

**UNITED STATES DISTRICT COURT
Eastern District of New York**

Dr. David Schwartz,

Plaintiff,

v.

The City of New York and
Lorelei Salas, in her official capacity as
Commissioner of the Department of
Consumer Affairs,

Defendants.

Case No.: 1:19-CV-463-RJD-ST

PLAINTIFF’S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
INJUNCTION

Oral Argument Requested

Please take notice that as soon as the matter may be heard before the Honorable Judge Raymond J. Dearie, Plaintiff Dr. David Schwartz will and hereby does move this Court for a preliminary injunction pursuant to Federal Rules of Civil Procedure 65. Oral argument will be held on a date and at a time to be designated by this Court. Specifically, Dr. Schwartz, a practicing psychotherapist, requests that this Court preliminarily enjoin Defendants, The City of New York and Lorelei Salas in her official capacity as Commissioner of the Department of Consumer Affairs, from enforcing Law Number 2018/22 of the City of New York (“the Counseling Censorship Law”) against him pending entry of a final order in this case. This order is needed because the Counseling Censorship Law censors private conversations between a therapist and his patient in violation of the rights of both Dr. Schwartz and his patients secured under the First and Fourteenth Amendments of the U.S. Constitution.

As is detailed in the accompanying memorandum of law and supporting declarations and exhibits, the Counseling Censorship Law violates the free speech

and free exercise rights of Dr. Schwartz and his clients and is so vague that it violates Dr. Schwartz's right to due process. Because the violation of Dr. Schwartz's First Amendment rights constitutes irreparable harm and Dr. Schwartz demonstrates a likelihood of success in establishing a First Amendment violation, no separate "balance of harms" analysis is necessary to conclude that a preliminary injunction should issue. Further, the City has no cognizable interest in preventing the harms from ideas to citizens that the Counseling Censorship Law purports to avert.

For the reasons set forth above and detailed in the accompanying papers, Dr. Schwartz respectfully requests that this Court issue a preliminary injunction prohibiting Defendants from taking or threatening any enforcement action against him under the Counseling Censorship Law pending entry of a final order in this case.

Respectfully submitted this 19th day of February, 2019.

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**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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Preliminary Statement

Dr. David Schwartz, a practicing psychotherapist, moves this Court to enjoin the enforcement, both on its face and as-applied, of newly enacted Law Number 2018/22 of the City of New York (“the Counseling Censorship Law”)—a law that censors private conversations between doctor and patient in violation of the First and Fourteenth Amendment rights of both Dr. Schwartz and his patients.

The patient-psychotherapist relationship requires trust and openness between patient and counselor as they explore together the patient’s most intimate concerns and personal goals. It is the last place where government agents should intrude to declare disfavored topics and ideas off limits, yet the Counseling Censorship Law does just that. Specifically, if a patient is experiencing same-sex attractions, or a sense of gender identity that is discordant with his or her biological sex, the Counseling Censorship Law flatly prohibits the psychotherapist from offering any thoughts to assist the patient in pursuing even a personally chosen goal of reducing same-sex attraction, or achieving comfort in a gender identity congruent with the patient’s physical body and reproductive nature.

Because even the prospect of enforcement chills free and open discussion between Dr. Schwartz and his patients, and because as detailed below Dr. Schwartz has a strong probability of prevailing on the merits, enforcement of the Counseling Censorship Law against Dr. Schwartz should be preliminarily enjoined pending resolution of this case on the merits.

Governing Legal Standards

To obtain a preliminary injunction, the moving party must ordinarily show:

(1) a likelihood of success on the merits; (2) a likelihood of irreparable harm; (3) the balance of hardships tips in his favor; and (4) an injunction is in the public interest. *ACLU v. Clapper*, 804 F.3d 617, 622 (2d Cir. 2015). But where First Amendment rights are at issue (as here), the test reduces essentially to a single prong: “the likelihood of success on the merits is the dominant, if not the dispositive, factor.” *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). This is so because the deprivation of rights itself “for even minimal periods of time, unquestionably constitutes irreparable injury,” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); protection of First Amendment rights is per se “in the public interest,” *Walsh*, 733 F.3d at 488; and the balance of hardships is entirely one-sided because “the Government does not have an interest in the enforcement of an unconstitutional law.” *Id.*

Statement of Facts

A. Dr. Schwartz and his patients.

Plaintiff Dr. Schwartz is a counselor and psychotherapist with a general practice in Brooklyn, New York. (Decl. of David Schwartz in Supp. of Mot. for Prelim. Inj. (“Schwartz Decl.”) ¶ 1.) He was employed by the Veterans Administration for many years, and has served as a field instructor for numerous respected universities, and has maintained a private practice for decades. (*Id.* ¶¶ 5, 8-9.) As detailed in the accompanying Declaration, Dr. Schwartz has extensive experience counseling patients to overcome or ameliorate a wide range of emotional, addictive, relational, and psychological problems. (*Id.* ¶¶ 6, 8, 11-12, 14-18, 21-22, 24.)

Dr. Schwartz is an Orthodox Jew who is a member of the Chabad Lubavitch community in Crown Heights, Brooklyn. (*Id.* ¶¶ 1, 10.) Almost all of his patients today also follow the Orthodox Jewish faith. (*Id.* ¶ 13.) Dr. Schwartz's practice as a psychotherapist is not to pressure his patients or tell them what they ought to do. (*Id.* ¶ 20.) Instead, his approach to psychotherapy seeks to help patients understand themselves and achieve their own goals for themselves and their relationships. (*Id.* ¶¶ 16, 21.) However, both his patients' personal goals and Dr. Schwartz's counsel are informed by perspectives on human nature and a life well lived that are grounded in their Jewish faith, and his patients often choose and trust him as a counselor for that very reason. (*Id.* ¶¶ 13, 19, 23, 26.)

Among the wide range of problems and goals that patients bring into his office, some patients ask Dr. Schwartz to assist them in reducing same-sex attractions and increasing their attraction to the opposite sex. (*Id.* ¶ 27.)

An individual's goals in this regard may be driven by a desire for a natural biological family, by religious conviction, and by personal philosophy. (*Id.* ¶¶ 41-48, 58.) Some patients who seek Dr. Schwartz's assistance desire to develop or strengthen heterosexual attraction so that they can enter into a stable heterosexual marriage and form a biological family. (*Id.* ¶ 41.) Indeed, participating in the small society that consists of a mother, father, and their mutual offspring has been viewed across virtually all human cultures as one of the greatest sources of joy in life.

Patients who seek the assistance of Dr. Schwartz in this area have also included individuals who have already entered into a heterosexual marriage, given

life-long promises, and begotten or borne children. (*Id.* ¶ 42.) These individuals consider the promises made and the obligations incurred to their husband or wife and children to be more important to their personal integrity and identity than are their subjective sexual attractions. (*Id.* ¶ 43.)

Further, one of the teachings of Orthodox Judaism specifically is that it is both a blessing and a sacred obligation for men and women to join together in marriage to raise up a new generation of children dedicated to G-d. (*Id.* ¶ 48.) In addition, the spiritual guide of the Lubavitcher Orthodox Jewish community, the late Rebbe Menachem Schneerson, taught that the individual always has the capacity to change towards obedience to the teachings of the Torah. (*Id.* ¶¶ 49-52.)

Indeed, it is fundamental to the traditional Orthodox Jewish ethic that a person's lifetime involves an almost constant spiritual campaign to direct or even deny physical drives and desires in order to serve G-d properly. (*Id.* ¶ 55.) Such discipline includes denying oneself the pleasures of non-kosher foods or, on Yom Kippur, of any food at all, in order to achieve spiritual goals. (*Id.*) The denial or channeling of physical drives in Judaism in accordance with the dictates of the Torah applies to needs beyond food and to emotional drives as well, including the natural drive for sexual gratification which, in normative Jewish practice, is channeled exclusively to the relationship between husband and wife. (*Id.* ¶ 56.) Thus, Dr. Schwartz and any individual who considers his relationship with his Creator—as he understands it based on his Orthodox Jewish faith—to be more important and fundamental to his identity than are his sexual attractions, will take

a different position on human nature, the role of sexuality, and the possibility of human change than does the New York City Council. (*Id.* ¶¶ 53, 57.)

For any or all of these reasons, an individual who experiences same-sex attraction may decide that he or she does not wish to be defined or limited by that subjective attraction, and may instead desire to harmonize his or her sexual attractions with the objective purposes of sexual differentiation and reproduction revealed in nature. Dr. Schwartz is willing to, and does currently, provide counseling to such patients that seeks to help them achieve their goal of changing their sexual attractions to reduce or eliminate same-sex attractions, and develop or strengthen sexual attraction to the opposite sex.

Dr. Schwartz does not advertise. (*Id.* ¶ 13.) His patients come to him because of referrals from former patients, other members of the community, and area rabbis. (*Id.*) In counseling relating to sexual attractions, Dr. Schwartz never promises patients they will be able to achieve their goals for change. (*Id.* ¶ 31.) In working with such patients, Dr. Schwartz engages in no actions other than listening and talking, asking questions or offering ways of thinking about themselves and others that may help them make progress towards the change they desire. (*Id.* ¶¶ 18, 32-34.) Dr. Schwartz does not use any forms of physical or pharmaceutical treatment. (*Id.* ¶¶ 18, 32-33.) He just listens, and talks. (*Id.* ¶¶ 18, 32, 34.)

Not all of Dr. Schwartz's patients who have asked him to help them achieve increased opposite-sex attraction have achieved that goal. (*Id.* ¶ 35.) Some have chosen to stop pursuing it. (*Id.*) But across the years of his practice, Dr. Schwartz

has had a number of patients who have achieved their goal sufficiently to enter into heterosexual marriages and form of family they desire. (*Id.* ¶¶ 36-37.)

Dr. Schwartz currently has clients who seek his counsel to change their sexual attractions by reducing same-sex attraction and developing or enhancing opposite-sex attraction. (*Id.* ¶¶ 40, 59.) Dr. Schwartz has in the past provided such counsel to patients who request it, is doing so for patients currently, and wishes to continue to help patients this way in the future. (*Id.* ¶¶ 36, 40, 59.) The Counseling Censorship Law threatens Dr. Schwartz with fines quickly escalating to \$10,000 per patient if he provides this counseling. (*Id.* ¶ 61.)

