UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

CATHOLIC CHARITIES OF JACKSON, LENAWEE AND HILLSDALE COUNTIES and EMILY MCJONES, *Plaintiffs*, v. GRETCHEN WHITMER, *et al.*, *Defendants*.	Civil No. 1:24-cv-00718-JMB-SJB **[PROPOSED] BRIEF OF AMICUS CURIAE EQUALITY MICHIGAN IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Amicus curiae Equality Michigan respectfully submits this brief to assist the Court's consideration of Plaintiff's motion for preliminary injunction.[1] Equality Michigan is the largest civil rights organization in the state advocating for lesbian, gay, bisexual, transgender and queer ("LGBTQ") residents. Equality Michigan was a key organizational supporter of the statute at issue in this case, and the community it serves include LGBTQ youth at risk of being subjected to these harmful practices.

For more than a decade, the federal courts, including multiple federal courts of appeals, have repeatedly upheld laws protecting minors from the well-documented harms of "treatments" that seek to change a person's sexual orientation or gender

[1] All parties have been contacted and none oppose the filing of this brief. 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 amicus curiae contributed money that was intended to fund preparing or submitting the brief.

identity. With the sole exception of the Eleventh Circuit's outlier opinion, recent decisions have continued to hold that these laws do not violate the First Amendment's speech or religion clauses. In addition to the Ninth Circuit's recent *Tingley* decision, another district court has upheld Colorado's conversion therapy statute, and an appeal from that decision has been argued and remains pending in the Tenth Circuit. *See Tingley v. Ferguson,* 47 F.4th 1055 (9th Cir. 2022), *cert. denied,* 144 S. Ct. 33 (2023); *Chiles v. Salazar*, No. 1:22-cv-02287-CNS-STV, 2022 WL 17770837 (D. Colo. Dec. 19, 2022), *appeal pending*, Nos. 22-1445, 23-1002 (10th Cir.) (argued Nov. 17, 2023). This Court should join the large majority of courts that have rejected the same claims asserted by Plaintiffs here and conclude that they have failed to establish a likelihood of success on the merits.

Equality Michigan submits this brief to highlight certain additional reasons why laws preventing licensed medical and mental health professionals from engaging in conversion therapy with minors do not violate the First Amendment. First, Equality Michigan wishes to offer accurate information to the Court concerning the robust and growing medical consensus that attempts by health professionals to change a minor's sexual orientation or gender identity are unnecessary, dangerous to their physical and mental health, and provide no therapeutic benefit.

Although Plaintiffs direct much of their argument to attacking prevailing standards of care for medical treatments for gender dysphoria (such as prescribing puberty delaying medications and hormone therapy in appropriate cases), Michigan's conversion therapy law does not regulate such medical interventions. The law also

does not prevent a "cautious" or "watchful waiting" approach to mental health care for youth who are being assessed or treated for gender dysphoria. ECF No. 15 at 1, 7. Contrary to the inaccurate caricature offered by Plaintiffs, the prevailing standards for treatment of gender dysphoria in minors—the approach Plaintiffs label the "gender-affirming" approach—do not call for mental health professionals to "immediately affirm[]" a child's transgender identity. ECF No. 15 at 1. Instead, the accepted standards expressly recognize that "diverse gender expressions in children cannot always be assumed to reflect a transgender identity or gender incongruence," while at the same time making clear that "'therapeutic' attempts to compel a gender diverse child through words, actions, or both to identify with, or behave in accordance with, the gender associated with the sex assigned at birth are harmful."[2] It is only this latter type of treatment—therapy undertaken with the predetermined aim of causing youth to "accept [their] biological sex" rather than be transgender—that is prohibited under the statute. ECF No. 15 at 2. The harms associated with this type of therapy are both severe and well documented.

