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Testimony in Support of LD 1025: An Act To Prohibit the Provision of Conversion Therapy to Minors by Certain Licensed Professionals

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Joint Standing Committee on Health Coverage, Insurance, and Financial Services
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Senator Sanborn, Representative Tepler, and distinguished members of the Joint Standing Committee on Health Coverage, Insurance, and Financial Services- I am Mary Bonauto of Portland, and an attorney at GLBTQ Legal Advocates & Defenders (GLAD). GLAD strongly supports LD 1025, which prohibits licensed healthcare professionals from engaging in the discredited and harmful practice of seeking to change a minor's sexual orientation or gender identity.

My written testimony supplements some of the points I am making here.

1) There is no real doubt that conversion therapy is happening in ME. In the last legislature, three licensed professionals opposed the bill on grounds that it would affect their practices, and another individual who opposed the bill spoke about needing to refer students to therapists who support their world view. This practice is occurring in Maine and, however broad or infrequent, should be regulated.

2) You have heard and will continue to hear that this bill is beyond this body's authority. To the contrary, LD 1025 is well within the state's established and long-standing authority to

[1] GLBTQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation through strategic litigation, public policy advocacy, and education.

regulate the conduct of licensed providers of healthcare and medical treatment, especially with respect to minors. This has been the law since at least 1889, *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (stating the rule), and extends to the provider-patient relationship when it is "part of the practice of medicine." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion).

The First Amendment provides no refuge for professional misconduct. As the U.S. First Circuit Court of Appeals ruled in a psychotherapist's case challenging professional discipline, "Simply because speech occurs does not exempt those who practice a profession from state regulation." *Coggeshall* v. *Mass. Bd. Of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010). It cannot be a free speech violation to make a course of conduct illegal simply because that conduct is in part initiated, evidenced, or carried out by means of language. *See* Section I.

Nor does this bill contravene a parent's protected rights. Parental authority must yield when the children's "physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). The state's interest in protecting the physical and mental well-being of minors is deemed "compelling" and such laws are usually upheld "even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982).

(3) Conversion therapy laws remain on sound constitutional footing. A 2018 Supreme Court opinion, known as *NIFLA v. Becerra*, 138 S.Ct. 236 (2018), reiterated that States have well-established authority to regulate medical and mental health practices. It cited the prevailing rule that applies here: "[T]his Court has upheld regulations of professional conduct that incidentally burden speech. The First Amendment does not prevent restrictions directed at

commerce or conduct from imposing incidental burdens on speech." *NIFLA*, 138 S. Ct. at 2373, *quoting Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). It quoted *Planned Parenthood* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), for the point that when speech is "part of the practice of medicine, it is subject to reasonable regulation and licensing by the State.

The *NIFLA* case did not even involve medical or health care – it involved crisis pregnancy centers who try to discourage women from abortion, and who objected to being forced to put up state-mandated notices about the availability of free and low-cost abortion services from the State. The Supreme Court held that they could not be forced to speak this message – which is known as "compelled speech" – and so they won their Free Speech claim.

Opponents of conversion therapy bans have latched on to comments of Justice Thomas, the author of the decision, suggesting that "professional speech" must be subject to the highest and most rigorous level of constitutional review applied to state laws that regulate the content of speech. The Court did not make such a ruling as it decided the case on other grounds, i.e., compelled speech. The case did not involve the provision of medical care so the rule above applies. Justice Thomas's comments did not state or even suggest that states lack the authority to prohibit the practice of conversion therapy, or any other medical practice, and here LD 1025 is narrowly crafted to prohibit only *practice or treatment* of "conversion therapy." If required to meet the highest standards of review, conversion therapy laws would do so because they cause harm to minors and preventing such therapy is the most narrow way to prevent that harm. Finally, to be clear, if a health care professional wants to speak about "conversion therapy" in a public forum, they can. If they want to discuss conversion therapy with their patient, they can. This bill prohibits only conduct designed to change a minor's sexual orientation or gender

identity. LD 1025 is thus narrowly tailored and consistent with the state's authority to regulate healthcare without limiting provider speech outside the realm of actual treatment. *See* Section II.

(4) You will hear other objections, such the claim that this bill removes a "clergy exemption" that was in the bill considered in the last legislature (118th Legislature, LD 912). This is incorrect. In both bills, it is clear that when clergy act as clergy, they have constitutional protection under the state and federal religion clauses to share their views and provide spiritual guidance to their congregations and others. However, if clergy act *under their professional licenses* to provide conversion therapy, then are subject to the prohibition on providing conversion therapy. They would not be exempt under either the last bill or this one.

