UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES OF JACKSON, LENAWEE AND HILLSDALE COUNTIES and EMILY MCJONES,

Plaintiffs,

v

GRETCHEN WHITMER, in her official capacity as Governor of Michigan;

DANA NESSEL, in her official capacity as Attorney General of Michigan;

AMY GUMBRECHT, in her official capacity as Director of the Bureau of Professional Licensing in the Michigan Department of Licensing and Regulatory Affairs;

ELIZABETH HERTEL, in her official capacity as director of the Michigan Department of Health and Human Services;

NAPOLEON HARRINGTON, SHERI PICKOVER, LESLEY ADDISON, LAURA MAMMEN, ROBIN CHOSA, MARY BILLMAN, WALTER HARPER, CHARLES HUGHES, JANET GLAES, ROTESA BAKER, ROBERTO OVERTON, and COURTENAY MORSI, in their official capacities as members of the Michigan Board of Counseling,

JULIAN DIAZ, DANIELLE HOOVER, JANET JOINER, MARIA PETRIDES, PETRA ALSOOFY, MAXINE THOME, VICTOR WEIPERT, ROCHELLE VRSEK, and CHINA SELLS, in their official capacities as member of the Michigan Board of Social Workers; and

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

HON. JANE M. BECKERING

MAG. SALLY J. BERENS

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (ECF NOS. 14, 15)

ORAL ARGUMENT REQUESTED

LATRICIA POWELL, JOHN RANDLE, GARY HARPER, FRANCES BROWN, CHARMEKA NEWTON, HARPER WEST, MELISSA GREY, BRANDELL ADAMS, and COURTENAY MORSI, in their official capacities as members of the Michigan Board of Psychology,

Defendants.

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Dated: August 16, 2024

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INTRODUCTION

"Conversion therapy" is a discredited and dangerous practice that seeks to change an individual's sexual orientation or gender identity. Study after study shows that it inflicts enduring and profound harms on those receiving it. For instance, children who were exposed to conversion therapy were *more than twice as likely* to later attempt suicide than those who did not experience conversion therapy. Presented with mounting evidence of these harms, Michigan's Legislature enacted HB 4616 to safeguard Michigan youth by prohibiting licensed mental health professionals—practitioners who hold a role of immense responsibility in our healthcare system—from subjecting minors to this harmful practice.

Plaintiffs say HB 4616 infringes on their free-speech and free-exercise rights. But a therapy session is not the town square. And when properly understood as the injurious practice that it is, conversion therapy is neither speech nor religious exercise. It is conduct—a set of practices masquerading as healthcare. Regulations like HB 4616, which apply to health professionals providing treatment, call for rational-basis review. But whatever scrutiny applies, HB 4616 meets it.

More fundamentally: Plaintiffs do not claim to perform "conversion therapy" under the law. Rather, they allege that they merely facilitate the development of their clients' sexual orientations or gender identities—which HB 4616 explicitly permits. Thus, and because they cannot show any threat of enforcement, they lack pre-enforcement standing.

Plaintiffs are unlikely to succeed on the merits, and they have not satisfied the other preliminary-injunction factors. The injunction should be denied.

STATEMENT OF FACTS

Conversion therapy is widely recognized as both ineffective and harmful.

Conversion therapy is a discredited set of practices that attempts to change a person's sexual orientation or gender identity.[1] The practice is "premised on or motivated by the unscientific perspective that diversity in sexual orientation and/or gender identity and expression is a deficit, developmental defect, and/or a mental illness." (Ex. 1, Declaration of Dr. Judith Glassgold ¶ 34.)

But sexual orientation and gender identity are not afflictions in need of a cure. *See Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) ("[P]sychiatrists and others [have] recognized that sexual orientation is both a normal expression of human sexuality and immutable."). As the American Psychological Association (APA) has recognized, "diversity in gender identity and expression is part of the human experience." APA, *Resolution on Gender Identity Change Efforts* 2 (2021), https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf. As a result, conversion therapy is both unnecessary and ill-advised.

The leading associations that develop the standards of care for medical and mental health care for children have rejected the use of conversion therapy. (Glassgold ¶¶ 24, 42.) This is because, in addition to serving no legitimate purpose, research studies consistently find conversion therapy to be both ineffective and uniquely harmful to minors. (*Id.* ¶¶ 43–46.)

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[1] Conversion therapy has also been referred to as sexual orientation change efforts (SOCE) or sexual orientation and gender identity change efforts (SOGICE). (Declaration of Dr. Judith Glassgold ¶¶ 11–12, 15.)

Two comprehensive reports examining the last 60-plus years of scientific literature in this area demonstrate why conversion therapy has been so thoroughly rejected: (1) APA, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) (attached as Exhibit B to Glassgold Decl.) (APA Report); and (2) U.S. Substance Abuse and Mental Health Services Administration (SAMHSA), *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth* (2023) (attached as Exhibit D to Glassgold Decl.) (SAMHSA Report).

The APA Report concluded, based on the scientifically valid research conducted up to that point, that "it is unlikely that individuals will be able to reduce same-sex sexual attractions or increase other-sex attractions through SOCE." *Id.* at 83. Further, the APA noted that the research found "unintended harmful side effects" resulting from conversion therapy, including "depression, suicidality, and anxiety." *Id.*

The SAMHSA Report reviewed and summarized more recent research on conversion therapy efforts. SAMHSA found that "[t]here is now a significant body of research on SOGI change efforts" and that the research conducted since the APA Report further corroborated conversion therapy's ineffectiveness and its harm. *Id.* at 25–26. "Recent large, methodologically rigorous studies consistently find that exposure to sexual orientation change efforts places individuals at increased risk of suicidality and suicide attempts," and "[i]t is now scientific consensus that sexual

orientation change efforts are not effective and can cause significant harm." *Id.*[2] Twenty-two states and the District of Columbia have banned the practice of conversion therapy.[3]

The Legislature enacts HB 4616 to protect Michigan minors.

The Michigan Legislature enacted HB 4616 and HB 4617 to protect minors from the harms caused by conversion therapy.[4] HB 4616 amended Michigan's Mental Health Code by adding Section 901a, which provides that "[a] mental health professional shall not engage in conversion therapy with a minor," and provides that violations will subject those professionals to potential licensing sanctions. Mich. Comp. Laws § 330.1901a. HB 4617, in turn, defines "conversion therapy" as "any practice or treatment by a mental health professional that seeks to change an individual's sexual orientation or gender identity, including, but not limited to,

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[2] The SAMHSA report cited numerous recent studies finding a link between attempted conversion therapy and suicide risk. *See, e.g.*, SAMHSA Report at 8 (collecting studies) and 27. One such study, involving 34,808 respondents, found that 43.6% of those who experienced conversion therapy had attempted suicide, compared to 17.3% of 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, 1222–24 (2020).

[3] See S.B. 1172 (Cal. 2012); H.B. 19-1129 (Colo. 2019); H.B. 6695 (Conn. 2017); S.B. 65 (Del. 2018); B20-0501 (D.C. 2014); H.B. 664 (Haw. 2019); H.B. 0217 (Ill. 2015); L.D. 1025 (Me. 2019); S.B. 1028 (Md. 2018); H. 140 (Mass. 2019); HB 4616 (Mich. 2023); H.F. 16 (Minn. 2023); S.B. 201 (Nev. 2017); H.B. 587 (N.H. 2018); A.B. 3371 (N.J. 2013); S.B. 121 (N.M. 2017); S.B. 1046 (N.Y. 2019); H.B. 2307 (Or. 2015); H. 5277A (R.I. 2017); H.B. 228 (Utah 2023); S. 132 (Vt. 2016); H.B. 386 (Va. 2020); S.B. 5722 (Wash. 2018).

