



December 11, 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 et al.*, No. 1:19-cv-463

Your Honor:

The City's hurried repeal of Public Law 22 reflected a strategic decision to dodge a judicial ruling that would potentially establish precedent protecting First Amendment rights against censorship disguised as medical regulation, while also entitling Dr. Schwartz to an award of attorneys' fees. The City's proposed motion to dismiss represents step two of that plan. For the reasons sketched below, that motion would not be meritorious.

I. Mootness

In its letter to the Court dated September 26, 2019, the City stated, "insofar as the claims set forth in the Complaint seek damages, the claims will not necessarily be mooted by a repeal of Local Law 22." The City was correct. Section 1983 expressly provides for the award of nominal damages as a vindication of rights when actual damages cannot be proven. "Plaintiffs may recover nominal damages under § 1983 in the absence of proof of actual injury." *Diesel v. Town of Lewisboro*, 232 F.3d 92, 108 (2d Cir. 2000). "Indeed, . . . it is error for courts not to award nominal damages in § 1983 actions where a constitutional violation is established." *Dawes v. Walker*, 239 F.3d 489, 497 (2d Cir. 2001). Damages, whether actual or nominal, are almost always associated with past conduct and injury; the subsequent repeal of the law cannot unring that bell. As a result, the Second Circuit has stated that if a claim for nominal damages is made as part of a Section 1983 action, cessation of the violation does not moot the claim. *Van Wie v. Pataki*, 267 F.3d 109, 115 n. 4 (2d Cir. 2001). The City simply ignores this controlling authority, instead citing cases that did not involve claims for nominal damages under § 1983.

Even apart from Plaintiff's claim for nominal damages, there is a serious argument that where an unconstitutional law is repealed tactically, "for the deliberate purpose of evading a possible adverse decision," *R. C. Bigelow, Inc. v.*

Unilever N.V., 867 F.2d 102, 106 (2d Cir. 1989), this does not moot a request for injunctive protection to preclude a renewed violation in the future. There is no doubt that a desire to evade an adverse decision was the *sole* reason that the City Council repealed Local Law 22; the Chair of the Council’s Committee on Civil and Human Rights said so expressly at the Committee meeting that proposed the repeal. (See Transcript of Sept. 24, 2019, Committee Hearing, attached as Exhibit A hereto, at p. 3.) And legislative leaders said the same to the press. (See Washington Post article dated September 13, 2019, attached as Exhibit B hereto.)

The Second Circuit has suggested that the burden of establishing lack of risk of recurrence is somewhat lower when the defendant is the government and the challenged law is repealed, but the Circuit has not flipped the burden of proof on that question to the plaintiff. See *Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 375-377 (2d Cir. 2004). Indeed, the case of *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992), on which the City heavily relies, makes clear that this lightened burden assumes good faith in the repeal. In that case, the Court emphasized that “[w]e do not adopt appellants’ characterization of the emergency regulation as a last-minute attempt to evade federal court jurisdiction.” *Id.* at 59. Here, in sharp contrast, the City has publicly proclaimed *exactly* that evasive goal, bemoaning what it sees as a currently unfavorable makeup of the Supreme Court and Second Circuit, and reasserting its belief in the merits of Public Law 22 even while repealing it. (See Exhibits A and B.) On that record, the situation fits the rule in *R. C. Bigelow* quoted above, the case should not be considered moot, and a ruling will serve an important function in protecting citizen’s rights going forward.

The Supreme Court has stated that “It is well settled that a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982). The only exception to this rule is if the defendant demonstrates it is “absolutely clear” that the practice “could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 189 (2000). “[T]he party asserting mootness” bears a “heavy burden.” *Id.* In applying this standard, the Supreme Court has not distinguished between governmental and private defendants. In *City of Mesquite*, for instance, the defendant city “repeal[ed] the objectionable language” in an ordinance after a district court held the ordinance unconstitutional; nonetheless, the court held the case was not moot because there was “no certainty” that the city would not “reenact[] precisely the same provision if the District Court’s judgment were vacated.” 455 U.S. at 289.¹ Presumably, we will soon have an authoritative word from the Supreme Court on the standard governing claims of mootness based on

¹ The bulk of the discussion in this paragraph is taken from an amicus brief filed by the Becket Fund for Religious Liberty in the matter *New York State Rifle & Pistol Association v. City of New York*, now pending before the Supreme Court. That brief may be found at 2019 WL 3545854.

legislative repeal in the closely analogous *New York State Rifle & Pistol Association* matter now pending before that court.

II. Standing

The City's discussion of standing likewise ignores the most relevant authorities. Standing rules are "somewhat relaxed" in the case of First Amendment claims, lest citizens be put to the "unattractive" choice of "refraining from activity they believe the First Amendment protects, or risk civil or criminal penalties for violating the challenged law." *National Organization for Marriage, Inc. v. Walsh*, 714 F.3d 682, 689 (2d Cir. 2013). The City argues that no enforcement action was taken against Dr. Schwartz; this is true but does not negate standing and ripeness. In the seminal case of *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988), the Supreme Court wrote, "We are not troubled by the pre-enforcement nature of this suit. The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise." *Id.* at 393.