B. The new Counseling Censorship Law and implementing rules.

On December 31, 2017, the Council of the City of New York enacted Law Number 2018/22, now codified at New York City Administrative Code Title 20, Chapter 5 § 20-824-827. The Counseling Censorship Law declares: “It is unlawful for any person to offer or provide conversion therapy services.” *Id.* § 20-825.

The Counseling Censorship Law defines “conversion therapy” services as “any services, offered or provided to consumers for a fee, that seek to change a person’s sexual orientation or seek to change a person’s gender identity to conform to the sex of such individual that was recorded at birth” (i.e., the individual’s biological sex). *Id.* § 20-824. The Counseling Censorship Law carves out from its prohibitions “counseling that provides . . . understanding of a person’s sexual orientation or facilitates a person’s . . . identity exploration and development . . . as long as such services do not seek to change an individual’s sexual orientation or gender identity.” *Id.* § 20-825. The law does not explain how an individual’s sexual

orientation or identity can “develop” without “changing.” *Id.*

The Counseling Censorship Law expressly prevents patients from hearing ideas and suggestions from skilled professionals that the patients want to hear, and from obtaining help from such professionals to pursue the attractions, identity, relationships, and indeed the life that they desire.

An underlying motivation of the City Council in passing the Censorship Law is revealed by a report from the Committee on Civil Rights submitted to the City Council shortly before the Counseling Censorship Law was passed (the “November 29 Report”). (Decl. of Jeana Hallock in Supp. of Mot. for Prelim. Inj. (“Hallock Decl.”) ¶ 2, Ex. 1). In that report, the Committee asserted that “groups” engaging in the practices to be prohibited are “often religious in nature.” *Id.* Testimony taken by the Committee in support of the Counseling Censorship Law likewise repeatedly associated those practices with religious groups and individuals. *See id.* Nowhere in the November 29 Report or the testimony of the witnesses recorded in the legislative history of the law is a single example cited of any group or individual in New York City performing what it calls “conversion therapy,” other than religious groups. *Id.*

Section 20-827 of the Counseling Censorship Law provides that the New York City Department of Consumer Affairs (the “DCA”) “may promulgate such rules and regulations as it deems necessary to implement and enforce the provisions of this subchapter.” Effective July 22, 2018, the DCA, under the direction of Commissioner Lorelei Salas, promulgated a new rule, § 6-69 of Subchapter B of Chapter 6 of Title

6 of the Rules of the City of New York (“the Penalty Rule”), fixing mandatory penalties for first, second, and subsequent violations of the Counseling Censorship Law in the amounts of \$750, \$4,500, and \$10,000, respectively, per patient.

More recently, the DCA has actively worked to recruit anonymous informants, posting an online notice encouraging complaints against “any person offering or providing conversion therapy services,” and promising that the “DCA will investigate” even anonymous complaints, and will fine violators. *See* NYC Consumer Affairs, *Conversion Therapy is Illegal in New York City*, <https://www1.nyc.gov/site/dca/consumers/conversion-therapy-is-illegal.page> (last visited Feb. 4, 2019) (Hallock Decl. ¶ 3, Ex. 2).

I. The Counseling Censorship Law violates the free speech and due process rights of Dr. Schwartz.

A. The Censorship Law violates Dr. Schwartz’s free speech rights. (Count I)

It would be difficult to construct—even as a classroom exercise—a law that violates basic free speech principles from more angles than does the Counseling Censorship Law. The catalog is fatal.

First, the law censors—under penalty of heavy fines—a private conversation between consenting adults. Two adults may explore all 50 shades of sexual gray with each other behind closed doors in New York City, but certain shades of *conversation*, the City says, they may not have. This sort of censorship of conversations between adults is unprecedented.

Second, the Censorship Law intrudes the hand of the state into the most personal and important of private concerns: issues of personal identity, life goals,

sexuality, and relationships. Only a male-female union can be procreative, producing children who are the genetic offspring of both partners, and if human experience in all times and places may be permitted to be instructive, it is a reasonable and natural desire to attain to such a traditional family relationship. So the individual whose life goals include entering into a procreative marriage, but who experiences same-sex attraction that stands in the way of that goal, is in a difficult position, and may indeed desire expert counsel. Yet the Censorship Law bars the door to that counsel, and thus impedes the individual's pursuit of what the Supreme Court has repeatedly protected as one of the "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)—"the right 'to marry, establish a home and bring up children,'" *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring), (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)); *cf. Obergefell v. Hodges*, 135 S. Ct. 2484, 2598 (2015) ("It cannot be denied that" the Court's "right to marry" cases "presumed a relationship involving opposite-sex partners").

Third, while the Counseling Censorship Law does not limit its reach to mental health professionals, it includes them, and thus intrudes into the private doctor/patient relationship—a relationship to which openness is so essential that New York privileges it from intrusion. *See* N.Y. C.P.L.R. § 4507 (psychologist/patient privilege). "Doctors help patients make deeply personal decisions, and their candor is crucial," the Supreme Court wrote in *NIFLA v. Becerra*, 138 S. Ct. 2361, 2374 (2018), observing that it is characteristic, not of free

societies such as ours, but of tyrannies such as China during the Cultural Revolution, to “manipulate the content of doctor-patient discourse.” *NIFLA*, 138 S. Ct. at 2374.

Striking a law that attempted to compel state-dictated speech by pregnancy resource centers, the Supreme Court in *NIFLA* further emphasized that its precedents forbid government content-based speech-restrictions absent “‘persuasive evidence ... of a long (if heretofore unrecognized) tradition’ to that effect.” 138 S. Ct. at 2372. There is no “long tradition” in our country of government muzzling of doctors or psychotherapists, restricting their conversations with patients to government-approved viewpoints. To the contrary, such laws have consistently been found to violate the free speech rights of both doctors and patients. *See, e.g., Wollschlaeger v. Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc) (striking law prohibiting doctors from asking questions about guns in the home); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (striking law prohibiting doctors from recommending medical use of marijuana); *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) (government cannot prohibit off-label recommendation of drugs by physician where the recommended use is not illegal). The Counseling Censorship law is equally unconstitutional.

1. The Censorship Law is subject to strict scrutiny.

Strict scrutiny is “the most demanding test known to constitutional law,” *City of Boerne v. Flores*, 521 U.S. 507, 509 (1997). A law that is subject to strict scrutiny is “presumptively unconstitutional,” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The Censorship Law is subject to strict scrutiny for multiple reasons.

A law that regulates speech is subject to strict scrutiny unless it is content neutral and viewpoint neutral. A law is content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Reed*, 135 S. Ct. at 2226-27. The Counseling Censorship Law is not content neutral: whether it applies to a particular counseling discussion depends on whether the doctor and patient are speaking about sexual orientation or gender identity.

More egregiously, the Counseling Censorship Law is not viewpoint neutral. The applicability of the law depends not only on the topic discussed, but on the “idea . . . expressed.” *Id.* The psychotherapist may talk freely about sexual orientation or gender identity with his patient—so long as he does not encourage or assist change in sexual attractions, or toward an identity consonant with the patient’s sex. The Supreme Court has vigorously condemned such viewpoint-based censorship:

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). . . . Discrimination against speech because of its message is presumed to be unconstitutional. *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641–643 (1994). . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. *See R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828-29 (1995).

The Counseling Censorship Law stands at the very center of the bulls-eye targeted by the Court in *Rosenberger* and *Reed*. In a city that echoes with messages encouraging sexual freedom, choice, and experimentation, the City Council says “No!” to just one thing: counseling requested by a patient to help align his sexual attractions or gender identity with his reproductive biology.

What the Counseling Censorship Law seeks to do is to enforce—even in the privacy of the psychotherapeutic counseling room—the City Council’s preferred orthodoxies on what are endlessly debated questions of philosophy, anthropology and faith. The City Council may believe that sexual desire and identity are immutable. The City Council may value the actualizing of sexual desires over forming procreative marriages, over honoring promises already made and duties owed to spouse and children, and over fidelity to the teachings of religious faiths. But what City Council may not do is compel private counselors to conform their speech to the City Council’s beliefs—or be silent. These are not topics on which the City Council may “suppress unpopular ideas.” *NIFLA*, 138 S. Ct. at 2374.

2. The Censorship Law cannot survive strict scrutiny.

To survive strict scrutiny, the Defendants must overcome the presumption of unconstitutionality by demonstrating that the Counseling Censorship Law “furthers a compelling interest and is narrowly tailored.” *Reed*, 135 S. Ct. at 2231. Defendants bear the burden of establishing this both on the merits and for purposes of defeating a request for preliminary injunction. *Ashcroft v. ACLU*, 542 U.S. 656, 660-61, 666 (2004). The Eighth Circuit has usefully summarized the implications of “narrowly tailored”: “A narrowly tailored regulation is one that actually advances the state’s interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).” *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

In an as-applied challenge the government must demonstrate that the compelling interest would be injured if an exception were granted to the challenger. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-32 (2006) (applying the compelling interest test in the context of RFRA). Otherwise, application of the law in that setting cannot further the interest. The Counseling Censorship Law fails at every point.

a. The Counseling Censorship Law cannot survive strict scrutiny because, as enforced against speech, it does not further any cognizable governmental interest.

The City fails scrutiny at the threshold. The Counseling Censorship Law applies to conversations between willing patients and a psychotherapist and thus serves no cognizable government interest. It is a lodestar of First Amendment jurisprudence that censorship can never be justified on the ground that it will prevent harm presented by *ideas* conveyed in speech. On the contrary, the risk that ideas have consequences provides no footing for censorship under our laws unless and until that risk rises to the high and immediate urgency defined by the “clear and present danger” test. *See Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (*per curiam*) (general promotion of KKK and vague allusions to armed resistance not sufficient to justify punishment for speech).

It is equally clear that the City does not have a cognizable interest in preventing the dissemination of ideas concerning personal, philosophical, scientific, and religious topics on the grounds that such ideas are (or it believes them to be) false or offensive. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citing *FCC v.*

League of Women Voters of Cal., 468 U.S. 364, 377 (1984)) (“the First Amendment’s purpose” is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (the “bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) (“the point of all speech protection . . . is to shield just those choices of content that in someone’s eyes are misguided, or even hurtful”).