[4] For ease of reference, this brief adopts Plaintiffs' convention of referring to HB 4616 and HB 4617 collectively as "HB 4616."

efforts to change behavior or gender expression or to reduce or eliminate sexual or romantic attractions or feelings toward an individual of the same gender." Mich. Comp. Laws § 330.1100a(20).

The bill further clarifies what does *not* constitute conversion therapy:

> Conversion therapy does not include counseling that provides assistance to an individual undergoing a gender transition, counseling that provides acceptance, support, or understanding of an individual or facilitates an individual's coping, social support, or identity exploration and development, including sexual orientation-neutral intervention to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to change an individual's sexual orientation or gender identity.[5] [*Id.*]

The Mental Health Code defines "mental health professional" to include psychologists, licensed master's social workers, licensed counselors, and several other professions. Mich. Comp. Laws § 330.1100b(19). Unlicensed counselors are not included within the definition. *See id.*

HB 4616 was first considered by the Committee on Health Policy's Subcommittee on Behavioral Health, which heard testimony from numerous individuals and organizations in support of the bill, including the Michigan Psychological Association, the National Center for Lesbian Rights (NCLR), and the Michigan Association of School Psychologists (MASP). *See Committee Meeting*

[5] "Gender identity" is defined at Mich. Comp. Laws § 37.2103(f) as "having or being perceived as having a gender-related self-identity or expression whether or not associated with an individual's assigned sex at birth." And "sexual orientation" is defined at subsection (*l*) as "having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation."

Minutes, Mich. H. Comm. on Health Policy Subcomm. on Behavioral Health (June 7, 2023).[6]

The testimony presented to the Subcommittee discussed at length the scientific research on the ineffectiveness of conversion therapy and its documented harms, particularly its association with increased risk of suicide. *See, e.g.*, NCLR Letter (June 7, 2023); MASP Letter (June 5, 2023); The Trevor Project Letter (June 7, 2023) (Attached as Ex. 3).

When signing HB 4616, Governor Gretchen Whitmer celebrated the law's passage, noting that "[n]ot only is conversion therapy ineffectual, it can lead to significant long-term harm, including anxiety, depression, internalized homophobia, self-blame, and higher risk of suicide." *See Gov. Whitmer Signs Legislation to Protect LGBTQ+ Youth, Ban Conversion Therapy*, Press Release (July 26, 2023), https://www.michigan.gov/whitmer/news/press-releases/2023/07/26/whitmer-signs-legislation-to-protect-lgbtq-youth-ban-conversion-therapy.

LARA has taken no enforcement action under HB 4616.

HB 4616 became effective on February 13, 2024. In the six-plus months since the statute's effective date, the Michigan Department of Licensing and Regulatory Affairs (LARA) has received no complaints alleging violations of HB 4616. (Ex. 2, Declaration of Amy Gumbrecht ¶ 23.) LARA has also taken no disciplinary action

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[6] Subcommittee materials, including meeting minutes and letters in support and opposition, are available at https://www.house.mi.gov/Committee/HSHEA. The recording of the Subcommittee hearing is available at https://www.house.mi.gov/VideoArchivePlayer?video=HSHEA-060723.mp4.

enforcing HB 4616, nor has it opened any investigations into possible violations of HB 4616. (*Id.* ¶¶ 24–25.) Finally, LARA has made no public statements regarding HB 4616, nor has it issued any warnings to Plaintiffs or other licensed mental health professionals (LMHPs) relating to HB 4616. (*Id.* ¶¶ 21–22.)

PRELIMINARY INJUNCTION STANDARD

In deciding whether to grant a preliminary injunction, a court weighs four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury absent the injunction; (3) whether the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of an injunction." *Bays v. City of Fairborn*, 668 F.3d 814, 818–19 (6th Cir. 2012). When the government opposes the issuance of an injunction, however, "the final two factors—the balance of equities and the public interest—merge, because the government's interest is the public interest." *Malam v. Adducci*, 452 F. Supp. 3d 643, 661–62 (E.D. Mich. 2020) (cleaned up).

Importantly, "[t]he party seeking the preliminary injunction bears the burden of justifying such relief," and faces a "much more stringent [standard] than the proof required to survive a summary judgment motion" because a preliminary injunction is "an extraordinary remedy." *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012). Whereas surviving summary judgment requires only the showing of a jury question, a plaintiff seeking an injunction must meet the burden of persuasion. *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000) (citations omitted).

ARGUMENT

I. Plaintiffs cannot show a strong likelihood of success on the merits because they have not established standing.

Plaintiffs do not just fail to demonstrate a *strong likelihood* of success on the merits of their federal claims, but for the reasons that follow, those claims are sufficiently weak that they are ripe for dismissal. *E.g.*, *Mackinac Ctr. for Pub. Policy v. Cardona*, 102 F.4th 343 (6th Cir. 2024) (affirming district court's *sua sponte* dismissal of complaint due to lack of standing and denying motion for preliminary injunction as moot); *see also Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024) ("At the preliminary injunction stage, . . . the plaintiff must make a 'clear showing' that she is 'likely' to establish each element of standing." (citation omitted)).

A. Plaintiffs lack pre-enforcement standing to challenge the statute.

In evaluating standing, this Court "must accept the allegations set forth in the complaint as true, drawing all inferences in favor of the plaintiff." *Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 756 (6th Cir. 2019) (quotation omitted).

Article III standing requires a plaintiff to establish three elements: (1) the plaintiff suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) the injury must be "fairly traceable to the challenged action of the defendant"; and (3) "it must be likely . . . that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up).

Although a plaintiff seeking declaratory relief may pursue "a pre-enforcement challenge . . . before the actual completion of an injury-in-fact," *Glenn v. Holder*, 690 F.3d 417, 421 (6th Cir. 2012) (quotation omitted), no relief may be obtained unless the plaintiff demonstrates "[1] an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute, and [2] there exists a credible threat of prosecution thereunder." *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

The same framework applies regardless of whether a plaintiff violates the statute or wishes to violate the statute but abstains from doing so (*i.e.*, a "chilling" theory).[7] In either situation, a plaintiff still must establish both that the conduct in question violates the statute *and* a credible threat of enforcement. *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972); *Kareem v. Cuyahoga Cty. Bd. of Elections*, 95 F.4th 1019, 1023 (6th Cir. 2024) (holding "subjective apprehension and a personal (self-imposed) unwillingness to communicate . . . lack the sufficiently adverse interests necessary to establish standing" (cleaned up)).

Plaintiffs fail to meet their burden. Their perceived need to tread cautiously—or their modalities prior to HB 4616's effectiveness—comprise neither an objective chill nor a violation of the law they challenge. As explained further

[7] On this point, Plaintiffs' claim is not altogether clear. They suggest—somewhat inconsistently—that their reading of the law has caused them to act cautiously in how they speak to their clients. (*Compare, e.g.*, Compl. ¶ 122–125 (alleging chilled speech), PageID.23–24, *with id.* ¶ 71 (disavowing intent to change therapeutic model), and McJones Decl. ¶¶ 44, 48, PageID.244 (same)).

below, Plaintiffs have not established that they are engaged, or wish to engage, in conduct HB 4616 prohibits. And there is no constitutionally cognizable threat of specific future or present harm, *i.e.*, enforcement.

1. Plaintiffs fail to demonstrate that they will violate HB 4616.

Plaintiffs have failed to demonstrate that either their past conduct or their intended future conduct constitutes conversion therapy as defined by HB 4616. As a result, they have failed to establish standing. *Cf. McKay*, 823 F.3d at 868 (finding standing when "a plain reading of the order suggests that it would apply to [the plaintiff]'s proposed [conduct]").