Second, the clergy exception in LD 912 appeared in and applied to a section of the bill making conversion therapy an unfair trade practice under Maine law. Nothing exempted clergy from the general prohibition on conversion therapy applicable to licensed professionals. LD 1025 contains no unfair trade practice provision and so there is no need for a clergy exception from its reach. The specific exemption in LD 912 was limited to clergy "when performing counseling services as part of religious duties and in connection with a specific synagogue or church or any religious denomination" as long as they did not "advertise, offer or administer conversion therapy" to minors "in exchange for monetary compensation in addition to the monetary compensation" the individual received "as an employee of a specific synagogue or church." In other words, clergy were allowed to provide spiritual guidance in the course of their regular duties and for their regular pay, and not beyond that. LD 1025 is consistent with LD 912 in providing no exemptions for the licensed professionals to whom it applies.

I. LD 1025 is Well Within the Scope of the State's Long-established Authority to Regulate Healthcare and Does Not Infringe on Therapists' Free Speech Rights or Parental Rights.

States have a long-standing and well-established power to regulate healthcare and to ensure that healthcare practices are safe and effective. The government's power to regulate healthcare is beyond cavil. *See Watson* v. *State of 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."); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889) (first U.S. Supreme Court case stating the rule). The "state's authority over children's activities is broader than over like actions of adults." *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). In fact, Maine invokes its broad regulatory powers in a variety of contexts affecting the health and safety of children. Me. Rev. Stat. tit. 29-A, § 2116 (prohibits the use of electronic devices by minors while operating motor vehicles); Me. Rev. Stat. tit. 29-A, § 2081 (requires the use of seatbelts in motor vehicles by minors); Me. Rev. Stat. tit. 22, § 1555-B (prohibits sale of tobacco to minors, prohibits individuals under 17 from selling tobacco); Me. Rev. Stat. tit. 28-A, § 2051 (prohibits minors from the purchase of alcohol).

The purposes of licensing and regulating healthcare professionals are to protect patients from harm and to ensure quality of care. For that reason, states can regulate the provider-patient relationship including, as the Supreme Court noted, speech that is "part of the practice of medicine." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 884 (1992) (plurality opinion). As the Court explained, when speech is "part of the practice of medicine, it is subject to reasonable regulation and licensing by the State." *Casey* at 884.

The United States Court of Appeals for the First Circuit explained in a constitutional challenge brought by a psychotherapist disciplined by a Massachusetts licensing board: "Simply

because speech occurs does not exempt those who practice a profession from state regulation." *Coggeshall* v. *Mass. Bd. Of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010). A course of conduct may be The Court explained that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *See* 228 F.3d at 1053. As such, the Court rejected the view that because psychotherapy is the "talking cure," a different constitutional standard should apply to the regulation of mental healthcare than to other types of medical treatment its decision, the First Circuit favorably cited the case *Nat'l Ass'n for the Advancement of Psychoanalysis* v. *Cal. Bd. Of Psychology*, 228 F.3d 1043 (9th Cir. 2000) (*NAAP*). In that case, the U.S. Court of Appeals for the Ninth Circuit held that the purpose of therapy is not to provide the therapist with an opportunity to express personal views, but rather to benefit the patient by providing treatment. *NAAP*, 228 F.3d at 1054. The Court explained that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *See* 228 F.3d at 1053. As such, the Court rejected the view that because psychotherapy is the "talking cure," a different constitutional standard should apply to the regulation of mental healthcare than to other types of medical treatment, 228 F.3d at 1054. *See also Shultz* v. *Wells*, No. 2:09cv646, 2010 WL 1141452 (M.D. Ala. March 3, 2010) ("[c]learly the state may reasonably regulate speech in the doctor-patient relationship;" the First Amendment did not protect licensed chiropractor who advised a patient to stop taking certain medications).

The state's interest in protecting the health, safety, and welfare of children also outweighs a parent's constitutional right to direct the upbringing of a child, including protecting a minor

from physical or emotional harm that may result from a parental decision. Certainly, parents enjoy a fundamental right to "decisions concerning the care, custody and control of their children," *Troxel v. Granville*, 530 U.S. 57, 66 (2000), and to bring up a child in the parent's faith, *e.g. Pierce v. Society of Sisters*, 268 U.S. 510 (1925), but parental authority must yield when the children's "physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603 (1979). The state's interest in protecting the physical and mental well-being of minors is deemed "compelling" and such laws are usually upheld "even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). As the U.S. First Circuit held in *Frazier v. Bailey*, parental authority over minors "must always be balanced against the governmental interest involved." 957 F.2d 920, 931 (1st Cir. 1992). With conversion therapy, both the child's interests and the state's interests weigh in favor of protecting minors from the record of harms associated with conversion therapy.

Importantly, LD 1025 prohibits only a "practice" that "seeks or purports to impose change of an individual's sexual orientation or gender identity." It does not penalize a healthcare professional for speaking in a public forum about "conversion therapy." Nor would it subject a healthcare professional to discipline for recommending conversion therapy or even providing a patient with literature. It prohibits only conduct designed to change a minor's sexual orientation or gender identity. LD 1025 is thus narrowly tailored and consistent with the state's authority to regulate healthcare without limiting provider speech outside the realm of actual treatment.

