Prepared Testimony of
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Health Policy Committee &
Health Policy Subcommittee on Behavioral Health
and
the Michigan Senate Health Policy Committee & Housing and Human Services Committee
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Distinguished Chair and Distinguished Members of the Committee: Thank you for providing me the opportunity to share testimony on House Bills 4616 and 4617 and Senate Bills 348 and 349**.**

INTRODUCTION

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida Levin College of Law and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the *Faith and Freedom Center Distinguished Chair* at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, as a Legal Counsel in the United States Senate, as Chief Counsel to the Michigan Senate Judiciary Committee, and was a US Diplomat. I am also the Founder and President Emeritus of the Great Lakes Justice Center.

I am here to testify in my personal capacity before you today and share some thoughts and concerns about HB 4616 and 4617 and SB 348 and 349, opposing passage as currently written.

THE PROPOSED LAW IS UNCONSTITUTIONAL

Ratified in 1791, the First Amendment to the United States Constitution provides that "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech ...." U.S. Const. amend I.

The Supreme Court holds liberty protected by the First Amendment applicable to the States via the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (Free Exercise); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (Free Speech); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

Reflecting an accurate historical understanding of the plain meaning of the Free Exercise Clause, the Supreme Court, in *Sherbert v. Verner* and *Wisconsin v. Yoder,* struck down government actions that substantially interfered with a person's sincerely held religious beliefs. *Sherbert,* 374 U.S. 398 (1963) (denying unemployment benefits to a person who lost her job when she did not work on her Sabbath); *Yoder*, 406 U.S. 205 (1972) (overturning convictions for violations of state compulsory school attendance laws incompatible with sincerely held religious beliefs). Under these decisions, a person's unalienable right to the free exercise of religious conscience appropriately required government to provide a compelling interest to justify its interfering with such a fundamental liberty interest. The U.S. Supreme Court, in applying strict scrutiny to the government actions, further required the government to show it used the least restrictive means available to accomplish its interest. Recently, in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2020), this Court confirmed that government action infringing on First Amendment religious liberty warrants the strictest of scrutiny. Moreover, in *Kennedy v. Bremerton School District,* the Supreme Court confirmed that religious expression is doubly protected under the First Amendment requiring the application of strict scrutiny. 142 S. Ct. 2407, 2421, 2426 (2022) citing, *Fulton,*

141 S. Ct. at 1876-1877; *Reed v. Town of Gilbert,* 576 U.S. 155, 171 (2015); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993); *Sherbert*, 374 U.S. at 403 (1963).

The Sexual Orientation Gender Identity (SOGI) conversation censorship bills now before this body (and other ubiquitous special SOGI preferences, imposed by state and local authorities), exacerbate the threat to the free exercise of religious conscience. These government actions necessarily require Christian people to: 1) relinquish their religious identity; and 2) surrender their right to freely exercise and express their religious conscience. State enforcement of illusory "neutral" SOGI preferences often weaponize State action to eliminate the Free Exercise and Speech Clauses as important constitutional constraints on the exercise of State authority. Indeed, religious people in our nation face a far more horrific predicament than the drafters and ratifiers of the Constitution and Bill of Rights could ever have imagined. This is especially so in any regulated profession where the government recharacterizes religious conscience and expression as the regulation of professional conduct.

The Supreme Court's Recent Cases Point Toward Understanding Free Exercise of Religious Conscience as an Unalienable Fundamental Right.

In *Fulton,* the Supreme Court confirmed that when First Amendment religious liberty is at stake:

> A government policy can survive strict scrutiny only if it advances "interests of the highest order" and is narrowly tailored to achieve those interests. *Lukumi*, 508 U.S. at 546 (internal quotation marks omitted). Put another way, so long as the government can

> achieve its interests in a manner that does not burden religion, it must do so.

Fulton, 141 S. Ct. at 1881.

While the government action in *Fulton* was not generally applicable, nothing in the Court's holding suggests the fundamental nature of the constitutional protection ought to diminish where it is.

Subsequently, in *Kennedy*, the Supreme Court confirmed that "…a [n]atural reading" of the First Amendment leads to the conclusion that "the Clauses have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. *Kennedy,* 142 S. Ct. 2407, 2421, 2426 (2022). In such situations, *Kennedy* reaffirmed the application of strict scrutiny. *Id.* The First Amendment "is essential to our democratic form of government, and it furthers the search for truth. Whenever ... a State prevents individuals from saying what they think on important matters or compels them to voice ideas with which they disagree, it undermines these ends." *Janus v. Amer Fed of State, County, and municipal Employees, Council 31, et a*l., 138 S. Ct. 2448, 2464 (2018). Such actions "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or [to] manipulate the public debate through coercion rather than persuasion." *Turner Broad Sys., Inc. v FCC*, 512 U.S. 622, 641, 114 S. Ct. 2445, 129 L.Ed. 2d 497 (1994).