HB 4616 defines "conversion therapy" as "any practice or treatment by a mental health professional that *seeks to change* an individual's sexual orientation or gender identity." Mich. Comp. Laws § 330.1100a(20) (emphasis added.) It exempts mere facilitation of the client's exploration or development of their own orientation or identity. *See id.* Under this framework, the *client* retains agency to work toward a genuinely self-determined outcome, and the therapist must refrain from treatment that tries to change or predetermine that outcome. (Glassgold ¶ 26; SAMHSA Report at 51.)

Plaintiffs have not sufficiently demonstrated, in either their Complaint or the materials supporting their motion, that their intended conduct is impermissible under HB 4616. Michigan law requires construing its statutes to "avoid an interpretation that would render any part of the statute surplusage or nugatory."

Johnson v. Recca, 821 N.W.2d 520, 525 (Mich. 2012) (citation omitted). And "when statutes conflict, the more specific provision governs over the more general one." *Milne v. Robinson*, 6 N.W.3d 40, 47 n. 8 (Mich. 2024) (quotation omitted). Applying these principles here, HB 4616 draws a clear line between what it prohibits—*i.e.*, a fixed therapeutic goal of "converting" or "changing" the patient—and what it specifically permits—*i.e.*, therapy that "*facilitates* . . . *an individual's* . . . identity exploration and development." (Emphasis added.)

Plaintiffs consistently emphasize that they allow clients to lead when setting or maintaining therapy goals, and stop short of saying they actively seek to change their clients' sexual orientation or gender identity:

- "Plaintiffs' approach to counseling is client driven," in which "clients, not Plaintiffs, determine the goals for counseling." (Compl. ¶ 55, PageID.12.)
- "I do not set goals for my clients; goal setting is done by the clients themselves." (Veenstra Decl. ¶ 25, PageID.230.)
- "[M]y practice has been to *gently explore* those issues and ask my clients why they felt that way." (*Id.* ¶ 35, PageID.232 (emphasis added).)
- "I allowed clients to guide any conversations around sexuality or gender." (McJones Decl. ¶ 32, PageID.241.)
- "Some youth . . . made changes in their behavior or gender expression, *but this was never my direct aim*." (*Id.* (emphasis added).)

"Often," say Plaintiffs, clients "shift their goals" away from those which Plaintiffs are willing to entertain. (Compl. ¶ 57, PageID.13.) When such a shift occurs, and the client wishes to "pursue a gender identity that is not aligned with a client's biological sex or to act on same-sex romantic attractions," Plaintiffs "refer them to other counselors in the community who are able to do so." (Lewis Decl.

¶ 24, PageID.166.) Consistent with these statements, Plaintiff Catholic Charities' "Outpatient Counseling Program Policies and Procedures" provides:

> Clinicians and staff *refrain from professing or projecting their own culture upon their clients*. Treatment goals are created in collaboration with clients to promote client empowerment and transparency. This collaboration ensures that clinicians attend to cultural, historical, and gender issues essential to the client. [PageID.169 (emphasis added).]

Catholic Charities' "Clients' Rights Policy" likewise guarantees clients the right to "receive services in a manner that is free from harassment or coercion and that protects the client right [to] self-determination." (PageID.174.)

Based on their descriptions of their conduct, Plaintiffs lack standing to bring this action. If, as they suggest, Plaintiffs intend only to facilitate identity development by "gently exploring" issues of sexuality or gender, while honoring the client's right of "self-determination," they will not run afoul of HB 4616. Because Plaintiffs' briefing does not suggest that their therapy seeks to alter patients' sexual orientation or gender identity, they have failed to establish that they are the proper parties to bring these claims. Standing to confer jurisdiction over this "difficult constitutional question" requires a party whose conduct is concretely adverse to what the statutes permit and proscribe—it requires a personal stake in the outcome sufficient to "assure" a sharpening of the issues raised. *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (quotation omitted). Plaintiffs' motion does not satisfy that requirement.

To be sure, Plaintiffs might—in contrast to their pleadings—intend to engage in therapy that *seeks to change* their clients' gender identity or sexual orientation. If that is the case, Plaintiffs will violate HB 4616. But taking Plaintiffs at their word, and accounting for their burden to "make a clear showing" that they are

"likely" to establish standing, *Murthy*, 144 S. Ct. at 1986 (cleaned up), they have failed to demonstrate that their intended conduct falls outside the "counseling that provides . . . understanding of an individual or facilitates an individual's coping, social support, or identity exploration and development" that HB 4616 permits. As a result, this Court lacks jurisdiction to provide relief.

2. There is no credible threat of prosecution.

Plaintiffs also fail to plead or support a credible threat of enforcement, another necessary component of pre-enforcement standing. An allegation of future injury clears this hurdle only if the "alleged 'threat of injury is certainly impending, or there is a substantial risk that the harm will occur.'" *McKay*, 823 F.3d at 867 (quoting *Susan B. Anthony List*, 573 U.S. at 158). Even when a law's text "suggests it would apply" to the plaintiff, the plaintiff still must allege facts that support "a credible threat of prosecution." *Id.* at 868 (quoting *Susan B. Anthony List*, 573 U.S. at 159).

This hurdle might be cleared by proof of a warning directed to the plaintiff. *E.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Or it might be satisfied by a history of past enforcement of the same law. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1049 (6th Cir. 2015).

Plaintiffs make no allegation or showing of any actions directed against them. Nor do Plaintiffs establish a history of past enforcement "against the *same conduct*." *Id.* (emphasis added); *see also Susan B. Anthony List*, 573 U.S. at 164–65 (cataloguing complaints "alleging violations of the [challenged] statute."). At best,

Plaintiffs allege that "Michigan actively enforces its licensing regulations," to which Plaintiffs are subject. (Compl. ¶ 110, PageID.21.) In support, however, Plaintiffs make only general overtures to Defendants' regulatory duties. (PageID.21-22.) Plaintiffs do not even make allegations specific to *mental health professionals*, instead inflating their statistics by including all health professions ranging from dentistry to veterinary care.[8] (PageID.21.) Plaintiffs invoke the issuance of "hundreds or thousands of disciplinary orders each year." (*Id*. ¶ 119, PageID.23.) But this is akin to alleging that a criminal statute carries a credible threat of prosecution by citing the number of convictions, of any stripe, obtained in a given year. Plaintiffs thus fail to establish a history of enforcement "against the same conduct." *Russell*, 784 F.3d at 1049.

Related, it is unlikely that anyone else—patients or third-party activists—meaningfully contributes to a credible threat of enforcement via Defendants' complaint process. First, there is nothing unique about HB 4616 that makes it easier to file complaints against LMHPs. As licensees under Michigan's Public Health Code, Plaintiffs remain subject to the same complaint process as all health professionals. Mich. Comp. Laws § 333.16231(1). Notably, LARA does not take action on such complaints unless it receives authorization from the relevant profession's governing board *and* there is a "reasonable basis to believe that a violation" has occurred. (Gumbrecht ¶¶ 15–19.) Plaintiffs' offerings in this regard

[8] While there are over 450,000 licensed health professionals in Michigan, less than 10% belong to Plaintiffs' professions (psychologists, counselors, and master's social workers). (Gumbrecht ¶¶ 8–10.)

are limited to (1) an inapposite anecdote about a teen client who incorrectly (and self-interestedly) told her parents that the counselor had labeled the teen's underage drinking and sexual activity "normal," (Veenstra Decl. ¶ 38, PageID.233); and (2) a claim that they are subject to enforcement instigated by unrelated "ideological opponents," (Compl. ¶ 121, PageID.23). Both are irrelevant, shedding no light on HB 4616's possible future enforcement in Michigan, and each comprises speculation unmoored from any concrete threat, which untenably depends on third parties' decision-making. *Lujan*, 504 U.S. at 560.