Second, Equality Michigan submits this brief to make clear that Michigan's law fits squarely within the long tradition of state regulation of medical professionals. For well over a century, if not much longer, states have regulated medical practice, including speech that is part of medical practice, to ensure compliance with relevant standards of care and prevent harm to patients. From the earliest days of this nation,

[2] Eli Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 Int'l J. Transgender Health, Issue Supp. 1, at S67 (2022), available at https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644.

such regulations have included tort liability for professional malpractice, and, later, licensing requirements and professional conduct regulations. These longstanding rules have never been thought to violate the Constitution's free speech guarantee, even when liability is based on verbal communications that violate the applicable standard of care for health professionals. This long tradition is a further reason why courts should be hesitant to adopt the rule advocated by Plaintiffs here, which would subject any state regulation to strict scrutiny if it in any way affects what professionals may say in a treatment setting. Such a rule would put a broad range of long-standing professional regulations at risk of invalidation.

In keeping with this tradition, laws prohibiting therapists from performing conversion therapy with minors regulate only professional conduct; they do not apply to mere conversations, nor do they prevent therapists from expressing opinions or providing information to clients or anyone else, and they do not violate therapists' religious freedom. Like the many other similar laws that have been upheld against the same claims asserted here, Michigan's statute regulates a specific medical treatment that is unnecessary, ineffective, and puts youth at risk of suicide and other severe harms. As such, it readily satisfies the applicable rational basis scrutiny, and—given the gravity of the harms at issue—would satisfy any level of review. For all of these reasons, Plaintiffs' motion should be denied.

INTEREST OF *AMICUS CURIAE*

Equality Michigan was a key organizational supporter of Michigan's statute protecting youth from the documented dangers of conversion therapy. It serves all of

Michigan's LGBTQ residents, including children and youth who are at risk of being subjected to conversion therapy. These youth are currently protected by the statute and have a strong interest in ensuring that it is upheld. Equality Michigan also represents adults who were subjected to these practices as minors and who understand through experience the harms that result from efforts by medical and mental health professionals to change a minor's sexual orientation or gender identity.

BACKGROUND

For decades, "psychiatrists and others [have] recognized that sexual orientation is both a normal expression of human sexuality and immutable." *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015). Similarly, medical science recognizes that being transgender is "not a mental disorder" and that "diversity in gender identity and expression is part of the human experience." Am. Psychological Ass'n, *Resolution on Gender Identity Change Efforts* (2021), *available at* https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf ("APA GICE Resolution"). Plaintiffs' own expert witness agrees that being transgender is not a mental illness in need of curing. *See* Declaration of Dr. Andrew Clark (ECF No. 15-4) ¶ 24.

In addition to being unnecessary because it does not address any underlying illness or disease, conversion therapy—also known as sexual orientation or gender identity change efforts ("SOGI change efforts")—is ineffective. As an expert panel convened by the Department of Health and Human Services recently concluded, no available research indicates that SOGI change efforts are effective in altering sexual

orientation or gender identity. *See* Dep't of Health and Human Servs., Substance Abuse and Mental Health Servs. Admin., *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth* 9 (2023), *available at* https://store.samhsa.gov/product/moving-beyond-change-efforts/pep22-03-12-001 ("2023 SAMHSA Report").

Conversion therapy that attempts to change a person's sexual orientation, or that attempts to change a person's gender identity and cause them to instead "accept [their] biological sex," ECF No. 15 at 2, offers no benefit to a minor patient, but it often leads to serious, even life-threatening, harm. As the HHS panel found, "studies on thousands of individuals who have undergone SOGI change efforts" establish that "SOGI change efforts can cause significant harm" and "are inappropriate, ineffective, and harmful practices that should not be provided to children and adolescents." *Id.*

In 2021, the American Psychological Association (APA) found that "sexual minority youth and adults who have undergone [conversion therapy] are significantly more likely to experience suicidality and depression than those who have not …; and this elevated risk of suicidality, including multiple suicide attempts, persists when adjusting for other risk factors." Am. Psychological Ass'n, *APA Resolution on Sexual Orientation Change Efforts* 5 (Feb. 2021), *available at* https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf ("APA SOCE Resolution"). According to one study cited by the APA, "SOCE 'was the strongest predictor of multiple suicide attempts, even after adjustment for other known risk factors.'" *Id.* (citation omitted).

