



September 20, 2019

Via Electronic Filing

The Honorable Raymond J. Dearie
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Schwartz v. City of New York*, No. 1:19-cv-463

Your Honor:

I write in response to the Court's order of September 19, 2019.

Plaintiff, like the Court, is aware of the recent introduction of a bill in the New York City Council to repeal Local Law 2018/22, which Plaintiff has challenged. Further, while the City has made no contact at all to counsel for Plaintiff on this topic, certain leaders of the Council have been at pains to announce an impending repeal to the press, apparently hoping to forestall any ruling from this Court.

To avoid any confusion, Plaintiff notes that even a complete and unambiguous repeal—should that occur—would not moot Plaintiff's claims. Plaintiff contends that his rights have been violated by Local Law 2018/22 throughout the time since its passage, and has asserted claims for both nominal and actual damages. Repeal of the law will not moot Plaintiff's claim for damages. *Van Wie v. Pataki*, 267 F.3d 109, 115 n. 4 (2d Cir. 2001) (claim for nominal damages for constitutional violation sufficient to prevent mootness); *see also Morgan v. Plano Independent Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (same).¹ If and when the City believes that plaintiff's claims are thoroughly moot, the burden—"a heavy one"—will be on the City to establish mootness. *Sugarman v. Vill. Of Chester*, 192 F. Supp.2d 282, 290 (SDNY 2002).

In fact, the law currently remains in effect, the Department of Consumer Affairs website inviting anonymous complaints against psychologists and counselors such as Dr. Schwartz and threatening fines of up to \$10,000 per violation remains up and remains chilling (<https://www1.nyc.gov/site/dca/consumers/conversion-therapy-is->

¹ In addition, the "voluntary cessation of illegal conduct" "for the deliberate purpose of evading a possible adverse decision" will not necessarily moot a request for injunctive relief. *R. C. Bigelow, Inc. v. Unilever N. V.*, 867 F.2d 102, 106 (2d Cir. 1989).

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[illegal.page](#)), no vote has been taken on the bill, and even if passed the current bill could first be amended to something less than a full and unequivocal repeal. In a democratic assembly, announcements of intention by legislative leaders cannot be taken as equivalent to accomplished fact.

For this reason, Plaintiff respectfully suggests that the Court should proceed to decide Plaintiff's request for a preliminary injunction unless and until the law has been unequivocally repealed. Further, while Plaintiff makes no assumptions about how this Court will rule, *if* a preliminary injunction is entered and the case is somehow subsequently mooted, that preliminary injunction order would suffice to recognize Plaintiff as a "prevailing party" entitled to attorneys' fees under 42 U.S.C. § 1988. *Haley v. Pataki*, 106 F.3d 478, 483 (2d Cir. 1997). And indeed, this would reflect reality. Public statements by City Council leaders have made emphatically clear that they are planning to repeal Local Law 2018/22 *only* because of Plaintiff's constitutional challenge, and *only* because they have concluded that the law is likely to be held unconstitutional by the Second Circuit and the Supreme Court. Council Speaker Johnson told reporters that "he could not name another time in his six years on the City Council when the body has pulled a law in such a way,"² and explained, "The Supreme Court has become conservative; the Second Circuit, which oversees New York, has become more conservative."³

² Amanda Ottaway, "NYC Moves to Repeal Ban on Gay Conversion Therapy," Courthouse News Service Sept. 12, 2019 [<https://www.courthousenews.com/nyc-moves-to-repeal-ban-on-gay-conversion-therapy/>].

³ Aaron Randle, "Why Is a Gay Council Speaker Killing a Ban on Conversion Therapy?" *The New York Times* Sept. 13, 2019 [<https://www.nytimes.com/2019/09/13/nyregion/nyc-conversion-therapy-ban.html>].

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In sum, Plaintiff suggests that the Court should proceed to decide Plaintiff's pending motion, rather than staying its hand to wait for promised action by the City Council.

Respectfully submitted,

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