Here, similarly, Dr. Schwartz's lawsuit was filed, "[s]hortly after [the law's] enactment." (See, Exhibit B, Statement of Chairman Eugene, 9/24/19 Committee Hearing Tr at 3.) And here, the City positively *assured* the public that this newly enacted law *would* be enforced, actively soliciting anonymous informants through a City-posted web page, stating that DCA "*will* investigate" even anonymous complaints, and publicly threatening "fines up to . . . \$10,000 for each future violation." (See extracts from Department of Consumer Affairs web page, attached as Exhibit C hereto.) This aggressive publicizing of the new law and penalties by the City was more than enough to chill Dr. Schwartz with a "well-founded fear that the law [would] be enforced against [him]." *National Organization for Marriage*, 714 F.3d at 689, quoting *American Booksellers*, 484 U.S. at 393. Nor, up to the time the law was repealed, did the City ever represent to the Court or to Dr. Schwartz that the law would *not* be enforced against him. We believe that in no case has this type of active threat of enforcement been found inadequate to support standing and ripeness for a First Amendment challenge.

For these reasons, Dr. Schwartz respectfully submits that the City's proposed motion to dismiss will not be a productive use of the time of the Court or the parties.

Respectfully submitted,

s/Roger G. Brooks
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EXHIBIT

A

IN RE: COMMITTEE ON CIVIL AND HUMAN RIGHTS

SEPTEMBER 24, 2019

THE NEW YORK CITY COUNCIL

Video Recording Transcribed By:
La Palabra Court Reporting
175 Main Street, 5th Floor, Suite 515
White Plains, New York 10601

1 MR. EUGENE: Good afternoon, my name is
2 Mathieu Eugene and I'm the Chair of the Civil and
3 Human Rights Committee. Today the committee will
4 be voting on proposed introductory bill number
5 1682A sponsored by Speaker Johnson which seeks to
6 repeal the City Conversion Therapy Law.

7 In 2017, this committee heard a number of
8 bills aimed at protecting and improving the lives
9 of New York City LGBTQ people. At the hearing,
10 multiple witnesses testified about the process
11 known as conversion therapy. This treatment
12 involves a range of practices that aim to change a
13 person's sexual orientation so that they fit
14 strictly into the norms of heterosexuality.

15 However, the American Medical Association has
16 reported that leading professional medical and
17 mental health associations reject conversion
18 therapy as a legitimate medical treatment. As a
19 result, the City enacted local law 22 of 2019, to
20 ban conversion therapy services offered for a fee.
21 Shortly after its enactment, a lawsuit was filed
22 challenging the City's ban as unconstitutional.

23 As the Supreme Court and federal courts have
24 become more conservative, LGBT advocates have
25 become increasingly concerned that their rights

1 will be dismantled by the court. And to avoid
2 problematic legal precedent, the speaker has made
3 the very difficult decision to introduce proposed
4 introductory bill number 1682A, repealing local
5 law 22nd (sic).

6 Before we begin, I'd like to acknowledge the
7 members of this committee who are with us. We
8 have with us Counsel Member Ydanis Rodriguez,
9 Counsel Member Bill Perkins.

10 Now, I would like to thank committee staff,
11 Belke (ph) (inaudible), Senior Counsel to the
12 committee, (inaudible), (inaudible) and
13 (inaudible), financial analyst as well as my staff
14 David Suarez and Jim Fagan (ph).

15 Now, I would like to ask the clerk to call
16 the vote.

17 MR. DISTEFANO: Matthew Distefano, Committee
18 Clerk, Committee on Civil and Human Rights, roll
19 call vote on proposed intro number 1682A. Chair
20 Eugene?

21 MR. EUGENE: I vote aye.

22 MR. DISTEFANO: Rodriguez?

23 MR. RODRIGUEZ: Aye.

24 MR. DISTEFANO: Perkins?

25 MR. PERKINS: Aye.

09/24/19 COMMITTEE ON CIVIL AND HUMAN RIGHTS 4

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MR. DISTEFANO: Lander?

MR. LANDER: Aye.

MR. DISTEFANO: By a vote of four in the affirmative, zero negative, no abstentions, the item has been adopted.

MR. EUGENE: Thank you very much. With that, the meeting is adjourned.

(Meeting adjourned.)

C E R T I F I C A T E

I, Valeri Wilson, certify that the foregoing transcript of the recorded audio transcribed from video recording was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature

La Palabra Court Reporting,
175 Main Street, Ste. 515
White Plains, New York 10601

Date: 12/05/2019

EXHIBIT

B

Religion

Why the N.Y. City Council made the ‘painful’ decision to repeal its ban on conversion therapy

By [Marisa Iati](#)

September 13

A New York City Council member on Thursday proposed repealing the city’s ban on conversion therapy to thwart a potential Supreme Court battle that could set precedent that would complicate efforts to outlaw the discredited practice.