However much the City Council may dislike the ethics and goals of patients seeking counsel for unwanted sexual attractions and identity, “the [patient’s] freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the ‘conventional wisdom,’ may not be abridged.” *Eisenstadt v. Baird*, 405 U.S. 438, 457 (1972) (Douglas, J., concurring). In short, no legitimate government interest is furthered by censorship in such a setting.

b. The Counseling Censorship Law cannot survive strict scrutiny because it is *overbroad* rather than “narrowly tailored.”

The City Council Committee on Civil Rights did not report that any of the actual *conduct* it listed for shock value—“institutionalization, castration, and electroconvulsive shock therapy”—has ever been performed as treatment for same-sex attractions within the boundaries of New York City, much less that anyone is doing such things today. *See* November 29 Report at 4 (Hallock Decl. ¶ 2, Ex. 1). Perhaps the City has the power to regulate such conduct and procedures. But the scope of the City’s power to regulate such conduct by health professionals is not

before this Court. Instead, the Counseling Censorship Law prohibits even simple adult conversation if that conversation is oriented toward a *goal* of which the City Council disapproves. The Censorship Law is sweepingly overbroad with respect to any legitimate governmental interest.

c. The Counseling Censorship Law cannot survive strict scrutiny because it is radically *underinclusive*.

If a statute like the Counseling Censorship Law is underinclusive with respect to the alleged interest to be served, this negates the legitimacy of the law in at least three distinct ways. First, it contradicts the claim that the law is “narrowly tailored” to the harm it purports to address. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 543-46 (1993). Second, the poor fit between the law and the alleged harm “raises serious doubts about whether [the government] is, in fact, serving, with this statute, the significant interests which [it] invokes” to justify the law. *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989). Third, underinclusiveness may justify an inference that the law was in fact targeted against religiously motivated practices, rather than being genuinely “of general applicability.” *Lukumi*, 508 U.S. at 542-43, 545. Such is the case here.

The Counseling Censorship Law is severely underinclusive as a means toward the goal it purports to serve, triggering each of these concerns. Based on the recitations of the Committee Report, the harm that the law purportedly seeks to avoid is the psychic distress to individuals caused by misguided counsel about sexuality. (Compl. ¶ 47.) Even if this were a legitimate basis for governmental censorship (it is not), New York City is filled with sexual and relational advice

pointing in every conceivable direction, much of which may cause distress to those who follow it. Yet the City Council has not launched a general inquiry, nor banned “counseling that leads to feelings of psychological distress.” Instead, it has exclusively named, targeted, and prohibited from counseling conversations a narrow category defined by current politics rather than by any demonstration of unique harm.

3. The Counseling Censorship Law cannot survive strict scrutiny because it is not the least restrictive alternative.

The Defendants also cannot demonstrate that the Counseling Censorship Law is the “least restrictive means among available, effective alternatives.” *Ashcroft*, 542 U.S. at 660, 665-66. Means less restrictive of free speech are evident; if New York City is concerned about harm caused by use of electroshock therapy, holding individuals against their will for therapy, or other practices legitimately characterized as “conduct,” then New York City can prohibit electroshock therapy, holding individuals against their will, etc.¹

B. The Law is so vague that it violates Dr. Schwartz’s right to due process protected by the 14th Amendment. (Count II)

The Counseling Censorship Law violates Dr. Schwartz’s right to due process guaranteed by the Fourteenth Amendment because it is “so vague and standardless

¹ See Report and Recommendation, *Vazzo et al. v. City of Tampa*, No. 8:17-cv-2896-T-02AAS (M.D. Fla. Jan. 30, 2019), ECF No. 149 (recommending grant of preliminary injunction against similar city counseling censorship ordinance after noting plaintiff’s probability of success in demonstrating that the ordinance was not the “least restrictive” alternative, where city could have enacted a narrower ban prohibiting only involuntary counseling, or “aversive” or electroshock therapy techniques, or requiring informed consent).

that it leaves the public uncertain as to the conduct it prohibits.” *City of Chicago v. Morales*, 527 U.S. 41, 55-56 (1999). Vagueness violates due process for two reasons. First, citizens “are entitled to be informed as to what the State commands or forbids.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). Second, vagueness “may authorize and even encourage arbitrary and discriminatory enforcement.” *City of Chicago*, 527 U.S. at 56. Courts are particularly concerned about vagueness when First Amendment rights are at stake, because “the very existence of [such] statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression.” *Young v. Am. Mini Theaters*, 427 U.S. 50, 60 (1976).

The Counseling Censorship Law is hopelessly vague, and invites both these ills. The law permits counseling that facilitates “identity exploration and development” regarding sexual orientation and identity, but prohibits counseling that seeks “change.” Since “development” of any sort involves “change,” the statute is irredeemably contradictory and thus vague on its face. Likewise, the law provides no definition of “gender identity,” “sexual orientation,” nor of “identity exploration and development”—decidedly vague terms.² If a male patient says, “I’ve had attractions to both women and men, but I want you to help me get distance from those same-sex attractions so that I can marry and have a stable relationship with my wife,” is that a request for “exploration,” “development,” or “change”? There is no

² See the definitions cited in the Complaint ¶¶ 121-124, including: “Gender identity can be conceptualized as a continuum, a Mobius, or patchwork” (Compl. ¶ 122).

way to know. This is not reasonable notice.

The vagueness is compounded because the Counseling Censorship Law specifies nothing at all about the prohibited speech except its *intent*. “That is to make freedom of speech turn not on what is said, but on the intent with which it is said” with the result that citizens “become entangled in the law not for what they did but for what they thought” *Dennis v. United States*, 341 U.S. 494, 583 (1951) (Douglas, J., dissenting).

Worse, the question of violation may turn on the unspoken intent of the *patient*, while it is the counselor who is at risk. The subject in the statutory text is indeterminate, prohibiting “services . . . that seek to change.” Services, of course, do not “seek”; *people* seek. If a patient says, “I’m not attracted to women, and I want you to help me understand why,” may a psychotherapist provide that help? Is the counselor obliged to interrogate his patient as to whether the patient seeks to “change” or only “develop” or merely “understand” his attractions? What if the patient’s personal goal changes across time from one of self-understanding to one of “change”? Must the counselor continually interrogate his patient’s goals on an ongoing basis, and shut down the conversation if those goals change to “change”? The counselor is put in an impossible situation; the patient, in a cruel one.

II. The Counseling Censorship Law violates free speech rights and protected liberty interests of the clients of Dr. Schwartz. (Count III)

A. Dr. Schwartz has standing to assert the rights of his patients threatened by the Counseling Censorship Law.

Dr. Schwartz has standing to assert the rights of his patients violated by the Counseling Censorship Law. Such standing should be recognized where the party

“has a ‘close’ relationship with the person who possesses the right,” and where there is also some “hindrance to the possessor’s ability to protect his own interests.”

Kowalski v. Tesmer, 543 U.S. 125, 130 (2004). These considerations exist strongly here.

First, Dr. Schwartz has an extremely close relationship with patients who seek his assistance with goals relating to relationships and sexual attractions. Therapeutic conversations relating to such topics are intensely sensitive, intimate, and important for patients, and “candor is crucial.” *NIFLA*, 138 S. Ct. at 2374; *see also Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 958 (1984) (fund-raising company may assert free speech rights of client charities, where the protected interest was “at the heart of the . . . relationship between Munson and its clients”).

Second, there are multiple obstacles to psychotherapy patients “protect[ing] [their] own interests.” As was true in *Eisenstadt*, the Counseling Censorship Law does not prohibit *receiving* counsel, so Dr. Schwartz’s patients “are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights.” 405 U.S. at 446.

Further, it is extremely difficult or even impossible for these patients to step forward to vindicate their own rights to engage in therapeutic conversations with Dr. Schwartz. (Schwartz Decl. ¶ 63.) These patients already experience emotional turmoil, and it is hardly speculative to predict that putting their personal difficulties into the spotlight of litigation would cause additional anguish and harm. (*Id.* ¶¶ 62, 64.) Further, their desire is typically to build or strengthen a family

based in a husband-wife union, and public disclosure of present or past same-sex attraction could damage their prospects of achieving such a marriage. (*Id.* ¶ 65.)

Finally, where First Amendment rights are threatened, the rules for standing are relaxed. *Joseph H. Munson Co.*, 467 U.S. at 956. In particular, standing will readily be found “when enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties’ rights.” *Warth v. Seldin*, 422 U.S. 490, 510 (1975); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (advertisers may assert readers’ right to receive information). This concern is present here.

B. The Counseling Censorship Law violates the right of Dr. Schwartz’s patients to receive desired information and counsel.

“The right of freedom of speech and press includes not only the right to utter or to print, but . . . the right to receive, the right to read.” *Griswold*, 381 U.S. at 482; *see also Va. State Bd. of Pharmacy*, 425 U.S. at 756 (“the protection afforded is to the communication, to its source and to its recipients both”). Thus, “enforcement of the challenged restriction against [Dr. Schwartz] would result indirectly in the violation of third parties’ rights.” *Warth*, 422 U.S. at 510.

III. The Counseling Censorship Law violates the free exercise rights of Dr. Schwartz and of his clients. (Counts IV & V)

As explained above, the Counseling Censorship Law is unconstitutional to anyone. And it is unconstitutional as applied to Dr. Schwartz on the additional grounds that it forecloses the religious exercise of Dr. Schwartz and his patients. The right to “free exercise” includes not merely the right to *believe*, but to *exercise*

one's faith. This includes the right to "the *performance* of (or abstention from) physical acts," as well as the right to "*profess* whatever religious doctrines one desires," *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990) (emphasis added), along with "communicating" these teachings to others so that they may live according to that faith. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 199 (2012) (Alito, J., concurring); *see also Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439 (2d Cir. 1981) ("courts will . . . invoke free exercise analysis where a belief is . . . acted upon in good faith."). We trust that the City will not doubt the good faith and sincerity of Dr. Schwartz and his clients in accepting the Orthodox Jewish teaching that a procreative marriage between man and woman is both a blessing and a moral obligation to pursue. (Schwartz Decl. ¶¶ 46-54); *see also Obergefell*, 135 S. Ct. at 2594 (noting that the belief that marriage can only be between a man and a woman is held "in good faith by reasonable and sincere people").