II. Courts Have Upheld the Authority of States to Regulate the Harmful Practice of Conversion Therapy.

The two federal appeals courts that have addressed this type of legislation have both upheld the constitutionality of bans on conversion therapy. In *Pickup* v. *Brown* and *Welch* v. *Brown* (consolidated on review), the U.S. Court of Appeals for the Ninth Circuit ruled that a

California law prohibiting state-licensed therapists from trying to change the sexual orientation or gender expression of a patient under 18 years old could be enforced and did not infringe upon therapists' rights to free speech or the rights of parents to direct the upbringing of their children. *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014). In a subsequent decision, *Welch* v. *Brown*, No. 15-16598, 2016 U.S. App. LEXIS 15444 (9th Cir. Aug. 23, 2016), the Ninth Circuit once again considered a challenge to California's conversion therapy law and rejected claims that the law violated the religion clauses of the United States Constitution. On May 1, 2017, the U.S. Supreme Court denied the therapist petitioner's request to review that ruling. *Welch* v. *Brown*, 137 S. Ct. 2093 (2017). Similarly, in *King* v. *Governor of N.J.*, the U.S. Court of Appeals for the Third Circuit affirmed that a New Jersey law prohibiting conversion therapy was constitutional. *See King* v. *Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014).

Some opponents of laws that prohibit conversion therapy have posited that a June 2018 United States Supreme Court decision, *Nat'l Inst. Of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018) (referred to as "NIFLA"), provides grounds to challenge the constitutionality of conversion therapy bans. Any such conclusion distorts the Supreme Court's decision and ignores the Court's language and reasoning, both of which *support* state regulation of medical treatment like that effectuated by laws such as LD 1025.

At the outset, it is important to keep in mind that *NIFLA* involved a totally different type of legislation than laws, such as LD 1025, that prohibit the practice of conversion therapy. Critically, *NIFLA* did not involve a statute regulating professional conduct, such as the practice of medicine or psychology. *NIFLA* involved a California statute that applied to "pregnancy crisis centers" that are typically set up by organizations discouraging abortions. The law at issue mandated that these centers display notices stating the availability of publicly-

funded family planning services, including for abortion. Holding that the California law violated the First Amendment's protections for Free Speech, the Supreme Court characterized the law as a compelled speech regulation, which because of its content-based nature, had to be subject to strict scrutiny (the most rigorous level of constitutional review). *See NIFLA*, 138 S.Ct. at 2371.

Opponents of conversion therapy bans have latched on to comments of Justice Thomas, the author of the decision, suggesting that "professional speech" must be subject to the highest and most rigorous level of constitutional review applied to state laws that regulate the content of speech. The Court did not make such a ruling as it decided the case on other grounds, i.e., compelled speech. Even more importantly, Justice Thomas's comments about the standard to be applied to "professional speech" lack the significance for conversion therapy laws that these opponents suggest. The *NIFLA* decision did not state or even suggest that states lack the authority to prohibit the practice of conversion therapy, or any other medical practice.

To the contrary, the *NIFLA* case supports the state's well-established authority to regulate professional conduct, including medical and mental health practices. It cited the prevailing rule, one that clearly applies here: "[T]his Court has upheld regulations of professional conduct that incidentally burden speech. The First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *NIFLA*, 138 S. Ct. at 2373, *quoting Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

As an example of the lawful state regulation of conduct that only incidentally burdens speech, the Court pointed out that "[l]ongstanding torts for professional malpractice … fall within the traditional purview of state regulation of professional conduct." *Id.* This statement provides a helpful lens through which to understand the lawfulness of conversion therapy laws. Here, the Supreme Court is indicating that the imposition of liability for malpractice against a

psychiatrist or psychologist, for example, is well within the state's authority to prevent harm, and it does not matter that the medium of the medical practice is speech. Malpractice claims are aimed at the conduct of medical treatment and only incidentally burden speech, a permissible burden in that context. The same is true for laws that prohibit the practice of conversion therapy. Indeed, if the reasoning of opponents of conversion therapy laws prevailed, there could be no such thing as a medical malpractice claim against a psychiatrist or psychologist because, as they assert, such claims involve liability based on the practitioner's speech. The same would be true of disciplinary actions by the state boards regulating the practice of psychiatry or psychology. To the contrary, the legitimacy of medical malpractice claims against psychiatrists, psychologists, and other providers, as well as disciplinary actions by state regulatory boards, is beyond question in American law.

Conversion therapy laws are squarely within the state's authority to regulate the conduct of healthcare and are constitutional under longstanding legal doctrine, including the Supreme Court's recent decision in *NIFLA*.

Conclusion

LD 1025 is narrowly tailored to prevent a well-documented risk of harm to minors and to eradicate a purported healthcare practice that is contrary to medical science and based on discredited views of sexual orientation and gender identity. GLAD strongly supports LD 1025.