws § 333.18101(a)(i). Likewise, the "practice of counseling" is defined as "a service involving clinical counseling principles, methods, or procedures for the purpose of achieving social, personal, career, and emotional development and with the goal of promoting and enhancing healthy self-actualizing and satisfying lifestyles . . . ." Mich. Comp. Laws § 333.18101(d). In order to lawfully practice, one must have a license from the state and comply with certain training and education requirements. *See, e.g.*, *id.* §§ 333.18107 (minimum qualifications for licensure as licensed professional counselor);

333.18114 (relicensure procedure). Michigan's law—like those upheld in California and Washington—is thus limited only to licensed practitioners' conduct, and even then only to conduct that seeks to change a child's sexual orientation or gender identity. Medical and mental health practices like those engaged in by Plaintiffs are concerned with the treatment of a condition or disorder. Indeed, the regulation of health professions like Plaintiffs' therapy practice takes place in a context where there is a desired outcome in treating the patient for the patient's benefit. Laws prohibiting conversion therapy for minors as practiced by licensed professionals are a lawful extension of a state's duty to regulate professions to protect the public.

2. Accepting Plaintiffs' argument would endanger the public by immunizing licensed professionals from disciplinary action for treatment that falls below the standard of care

Plaintiffs' position that talk therapy is speech that should be afforded the highest levels of constitutional protection is legally wrong, for the reasons set forth above. It also carries significant risks. "[P]sychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word[.]" *Pickup*, 740 F.3d at 1227. To hold otherwise would "'make talk therapy virtually immune from regulation.'" *Id.* at 1231 (quoting *NAAP*, 228 F.3d at 1054). Further, Plaintiffs' position is even more sweeping than just immunizing talk therapy from regulation; every word a health care provider speaks could be immunized from regulation, no matter how unrelated to the provision of evidence-based health care or how harmful to patients.

Examples of states' lawful regulation of harmful speech-related health care provider conduct abound. For example, in Colorado, the State Board of Psychologist Examiners revoked a psychologist's license for disclosing confidential information about his patients to a third party and soliciting loans from patients. *Davis v. State Bd. of Psych. Exam'rs*, 791 P.2d 1198 (Colo. App. 1989). These acts were undoubtedly carried out through speech and would presumably be

protected from disciplinary action under Plaintiffs' argument. In Ohio, the State Board of Psychology revoked a psychologist's license for, among other things, making seductive statements to a patient, misrepresenting the professional qualifications of a colleague, and breaching the confidentiality of a client by discussing her health issues with another client. *Althof v. Ohio State Bd. of Psych.*, No. 05AP-1169, 2007 WL 701572 (Ohio Ct. App. Mar. 8, 2007) (unpublished). In Washington, the Medical Commission disciplined a psychiatrist for violating the standard of care for his profession, where he "deviated from . . . traditional psychotherapy" and failed to maintain an appropriate doctor-client relationship by encouraging his minor patient's "unhelpful dependency" on the psychiatrist and communicating with the patient's parents in a way that alienated family members from each other. *Huffine v. Wash. Dep't of Health Med. Quality Assurance Comm'n*, 148 Wash. App. 1015 (2009) (unpublished). Under Plaintiffs' framing, the state would have no authority to regulate a provider's conversations with the minor and their parents that fall below the standard of care for his profession. Another example: in 2018, Washington found that a licensed marriage and family therapist practiced below the standard of care for her profession by: (1) treating multiple family members individually, causing role confusion and undermining objectivity, (2) suggesting inappropriate medication in inaccurate dosages to a client's physician, and (3) disclosing a minor client's masturbation habits at a school meeting, ignoring the goals of the discussion and distressing all of the participants. *Townsend v. Wash. State Dep't of Health*, 6 Wash. App. 2d 1035 (2018) (unpublished).

In Plaintiffs' view, medical professionals can cloak themselves in First Amendment protection based on the notion that their medical practice merely entails "conversations." PageID.137. Yet "doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice

that is not consistent with the accepted standard of care." *Pickup*, 740 F.3d at 1228. Plaintiffs' position, unsupported by precedent and state practice, would endanger regulations on the practice of medicine where speech is part of the treatment. It could leave doctors, psychologists, and counselors who perpetuate substandard care unchecked and state residents at risk of serious harms.

3. Plaintiffs' reliance on *Otto* is misplaced

The Eleventh Circuit stands alone in enjoining two conversion therapy ordinances as content-based regulations that do not survive strict scrutiny. *See Otto*, 981 F.3d 854.[6] There are crucial distinctions between Michigan's law and the ordinances at issue in *Otto*. *Otto* involved local ordinances that threatened criminal punishment for therapists who practiced conversion therapy on minors, punishments entirely untethered from the state's system for licensing healthcare practitioners. This lack of connection to any professional licensing scheme played a key role in the Eleventh Circuit's decision, with the court emphasizing that the ordinances were "not connected to any regulation of separately identifiable conduct[,]" *Id.* at 865, so striking them down, in the court's view, did not threaten "'[l]ongstanding torts for professional malpractice' or other state-law penalties for bad acts[.]" *Id.* at 870 (first alteration in original).