A. The Counseling Censorship Law violates free exercise rights because it interferes with the right of patients to pursue their chosen goals, and the right of Dr. Schwartz to advise them consistently with historic teachings of their shared faith.

In some settings, the boundary line between government power and Free Exercise is currently traced by the test articulated in *Smith*, 494 U.S. 872 (1990). However, while satisfying the *Smith* test is a necessary threshold for the government, it is not always sufficient. The Supreme Court has expressly rejected the idea "that any application of a valid and neutral law of general applicability is necessarily constitutional under the Free Exercise Clause," *Trinity Lutheran*

Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2021 n.2 (2017). It has also stated (in the context of faith-based education) that the contention that satisfaction of *Smith* neutrality grants the state a license to interfere in historically respected areas of religious autonomy “has no merit.” *Hosanna-Tabor*, 565 U.S. at 190 (unanimously barring application of employment discrimination laws against teacher in religious school on free exercise grounds, without application of *Smith* test). Notably, the *Smith* test has never been applied to permit a government to suppress pure speech because it dislikes its purpose or message.

When considering fundamental clashes between ostensibly neutral laws and faith-based teachings, courts have considered what could be called the historical depth of the claimed religious conviction. *See, e.g., Hosanna-Tabor*, 565 at 182-87 (tracing history of ministerial independence); *see also Int’l Soc’y for Krishna Consciousness*, 650 F.2d at 442 (protecting practice of soliciting contributions that traces “since ancient times”). It will hardly be disputed that the question of what is right and wrong with respect to relationships between men and women, marriage, and family life—what will lead towards a whole life and society and what will not—has been a central concern of religions including at least Judaism, Islam, and Christianity since ancient times. Religious teachings about the highest answer to this question have ranged from celibacy to the command given in Eden that a “man shall leave his father and mother, and be joined to his wife” (Genesis 2:24), so that they can “be fruitful and multiply.” (Genesis 1:28). Teaching and counsel directed to right ordering in the realm of sex, marriage, and family is central to the content and

propagation of religious faith.

Equally, the Orthodox Jewish tradition—in common with other religions—teaches that individuals *should* feel guilty when they do what is wrong, and that they *can* and should change to bring themselves into alignment with what is right. Likewise, it teaches that the moral instructions of the Torah concerning sexuality are more important than an individual’s subjective feelings. For example, the Seventh Commandment, “Do not commit adultery,” is to be obeyed regardless of one’s sexual attractions. As with teachings about marriage, these teachings about right, wrong, guilt, obedience, and the ability of individuals to change are undoubtedly central, sincere, and ancient. The First Amendment flatly denies the City the power to tell an Orthodox Jew (or Christian, Muslim, Hindu, or any other believer) that he cannot seek the help of a trusted counselor to pursue a path of conduct in his life consistent with his faith, or to tell Dr. Schwartz that he cannot provide counsel that is informed by and consistent with his own faith and that of his patient.

The Second Circuit has left undecided the question of whether any separate “substantial burden” requirement remains for claims of free exercise violations after *Smith*, 494 U.S.872, 887 (1990). See *McEachin v. McGuinnis*, 357 F.3d 197, 202 (2d Cir. 2004). It is equally unnecessary to decide that here, as we trust that the City will not dispute that denying Dr. Schwartz and his patients the right to talk together about matters of sexual orientation and gender identity consistently with the teachings of their shared faith, and in furtherance of the patient’s faith-based

goal of entering into a heterosexual marriage and forming a family, more than clears that “not . . . particularly onerous” hurdle, if it exists. *Id.*

B. The Counseling Censorship Law violates free exercise rights because it cannot survive strict scrutiny.

As explained above, it is not necessary to engage in a *Smith* analysis to conclude that the Counseling Censorship Law is unconstitutional both facially and as applied to Dr. Schwartz. But applying the analysis set out in *Smith* leads to the same conclusion. “A law burdening religious conduct that is *not* both neutral and generally applicable . . . is subject to strict scrutiny.” *Roman Catholic Diocese of Rockville Centre, N.Y. v. Incorporated Village of Old Westbury*, 128 F. Supp. 3d 566, 581 (E.D.N.Y. 2015) (citing *Lukumi*, 508 U.S. at 531–32).

For purposes of a free exercise claim, the Counseling Censorship Law triggers strict scrutiny because it was motivated by animus against a religious group, belief, or practice. *Lukumi*, 508 U.S. at 540-42; *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1722 (2018). In this evaluation, courts look at “specific series of events leading to the . . . policy in question,” “the legislative or administrative history,” and “contemporaneous statements . . . of the decisionmaking body.” *Id.* (citing *Lukumi*, 508 U.S. at 540). Here, while New York City maintains only a thin legislative history, the limited record that exists presents evidence of targeted hostility to religion and the religious. (*See supra* at 7, 11-12.)

Next, “[a] law is . . . not generally applicable if it is substantially underinclusive such that it regulates religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests

purportedly justifying it.” *Central Rabbinical Congress of the U.S. & Can. v. N.Y.C. Dep’t of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014), (citing *Lukumi*, 508 U.S. at 535-38). As reviewed above (at 15-16), the Counseling Censorship Law is radically underinclusive with respect to the type of harm that it purports to address.

The City cannot meet its burden to demonstrate that the Counseling Censorship Law satisfies the requirements of strict scrutiny. As set forth above, the law does not serve any compelling governmental interest, and is both overbroad and underinclusive. (*See supra* at 13-16.)

IV. The balance of harms favors granting a preliminary injunction.

Once a likelihood of success in establishing a First Amendment violation has been established, no separate “balance of harms” analysis is necessary to conclude that a preliminary injunction should issue. (*See supra* at 1-2.) The violation of Dr. Schwartz’s First Amendment rights constitutes irreparable harm, and the City has no cognizable interest in preventing the “harms from ideas” to citizens that the Counseling Censorship Law purports to avert. (*See supra* at 13-14).

Conclusion

For the reasons set forth above, Dr. Schwartz respectfully requests that this Court issue a preliminary injunction prohibiting the City from taking or threatening any enforcement action both facially and as-applied against him under the Counseling Censorship Law pending entry of a final order in this case.

Respectfully submitted this 19th day of February, 2019.

s/Roger G. Brooks

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**UNITED STATES DISTRICT COURT
Eastern District of New York**

Dr. David Schwartz,

Plaintiff,

v.

The City of New York and
Lorelei Salas, in her official capacity as
Commissioner of the Department of
Consumer Affairs,

Defendants.

Case No.: 1:19-CV-463

DECLARATION OF DAVID
SCHWARTZ IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

I, Dr. David Schwartz, declare as follows:

1. I am a licensed clinical social worker in the State of New York. I reside and practice in Brooklyn, New York.
2. I have previously been a Massachusetts Licensed Independent Clinical Social Worker.
3. I obtained a Masters in Social Work from the University of Michigan in 1968, and a doctorate in psychology from California Southern University in 2005.
4. I am a member of the New York City Department of Health and Mental Hygiene Medical Reserve Corps, the National Association of Social Workers, the North American Network of Orthodox Mental Health Professionals, and the Association of Orthodox Jewish Scientists - Mental Health Division. In the past, I was a member of the American Group Psychotherapy Association, and the American Association of Marriage and Family Therapists.
5. Among other positions, I was employed at the Veterans Administration Medical Center in Northampton, Massachusetts from 1970 through 1996, where I

served on the hospital's Ethics Advisory Committee from 1987 through 1996, and chaired that committee from 1994 through 1996. From 1996 until 1999, I was employed by Medical West Associates of Springfield, Mass. (formerly Blue Cross, Blue Shield). In that position I was co-director for substance abuse, doing independent, group, couples, family, and adolescent therapy, along with staff training.

6. I was employed at the Ohel Children's Home & Family Services in Brooklyn from 1999 through 2011, serving there as a psychotherapist specializing in addictions, eating disorders, and sexual abuse from 1999-2011.

7. I have served as a consultant on eating disorders with the Magen Avroham Eating Disorder Program in Borough Park, Brooklyn from 2005 to the present.

8. I have also maintained a private practice of counseling and psychotherapy for more than 40 years, from 1976 to the present, working with adolescents, adults, couples, and families dealing with interpersonal or marital conflicts, addictions and substance abuse, sexual abuse and addictions, post-traumatic stress syndrome, grief and loss counseling, and anorexia and bulimia, among many other issues.

9. I have served as a field instructor for many universities and colleges including: Long Island University, NYU School of Social Work, Yeshiva University Wurzweiler School of Social Work, Touro College, Adelphia University, Fairleigh Dickinson University, Hunter College, University of Connecticut, Boston College,

SUNY of Albany, University of Massachusetts, University of Michigan, and Michigan State University.

10. I am an Orthodox Jew and a member of the Chabad Lubavitch Jewish community, believing and seeking to follow the teachings of that faith, and valuing and largely living within that community.

11. I practiced as a licensed clinical social worker in Massachusetts for 29 years.

12. I have lived and maintained an independent general counseling and psychotherapy practice within the Orthodox Jewish community throughout New York City since 1999.

13. Virtually all of my patients are Orthodox Jews, and many, although not all, and are part of the Chabad Lubavitch community of which I am a part. I do not advertise; my patients come to me as a result of referrals from former patients, other members of the community, other psychotherapists, and area rabbis.

14. As a general practitioner, I encounter in my patients a wide scope of the emotional, family, relational, and mental difficulties to which members of any human community are vulnerable.

15. In this regard, my practice is similar to that of any general practice psychotherapist.

16. In my general psychotherapeutic practice, I encounter patients with concerns relating to sexuality, among a wide range of other issues. My approach to

psychotherapy seeks to help patients achieve their own goals with respect to themselves and their relationships that they choose for themselves.

17. I work only with willing patients—patients who voluntarily walk into my office and talk with me because they want and value my counsel.

18. In my work with patients on any problem or goal, I do nothing to or with them other than listen to them and talk with them.

19. Because I am a member of the Orthodox community, I am able to engage with my patients in a manner that is particularly understanding and respectful of, and informed by, their faith convictions and their personal goals that may be guided by those faith convictions, or by those patients' desire to live lives of integrity and happiness within their families and faith community.

20. Although I am religiously observant and actively involved in the religious and cultural life of the Lubavitcher community, I do not view it as the psychotherapist's role to rebuke patients or to tell them the path they ought to pursue.