With respect to gender identity, the APA found that "individuals who have experienced pressure or coercion to conform to their sex assigned at birth or therapy that was biased toward conformity to one's assigned sex at birth have reported harm resulting from these experience[s] such as emotional distress, loss of relationships, and low self-worth." Am. Psychological Ass'n, *APA Resolution on Gender Identity Change Efforts* 2 (Feb. 2021), available at https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf ("APA GICE Resolution") (citing studies). Efforts to change an individual's gender identity or to prevent them from being transgender "are associated with harmful social and emotional effects for many individuals, including but not limited to, the onset or increase of depression, anxiety, suicidality, loss of sexual feeling, impotence, deteriorated family relationships, a range of post-traumatic responses, and substance abuse." *Id.* at 4.

One peer-reviewed study found that more than **sixty 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 LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. Homosexuality 159, at p.10 (2020), *available* at https://www.utah.gov/pmn/files/513643.pdf. If any other treatment were known to put youth at such high risk while addressing no underlying illness or disease and providing no benefit, its use by licensed providers would be prevented, as Michigan has properly acted to do here.

ARGUMENT[3]

A. Therapy that Attempts to Change Sexual Orientation or Gender Identity Puts Minors at Risk of Serious Harm

The serious harms associated with conversion therapy are thoroughly documented. In 2021, the APA approved a pair of resolutions summarizing the current state of research on SOCE and GICE and expressing the APA's conclusion that these forms of treatment are harmful and should not be administered to minors under any circumstances. With respect to **sexual orientation**, the APA found that "after reviewing scientific evidence on SOCE published since 2009, the APA affirms SOCE puts individuals at significant risk of harm [and] . . . opposes SOCE because of their association with harm." APA SOCE Resolution at 8. With respect to **gender identity**, the APA found that "consistent with the APA definition of evidence-based practice . . . , the APA affirms that scientific evidence and clinical experience indicate that GICE put individuals at significant risk of harm [and]. . . opposes GICE because such efforts put individuals at significant risk of harm." APA GICE Resolution at 3.

Other major medical and mental health organizations in the United States have reached similar conclusions, including: the American Medical Association, the American Psychiatric Association, the American Academy of Child and Adolescent

[3] This brief is primarily directed to Plaintiffs' claim that the statute violates Plaintiffs' rights to freedom of speech under the First Amendment. Equality Michigan agrees with Defendants that Plaintiffs are not likely to succeed on their other claims, including their claims that the statute is void for vagueness and violates their religious freedom under the First Amendment. *See, e.g., See Tingley,* 47 F.4th at 1084-89; *Welch v. Brown*, 834 F.3d 1041, 1047 (9th Cir. 2016); *King v. Governor of New Jersey*, 767 F.3d 216, 241-43 (3d Cir. 2014); *Doyle v. Hogan,* 411 F. Supp. 3d 337, 348–49 (D. Md. 2019), *vacated on other grounds,* 1 F.4th 249 (4th Cir. 2021).

Psychiatry, the American Academy of Pediatrics, the American College of Physicians, the National Association of Social Workers, the American Association for Marriage and Family Therapy, the American Psychoanalytic Association, the American Counseling Association, and the American School Counselor Association. (For the Court's convenience, excerpts from these organizations' policy statements opposing the use of conversion therapy are attached to this brief as Appendix A.)

This professional consensus rests on decades of study and research. In 2009, the APA reviewed the relevant scientific literature and concluded that "Scientific evidence shows that SOCE is not likely to produce its intended outcomes and can produce harm for some of its participants." *See* Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 83 (2009), available at https://perma.cc/KX75-3KW4 (hereinafter, "APA Report"). More recent research has continued to show that efforts by therapists to change a child's sexual orientation or gender identity result in greatly increased rates of suicidality and other serious harms. As noted, a 2018 study found that more than sixty percent of young adults who had been subjected to conversion therapy as minors reported one or more suicide attempts. See Ryan et al., *supra*. A 2020 study found that youth who underwent conversion therapy were "more than twice as likely to report having attempted suicide" and more than 2.5 times as likely to report multiple suicide attempts in the past year compared to those who did not. Amy E. Green et al., *Self-Reported Conversion Efforts and Suicidality Among US LGBTQ Youths and Young Adults*, 2018, 110 Am. J. Pub. Health 1221, 1224 (2020).