Nothing in the record sufficiently alleges or supports that any defendant means to enforce HB 4616 against anyone engaged in the conduct Plaintiffs describe.[9]

B. Plaintiffs do not have standing to invoke their patients' parents' First Amendment rights.

Plaintiffs also invoke their clients' parents' First Amendment right to direct the religious upbringing of their children. (Compl. ¶¶ 174–80, PageID.30-31, 158.) But Plaintiffs have not established standing to invoke the First Amendment rights of third-party parents, and they fail to state a claim regarding the same.

First, this claim is incompatible with Plaintiffs' description of their client-led therapeutic model. Under this model, the parent's only role, *at most*, entails (1)

[9] For the same reasons—*i.e.*, the insubstantial and non-immediate possibility of future enforcement—Plaintiffs' claims are unripe. *Ammex, Inc. v. Cox*, 351 F.3d 697, 706 (6th Cir. 2003); *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 284 (6th Cir. 1997).

providing informed consent and (2) receiving notice of any "concerns about abuse or dangerous situations." (*Id.* ¶ 54, PageID.12.) When the existence of an injury depends on the intervening decisions of a third party, the plaintiff bears a heavy burden "to adduce facts showing that those [third parties'] choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Lujan*, 504 U.S. at 562. Here, Plaintiffs' own policies break the causal chain between Defendants and the third-party parents.

Plaintiffs' invocation of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), is unavailing. That case protected the rights of Amish parents to insulate their children from an external affront to their religious beliefs, *i.e.* compelled attendance at public or private schools. *Id.* at 209. *Yoder* is applicable only if this Court accepts Plaintiffs' faulty premise that hewing to the statute requires them to provide gender-affirming care. But as described more fully below, HB 4616's proscription on conversion therapy means nothing more than "no conversion therapy." It does not *require* Plaintiffs to engage in treatment with which they—or their clients' parents—disagree.

Despite the foregoing causality problem, Plaintiffs assert they have standing to assert this claim on those parents' behalf because the statute "'threaten[s] with destruction' Plaintiffs' 'business.'" (Compl. ¶ 179 (quoting *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 535 (1925)), PageID.31.) But Plaintiffs have not alleged or supported this injury. *Pierce* is distinguishable, in part, based on the scope of the harm alleged. Those plaintiffs (two private schools) alleged a definite and complete loss of

their business, given that 100% of their "customers" would be precluded from retaining them to educate their children under a law compelling attendance at public schools. *Pierce*, 268 U.S. at 535–36.

Here, neither the Complaint nor any of Plaintiffs' declarations alleges a financial threat beyond a conclusory claim that such threat exists. They do not articulate the proportion of clients who are minors seeking treatment implicating HB 4616. (*See, e.g.*, Compl. ¶ 50 (alleging provision of a wide range of therapies, many forms of which are irrelevant), PageID.9; *id.* ¶ 34, PageID.10; *see also* Lewis Decl. ¶ 13, PageID.165.) Nor do they articulate the proportion of those clients who pay for services. (*See* Lewis Decl. ¶ 5 (stating that Catholic Charities accepts clients regardless of ability to pay), PageID.163.)

At best, Plaintiffs allege that they or their employees could face licensure consequences if they do not hew to the law. (Compl. ¶ 117, PageID.117.) But Catholic Charities does not allege that it holds a license, and none of its LMHPs are named parties. Nor does it support whether, or to what extent, suspension of pertinent employees' licenses would affect its business. (*See* Lewis Decl. ¶ 7, PageID.164 ("Catholic Charities employs 16 counselors, nine who see adults[.]").) And while Plaintiff McJones states she counsels "youth" in her current practice, she provides no details as to their ages or what percentage of her client base they represent.[10] Thus, Plaintiffs have not offered evidence suggesting that any

[10] The Complaint does not allege that McJones, in particular, counsels minors on the relevant issues, or that she will do so in the future. (*See* Compl. ¶¶ 38–48, PageID.10-11.) In her declaration, McJones merely claims to have seen some

improper licensure suspensions would affect their revenues to the dramatic extent necessary to confer standing.

C. Plaintiffs fail to establish standing as against Director Hertel.

Plaintiffs' allegations are independently insufficient as against Director Hertel, in particular. The complaint says Director Hertel's authority stems from Mich. Comp. Laws § 330.1273(3), which grants MDHHS authority to "make inspections necessary to enforce *this chapter*[.]" (PageID.7 (emphasis added).)

But Plaintiffs are misreading the phrase "this chapter" as a reference to the Mental Health Code *in toto*, which Code appears at Chapter 330 of the Michigan Compiled Laws. In fact, however, the "Michigan Compiled Laws use 'chapter' in two different contexts," and "many acts within the Compiled Laws are themselves divided into chapters." *Al-Hajjaj v Hartford Accident & Indem. Co.*, 5 N.W.3d 353, 358 n. 1 (Mich. Ct. App. 2023). Plaintiffs' foundation for Director Hertel's liability, Mich. Comp. Laws § 330.1273, appears in *Chapter 2A* of the Mental Health Code, Mich. Comp. Laws §§ 330.1260 *et seq.*, which addresses substance abuse. Its references to MDHHS's authority "to enforce this chapter," therefore, do not extend to *Chapter 9* of the Mental Health Code, in which HB 4616 is housed. *Al-Hajjaj*, 5 N.W.3d at 358 n.1 ("[T]he term "chapter" refers to the chapters nested within the . . . Code and not the primary chapters dividing the Compiled Laws."); *see also*

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gender-nonconforming minor clients and states that she "expects that" existing or future clients "may make changes in their sexual behavior or gender expression." (McJones Decl. ¶¶ 36–37, PageID.242.)

Whole Woman's Health v. Jackson, 595 U.S. 30, 43–44 (2021) (reaching same result in functionally identical context).

Accordingly, no alleged injury could be redressed by a judgment founded upon Mich. Comp. Laws § 330.1273. All claims against Director Hertel should be dismissed.

II. The First Amendment does not protect a therapist's right to provide harmful mental-health care.

Plaintiffs are not likely to succeed on the merits of their free-speech claim. Consistent with States' long tradition of regulating medical professions, HB 4616 bars conduct that is harmful to minors. The Supreme Court has endorsed, and the Sixth Circuit has applied, the doctrine that governs this case—that State regulation of conduct attendant to health care is subject to reduced scrutiny. Because HB 4616 does not implicate expressive speech, it is subject to rational basis review. Even if intermediate, or even strict, scrutiny applied, HB 4616 would pass muster in light of Michigan's compelling interest in protecting children against acute and long-term harm and the narrow targeting of that harmful conduct.

A. The Supreme Court has long affirmed States' authority to impose reasonable regulations on healthcare professionals.

State regulation of the medical profession has a long pedigree. *See 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." *Id.* at 176. The States reserve the power, and the duty, to "require[e] for

[medicine's] successful practice general education and technical skill." *Id.; see also Dent v. State of W.Va.*, 129 U.S. 114, 122 (1889) ("Few professions require more careful preparation by one who seeks to enter it than that of medicine."); *People v. Phippin*, 37 N.W. 888, 897 (Mich. 1888) (noting the state "has power to define the qualifications of those who shall be licensed to practice those callings or professions the exercise of which may affect the public health or safety.").

Beyond just endorsing credential requirements and standards, the Court has consistently respected States' authority to regulate "medical matters concerning which there is difference of opinion and dispute." *Collins v. State of Tex.*, 223 U.S. 288, 297–98 (1912). In *Lambert v. Yellowley*, 272 U.S. 581, 587–589 (1926), for example, a physician brought suit to enjoin a law that barred him from prescribing liquor for medicinal purposes, contending that this restriction violated his "fundamental rights." The Court disagreed—Dr. Lambert's "belie[f] that the use of spirituous liquor as a medicinal agent is at times both advisable and necessary" did not override the ability of the government to outlaw it. *Id.* at 596.