Here the SOGI conversion censorship law coerces professionals to betray their convictions. "Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, ... a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence." *Janus,* 138 S. Ct. at 2464 (2018) quoting *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 633 (1943).

The First Amendment "includes both the right to speak freely and the right to refrain from speaking at all. The right to eschew association for expressive purposes is likewise protected." *Janus*, 138 S. Ct. at 2463 (cleaned up). Indeed, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 642 (1943).

Bearing witness to the intolerant laws of seventeenth century England that persecuted individuals because of their religious views, the First Amendment balances the need for freedom of speech and religion with the need of a well-ordered central government. *See, e.g.*, Mark A. Knoll, *A History of Christianity in the United States and Canada* 25-65 (1992); F. Makower, *The Constitutional History and Constitution of the Church of England* 68-95 (photo. reprt. 1972) (1895). The First Amendment embodies an ideal that is uniquely American—that true liberty exists only where men and women are free to hold and express conflicting political and religious viewpoints. Under this aegis, the government must not interfere with its citizens living out and expressing their freedoms but embrace the security and liberty only a pluralistic society affords. That is why the First Amendment protects expression of a religious person's viewpoints and ideas, subjecting a State to the strictest of scrutiny if it substantially interferes. See, e.g., *Masterpiece Cakeshop, LTD., v. Colorado Civil Rights Commission,* 138 S. Ct. 1719, 1745-46 (2018) (Thomas, J., concurring) (noting, the necessity of applying "the most exacting scrutiny" in a case where Colorado's law penalized expression of cake designer) citing *Texas v. Johnson*, 491 U.S. 397, 412 (1989); accord, *Holder v. Humanitarian Law Project*, 561 U.S.1, 28 (2010); see also, *Reed v. Town of Gilbert*, Ariz., 576 U.S. 155, 164 (2015).

In *Shurtleff v. Boston*, the Supreme Court unanimously reaffirmed that government "may not exclude speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination,'" 142 S. Ct. 1583, 1593

(2022) (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001)). See also, *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828-830 (1995).

The SOGI conversion censorship law requires forced acceptance of political policy preferences, by force of law and punishment and is especially wrong because the government action here substantially interferes with constitutionally protected liberty. Here, the proposed rule, masquerading as a neutral law, effectively censures the viewpoint of many counselors, a religious viewpoint consistent with their conscience and inherent in their personal religious identity. Moreover, the SOGI censorship law seeks to compel these professionals to engage in expression conflicting with it. The disturbing diminishment of First Amendment religious conscience and expression, as a practical matter, denudes any meaningful constitutional protection for liberty as a limit on the exercise of State power.

Significance of Obergefell

In *Obergefell v. Hodges*, the U.S. Supreme Court found in the Constitution a right of personal identity for all citizens. 135 S. Ct. 2584 (2015). The Justices in the majority held that: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity." *Id.* at 2593; *see also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* 138 S. Ct. at 1727. *Obergefell* affirmed, therefore, not just freedom to define one's belief system, but freedom to exercise one's conscience associated with it.

Because *Obergefell* defined a fundamental liberty right as including "most of the rights enumerated in the Bill of Rights," and "liberties [that] extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," this new right of personal identity must broadly comprehend factual contexts well beyond the same-sex marriage facts of that case. 135 S. Ct. at 2589. Because the Court meant what it said in *Obergefell*, the right of personal identity applies not just

to those who find their identity in their sexuality and sexual preferences—but also to citizens who define and express their identity via their religious beliefs.

Christian people like Petitioner find their identity in Jesus Christ and the ageless, sacred tenets of His word in the Holy Bible. For followers of Jesus, adhering to His commands is the most personal choice central to their individual dignity and autonomy. A Christian person, whose identity inheres in his or her religious faith orientation, is entitled to at least as much constitutional protection as those who find their identity in their sexual preference orientation. The proponents of the proposed law grievously error suggesting otherwise. The proposed law cancels a person's humanity, dignity, and autonomy, demanding that one abandon one's identity when expressing principles that are so central to one's life and faith.

There can be no doubt that the Supreme Court's recently identified substantive due process right of personal identity protects against government authorities who use public policy to persecute, oppress, and discriminate against Christian people. Indeed, government must not use its power, irrespective of whether neutrally applied, in ways hostile to religion or religious viewpoints under this new "autonomy" paradigm. *Masterpiece Cakeshop,* 138 S. Ct. at 1731. Certainly, government ought to protect, not impede, the free exercise of religious conscience. *See, e.g., Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2022 (2017) (holding the government violates the Free Exercise Clause if it conditions a generally available public benefit on an entity giving up its religious character); *Burwell v. Hobby Lobby Stores, Inc.,*134 S. Ct. 2751, 2775 (2014) (holding the RFRA applies to federal regulation of activities of closely held for profit companies); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (barring an employment discrimination suit brought against a religious school). State actions must uphold constitutionally-protected freedoms, not grant special protections for some, while coercing others to engage in conduct or expression contrary to their religious identity and conscience.