Council Speaker Corey Johnson’s bill comes in response to a legal challenge from the [Alliance Defending Freedom](#), a conservative Christian organization that alleges that the ban infringes upon freedom of speech and religion. The [federal lawsuit](#), filed in January, targets the city’s [ordinance](#) prohibiting people from charging others for conversion therapy, which includes any technique meant to change a person’s sexual orientation or gender identity.

The decision to suggest eradicating the ban was “painful,” Johnson said in a statement. The council and Mayor Bill de Blasio (D), a 2020 presidential hopeful, are expected to support the repeal, which would take effect by October.

“After intense deliberation, the Council concluded that it was best to take this drastic step,” said Johnson, [who is gay](#). “The courts have changed considerably over the last few years, and we cannot count on them to rule in favor of much-needed protections for the LGBTQ community.”

The move to repeal the ban is the first time [Born Perfect](#), a legal campaign that works to end conversion therapy, has advocated undoing a prohibition to protect its strategy of pushing for local and state restrictions. Eighteen states, the District of Columbia and about 55 municipalities [ban conversion therapy](#) for juveniles.

The Alliance Defending Freedom has a history of elevating cases [to the Supreme Court](#), where a conservative-leaning majority currently sits. The U.S. Court of Appeals for the 2nd Circuit, which includes New York, also has become more conservative since President Trump appointed three judges to it. Two other of his nominees for the 2nd Circuit are pending.

Roger Brooks, senior counsel for the Alliance Defending Freedom, called New York City's plan to repeal the conversion therapy ban a "win" for the Orthodox Jewish psychotherapist behind the lawsuit, his clients and all New Yorkers.

"By trying to regulate and censor private sessions between an adult and his counselor, New York City directly violated freedom of speech — a core right protected by the First Amendment," Brooks said in a statement. "The city council appears to have realized its error and correctly concluded that this censorship is unconstitutional."

The ordinance, which imposes a \$1,000 fine for a first offense, was susceptible to legal challenges because it is broader than other similar legislation. Most conversion therapy laws, including a [New York state law](#) that took effect in January, ban the practice just for juveniles.

Johnson told The Washington Post that he initially turned down LGBTQ rights organizations' efforts to persuade him to reverse the ban because he wanted to resist giving in to right-wing groups. Eventually, he said, he listened to the advocates who urged him to propose the repeal for the sake of protecting other laws.

"It was a process for me," Johnson told The Post. "And ultimately, when the case was made to me that this law could potentially be jeopardizing protecting millions of other children across the country, that was the thing that moved me."

Advocates believe LGBTQ New Yorkers' rights will remain unchanged after the repeal because the city ordinance duplicates the state's consumer-protection laws, said Mathew Shurka, a co-founder and strategist at Born Perfect. The organization previously achieved a victory in [New Jersey](#) and a settlement in [California](#) for people who used state consumer-fraud laws to sue over their experiences with conversion therapy.

Four lawsuits across the country currently challenge conversion therapy bans, Shurka said, and advocates want to minimize legal challenges. The consumer-protection angle of New York City's existing ordinance is, legally, "a little bit of gray," he said, making it good ground to cede.

"Instead of investing in winning the lawsuit or fighting for the lawsuit, why don't we just repeal the law because it's an unnecessary law?" Shurka said.

Nearly 700,000 adults in the United States have [undergone conversion therapy](#), according to the Williams Institute at the University of California at Los Angeles School of Law. Tactics include talk therapy, "aversion

treatments” such as electric shocks and non-aversive treatments such as trying to change thought patterns through hypnosis.

Conversion therapy is ineffective and associated with poor mental health, including suicidal ideation, according to many experts. Several major medical associations — including the American Medical Association and the American Academy of Pediatrics — oppose the practice. People who report wanting to change their sexual orientations [perceive a benefit](#) from therapeutic interventions when they are given acceptance, social support and opportunities to explore their identity, according to the American Psychological Association.

The conversion therapy industry was shaken several weeks ago when the founder of faith-based conversion therapy center Hope for Wholeness Network [said he was gay](#) and recognized the harm he had caused.

“It’s all in my past, but many, way TOO MANY continue believing that there is something wrong with themselves and wrong with people that choose to live their lives honestly and open as gay, lesbian, trans, etc.,” McKrae Game, 51, wrote on Facebook. “The very harmful cycle of self shame and condemnation has to stop.”

Read more:

[Perspective: The ex-gay Christianity movement is making a quiet comeback. The effects on LGBTQ youth could be devastating.](#)

[Are Confederate monument fans committing the sin of idol worship? An unusual Charlottesville Bible study makes the case.](#)

[Trump accidentally tweeted an insult at a pastor. Here’s how the pastor responded.](#)

[Once a white supremacist, he now has a prescription for tolerance: True Christianity](#)

Marisa Iati

Marisa Iati is a reporter for the General Assignment News Desk and the Metro desk. She is a graduate of American University. She previously worked at The Star-Ledger and NJ.com in New Jersey, where she covered municipal mayhem, community issues, education and crime. [Follow](#) 

EXHIBIT

C



**Consumer
Affairs**

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.”

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.