B. HB 4616 regulates the provision of health care, and therefore, conduct.

Consistent with States' power and special responsibility to regulate the medical profession, HB 4616 regulates the conduct of health care professionals by barring the provision of a discredited and harmful course of treatment.

1. State regulation of health care is subject to reduced scrutiny.

Where a law regulates the conduct of medical professionals, those laws are subject to reduced scrutiny. Contrary to Plaintiffs' suggestion, the mere fact that conversion therapy involves speaking words does not render HB 4616 a speech regulation. "[I]t 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, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)*; see also New York v. Ferber*, 458 U.S. 747, 761–62 (1982); *United States v. Rowlee*, 899 F.2d 1275, 1278 (2d Cir. 1990) ("Put another way, speech is not protected by the First Amendment when it is the very vehicle of the crime itself."). In other words, where a "law's effect on speech would be only incidental to its primary effect on conduct," even where the conduct is effectuated through language, strict scrutiny is not appropriate. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017); *see also Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 62 (2006) ("[W]e have extended First Amendment protection *only* to conduct that is *inherently expressive*." (cleaned up; emphasis added)).

In *NIFLA v. Becerra*, 585 U.S. 755 (2018), the Supreme Court fielded a free speech challenge to a California law requiring licensed clinics serving pregnant women to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call." *Id.* at 761. Certain "crisis

pregnancy centers" challenged the law on First Amendment free-speech grounds. *Id.*

Although "[n]umerous examples could be cited of communications that are regulated without offending the First Amendment," *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the Court disavowed a blanket, independent category of "professional speech" entitled to lesser scrutiny. *NIFLA*, 585 U.S. at 767. But as the Sixth Circuit has since explained, *NIFLA* described two categories of professional speech for which there *is* "less protection": (1) "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" like advertisements, and (2) the regulation of "professional conduct, even though that conduct incidentally involves speech." *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 426 (6th Cir. 2019) (quoting *NIFLA*, 585 U.S. at 768).

That second category governs this case. Applied to the regulation of medical care, both the Supreme Court and Sixth Circuit have defined the contours of what constitutes "conduct" in the context of State regulations. *See Planned Parenthood 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). In addressing a physician's First Amendment challenge to a state law mandating the oral provision of "information about the risks of abortion, and childbirth," *Casey* made clear that where a law regulates "the practice of medicine" the State has latitude to impose "reasonable regulation." *Id.* at 885.

More recently, *NIFLA* firmly suggested that laws like HB 4616 implicate conduct for which reduced scrutiny is warranted. The Court noted that "drawing the line between speech and conduct can be difficult," but it confidently asserted that it is a line that is "long familiar to the bar." *NIFLA*, 585 U.S. at 769. It explained that mandated informed-consent requirements fell on the "conduct" side of the line, consistent with *Casey*. *Id.* at 770. But requiring licensed clinics that serve pregnant women to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call" constituted speech. *Id.* at 761. The Court explained this line-drawing by stating that "regulation of professional conduct" that is "tied" to a "medical procedure" constitutes "conduct" which the State may regulate subject to reduced scrutiny. *Id.* at 770.

The Sixth Circuit echoed and relied on *NIFLA* and *Casey* in explaining that, although "[h]eightened scrutiny *generally* applies to content-based regulation of any speaker," regulation of "professional conduct" is subject to less protection. *EMW Women's Surgical Ctr.*, 920 F.3d at 426 (emphasis added). In *EMW Women's Surgical Center*, the Court applied the rubric to a physician's free-speech challenge to a state law requiring physicians, under threat of licensure sanctions, to "explain, in the doctor's own words, what is being depicted by the images—for example, pointing out organs." *Id.* at 424. In other words, the law forced a physician to speak. And yet, the Court found it regulated conduct, burdening speech only incidentally. *Id.* at 446.

In a nutshell, "*Casey* and *NIFLA* recognize that First Amendment heightened scrutiny does not apply to incidental regulation of professional speech that is part of the practice of medicine." *Id.* at 429.

2. HB 4616 regulates the provision of medical care, not of constitutionally protected speech.

HB 4616 proscribes the harmful act of a mental health professional "seek[ing] to change" a minor's sexual orientation or gender identity. It bars "conduct [that is] in part initiated, evidenced, or carried out by means of language," *Giboney*, 336 U.S. at 502, and is therefore subject to reduced scrutiny.

To start, the language of the statute does not target speech. HB 4616, § 901a, provides that "[a] mental health professional *shall not engage* in conversion therapy with a minor." And "conversion therapy" is defined as a "*practice* or *treatment*," and it encompasses "*efforts* to change." HB 4617, § 100a(20). Barring one from "engag[ing]" in a "practice or treatment" designates the prohibition of a course of conduct. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring) (finding that, "[o]n its face," a law barring a person from "engag[ing], appear[ing], or fondl[ing]" was "not directed at expression in particular"). The challenged statute does not facially target speech.

Nevertheless, Plaintiffs contend that talk therapy is protected "speech" in the constitutional sense. They cite *Otto v. City of Boca Raton*, 981 F.3d 854, 863 (11th Cir. 2020), which considered a similar ban on conversion therapy for minors, for the proposition that "this [i]s not a hard case." (PageID.140.) The Eleventh Circuit

asserted that, "The government cannot regulate speech by relabeling it as conduct." *Otto*, 981 F.3d at 865. True enough. But this law targets and regulates conduct. Simply declaring talk therapy to be First-Amendment-protected speech fails to grapple with the central issues of the case.

Moreover, the *Otto* majority hinged its analysis on a faulty premise: that conversion therapy "*is not medical at all*—it is a client-directed conversation consisting entirely of speech." *Id.* at 866 n.3 (emphasis added). That is inaccurate. *E.g.*, *Powell v. State of Tex.*, 392 U.S. 514, 528 (1968) (including psychotherapists within the scope of "the medical profession"); *accord Jaffee v. Redmond*, 518 U.S. 1, 16 (1996) (rejecting distinction between licensed social workers, psychiatrists, and psychologists in application of privilege). "[P]sychotherapy delivered by words is part of a tool kit of interventions for the LMHP." (Glassgold ¶ 52.) "Psychotherapy treatments for minors can be delivered through structured activities such as play, art, and dance, as well as with words." (Glassgold ¶ 52.) And "[p]sychotherapy treatments" are not just "conversations"; they "are elements of an individualized treatment plan with specific mental health goals such as alleviating distress and improving function." (Glassgold ¶ 54.) Moreover, even when psychotherapy relies on words, such words are not expressive on the part of the therapist: "The role of the LMHP is not to express or impose their own personal viewpoints, but rather to allow the client to lead their own discovery process." (Glassgold ¶ 68.)

This aligns with other aspects of health care. "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 v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014) (citation omitted), *abrogated in part NIFLA*, 585 U.S. 755 (2018). And in Michigan, Plaintiffs' conduct as licensed health professionals explicitly involves rendering treatment, even if virtually all of that treatment is provided via speaking. *See* Mich. Comp. Laws § 333.18201(b) ("practice of psychology" includes "treatment of mental or emotional disorders"); 333.18101 ("practice of counseling" includes "treating mental and emotional disorders"); 333.18501(1)(g) ("practice of social work at the master's level" includes "treatment of mental, emotional, and behavioral disorders").

Importantly, HB 4616 does not bar LMHPs from speaking on the topics of gender identity or sexual orientation generally, or conversion therapy specifically. A therapist is not barred from *discussing*, or even *endorsing* conversion therapy. It is administration of the treatment by LMHPs that is prohibited. Thus, speech is not foreclosed on the issue. *See id.* at 1229 (the law only "bans *a form of treatment* for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients" (emphasis added)).