21. Rather, I work with patients to help them overcome or change mental, emotional, or relationship problems that they wish to change, and to achieve the stable and happy relationships with others and indeed with themselves that they desire.

22. Psychotherapeutic counseling relationships and goals often develop over time, and I not infrequently find myself working with a patient on issues that

were not identified or presented by the patient at the beginning of the counseling relationship.

23. Both my patients' personal goals and my counsel are often informed by views about human nature and the nature of a life well lived that are grounded in our Jewish faith and Torah teachings.

24. My patients come to me for help with a very wide range of issues. However, my practice regularly includes a few individuals who experience undesired same-sex attractions.

25. I have a close therapeutic relationship with the patients who seek my assistance to pursue personal goals relating to sexual attractions and behaviors.

26. My patients' personal goals relating to sexuality, marriage, and family, as well as their views about morality, human nature, and the possibility of change, are often deeply informed by their religious beliefs. These individuals believe that it is more important to live consistently with their religious values than to conform their lives to their subjective feelings. Because I share that faith and those convictions, I am able to provide psychotherapy that understands, respects, and assists these patients towards their goals.

27. In some cases, patients come to me seeking my assistance in pursuing their personal goal of reducing their same-sex attractions and developing their sexual attraction to the opposite sex.

28. In other cases, patients come to me initially seeking therapy concerning other perceived difficulties, but in the course of therapy seek my assistance to develop or strengthen opposite-sex attraction.

29. In still other cases, patients who experience same-sex attraction have come to me for help on different issues, and have not expressed any desire for my help on issues relating to sexuality. I am willing to and do work with such individuals on such other issues.

30. In my psychotherapeutic practice, I do not attempt to increase opposite-sex attraction or change same-sex attraction in patients who do not desire my assistance in that direction.

31. In working with patients who desire to decrease same-sex attraction or increase their attraction to the opposite sex, I never promise that these goals will be achieved.

32. In counseling patients who desire to decrease same-sex attraction or increase their attraction to the opposite sex, I engage in no actions other than talking with the patient, and offering ways of thinking about themselves and others that may help them make progress towards the change they desire.

33. I do not use electro-shock therapy. I do not recommend that patients view heterosexual pornography. I do not recommend that patients subject themselves to painful or other adverse stimulations in response to undesired sexual thoughts.

34. I simply listen to what my patients share with me, and talk to them.

35. Not all of my patients who have asked me to help them achieve increased opposite-sex attraction have achieved that goal. Some have chosen to stop pursuing it.

36. However, across the years of my practice and recently, I have had a number of patients who have both pursued and achieved their personal goal in this regard with the aid of my psychotherapeutic services, over time experiencing changes including a reduced sexual attraction to their same sex, and an increased and consistent attraction to the opposite sex.

37. These changes have enabled my patients to enter into the heterosexual marriages that they desired, to build natural biological families consistent with their personal desires and the instruction of their faith, and to live integrated lives within their chosen and intentionally traditional community.

38. Conversations with colleagues as well as published reports from other practitioners over many years, have confirmed to me that it has been their experience, also, that some patients who are strongly motivated to reduce same-sex attraction and achieve stable opposite-sex attractions and relationships, and who obtain professional counseling to assist them, do succeed in achieving those goals.

39. While I share the widely held professional view that changing sexual attraction is often difficult, it is my professional opinion that this is a topic on which scientific knowledge is far from complete, on which professionals can and do have a host of good-faith disagreements, and in which it is therefore all the more

essential—for the good of patients—that an uninhibited discussion of ideas, therapies, and professional experiences continue.

40. While patient confidentiality precludes disclosing details, I am currently providing psychotherapeutic counseling to several patients who (among other difficulties) are experiencing unwanted same-sex attraction, and who have asked me to work with them towards their personally chosen goal of seeking to change their sexual attractions by reducing or eliminating that same-sex attraction and developing or increasing a sense of sexual attraction to the opposite sex. I am willing to, and currently do, provide counseling to patients that seeks to help them achieve those goals.

41. Some patients who seek my assistance to change sexual attractions and desires are motivated at least in part by a personal goal of forming a natural biological family in which children are raised in a household consisting of a child's two biological parents and genetic siblings—a goal that requires the initiation and maintenance of a stable heterosexual relationship.

42. Patients who seek my assistance have also included individuals who experience same-sex attraction but who have already entered into a heterosexual marriage, given life-long promises, and begotten or borne children.

43. These individuals consider the promises made and the obligations incurred to their husband or wife and children to be more important to their personal integrity, identity, and life philosophy than are their subjective sexual attractions.

44. These patients are determined to live faithfully with their spouses in their marriages, and they desire to decrease same-sex attractions and increase heterosexual attraction to make that faithful life more achievable and joyful.

45. These and similar personal goals and choices may also be motivated by, or be strengthened by, religious conviction.

46. As noted above, both I and the large majority of my patients believe in both the truth and the wisdom for living of the teachings of the Torah as interpreted by the religious traditions of both Lubavitcher and wider Orthodox Judaism.

47. The majority of patients who seek my assistance to reduce unwanted same-sex attraction and develop or increase opposite-sex attraction are motivated at least in part by a desire to live in accordance with the teachings of their faith.

48. These include the teaching that it is both a blessing and a sacred obligation for men and women to join together in marriage to “be fruitful and multiply” (Gen. 1:28; Gen. 9:1), so as to raise up a new generation dedicated to G-d. Participating in this blessing and fulfilling this obligation, obviously, requires heterosexual relationships.

49. The spiritual guide of the Lubavitcher Orthodox Jewish community, the late Grand Rabbi (or “Rebbe”) Menachem Mendel Schneerson OBM, has written with respect to same-sex attraction, that “a Jew is expected to do what is necessary in the natural order.”

50. Regarding that same subject, the Lubavitcher Rebbe also wrote, “The fact that the problem may largely be congenital does not alter the situation. Every

day children are born with particular natures and innate tendencies or drives, some of them good and some of them bad. . . . The Creator endowed human beings with the capacity to improve, indeed even to change their ‘natural’ (i.e., innate) traits.”

51. Recognizing that fighting to change a “congenital” tendency can be extremely difficult, the Rebbe applied a fundamental teaching of traditional Judaism—the principle that the Creator does not burden a person with a challenge he is incapable of overcoming, albeit perhaps with great effort, writing, “If an individual experiences a particularly difficult, or trying, situation, it may be assumed that HaShem [the Creator] has given him extraordinary powers to overcome the extraordinary difficulty. The individual concerned is probably unaware of his real inner strength; the trial may therefore be designed for the sole purpose of bringing out in the individual the hidden strength.”

52. The Rebbe taught that humans have “the capacity to . . . change” in the area of sexual attraction even if this may be “particularly difficult,” and that faithful Jews have an obligation to strive to achieve heterosexual attraction and marriage.

53. Based on both my religious conviction and my own professional experience and discussions with colleagues over the years, I believe that the New York City Council is mistaken in its understanding of human nature, and the Torah is right.

54. If a patient seeks my assistance in reducing unwanted same-sex attraction and developing or increasing opposite-sex attraction, I cannot—consistent

with my conscience, my religious convictions, or my general client-oriented approach to psychotherapy—counsel that individual that such change is impossible, or that the individual should not pursue it. The Lubavitcher Rebbe, whose teachings inform the core of my religious convictions, taught exactly the opposite.

55. Indeed, it is fundamental to traditional Jewish beliefs that a person's lifetime involves an almost constant spiritual campaign to direct or even deny physical drives, desires, and even needs in order to serve G-d properly. Such discipline includes denying oneself the pleasures of non-kosher foods or, on Yom Kippur, of any food at all, in order to achieve spiritual goals.

56. The denial or channeling of physical drives in Judaism in accordance with the teachings of the Torah applies to needs beyond food and to emotional drives as well, including the natural drive for sexual gratification which, in normative Jewish practice, is channeled exclusively to heterosexual marital relationships.

57. Thus—in addition to the empirical reasons discussed above—I and any individual who considers his Jewish faith to be more fundamental to his personal identity than are his sexual attractions, and who respects the teachings of the Lubavitcher Rebbe and the weight of other Orthodox Jewish authorities, will hold religious convictions about human nature, the possibility of change in desires, and the role of sexual relationships in life that together reject the idea that same-sex attractions are immutable.

58. In my experience, patients who ask me to help them change and reduce their attraction to individuals of the same sex or develop, or increase their attraction to the opposite sex, are motivated by varying combinations of the philosophical, religious, ethical, and social considerations mentioned above, as well as others. These individuals give higher priority to living consistently with their beliefs, or to forming a happy and stable heterosexual marriage and natural family, than to letting their lives be defined or molded by their current sexual attractions.

59. For human, professional, and religious reasons, I desire to continue to help both current and future patients who request my help to enable them to change their sexual attractions by reducing unwanted same-sex attraction and developing or increasing opposite-sex attraction.

60. In providing this help to patients who request it, I fear that I may be the target of an enforcement action under the newly enacted Counseling Censorship Law by the DCA acting under the direction of Commissioner Salas. Thus, I am forced to choose between risking the severe penalties mandated by that law and the Penalties Rule, or self-censoring my conversations with my patients in a manner that denies them the assistance they have requested, to avoid anything that might be construed as “offering” or “providing” “conversion therapy services.”

61. Even if I make the choice to provide my patients the counseling help that they desire notwithstanding the prohibition of the Counseling Censorship Law, I am conscious of the risk that the City of New York may impose tens of thousands of dollars of fines on me.

62. For most patients, therapeutic conversations relating to a patient's sexual attractions and behaviors involve what they feel to be one of the most sensitive, difficult, important, and intimate topics.

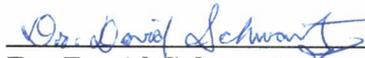
63. It is extremely difficult or even impossible as an emotional and social matter for these patients to step forward to vindicate their own rights to engage in the therapeutic conversations with me that they desire.

64. These patients already experience serious emotional turmoil, and their mental health could be harmed by adding the publicity and adversarial struggle of litigation.

65. Further, their goal and desire is to build a life and family based on heterosexual attractions and a heterosexual marriage, and public disclosure of present or past same-sex attraction may seriously damage their chances of ever achieving such a marriage.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on February 7, 2019.