This Supreme Court has already ruled that "religious and philosophical objections" to SOGI issues are constitutionally protected. *Masterpiece Cakeshop,* 138 S. Ct. at 1727, (citing *Obergefell* 135 S. Ct. at 2607 and holding that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.").

For Christian people in the current cultural environment, though, that right continues to manifest as a mirage. In practice, state and local government authorities elevate SOGI rights above all others, especially the free exercise of religious conscience. Theophobia has replaced homophobia, and the government has become the installer and enforcer of this new tyranny. Special preferences embodied in government SOGI classifications, and the SOGI conversation censorship law in the case at bar, exalt a particular belief system of what is offensive over another and, by its very nature, signals official disapproval of a Christian person's religious identity, expression, and religious beliefs. "Just as no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop* 138 S. Ct. at 1731 (internal quotations and citations omitted).

As the Supreme Court has so clearly stated:

> [T]he government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. . . . The Constitution commits government itself to religious tolerance,

> and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures.

Masterpiece Cakeshop, 138 S. Ct. at 1731 (citing *Lukumi,* 508 U.S. at 534, 547) (internal quotes omitted).

While the Court here characterized its analysis as addressing a lack of neutrality in the government's action, government imposition of SOGI preferences is unavoidably *always* hostile and can never be "neutral" toward the religious identity and beliefs of orthodox Christian people. Indeed, special SOGI preferences, like the SOGI conversation censorship law here, *necessarily* require Christian people to relinquish their religious identity and the freedom to express and exercise their religious conscience. For the First Amendment to have meaning, it must include the right to hold and manifest beliefs without fear of government punishment or coercion.

The proposed SOGI conversation censorship law substantially interferes with a person's religious identity and exercise of their religious conscience. Michigan ought not require its citizens serving as counselors to disavow their sincerely held religious beliefs to stay licensed. Here Michigan expressly requires its citizens to renounce their religious character, identity, and sincerely held religious conscience, or face professional discipline. When a government action imposes a penalty on the free exercise of religion, that government action must face the "most rigorous" scrutiny. *Fulton*, 141 S. Ct. at 1881; *Trinity Lutheran,* 137 S. Ct. at 2016; *Lukumi*, 508 U.S. at 546. "Under that stringent standard, only a state interest 'of the highest order' can justify the government's discriminatory policy." *Trinity Lutheran,* 137 S. Ct. at 2024 (citing *McDaniel v. Paty*, 435 U.S. 618 at 628 (1978) (internal quotation marks omitted); *Fulton*, 141 S. Ct. at 1881. And as *Masterpiece Cakeshop* recognized, "these disputes must be resolved with tolerance, without undue disrespect to

sincere religious beliefs," and without subjecting persons living a gay lifestyle to indignities "when they seek goods and services in an open market." 138 S. Ct. at 1732.

The expression of one's religious identity, and exercise of religious conscience is not invidious discrimination. Christian people know God created all human life in His image. Thus, for Christian people, every person holds inherent value and deserves respect. No sincere follower of Jesus would, therefore, ever willfully discriminate against another person based on who they are. Christian people are called, though, to adhere to a standard of behavior and beliefs and can never, then, concede their constitutionally protected religious identity and free exercise of religious conscience. We condemn invidious discrimination and hold no animus toward anyone. We seek respectful consideration of all viewpoints and reject the notion that honest disagreement based on religious conscience equates with bigotry.

Kennedy explains that the First Amendment Clauses "have complementary purposes" where constitutional protections for religious speech and the free exercise of religion "work in tandem," doubly protecting a person's religious expression and exercise of religious conscience. 142 S. Ct. 2407, 2421, 2426. *Obergefell* teaches that beyond the First Amendment's double protection for religious expression, a substantive due process right to personal identity also compels this legislature and our courts to always provide religious people with the highest standard of constitutional protection.[1] Government action not only must avoid interfering with a citizen's religious expression and free exercise of religious conscience, protected by the First Amendment, it must also refrain from violating their personal religious identity rights. Government authorities must cease using such laws to oppress religious people under the guise professional misconduct regulation. Only full protection for First Amendment

[1] While we question the cogency of the substantive due process jurisprudence that birthed the court-created liberty articulated in *Obergefell,* we expect government to follow the now-established constitutional Rule of Law, including when it protects the personal identity and viewpoints of religious people.

freedom of conscience ensures our other constitutional freedoms remain secured.