Notably, the federal courts considering conversion therapy bans since *Otto* have rejected *Otto*'s conclusion that such laws regulate expressive speech. *See Tingley v. Ferguson*, 47 F.4th 1055, 1077 (9th Cir 2022) (recognizing a split with *Otto*), *cert. denied*, 144 S. Ct. 33 (2023); *Chiles v. Salazar*, No. 1:22-cv-02287-CNS-STV, 2022 WL 17770837, at *8 (D. Colo. Dec. 19, 2022) ("The Court finds *Otto*'s reasoning unpersuasive and therefore rejects it."). Those courts proceeded to apply

rational basis review. *Tingley*, 47 F.4th at 1077–78; *Chiles*, 2022 WL 17770837, at *9.

It is a half-measure to pithily announce, as the Eleventh Circuit did, that "[s]peech is speech." *Otto*, 981 F.3d at 866 (citation omitted). Examples abound where government regulation regarding the use of words or communication is not subject to strict scrutiny. *See, e.g.*, *Ohralik*, 436 U.S. at 456 (collecting cases). And holding that talk-therapy is automatically speech, for which the government must satisfy strict scrutiny, would severely compromise the State's ability to ensure the health and safety of its citizens, including minors, rendering psychotherapy "virtually immune from regulation." *Pickup*, 740 F.3d at 1231 (cleaned up); *id.* at 1229 ("[A]ny prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech."). The delivery of any form of health care relies, in some measure, on speech. A contrary understanding would undermine the Supreme Court's long endorsement of State regulation of the medical profession, *Dent*, 129 U.S. at 122, including *NIFLA*'s recognition of the propriety of "[l]ongstanding torts for professional malpractice." 585 U.S. at 769.

C. HB 4616 survives rational-basis review, intermediate scrutiny, and strict scrutiny.

Rational-basis review properly applies to HB 4616 because it does not regulate protected speech. Even if HB 4616 incidentally affected protected speech, it would only be subject to intermediate scrutiny. *See United States v. O'Brien*, 391

U.S. 367, 376 (1968). Under intermediate scrutiny, an incidental burden on speech is permissible "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld*, 547 U.S. at 67 (cleaned up). But whatever level of scrutiny applies, HB 4616 would survive because it is the least restrictive means of achieving a compelling state interest.

That HB 4616 implicates a compelling state interest is beyond dispute. States have a compelling interest in regulating professional conduct to protect public health and safety. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); Mich. Comp. Laws § 333.1111(2). Indeed, "States have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Id.* Additionally, and equally as important, "it is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling." *New York v. Ferber*, 458 U.S. 747, 756 (1982). Thus, HB 4616 concerns at least two compelling state interests.

Extensive empirical evidence supports the conclusion that HB 4616 promotes these compelling state interests. To appreciate the weight of the evidence, it helps to compare the evidence in this case to the evidence found insufficient to satisfy strict scrutiny in *Brown v Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), on which Plaintiffs rely. (PageID.143–44.) In *Brown*, the government relied primarily on studies conducted by a specific researcher who claimed to find a connection between violent video games and harm to minors. *Brown*, 564 U.S. at 800. Here,

the State does not rely on the view of an individual outlier but on the uniform consensus of all major medical and mental health organizations. (*See* Glassgold, ¶ 42.) And in *Brown*, the Supreme Court criticized the methodology of the research on which the government relied, finding that it showed "at best some correlation" between violent video games and the purported harm. *Brown*, 564 U.S. at 800–01. Here, the harms of conversion therapy have been documented across numerous studies using a variety of methodologies, including contemporaneous and retrospective studies and studies of both minors and adults. (*See* Glassgold ¶¶ 42, 44.)

In addition to being well-documented, the harm to be avoided could not be weightier. Among the studies examining the effects of conversion therapy, the link between conversion therapy and attempted suicide is particularly well-documented. *See* SAMHSA Report at 8, 27. Looking again to *Brown*, the Supreme Court concluded that the government's objective ultimately was to protect minors from particular "*ideas* expressed by speech," rather than "its objective effects." *Brown*, 564 U.S. at 799. Here, the opposite is true. The State's objective underlying HB 4616 is to protect minors from the devastating and documented effects caused by an ineffective and harmful form of therapy.

In arguing that HB 4616 does not promote a compelling state interest, Plaintiffs suggest that the evidence in this area is uncertain and, if anything, favors their so-called "cautious" or "watchful waiting" approach. (PageID.132, 144-146.) But this is a simple strawman argument. Plaintiffs' evidence in support of this

position centers *not* on conversion therapy but on gender-affirming medical care for minors. In both their complaint and their brief, Plaintiffs spill much ink detailing the alleged health risks that gender-affirming medical care can cause to minors, highlighting a purported trend toward restricting such care for minors. (*E.g.*, Compl. ¶¶ 2, 74–82, PageID.15-17; BIS of Mot. for P.I., pp. 6–11, PageID.131–136; Clark Decl. ¶¶ 54–64, PageID.260-263.)

But gender-affirming medical care is not at issue in this case. HB 4616 neither bans nor mandates gender-affirming medical care. Indeed, as counselors and not physicians, Plaintiffs could not provide gender-affirming medical care. (Glassgold, ¶ 56.) Moreover, the statute does not mandate any particular form of therapy or treatment at all; it imposes a *negative restriction* on conduct, *i.e.*, it bans performing conversion therapy. Whatever misunderstanding underlies Plaintiffs' focus on medical transitioning for minors, the studies and case law on which Plaintiffs rely simply are not relevant to HB 4616.

To the extent Plaintiffs discuss conversion therapy at all, they echo *Otto*'s criticisms of the 2009 APA Report. (PageID.144–45.) The Eleventh Circuit in *Otto* emphasized that the APA Report found a lack of scientifically rigorous research in recent years on conversion therapy and a lack of clear evidence as to the prevalence of harmful outcomes. 981 F.3d at 869–70.

Otto's analysis, however, misses the ultimate conclusions of the APA Report: that the early, scientifically rigorous research on conversion therapy indicated that it was, in fact, not effective and that those studies raised concerns about the

harmful effects of conversion therapy, including suicide. APA Report, p 83. Significantly, *Otto* also did not have the benefit of the 2023 SAMHSA Report summarizing the more recent scientifically rigorous research that was conducted following the APA Report. That research both confirmed conversion therapy's ineffectiveness and its consistent association with numerous harms, particularly increased suicide risk. SAMHSA Report, *supra*, pp 25–26. Together, these reports, and the numerous studies summarized therein, confirm that HB 4616 furthers a compelling state interest.

Again, assuming HB 4616 does affect speech, it is also narrowly tailored. Rather than casting a wide net to catch all potentially harmful speech, HB 4616 is narrowly drawn in terms of what it limits, whom it limits, and whom it protects:

- *Content*: HB 4616 does not impose a general prohibition on speech challenging the scientific consensus that sexual orientation and gender diversity are a normal and healthy part of the human experience. Nor does the statute prevent LMHPs from exploring questions of sexual orientation and gender identity with clients. Instead, the statute prohibits a specific form of therapy that has repeatedly been found to cause severe harm: therapy that seeks to change an individual's sexual orientation or gender identity.

- *Speakers*: HB 4616 imposes no restrictions on family members, religious leaders, community members, or even unlicensed counselors. Instead, the statute applies only to licensed (i.e., regulated) mental health professionals in a treatment setting, who hold unique positions of trust and authority with their clients.

- *Audience*: HB 4616 prohibits conversion therapy only for minors, those most vulnerable to the harms of conversion therapy. (Glassgold, ¶ 46.) The statute does not prohibit conversion therapy for adults.

In each of these ways, HB 4616 is narrowly tailored to impact only the speech that causes the most serious harm.