DR. DAVID SCHWARTZ



Dr. David Schwartz

UNITED STATES DISTRICT COURT
Eastern District of New York

Dr. David Schwartz,
Plaintiff,

v.

The City of New York and
Lorelei Salas, in her official capacity as
Commissioner of the Department of
Consumer Affairs,
Defendants.

Case No.: 1:19-CV-463-RJD-ST

DECLARATION OF JEANA
HALLOCK IN SUPPORT OF
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION

I, Jeana Hallock, declare as follows:

1. I am legal counsel for Alliance Defending Freedom and I am one of the attorneys representing Plaintiff Dr. David Schwartz in this action.
2. Attached as Exhibit 1 is a true and correct copy of a report from the Committee on Civil Rights submitted to the City Council shortly before the Counseling Censorship Law was passed, dated November 29, 2017, which I personally downloaded from the New York City Council website.
3. Attached as Exhibit 2 is a true and correct copy of the New York City Consumer Affairs webpage titled "Conversion Therapy is Illegal in New York City", which I personally downloaded.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on February 18, 2019.

/s/Jeana Hallock
Jeana Hallock
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jhallock@adflegal.org

EXHIBIT 1

Civil Rights Staff
Ze-Emanuel Hailu, Counsel
Sheila Johnson, Finance Analyst
Nuzhat Chowdhury, Counsel



THE COUNCIL OF THE CITY OF NEW YORK

**COMMITTEE REPORT OF THE
GOVERNMENTAL AFFAIRS DIVISION**

Jeffrey Baker, Legislative Director
Rachel Cordero, Deputy Director, Governmental Affairs Division

COMMITTEE ON CIVIL RIGHTS

Hon. Darlene Mealy, Chair

November 29, 2017

INT. NO. 1650-A:

By The Speaker (Council Member Mark-Viverito) and Council Members Dromm, Levin, Salamanca, Constantinides, Rosenthal, Rodriguez and Kallos

TITLE:

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting conversion therapy

ADMINISTRATIVE CODE:

Adds a new Subchapter 19 to Chapter 5 of Title 20.

RES. NO. 614-2015:

By Council Members Dromm, Johnson, Menchaca, Mendez, Torres, Van Bramer, Chin, Constantinides, Gentile, Gibson, Lander, Levine, Palma, Richards,

Rose, Rosenthal, Koslowitz, Rodriguez, Vacca, Cumbo, Lancman, Ferreras-Copeland, Levin, Reynoso, Salamanca, Espinal, Barron, Grodenchik, Perkins, Crowley, Maisel, Garodnick, Kallos, Treyger and Miller

TITLE:

Resolution calling on the New York State Legislature to pass and the Governor to sign into law A.4558B/S.61B, which would prohibit discrimination on the basis of gender expression or identity and expand the State’s hate crimes statute to include offenses committed against someone on the basis of his or her gender expression or identity

RES. NO. 1287-2016:

By Council Members Dromm, Crowley, Menchaca, Chin, Constantinides, Rosenthal and Kallos

TITLE:

Resolution calling on the United States Congress to pass and the President to sign H.R.2282/S.1006, the Equality Act, which would amend the Civil Rights Act of 1964 and 1968 to include sexual orientation and gender identity as prohibited categories of discrimination or segregation with respect to employment, public accommodation and housing

I. Introduction

Today, the Committee on Civil Rights, chaired by Council Member Darlene Mealy, will hold a hearing on Proposed Introduction No. 1650-A (“Int. 1650-A”), a Local Law to amend the administrative code of the city of New York, in relation to prohibiting conversion therapy, Resolution No. 614-2015 (“Res. 614,”) calling on the New York State Legislature to pass and the Governor to sign into law A.4558B/S.61B, which would prohibit discrimination on the basis of gender expression or identity and expand the State’s hate crimes statute to include offenses committed against someone on the basis of his or her gender expression or identity, and Resolution No. 1287-2016 (“Res. 1287,”) calling on the United States Congress to pass and the

President to sign H.R.2282/S.1006, the Equality Act, which would amend the Civil Rights Act of 1964 and 1968 to include sexual orientation and gender identity as prohibited categories of discrimination or segregation with respect to employment, public accommodation and housing. Int. 1650-A, Res. 614, and Res. 1287 were originally heard at a hearing of this committee on June 19, 2017, at which the Committee received testimony from representatives of the New York City Commission of Human Rights, and various advocates, stakeholders, and members of the public.

II. Int. No. 1650-A

Background

In December 2014, a 17 year-old transgender girl named Leelah Alcorn committed suicide after her parents forced her to undergo conversion therapy.¹ In her suicide post, Leelah wrote that the therapists she saw reinforced the notion that being transgender was “wrong,” and that this, compounded by her parent’s negative reactions to her gender identity, made her feel isolated, hopeless, and alone, resigned to living her life “like a man in drag.”² Leelah’s is not the only reported case of conversion therapy having profoundly negative consequences on an individual—multiple accounts of LGBTQ persons who have been forced to undergo conversion therapy have emphasized similar, destructive outcomes including: suicidal ideation and tendencies,³ fear of intimacy and physical affection,⁴ anger, self-loathing,⁵ isolation, anxiety, and

¹ *Obama Calls for End to ‘Conversion’ Therapies for Gay and Transgender Youth*, N.Y. Times, Apr. 8, 2015, https://www.nytimes.com/2015/04/09/us/politics/obama-to-call-for-end-to-conversion-therapies-for-gay-and-transgender-youth.html?_r=1.

² *Leelah Alcorn’s Suicide: Conversion Therapy is Child Abuse*, TIME, Jan. 8, 2015, <http://time.com/3655718/leelah-alcorn-suicide-transgender-therapy/>.

³ *Leelah Alcorn’s Suicide: Conversion Therapy is Child Abuse*, TIME, Jan. 8, 2015, <http://time.com/3655718/leelah-alcorn-suicide-transgender-therapy/>.

⁴ *Conversion therapy is “torture”: LGBT survivors are fighting to ban “pray the gay away” camps*, Salon, Mar. 21, 2017, <http://www.salon.com/2017/03/21/conversion-therapy-is-torture-lgbt-survivors-are-fighting-to-ban-pray-the-gay-away-camps/>.

depression. One survivor of conversion therapy even stated, “we were no longer people at the end of the program.”⁶

Conversion therapy, also known as “reparative therapy,” “Ex-Gay therapy,” or “Sexual Orientation Change Efforts,” is a set of practices intending to change a person’s sexuality or gender identity to fit heterosexual or cisgender standards and expectations.⁷ In the past, these practices have included measures such as institutionalization, castration, and electroconvulsive shock therapy, though today “the techniques most commonly used include a variety of behavioral, cognitive, psychoanalytic and other practices that try to change or reduce same-sex attraction or alter a person’s gender identity.”⁸ In 2009, the American Psychological Association (“APA”) conducted a comprehensive study on these practices and concluded that they were not scientifically supported and that, in fact, “valid research indicate[s] that it is unlikely that individuals will be able to reduce same-sex attractions or increase other-sex attractions through [conversion therapy].”⁹ The evidence not only shows that conversion therapy does not achieve its stated goals, but also causes significant medical, psychological and other harms to LGBTQ people.¹⁰ In that same report, the APA concluded that the reported risks of the practice include: “depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of

⁵ *Straight Talk: How Mathew Shurka and His Conversion Therapist Renounced the ‘Gay Cure’*, Huffington Post, Feb. 2, 2016, http://www.huffingtonpost.com/2013/06/25/mathew-shurka-conversion-therapy_n_3466943.html.

⁶ *A Survivor of Gay Conversion Therapy Shares His Chilling Story*, Huffington Post, Nov. 17, 2016, http://www.huffingtonpost.com/entry/realities-of-conversion-therapy_us_582b6cf2e4b01d8a014aea66.

⁷ *Id.*

⁸ *#BornPerfect: The Facts About Conversion Therapy*, National Center for Lesbian Rights, <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/>.

⁹ *Id.*

¹⁰ *The Lies and Dangers of Efforts to change Sexual Orientation or Gender Identity*, Human Rights Campaign, <http://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy>.

friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.”¹¹

While conversion therapy has been largely discredited as ineffective and dangerous by all of the nation’s leading professional medical and mental health associations, including the American Medical Association, the American Psychological Association, the American Counseling Association and the American Psychiatric Association,¹² certain groups¹³ continue to endorse the practice and even encourage their members to consider additional conversion therapy techniques, including hypnosis, sex therapies and psychotropic medication.¹⁴ These groups, often religious in nature, offer conversion therapy in one-on-one and group therapy settings, including “boot camps” and “retreats,” to adults and minors alike.¹⁵

After Leelah’s tragic suicide, in April 2015, then-President Obama condemned the practice and called for an end to conversion and similar therapies aimed at “repairing” gay, lesbian, and transgender youth.¹⁶ In April 2017, Senator Patty Murray introduced S.928, the Therapeutic Fraud Prevention Act of 2017, a bill that would “prohibit, as an unfair or deceptive

¹¹ *#BornPerfect: The Facts About Conversion Therapy*, National Center for Lesbian Rights, <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/>.

¹² *Governor Cuomo Announces Executive Actions banning Coverage of Conversion Therapy*, New York State Governor’s Press Office, Feb. 6, 2016, <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-banning-coverage-conversion-therapy>.

¹³ See e.g. the National Association for Research & Therapy of Homosexuality (NARTH).

¹⁴ *#BornPerfect: The Facts About Conversion Therapy*, National Center for Lesbian Rights, <http://www.nclrights.org/bornperfect-the-facts-about-conversion-therapy/>.

¹⁵ See e.g. HuffPost, Newsweek, ABC ‘20/20’ Reports Expose Abuse, Torture of Gay Youths And Troubled Teens, March 12, 2017, http://www.huffingtonpost.com/entry/cover-up-in-alabama-newsweek-abc-2020-reports-expose_us_58c35449e4b0c3276fb78505.