In 2015 and again in 2023, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services conducted updated reviews of the scientific literature. The 2015 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." *See* Substance Abuse and Mental Health Serv. Admin., U.S. Dep't of Health and Human Serv., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (2015), at 26, available at https://store.samhsa.gov/sites/default/files/d7/priv/sma15-4928.pdf ("2015 SAMHSA Report").

Plaintiffs claim they do not use coercive methods as part of their therapy, *see* ECF No. 15 at 3, but the HHS reports make clear that therapy whose goal is to cause a young person to reject their gender identity and instead "accept [their] biological sex," *id.* at 2, is inherently coercive and has no place in professional mental health treatment. Contrary to Plaintiffs' claims, there is nothing "cautious," *id.* at 1, about such an approach, nor does it reflect "watchful waiting," *id.* at 7. Instead, such an approach explicitly seeks to cause the client to accept their "biological sex" and prevent them from being transgender. The only acceptable or preferred outcome for

youth under this approach is for them to adopt a gender identity that conforms to their "biological sex." *Id.* at 2. That is the definition of conversion therapy.[4]

Plaintiffs assert that there is insufficient evidence that conversion therapy to change a minor's gender identity causes harm. *See* ECF No. 15 at 19–20. That is incorrect. A growing body of research demonstrates the serious harms of therapy that seeks to change gender identity. To cite one example, a 2019 study documented a dramatically increased risk of suicidality among transgender youth exposed to conversion therapy. Based on a cross-section of 27,715 transgender adults, the study 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. Transgender adults reporting gender identity conversion efforts before the age of ten were four times more likely to experience suicide attempts than other transgender individuals. *See id.* Other

[4] Plaintiffs make little mention of sexual orientation in their motion, perhaps recognizing the broad understanding, now enshrined in law in *Obergefell,* that being gay, lesbian, or bisexual is a natural variation of human experience that is not in need of changing or curing. *See* 576 U.S. at 661. But the HHS reports make equally clear that mental health treatment should never include therapy that seeks to change a person's sexual orientation. *See, e.g.,* 2015 SAMHSA Report at 26.

research similarly documents the inefficacy and harm of conversion therapy aimed at changing gender identity. *See* APA GICE Resolution at 1 (citing studies).

The American Psychological Association's 2021 resolution makes clear that therapeutic attempts to change gender identity are both unethical and harmful. First, it is important to note that "the incongruence between sex and gender in and of itself is not a mental disorder . . . thus, any behavioral health or GICE effort that attempt to change an individual's gender identity or expression is inappropriate." APA GICE Resolution at 1. Further, "GICE are not supported by empirical evidence as effective practices for changing gender identity and are associated with psychological and social harm." *Id.* (citing studies).

Plaintiffs' argument is partially premised on the assertion that there is no consensus among medical professionals on the proper approach to medical treatment of gender dysphoria in adolescents using medications such as puberty blockers and hormone therapy. Although that assertion is incorrect, it is also largely irrelevant to the issues before the Court. Contrary to Plaintiffs' contention, there are established standards of care for treatment of both adults and minors that are both widely accepted within the profession and supported by the American Medical Association, the American Academy of Pediatrics, and other leading professional organizations.[5]

[5] *See, e.g.,* Br. of Amici Curiae Am. Acad. Pediatrics, et al., *Doe v. Ladapo*, No. 23-12159 at 10 (11th Cir. Oct.13, 2023) ("The treatment protocols for gender dysphoria are laid out in established, evidence-based clinical guidelines: (i) the Endocrine Society Clinical Practice Guideline for Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons, and (ii) the WPATH Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People.").

These standards call for mental health care that supports the adolescent in their identity exploration and development, and, beginning in puberty, may also include, when medically appropriate, prescribing medications to relieve the distress of gender dysphoria by bringing the individual's body more into alignment with their gender identity. None of those standards calls for mental health treatment that seeks to change a minor's gender identity or has a predetermined goal of attempting to prevent the minor from being transgender.