Plaintiffs list a series of proposed alternatives to HB 4616, but none "would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997). (PageID.147-149.) Relying on existing remedies, such as malpractice, that apply *after* a client is harmed is not an acceptable alternative when suicide is among the harms to be avoided. Nor is informed consent a viable alternative because minors cannot meaningfully consent to a harmful and ineffective form of therapy. (Glassgold ¶¶ 69–70.) Allowing non-aversive methods of conversion therapy or permitting an exception for religiously affiliated LMHPs would give Plaintiffs their desired outcome but would run directly contrary to the statute's goal of protecting minors from a demonstrably harmful form of therapy. Thus, Plaintiffs' proposed alternatives may be more desirable to them, but they are not effective alternatives for achieving the State's compelling interest.

Finally, while not dispositive, the fact that twenty-two states have enacted bans on conversion therapy speaks to the fact that Michigan has not ignored a less-restrictive alternative. Plaintiffs emphasize that Michigan is still (barely) in the minority, (PageID.148), but the reality is that, as the scientific consensus as to harmfulness of conversion therapy grows, so too does the consensus among the States that such practice has no place in the mental health profession.

III. Michigan's ban on conversion therapy is a neutral law of general applicability and does not burden Plaintiffs' exercise of religion.

Plaintiffs also allege that, by banning the practice of conversion therapy on children, Michigan has violated their First Amendment rights by "prohibiting the free exercise" of their religion. U.S. Const. amend. I. (PageID.155-157.) "[T]he right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (cleaned up). "[P]ublic authorities may enforce neutral and generally applicable rules and may do so even if they burden faith-based conduct in the process." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012).

In the free-exercise context, the Supreme Court has recognized that the government has "a wide range of power" and inherent authority to "protect the welfare of children[.]" *Prince v. Massachusetts*, 321 U.S. 158, 165–68 (1944). And "[w]hen followers of a particular sect *enter into commercial activity as a matter of choice*, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." *United States v. Lee*, 455 U.S. 252, 261 (1982) (emphasis added).

For the reasons that follow, Plaintiffs' free-exercise claim fails because (1) they have not sufficiently alleged how HB 4616 burdens or interferes with their free

exercise of religion, (2) HB 4616 is neutral with respect to religion, and (3) HB 4616 is generally applicable.

A. Plaintiffs fail to allege a sufficient burden on their right to freely exercise their religious beliefs.

Plaintiffs' free-exercise claim fails at the initial, threshold inquiry because they have not shown *how* Michigan's ban on conversion therapy burdens their right to exercise their religion. "To prevail, plaintiffs must show that defendants burdened their religious exercise . . . ." *Dahl v. Bd. of Trustees of W. Mich. Univ.*, 15 F.4th 728, 731 (6th Cir. 2021). Instead, Plaintiffs jump right into arguing against HB 4616's neutrality and general applicability. (PageID.155-157.) But whether the law is neutral or generally applicable makes no difference if it doesn't burden Plaintiffs' religious exercise.

An actual burden was shown, for example, where adherents of Santeria expressly wished to "bring the practice of the Santeria faith, including its ritual of animal sacrifice, into the open" before their city banned the practice. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 526 (1993). And it was shown where an Amish employer plainly stated that "both payment and receipt of social security benefits is forbidden by the Amish faith," and participation in such a system violates Amish beliefs. *United States v. Lee*, 455 U.S. 252, 257 (1982). Here, given that Plaintiffs have not asserted that they engage in religious conduct prohibited by the statute, they cannot identify a similar aspect of their beliefs that are burdened, and therefore cannot survive this "preliminary inquiry." *Id.* at 256.

B. Michigan's ban is neutral with respect to religion.

Even if Plaintiffs had shown a burden on their free exercise, HB 4616 still passes muster because it is neutral and generally applicable. The neutrality inquiry seeks to determine "if the object of a law is to infringe upon or restrict practices *because of their religious motivation*." *Lukumi*, 508 U.S. at 533 (emphasis added). "[T]he minimum requirement of neutrality is that a law not discriminate on its face." *Id.* HB 4616 easily passes this step, as it makes no reference to religion. Rather, it prohibits "any practice or treatment by a mental health professional that seeks to change an individual's sexual orientation or gender identity[.]" Mich. Comp. Laws § 330.1100a(20); *see also Tingley*, 47 F.4th at 1085 (finding that Washington's similar statute "makes no reference to religion").

Even a facially neutral law, though, can run afoul of the First Amendment if Plaintiffs can show it "targets religious conduct for distinctive treatment" or its object "is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533–34. To make this inquiry, "courts must look beyond the text and scrutinize the history, context, and application of a challenged law." *Meriwether v. Hartop*, 992 F.3d 492, 512 (6th Cir. 2021).

HB 4616 retains its neutrality even when viewed through the lens of its surrounding circumstances. To begin, there have not been any instances of Michigan attempting to *apply* this law to any LMHPs in the six-plus months since it took effect, much less apply it more rigorously toward religiously affiliated LMHPs. (Gumbrecht, ¶¶ 24–25.) This immediately distinguishes situations where a law or policy was applied with hostility toward the plaintiff's religion. *See Masterpiece*

Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 584 U.S. 617, 639 (2018) (finding "official expressions of hostility to religion" during enforcement); *Meriwether*, 992 F.3d at 512 (noting that university exhibited hostility to professor's religious beliefs during disciplinary process).

Plaintiffs instead rely heavily (as did the plaintiff challenging Washington's statute) on stray comments from legislators and government officials. (PageID.156.) *Tingley*, 47 F.4th at 1086 ("Stray remarks of legislators are among the weakest evidence of legislative intent"); *Dobbs*, 597 U.S. at 253–54 (noting that the Court "has long disfavored arguments based on alleged legislative motives"). To the extent these comments are probative, they do not evidence a hostility to religion—the legislators and the Governor were rightly critical of conversion therapy, and Plaintiffs fail to meaningfully connect how this criticism translates to hostility toward religion.

Plaintiffs suggest that this connection can be made because "most" conversion therapy is "directed to those holding conservative religious' beliefs" or because some organizations have linked the practice to religious activities. (PageID.156.) This attempt to paint conversion therapy as an exclusively religious practice is inapt. The APA Report, on which Plaintiffs rely, observed that "[c]lients' motivations to seek out and participate in [conversion therapy] seem to be *complex and varied and may include mental health and personality issues, cultural concerns, religious faith, internalized stigma, as well as sexual orientation concerns*." APA Report at 45

(emphasis added); *see also Tingley*, 47 F.4th at 1087 ("[P]eople seek conversion therapy for religious *and* secular reasons"); and (Glassgold, ¶ 39.)

HB 4616 is neutral because it prohibits all conversion therapy on minors regardless of whether the motivation is religious or secular.

C. The ban is generally applicable and does not burden religious conduct as compared to secular conduct.

The final component of the free exercise analysis is determining whether Michigan's ban is generally applicable. *Lukumi*, 508 U.S. at 542. A law is not generally applicable if (1) "it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions"; or (2) "it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton v. City of Philadelphia*, 593 U.S. 522, 533–34 (2021) (cleaned up). Michigan's ban does neither.

First, Plaintiffs do not argue that HB 4616 contains a mechanism for seeking individual exemptions (it does not), so this issue is not in dispute.

Second, HB 4616 does not "treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 593 U.S. 61, 62 (2021). Conversion therapy is not by its nature a "religious exercise" akin to the religious ritual in *Lukumi* or the gathering for religious services at issue in numerous pandemic-order cases. *See Tandon*, 593 U.S. at 64 (noting that California allowed larger secular gatherings than those allowed for at-home religious exercise); *Roberts*

v. Neace, 958 F.3d 409, 413–14 (6th Cir. 2020) (finding similarly regarding Kentucky's prohibitions on in-person gatherings). HB 4616 does not lend itself to the sort of tidy, apples-to-apples comparison that a ban on in-person religious gatherings does. Conversion therapy, as defined, is a specific type of mental health treatment that can be pursued for both secular *and* religious reasons. Accordingly, there is not a "comparable" secular activity that is treated more favorably than a religious exercise under Michigan's ban.