¹⁶ *Obama Calls for End to ‘Conversion’ Therapies for Gay and Transgender Youth*, N.Y. Times, Apr. 8, 2015, https://www.nytimes.com/2015/04/09/us/politics/obama-to-call-for-end-to-conversion-therapies-for-gay-and-transgender-youth.html?_r=1.

act or practice, commercial sexual orientation conversion therapy.”¹⁷ Further, many states and municipalities have passed legislation banning the practice.¹⁸ These states and municipalities have used multiple approaches to target and restrict conversion therapy practices: they have banned state-licensed mental health professionals from engaging in these practices, banned insurance providers from covering such therapy, and a New Jersey Superior Court has ruled that conversion therapy constitutes consumer fraud, in violation of state consumer fraud protections.¹⁹

In February 2016, Governor Cuomo announced a series of regulations prohibiting public and private health insurers from covering conversion therapy practices in New York State and prohibiting facilities under the jurisdiction of the New York State Office of Mental Health from providing conversion therapy to minors.²⁰ While these regulations significantly restrict the practice of conversion therapy, they do not prohibit mental health professionals from practicing conversion therapy on minors in every instance, and do not cover adults.²¹

¹⁷ S.928, Therapeutic Fraud Prevention Act of 2017, 115th Congress, Apr. 25, 2017,

<https://www.congress.gov/bill/115th-congress/senate-bill/928/text>.

¹⁸ See Movement Advancement Project, Conversion Therapy Laws, http://www.lgbtmap.org/equality-maps/conversion_therapy. See also Washington Blade, Pittsburgh votes to ban ‘conversion’ therapy, December 16, 2016, <http://www.washingtonblade.com/2016/12/16/pittsburgh-votes-ban-conversion-therapy/>. The States jurisdictions that have prohibited conversion therapy include the District of Columbia and the following states: California, Oregon, Nevada, New Jersey, Connecticut, New Mexico, Illinois, and Vermont. The following municipalities have passed similar legislation: Cincinnati, Seattle, and five South Florida cities/towns (Miami Beach, West Palm Beach, Bay Harbor Islands, Wilton Manors, North Bay Village, and Miami).

¹⁹ *N.J. gay conversion therapy group to close following fraud conviction*, NJ.com, Dec. 18, 2015, http://www.nj.com/politics/index.ssf/2015/12/nj_gay-to-straight_conversion_therapy_practice_agr.html. The legislation prohibiting conversion therapy passed in Illinois did so both by prohibiting state-licensed mental health professionals from engaging in this practice, and by making advertising or offering conversion therapy services unlawful under its Consumer Fraud and Deceptive Business Practices Act. See Illinois General Assembly, Public Act 099-0411, <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0411>.

²⁰ *Governor Cuomo Announces Executive Actions banning Coverage of Conversion Therapy*, New York State Governor’s Press Office, Feb. 6, 2016, <https://www.governor.ny.gov/news/governor-cuomo-announces-executive-actions-banning-coverage-conversion-therapy>.

²¹ Rhode Island’s House of Representatives unanimously approved a bill which would do the same, and Massachusetts legislators have heard similar bills. See *R.I. House OKs ban of ‘conversion therapy’ for LGBTQ youth*, Providence Journal, May 30, 2017, <http://www.providencejournal.com/news/20170530/ri-house-oks-ban-of-conversion-therapy-for-lgbtq-youth>; see also *Mass. Legislators hear testimony on proposed ‘conversion therapy’*

By prohibiting any person in New York City from offering or performing conversion therapy for a fee, New York City would not only protect consumers from fraudulent practices, but also protect its LGBTQ community and all New Yorkers, not just minors, from the potentially dangerous consequences of conversion therapy.

Analysis of Legislation

Section 1 of Int. 1650-A amends chapter 5 of Title 20 of the administrative code, which consists of laws regulating unfair trade practices, including the City's Consumer Protection Law, adding a new subchapter 19 to prohibit charging consumers for conversion therapy services. Services that provide assistance to a person undergoing gender transition, or counseling that provides acceptance, support and understanding of a person's sexual orientation, or facilitates a person's coping, identity exploration and development are not prohibited, as long as such services do not seek to change a person's sexual orientation or gender identity. Each instance a person is found to have provided conversion therapy services for a fee would result in a penalty of up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. Multiple violations with regards to the same consumer would be considered a single violation. The earlier version of this bill that was heard in Committee, Preconsidered Int. No. ____, would have created a penalty of \$1,000 for each violation, and did not expressly limit multiple violations with regards to the same consumer to a single violation.

Int. 1650-A would take effect 120 days after it becomes law.

III. Res. No. 614 and Res. No. 1287

Background

ban, Telegram.com, June 7, 2017, <http://www.telegram.com/news/20170607/mass-legislators-hear-testimony-on-proposed-conversion-therapy-ban>.

The 1964 Civil Rights Act (“Civil Rights Act”) and the Fair Housing Act (“FHA”) do not explicitly protect homosexual or transgender individuals from discrimination in employment, housing, or public accommodations. While some federal courts have held that homosexual workers are protected from job discrimination by the Civil Rights Act, others have reached the opposite conclusion.²² In April 2017, a federal judge ruled, for the first time, that the FHA protects LGBT individuals.²³ Although the Supreme Court found laws prohibiting same-sex marriage to be unconstitutional, “many other protections, including those related to employment and housing, have not been extended at all levels to gay people,” and gay rights advocates have expressed concern about the potential rollback of protections under President Trump’s administration.²⁴

While several municipalities in New York have passed ordinances or laws prohibiting harassment or discrimination on the basis of a person’s gender identity or expression, many municipalities do not guarantee these protections, and there is no statewide ban on discrimination or harassment for individuals not employed by the state.²⁵ In October 2015, Governor Cuomo introduced regulations, through the New York State Human Rights Law, affirming that all transgender individuals are protected from discrimination under the law. The state human rights

²² *Civil Rights Act Protects Gay Workers, Court Rules*, New York Times, Apr. 4, 2017, <https://www.nytimes.com/2017/04/04/us/civil-rights-act-gay-workers-appeals-court.html>.

²³ *Federal fair housing law protects LGBT couples, court rules for first time*, The Washington Post, Apr. 6, 2017, https://www.washingtonpost.com/news/morning-mix/wp/2017/04/06/federal-fair-housing-law-protects-lgbt-couples-court-rules-for-first-time/?utm_term=.aaeae5804236.

²⁴ *Civil Rights Act Protects Gay Workers, Court Rules*, New York Times, Apr. 4, 2017, <https://www.nytimes.com/2017/04/04/us/civil-rights-act-gay-workers-appeals-court.html>.

²⁵ *Governor Cuomo Introduces Regulations to Protect Transgender New Yorkers from Unlawful Discrimination*, New York State Governor’s Press Office, Feb. 6, 2016, <https://www.governor.ny.gov/news/governor-cuomo-introduces-regulations-protect-transgender-new-yorkers-unlawful-discrimination>.

law's text, however, still does not explicitly protect transgender individuals;²⁶ these protections are therefore vulnerable should a subsequent governor wish to rescind them.

Meanwhile, the number of reported hate crimes against lesbian, gay, bisexual and transgender individuals has been steadily increasing.²⁷ Of 5,462 “single-bias incidents” (hate-crime incidents with one motivation) in the FBI's 2014 hate crime statistics database, 1,115, about one fifth, were motivated by bias against a sexual orientation or gender identity.²⁸ In New York City, by April 2017, the NYPD had already investigated 17 anti-gay hate crimes, up from 15 in 2016.²⁹ Despite this, New York State's hate crime statute currently does not include gender identity or expression in its list of protected categories.

A.4558B/S.61B would explicitly prohibit discrimination on the basis of gender expression or identity, and expand New York's hate crimes statute to include offenses committed against someone on the basis of their gender expression or identity.

Analysis of Legislation

Res. 614

Res. 614 notes that, according to the New York State Department of Health, approximately 300,000 individuals living in the State of New York self-identify as transgender.

The Resolution also states that, according to a 2011 report by the National Gay and Lesbian Taskforce, and the National Center for Transgender Equality, 90% of those surveyed had experienced discrimination at work for reasons related to their gender identity or expression,

²⁶ See N.Y. Exec. Law § 296 (McKinney).

²⁷ *New York Attorney General Discusses Increase in Hate Crimes Against LGBTQ Community*, Human Rights Campaign, Nov. 18, 2016, <http://www.hrc.org/blog/new-york-attorney-general-discusses-increase-in-hate-crimes-against-lgbtq-c>.

²⁸ *Hate Crimes Against LGBT People Are Sadly Common*, FiveThirtyEight, June 14, 2016, <https://fivethirtyeight.com/features/hate-crimes-against-lgbt-people-are-sadly-common/>.

²⁹ *Man Punched on C Train in Apparent Anti-Gay Attack*, CBS New York, Apr. 2, 2017, <http://newyork.cbslocal.com/2017/04/02/c-train-assault/>.

and 24% had lost their jobs, 19% had been refused an apartment, and 11% had been evicted for the same reason.

Res. 614 declares that A.4558B/S.61B, if passed, would amend the Executive Law, Civil Rights Law, and Education Law to prohibit discrimination on the basis of gender identity or expression in housing, employment, public accommodation, and other areas.

Res. 614 also notes that 14% of victims or survivors of hate violence in the United States in 2009 were transgender men and women, and that if passed, A.4558B/S.61B would amend the Penal Law to include gender identity or expression in the list of categories that are currently protected under the state's hate crimes statute.

Finally, Res. 614 calls on the New York State Legislature to pass and the Governor to sign into law A.4558B/S.61B.

Res. No. 1287

Res. 1287 notes that the lesbian, gay, bisexual, and transgender community are not included as protected classes in the Civil Rights Act or FHA, and that according to the ACLU, 29 states permit workplace discrimination on the basis of sexual orientation, 38 states permit workplace discrimination on the basis of gender identity, 29 states permit housing discrimination on the basis of sexual orientation, 38 states permit housing discrimination on the basis gender identity, 29 states permit discrimination in places of public accommodation on the basis of sexual orientation, and 32 states permit discrimination in places of public accommodation on the basis of gender identity.

Res. 1287 states that, despite the progressive laws of some states and the progressive policies of some corporations, LGBT individuals throughout the United States still suffer

employment and housing discrimination, and are denied the equal use of public accommodations.

Res. 1287 also notes that H.R.2282/S.1006, also known as The Equality Act, would amend the Civil Rights Act and the Fair Housing Act to include sexual orientation and gender identity among the prohibited categories of discrimination or segregation in employment, places of public accommodation and housing.