While much of what Plaintiffs say on this subject is inaccurate, it is also largely irrelevant to the issues before the Court. Michigan's law does not require a specific approach to treatment of gender dysphoria in minors, and it says nothing at all about medications or treatments other than mental health therapy. In fact, the statute specifically authorizes therapists to facilitate identity exploration and development that is directed by the minor patient, provided such exploration does not have a predetermined goal or outcome. The statute simply prevents therapists from providing one specific form of treatment that has been shown to be both ineffective and dangerous: therapy that has the goal of changing a minor's gender identity. It is squarely within the state's power to protect its minor residents from these harmful treatments.

B. *NIFLA* Confirms That States May Regulate Medical Treatment to Protect Public Health and Safety

In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) ("*NIFLA*"), the Supreme Court expressly reaffirmed the settled proposition that governments may protect patients 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 (internal citations omitted).

The Court rejected the argument—relied on by Plaintiffs here—that whether a law regulates conduct turns on whether the law impacts any speech at all. Rather, the Supreme Court affirmed that "States may regulate professional conduct, even though that conduct incidentally involves speech," *id.* at 2372, and held 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 (emphasis omitted).

NIFLA explained that heightened scrutiny was required under the facts in that case because the challenged law required clinics to make disclosures that 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." *Id.* The law therefore directly regulated "speech as speech" and improperly "compel[led] individuals to speak a particular message." *Id.* at 2371, 2374. The Court contrasted these untethered speech requirements with the informed consent requirement previously upheld in *Planned Parenthood of Southeastern Pennsylvania 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 and internal quotations omitted).

Here, like the regulation upheld in *Casey*, Michigan's statute is limited to the performance of a specific mental health treatment—the practice by licensed therapists of conversion therapy for minors. The law is narrow, applying only to the actual administration 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. As the Ninth Circuit observed in upholding conversion therapy statutes from Washington and California that are nearly identical to Michigan's, these laws affect speech only to the extent it is part of the professional act of administering mental health treatment and do not impact therapists' ability to speak or express opinions on any subject. *See Tingley*, 47 F.4th at 1073 (9th Cir. 2022) (citing *Pickup v. Brown,* 740 F.3d 1208, 1229 (9th Cir 2014)). Conversion therapy laws are not subject to any form of heightened scrutiny under the First Amendment because the conduct regulated by these laws is not merely "tied to a [medical] procedure," *NIFLA,* 138 S. Ct. at 2373, but consists solely of the *administration of the procedure itself.*

C. The Statute Is a Constitutionally Permissible Regulation of Licensed Health Professionals' Administration of a Particular Medical Treatment

As many courts have concluded in upholding similar laws from other states, the purpose of legislation protecting minors from the practice of conversion therapy is to protect the health and well-being of minors based on the broad medical consensus that conversion therapy is unnecessary, ineffective, harmful, and

unethical. These laws seek to prevent minor patients from being subjected to an unsafe treatment that puts minors at risk of life-threatening harm while providing no therapeutic benefit, not to restrict therapists' speech or compel communication of the government's preferred message. *See Pickup*, 740 F.3d at 1231 ("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"); *Tingley,* 47 F.4th at 1078–79 (same); *King v. Governor of New Jersey*, 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.").[6] Like these appellate courts, federal district courts, both before and after *NIFLA,* have repeatedly upheld conversion therapy laws against claims that they infringe on therapists' freedom of speech. *See, e.g., Chiles,* 2022 WL 17770837, at *10; *Doyle v. Hogan,* 411 F. Supp. 3d 337, 348 (D. Md. 2019), *vacated on other grounds,* 1 F.4th 249 (4th Cir. 2021).