Here, too, Plaintiffs go to great lengths to draw a false comparison between banning conversion therapy, on the one hand, and, on the other, the alleged harms of undergoing surgical or medical gender transitions "via puberty blocking drugs, cross-sex hormones, and surgeries." (PageID.126, 157.) Plaintiffs' fixation on the harms from "medical transitions" (*see, e.g.*, PageID.134-135, 144-146) is a red herring and not a proper comparison. (Glassgold, ¶ 56.) In HB 4616, Michigan targeted specific harms to children that result from conversion therapy, including dramatically increased risks of suicide and depression. (*See, e.g.*, Ex. 3.) During the Michigan Senate deliberations, Senator McMorrow specifically commented that "nothing in this legislation is about sterilization or physically changing one's body[.]" (2023 Sen. J. 1182 (No. 62, June 27, 2023).); *See also Tingley*, 47 F.4th at 1089 ("[Plaintiff] is unable to show that Washington's law permits secular conduct that undermines the same interest Washington asserted in enacting [its ban]."). Michigan's law is generally applicable, and Plaintiffs' free exercise claim fails.

IV. HB 4616 is not unconstitutionally vague.

A statute is void for vagueness "only if it is so vague that no standard of conduct is specified at all," *Chambers v. Stengel*, 256 F.3d 397, 400 (6th Cir. 2001), or if it is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," *Johnson v. United States*, 576 U.S. 591, 595 (2015).

Plaintiffs "bear[] the burden of establishing that the statute is vague as applied to [their] particular case, not merely that the statute could be construed as vague in some hypothetical situation." *United States v. Krumrei*, 258 F.3d 535, 537 (6th Cir. 2001) (citation omitted).[11] To survive a vagueness challenge, the contested law need only: (1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"; (2) "provide explicit standards for those who enforce them" to prevent "arbitrary and discriminatory enforcement"; and (3) "not impinge upon first amendment rights." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Even without its express clarification as to forms of therapy that do not constitute conversion therapy, the statute would not be vague: LMHPs are prohibited from employing a "practice or treatment" that seeks to "change" an individual's gender identity or sexual orientation. But by defining with

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[11] If this court finds that Plaintiffs are likely to succeed on their other claims, Plaintiffs cannot also establish a strong likelihood of success on their vagueness claim. *E.g.*, *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) (citation omitted).

particularity what conversion therapy *is not*, both LMHPs and licensing authorities are well-informed as to what conduct is permitted or proscribed by the statute.

Although this Court may not narrow a state law to save it from vagueness, *see Boos v. Barry*, 485 U.S. 312, 330 (1988), it is proper to undertake a vagueness inquiry by reference to how the state supreme court would interpret the law, *Grayned*, 408 U.S. at 111–12. Recently, the Michigan Supreme Court reaffirmed that the "fair notice" facet of a vagueness challenge dictates that an ordinary person's knowledge "may be acquired by referring to judicial interpretations, common law, dictionaries, treatises, or the common meaning of words." *People v. Burkman*, ___ N.W.3d ___, ___, No. 164638, 2024 WL 2982804, at *17 (Mich. June 13, 2024) (citation omitted).

As explained in Part I.A.1, *supra*, Plaintiffs essentially argue that the proscription on "conversion therapy" overlaps—and therefore conflicts—with the carve-out for therapy that "facilitates an individual's coping, social support, or identity exploration and development." (*E.g.*, Pls.' BIS of Mot., p. 26, PageID.151.) There is no conflict, insofar as HB 4616 plainly carves out passive facilitation of a client's goals from the definition of "conversion therapy."

Thus, a person of ordinary intelligence–particularly an LMHP of ordinary intelligence who practices in these fields—understands that the statute's express approval of a practice that "*facilitates* . . . an individual's . . . identity exploration and development" exempts any such cooperative and supportive practice from the general prohibition on conversion therapy. (Glassgold ¶ 24 (referencing existing

professional standards of care).) The terms used are not difficult to understand or apply: An LMHP may openly work through the ongoing "exploration" and "development" of a client's sexual orientation and gender identity, without a predetermined outcome, but may not "seek to change" a client's recognized gender identity or sexual orientation.

Any other reading of the statute would untenably collapse its carve-out into its general rule, rendering the carve-out nugatory. Even assuming a conflict, the Michigan Supreme Court would not find vagueness, instead concluding that the general provision yields to the specific, avoiding rendering any portions nugatory. *Milne*, 6 N.W.3d at 47 n. 8; *Johnson*, 821 N.W.2d at 525. Here, that would mean the specificity of the permitted activities controls over the more general definition of "conversion therapy," which avoids rendering nugatory the various permitted activities. Accordingly, HB 4616 is not vague.

V. The remaining injunction factors also weigh against the issuance of a preliminary injunction.

In addition to failing to show a strong likelihood of success on the merits, Plaintiffs have failed to demonstrate that they will suffer irreparable injury without a preliminary injunction. *See Bays*, 668 F.3d 814 at 818–19. In support of irreparable harm, Plaintiffs rely primarily on their arguments regarding the purported violations of their constitutional rights. (PageID.159.) As demonstrated above, however, Plaintiffs' constitutional rights are not being violated, meaning

there is no constitutional violation from which to presume irreparable harm. *See Overstreet v. Lexington-Fayette Urban Cty. Gov't*, 305 F.3d 566, 578 (6th Cir. 2002).

Plaintiffs also allege they are experiencing ongoing harm due to "self-censoring" and their inability "to have open, candid" sessions with clients. (PageID.159.) But the statute *does not prohibit* open conversations around sexual orientation and gender identity. Instead, it expressly *permits* therapy that "facilitates . . . identity exploration and gender development." Mich. Comp. Laws § 330.1100a(20). Indeed, as set forth above, Plaintiffs have not adequately shown that their conduct violates the statute. If Plaintiffs are experiencing a self-imposed chilling of speech, that chill is subjective and insufficient to demonstrate harm. *See Morrison v. Bd. of Educ. of Boyd Cty.*, 521 F.3d 602, 608 (6th Cir 2008).

Conversely, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (cleaned up). The irreparable harm to the people of Michigan is particularly stark here, where numerous entities vigorously supported HB 4616 before the Legislature and where the statute's continued efficacy is needed to protect Michigan minors. (*See supra*, n 6.)

For the same reason, the third and fourth factors—the balancing of equities and the public interest—weigh against an injunction. The reinstatement of an ineffective and harmful form of purported therapy would only hurt the public. And the harms that HB 4616 seeks to prevent, which are well-documented and weighty,

are clearly contrary to the public's interest. Accordingly, the third and fourth factors counsel against a preliminary injunction of HB 4616.

CONCLUSION AND RELIEF REQUESTED

Defendants respectfully ask this Court to deny Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

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Dated: August 16, 2024

CERTIFICATE OF COMPLIANCE WITH LCIVR 7.2(B)(I)

In accordance with LCivR 7.2(b), this brief contains no more than 10,800 words. This document contains 10,775 words and was generated using Microsoft Word for Office 365.

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PROOF OF SERVICE (E-FILE)

I hereby certify that on August 16, 2024, I electronically filed the foregoing document(s) with the Clerk of the Court using the ECF System, which will provide electronic notice and copies to all parties.

A courtesy copy of the aforementioned document was placed in the mail directed to: Judge Jane M. Beckering, 602 Federal Building, 110 Michigan St., NW, Grand Rapids, MI 49503.

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