Res. 1287 recommends that, to cover the full spectrum of sexual orientations, The Equality Act should define sexual orientation as an immutable, enduring, emotional, romantic, or sexual attraction to other people. Finally, Res. 1287 calls on the United States Congress to pass and the President to sign H.R.2282/S.1006.

1 § 20-826 Enforcement. Any person who violates section 20-825 of this subchapter or any
2 of the regulations promulgated thereunder is liable for a civil penalty not to exceed \$1,000 for
3 the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. A
4 proceeding to recover any such civil penalty shall be commenced by the service of a notice of
5 violation returnable to any tribunal established within the office of administrative trials and
6 hearings or within any agency of the city designated to conduct such proceedings. For the
7 purposes of this section, each instance a person is found to have violated section 20-825 shall be
8 considered a separate violation, except that multiple violations of section 20-825 with regards to
9 the same consumer shall be considered a single violation.

10 § 20-827 Rules and regulations. The department may promulgate such rules and
11 regulations as it deems necessary to implement and enforce the provisions of this subchapter.

12 §2. This local law takes effect 120 days after it becomes law, except that the
13 commissioner of consumer affairs may take any actions necessary prior to such effective date for
14 the implementation of this local law, including, but not limited to, the adoption of any necessary
15 rules.

ZH
LS 9612/2017
11/21/2017

Res. No. 614

Resolution calling on the New York State Legislature to pass and the Governor to sign into law A.4558B/S.61B, which would prohibit discrimination on the basis of gender expression or identity and expand the State's hate crimes statute to include offenses committed against someone on the basis of his or her gender expression or identity.

By Council Members Dromm, Johnson, Menchaca, Mendez, Torres, Van Bramer, Chin, Constantinides, Gentile, Gibson, Lander, Levine, Palma, Richards, Rose, Rosenthal, Koslowitz, Rodriguez, Vacca, Cumbo, Lancman, Ferreras-Copeland, Levin, Reynoso, Salamanca, Espinal, Barron, Grodenchik, Perkins, Crowley, Maisel, Garodnick, Kallos, Treyger and Miller

1 Whereas, According to the New York State Department of Health, approximately
2 300,000 individuals living in the state of New York self-identify as transgender; and

3 Whereas, Despite the progressive reputations of our city and state, transgender
4 individuals continue to endure discrimination and threats to their physical well-being; and

5 Whereas, According to a 2010 report by the National Coalition of Anti-Violence
6 Programs, 14 percent of victims or survivors of hate violence in the United States in 2009 were
7 transgender men and women; and

8 Whereas, In New York City, approximately 13 percent of the reports of hate violence
9 received by the New York City Anti-Violence Project in 2009 came from transgender men and
10 women; and

11 Whereas, According to a 2011 report by the National Gay and Lesbian Taskforce and the
12 National Center for Transgender Equality ("the report"), 90 percent of those surveyed had
13 experienced discrimination at work for reasons related to their gender identity or expression, and
14 24 percent had lost their jobs for the same reason; and

15 Whereas, The report also disclosed that 19 percent of respondents had been refused a
16 home or apartment, and 11 percent had been evicted, because of their gender identity or
17 expression; and

1 Whereas, Transgender individuals are also not safe from anti-trans bias in places of
2 public accommodation, where, according to the report, 53 percent of respondents had
3 experienced harassment and discrimination; and

4 Whereas, In 2002, the New York City Council passed Local Law 3, which amended the
5 Human Rights Law to define gender as "actual or perceived sex and a person's gender identity,
6 self-image, appearance, behavior or expression, whether or not traditionally associated with the
7 legal sex assigned to that person at birth," thereby including transgender individuals in the class
8 of people to be protected from bias-related harassment and discrimination in housing,
9 employment and public accommodations; and

10 Whereas, Although New York City extends many protections to transgender individuals,
11 those living in the rest of the State are not guaranteed the same treatment; and

12 Whereas, If passed, A.4558B/S.61B would address this disparity at the state level by
13 amending the Executive Law, Civil Rights Law and Education Law to prohibit discrimination on
14 the basis of gender identity or expression in housing, employment, public accommodation and
15 other areas; and

16 Whereas, The legislation would also amend the Penal Law to include gender identity or
17 expression in the list of categories that are currently protected under the State's hate crimes
18 statute; and

19 Whereas, Eighteen states and the District of Columbia have already enacted laws
20 protecting transgender individuals from discrimination, as well as several cities and counties in
21 New York State, and the United States Department of Education has provided guidance that the
22 federal Title IX law prohibiting discrimination also applies to transgender students; and

1 Whereas, Without protection from bias-related harassment and discrimination,
2 transgender individuals are placed at a severe disadvantage in every facet of their lives; and

3 Whereas, It is imperative that the state of New York protect all of its marginalized
4 communities, including the transgender community; now, therefore, be it

5 Resolved, That the Council of the City of New York calls on the New York State
6 Legislature to pass and the Governor to sign into law A.4558B/S.61B, which would prohibit
7 discrimination on the basis of gender expression or identity and expand the state's hate crimes
8 statute to include offenses committed against someone on the basis of his or her gender
9 expression or identity.

IM/ZH
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LS 888/2014
11/29/2017

Res. No. 1287

Resolution calling on the United States Congress to pass and the President to sign H.R.2282/S.1006, the Equality Act, which would amend the Civil Rights Acts of 1964 and 1968 to include sexual orientation and gender identity as prohibited categories of discrimination or segregation with respect to employment, public accommodation and housing.

By Council Members Dromm, Crowley, Menchaca, Chin, Constantinides, Rosenthal and Kallos

Whereas, Title VII of the Civil Rights Act of 1964 and other federal statutes prohibit employers of 15 or more employees from engaging in workplace discrimination on the basis of “race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information;” and

Whereas, Title II of the Civil Rights Act of 1964 prohibits certain places of public accommodation from discriminating on the basis of “race, color, religion, or national origin;” and

Whereas, The Civil Rights Act of 1968, also known as the Fair Housing Act, prohibits individuals from engaging in housing discrimination on the basis of “race, color, national origin, religion, sex, disability, and the presence of children;” and

Whereas, Absent from this list of protected classes in the Civil Rights Act is the lesbian, gay, bisexual, and transgender (LGBT) community; and

Whereas, According to the American Civil Liberties Union (ACLU), 29 states permit workplace discrimination on the basis of sexual orientation, and 38 permit workplace discrimination on the basis of gender identity; and

Whereas, The ACLU further reports that twenty-nine states permit discrimination in places of public accommodation on the basis of sexual orientation, and thirty-two states permit discrimination in places of public accommodation on the basis of gender identity ; and

Whereas, Finally, the ACLU notes that twenty-nine states permit housing discrimination on the basis of sexual orientation, and 38 permit housing discrimination on the basis of gender identity ; and

Whereas, According to a 2013 Pew Research Center study, 21% of LGBT respondents stated they were discriminated against in hiring, pay, or promotion, and in a 2011 Pew Research Center survey, 78% of transgender respondents stated they were harassed or mistreated at their workplace due to their gender identity ; and

Whereas, According to a 2011 National Center for Transgender Equality report, 53% of transgender and gender-nonconforming respondents stated they were verbally harassed in a place of public accommodation; and

Whereas, According to a 2011 National Gay and Lesbian Task Force and National Center for Transgender Equality joint study, 19% of transgender individuals were denied housing and 11% were evicted from their homes because they were transgender ; and

Whereas, Despite the progressive laws of some states and the progressive policies of some corporations, LGBT individuals throughout the United States still suffer employment discrimination, are denied the equal utilization and access of public accommodation, and are denied access to housing because of their sexual orientation or gender identity; and

Whereas, H.R.2282/S.1006, also known as The Equality Act, would amend the Civil Rights Act of 1964 and the Fair Housing Act to include sexual orientation and gender identity among the prohibited categories of discrimination or segregation in employment, places of public accommodation and housing; and

Whereas, The Equality Act would also expand the categories of public accommodation that may not deny equal utilization or deny admission on the basis of “sex, sexual orientation, or

gender identity” to include a greater range of places, goods and services, such as transportation;
and

Whereas, The current language of the Act defines sexual orientation as “homosexuality, heterosexuality, and bisexuality” but to cover other orientations, should instead define sexual orientation as an immutable, enduring, emotional, romantic or sexual attraction to other people;
and

Whereas, In a nation whose independence was premised on the notion that all citizens are created equal, it is unconscionable that a specific population does not enjoy the same workplace protections, equal utilization of public accommodation and access to housing as its peers simply because of the sexual orientation or gender identity of its members; now, therefore, be it

Resolved, That the Council of City of New York calls on the United States Congress to pass and the President to sign H.R.2282/S.1006, the Equality Act, which would amend the Civil Rights Acts of 1964 and 1968 to include sexual orientation and gender identity as prohibited categories of discrimination or segregation with respect to employment, public accommodation and housing.

LS 8896
Date 11/29/2017
IM/ZH

EXHIBIT 2



CONVERSION THERAPY IS ILLEGAL IN NEW YORK CITY

Local Law 22 of 2018 makes it illegal for any person to offer or provide “conversion therapy” for a fee. “Conversion therapy” means any services that seek to change an individual’s sexual orientation or gender identity. Note: This law does not apply to services that provide assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person’s sexual orientation or facilitates a person’s coping, social support, and identity exploration and development.

How to File a Complaint

The NYC Department of Consumer Affairs (DCA) encourages anyone who is aware of any person offering or providing conversion therapy services to file a complaint. You can file a complaint anonymously.

Call:

Contact 311 to file a complaint. Say “conversion therapy.”

Go Online:

- Visit nyc.gov/dca and select “File a Consumer Complaint.” You will need to register for an account or log in to your account with the City of New York to submit your complaint online.

OR

- Visit nyc.gov/311 to “Make a Complaint” (you do not need to create an account).

Note: DCA will consider your complaint a tip if you do not provide your contact information.

Mail/Fax:

1. Download and complete our complaint form at nyc.gov/dca.
2. Mail or fax copies of the completed form and any additional information to the mailing address or fax number below.

Mailing Address:
NYC Department of Consumer Affairs
Consumer Services Division
42 Broadway, 9th Floor
New York, NY 10004

Fax: (212) 487-4482

What Happens to Your Complaint

DCA will investigate the business and issue a violation if it is found to be offering conversion therapy. A business found guilty of violating this law faces fines up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each future violation.