Like the many other conversion therapy laws that courts across the country have upheld against First Amendment claims, Michigan's law does not compel any

[6] The Eleventh Circuit reached a different result with respect to two local Florida Statutes on conversion therapy. *See Otto v. City of Boca Raton,* 981 F.3d 854 (11th Cir. 2020). But as the Ninth Circuit observed, even though the Eleventh Circuit disagreed with its sister circuits that the laws regulated conduct rather than speech, the Eleventh Circuit nevertheless recognized the fundamental principle that "'States may regulate professional conduct.'" *Id.* at 865 (quoting *NIFLA*, 138 S. Ct. at 2372). *See also Tingley*, 47 F.4th at 1077. The Supreme Court denied certiorari in *Tingley* in December 2023.

speech. Nor does it prevent therapists from expressing their ideas or opinions on sexual orientation, gender identity, or any other topic, whether in the public sphere or privately to their clients. And it does not mandate a specific approach to treating clients diagnosed with or being evaluated for gender dysphoria or considering gender transition, "as long as the counseling does not seek to change an individual's sexual orientation or gender identity." Mich. Comp. Laws § 330.1100a(20). The statute does only one thing: it prevents licensed therapists from subjecting minor patients to a specific course of medical treatment that has been overwhelmingly rejected by the medical community as ineffective and unsafe for minors. Michigan has acted properly to prevent licensed professionals from subjecting patients to potentially life-threatening harm. The only thing proscribed is a particular mental health treatment—not expressive speech.

For this reason, the statute 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 (internal quotations omitted), the statute 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 treatment. But government "do[es] not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel." *Tingley*, 47 F.4th at 1064. "The practice of psychotherapy is not different from the practice of other forms of

medicine simply because it uses words to treat ailments. [A therapist] is not immune from regulation on the practice of medicine because he claims that all he does 'is sit and talk' with his clients." *Id.* at 1082.

Like other conversion therapy laws that have been upheld against First Amendment challenges, Michigan's law exempts all speech between therapists and their clients that is not part of treatment. The law 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 LGBTQ 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. For this reason, it is a permissible regulation of professional conduct, even if it has an incidental impact on speech that is a necessary part of performing the relevant treatment.[7]

D. States Have Long Regulated Health Professionals' Compliance With Standards Of Care, Including When Such Standards Are Violated By Treatment Delivered Through Verbal Communication

The majority opinion in *NIFLA* went out of its way to head off any implication that its holding was intended to unsettle laws that fall within "the traditional

[7] Plaintiffs asserts that the statute is a viewpoint as well as a content-based speech restriction, ECF No. 15 at 15–17, but the law does not prevent the expression of any opinions or viewpoints. "[B]ecause it [is] a regulation of conduct," a law preventing licensed therapists from performing conversion therapy on minors "[does] not require content and viewpoint analysis." *Tingley*, 47 F.4th at 1073 (citing *Pickup*, 740 F.3d at 1231).

purview of state regulation of professional conduct," including informed consent requirements and "[l]ongstanding torts for professional malpractice." *NIFLA*, 138 S. Ct. at 2373. *NIFLA* stressed that such "longstanding" regulations remain good law and require no special First Amendment scrutiny. In *Tingley*, the Ninth Circuit followed this reasoning from *NIFLA* and held that a law protecting youth from the harms caused by conversion therapy "regulates a category of speech belonging to such a tradition, and it satisfies the lesser scrutiny imposed on such laws." *Tingley*, 47 F.4th at 1079.

The fact that government has long regulated health care professionals to ensure that their practice, including speech that is part of that practice, complies with relevant standards of care reinforces the need for caution before applying the First Amendment in an unprecedented way. Courts should not adopt a new First Amendment standard that would require ordinary medical practice regulations such as Michigan's conversion therapy statute to satisfy strict scrutiny merely because the treatment at issue is usually conducted verbally, through so-called "talk therapy."

Regulation of medical professionals' compliance with standards of care dates to the founding of the nation, if not much earlier. What is known today as malpractice has long been recognized as a tort at common law. In the eighteenth century, William Blackstone stated that "mala praxis is a great misdemeanor and offense at common law . . . because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction." 3 William Blackstone, Commentaries on the Laws of England, Ch. 8, p. 122 (1772). The American colonies also recognized common law

liability for harm arising from a physician's failure to exercise due care. *See* George J. Annas, *Doctors, Patients, and Lawyers — Two Centuries of Health Law*, 367 New Eng. J. Med. 445 (2012).