In any event, *Otto*'s reasoning should be rejected as unpersuasive. The decision is wrong and failed to adequately address how children can be protected from treatments that are deeply

[6] To Amici States' knowledge, every court to consider a state law restricting conversion therapy as part of professional licensing regulations has upheld the law. *See Chiles v. Salazar*, No. 1:22-cv-02287-CNS-STV, 2022 WL 17770837 (D. Colo. Dec. 19, 2022), *appeals docketed*, Nos. 22-1445, 23-1002 (10th Cir. 2022, 2023); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023); *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019), *vacated on immunity grounds*, 1 F.4th 249 (4th Cir. 2021); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), *cert. denied*, 581 U.S. 959 (2017); *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015), *cert. denied*, 577 U.S. 1137 (2016); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 575 U.S. 996 (2015); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir.), *cert. denied*, 573 U.S. 945 (2014).

harmful, ineffective, and repudiated by all leading medical and mental health organizations. The *Otto* panel proffered that the framing of talk therapy treatment as pure speech, with the associated First Amendment protections, "does not stand in the way of 'longstanding torts for professional malpractice' or other state-law penalties for bad acts that produce actual harm." *Id*. (cleaned up). Rather, the court noted that "[p]eople who actually hurt children can be held accountable[.]" *Id*. At base, *Otto* stands for the proposition that the government may not *prevent* injury to children from practices that have been widely recognized as harmful and may only discipline a provider *after* they cause the expected harm. But the law does not require states to wait for harm to occur before they may regulate professional practice and conduct. *See Ohralik*, 436 U.S. at 464 (professional regulation prohibiting client solicitation was a permissible "prophylactic measure[ ] whose objective is the prevention of harm before it occurs[ ]"); *id.* ("[T]he State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful [professional practices] by [professionals] whom it has licensed."). Nor does the *Otto* opinion explain how state governments should discipline a mental health provider for malpractice (or what the Eleventh Circuit has defined as speech protected by the First Amendment). *Otto* contradicts the state's responsibility to protect its people from practice below the standard of care and should not be followed by this Court.

Such a position is also unworkable as a practical matter, and intra-circuit cases have not applied *Otto* to professional regulations that impact speech. For example, in *Del Castillo*, the Eleventh Circuit considered *NIFLA* and held that an unlicensed dietician and nutritionist's practice was subject to state licensing because the effect on her speech was "incidental" even though her work mostly consisted of communicating her opinions and advice on diet and nutrition to clients. 26 F.4th at 1216. The Court considered that a licensed dietician's scope of practice includes

"conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment[,]" ultimately concluding that a dietician's practice is not speech and regulation of the profession was "incidental to speech." *Id*. at 1225–26.

Under this framework, there is no sound reason that a mental health counselor should be treated any differently than a nutritionist. Both engage in similar types of activities (like setting treatment goals, researching treatment options, and documenting treatment notes) that may lawfully be regulated as professional conduct even if the regulation incidentally impacts speech. Given the lack of internal consistency in the *Otto* decision and its incompatibility with historical regulation of professional practice, this Court should decline to follow the reasoning in *Otto*.

Finally, Plaintiffs' argument that HB 4616 is viewpoint discriminatory—taken from the *Otto* opinion—is flawed. Counseling is not directed toward the outward expression of ideas. The regulation of health professions takes place in a context where there is a desired health *outcome*—behavioral or physical—in treating the patient, for the patient's benefit. In that context, a state-licensed professional acts with the authority of a state license, and acts "to advance the welfare of the clients, rather than to contribute to public debate." *Pickup*, 740 F.3d at 1228; *cf. Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

IV. CONCLUSION

This Court should deny Plaintiffs' motion for preliminary injunction.

RESPECTFULLY SUBMITTED this 30th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.Civ.R. 7.2(b), I hereby certify that the foregoing brief contains 6,785 words. The brief was prepared, and the word count generated, using Microsoft Word for Microsoft 365.