Traditional malpractice liability extended not only to cases in which a physician failed to exercise adequate care in performing surgery or administering medications, but also when their *speech* failed to comply with applicable standards of care and resulted in harm. *See, e.g., Fowler v. Sergeant,* 1 Grant 355, 356 (Pa. 1856) (holding physician liable for malpractice where his instructions to patient's wife concerning care for an injury fell below standard of care and resulted in pain and suffering); *Graham v. Gautier,* 21 Tex. 111, 118-19 (1858) (holding physician liable for failing to give proper instructions on treatment of illness); *Ballou v. Prescott,* 64 Me. 305, 310 (1874) (holding that physician would be responsible if patient "was misled by any directions, or any want of directions, which it was [the doctor's] duty to give"). Mental health professionals have likewise been subject to tort liability when their verbal acts or omissions violate their duty of care.

The administration of health care has long been regulated by statute as well as the common law. Public health Statutes "were passed in various colonies very early in the colonial period." Nissa M. Strottman, *Public Health and Private Medicine: Regulation in Colonial and Early National America*, 50 Hastings L.J. 383, 387 (1999). Cities initially led the way in creating boards of public health to oversee these matters. *Id*. at 389. In a parallel development, state legislatures in the 1800s began requiring licensing and oversight of medical practitioners. *Id*. at 393–94; *see also Dent*

v. West Virginia, 129 U.S. 114, 122–23 (1889) (upholding state licensure requirements for doctors).

Following the Civil War, government authority to regulate medical practice was "too well settled to require discussion." *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."); *see also Collins*, 223 U.S. at 296–97 (upholding licensing requirements for osteopaths who required scientific training to diagnose patients); *Crane v. Johnson*, 242 U.S. 339, 340 (1917) (upholding licensing requirements for "drugless practitioner" who "does not employ either medicine, drugs, or surgery in his practice" but rather "faith, hope, and the processes of mental suggestion and mental adaptation.").

As the mental health professions emerged as a distinct field of medical care, regulation of those occupations followed. In 1917, for example, the Supreme Court upheld California's licensing requirement for "drugless [healthcare] practitioner[s] [who] employ in practice faith, hope, and processes of mental suggestion and mental adaptation" as falling within "the general scope of the police power of the state." *Crane,* 242 U.S. at 340, 344. The fact that the practice of these health occupations involved speech rather than techniques such as the administration of drugs did not lessen the authority of states to regulate them to protect the health and safety of individuals under their care.

Michigan's statute is part of this long tradition of regulation of the health professions and reflects the recognition that "[t]he difference between skilled and

inept talk therapy—no less than that between deft and botched surgery—can, in some cases, mean the difference between life and death." *Otto v. City of Boca Raton*, 41 F.4th 1271, 1292 (11th Cir. 2022) (Rosenbaum, J., dissenting from denial of rehearing en banc). "The practice of psychotherapy is not different from the practice of other forms of medicine simply because it uses words to treat ailments." *Tingley,* 47 F.4th at 1082.

The constitutionality of Michigan's law must be assessed against this long historical background of regulation of health care professionals. The fact that mental health professionals provide care through talk therapy instead of, or in conjunction with, prescription medications or other physical interventions, does not lessen the importance of this historical tradition. The comprehensive system of regulation that governs the practice of medical and health care professionals has long held the health and safety of patients to be of paramount importance. Moreover, the fact that some professionals, such as Plaintiffs, may disagree with existing professional standards of care does not diminish governmental authority to ensure that providers operating under a state license comply with those standards to protect patients. This historical tradition provides an additional reason for this Court to conclude that the statute does not require application of heightened scrutiny under the First Amendment.

CONCLUSION

For the foregoing reasons, Equality Michigan respectfully requests that the Court deny Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted this 16th day of August 2024.

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* Application for admission forthcoming

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on August 16, 2024, I filed a copy of the foregoing document via CM/ECF, which will send a copy to counsel of record for all parties.

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