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ADDENDUM

States Prohibiting or Restricting Conversion "Therapy" for Minors

Jurisdiction[1]	Law / Regulation	Description
Arizona	Exec. Order by Gov. Katie Hobbs, No. 2023-13 (Ariz. 2023)	Executive order prohibiting use of state and federal funds for conversion "therapy" for minors
California	S.B. 1172, 2011-12 Leg., Reg. Sess. (Cal. 2012)	Law prohibiting conversion "therapy" for minors
Colorado	H.B. 19-1129, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019)	Law prohibiting conversion "therapy" for minors
Connecticut	Sub. H.B. 6695, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017)	Law prohibiting conversion "therapy" for minors
Delaware	S.B. 65, 149th Gen. Assemb., Reg. Sess. (Del. 2018)	Law prohibiting conversion "therapy" for minors
District of Columbia	B20-0501, 20th Council, Reg. Sess. (D.C. 2014)	Law prohibiting conversion "therapy" for minors
Hawai'i	S.B. 270, 29th Leg., Reg. Sess. (Haw. 2018) H.B. 664, 30th Leg., Reg. Sess. (Haw. 2019)	Law prohibiting conversion "therapy" for minors
Illinois	H.B. 0217, 99th Gen. Assemb., Reg. Sess. (Ill. 2015)	Law prohibiting conversion "therapy" for minors
Maine	L.D. 1025, 129th Leg., 1st Reg. Sess. (Me. 2019)	Law prohibiting conversion "therapy" for minors
Maryland	S.B. 1028, 438th Gen. Assemb., Reg. Sess. (Md. 2018)	Law prohibiting conversion "therapy" for minors
Massachusetts	H.140, 191st Leg., Reg. Sess. (Mass. 2019)	Law prohibiting conversion "therapy" for minors
Michigan	H.B. 4616, 102nd Leg., Reg. Sess. (Mich. 2023)	Law prohibiting conversion "therapy" for minors
Minnesota	Third Eng. H.F.16, 93rd Leg., Reg. Sess. (Minn. 2023)	Law prohibiting conversion "therapy" for minors
Nevada	S.B. 201, 79th Leg., Reg. Sess. (Nev. 2017)	Law prohibiting conversion "therapy" for minors
New Hampshire	H.B. 587, 165th Gen. Ct., Reg. Sess. (N.H. 2018)	Law prohibiting conversion "therapy" for minors
New Jersey	A.B. 3371, 216th Leg., 1st Ann. Sess. (N.J. 2013)	Law prohibiting conversion "therapy" for minors
New Mexico	S.B. 121, 53rd Leg., 1st Sess. (N.M. 2017)	Law prohibiting conversion "therapy" for minors
New York	S.B. 1046, 242nd Leg., Reg. Sess. (N.Y. 2019)	Law prohibiting conversion "therapy" for minors

[1] This table excludes municipalities that prohibit or restrict conversion therapy for minors.

Jurisdiction[1]	Law / Regulation	Description
North Carolina	Exec. Order by Gov. Roy Cooper, No. 97, (N.C. 2019)	Executive order prohibiting use of state and federal funds for conversion "therapy" for minors
North Dakota	N.D. Admin Code. § 75.5-02-06.1 (2021)	Ethics regulation prohibiting licensed social workers from practicing conversion "therapy"
Oregon	H.B. 2307, 78th Leg., Reg. Sess. (Or. 2015)	Law prohibiting conversion "therapy" for minors
Pennsylvania	Exec. Order by Gov. Tim Wolf, No. 2022-02 (Penn. 2022); State Board Statements of Policy[2]	Executive order restricting conversion "therapy" for minors Board policies prohibiting conversion "therapy" for minors
Rhode Island	Substitute H.B. 5277A, Gen. Assemb., Reg. Sess. (R.I. 2017)	Law prohibiting conversion "therapy" for minors
Utah	H.B. 228, 65th Leg., Reg. Sess. (Utah 2023)	Law prohibiting conversion "therapy" for minors
Vermont	S. 132, 2015–16 Leg., Reg. Sess. (Vt. 2016)	Law prohibiting conversion "therapy" for minors
Virginia	H.B. 386, 2020 Gen. Assemb., Reg. Sess. (Va. 2020)	Law restricting conversion "therapy" for minors
Washington	S.B. 5722. 65th Leg., Reg. Sess. (Wash. 2018)	Law restricting conversion "therapy" for minors
Wisconsin	Exec. Order by Gov. Tony Evers, No. 122 (Wis. 2021) Wis. Admin. Code MPSW § 20.02(25) (2024)	Executive order prohibiting use of state and federal funds for conversion "therapy" for minors Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board licensing rule prohibiting conversion "therapy"

[2] Pennsylvania State Boards of Medicine; Nursing; Social Workers, Marriage and Family Therapists, and Professional Counselors; Psychology; and Osteopathic Medicine have adopted Statements of Policy opposing the use of conversion therapy on minors in Pennsylvania. *See* Commonwealth of Pennsylvania, *Shapiro Administration Announces Five State Boards Have Adopted New Policies Making Clear That Conversion Therapy on LGBTQ+ Minors is Harmful and Unprofessional* (May 2, 2024), https://www.pa.gov/en/governor/newsroom/2024-press-releases/shapiro-administration-announces-five-state-boards-have-adopted-.html.