

Alliance Defending Freedom
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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

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

1. The patient-psychotherapist relationship requires giving patients the ability to express themselves without fear of reprisal and allowing therapists the freedom to respond to that expression with understanding; it is the last possible place where the government should be dictating what topics or ideas are off limits. Yet New York City's recently enacted Law Number 2018/22 ("the Counseling Censorship Law"), reaches into this confidential relationship to prohibit the discussion and exploration of ideas—and even the patient's own, personal goals—to which the New York City Council objects.

2. Specifically, if an adult patient is experiencing—and does not wish to experience—same-sex attractions, or a sense of gender identity that is discordant with his or her biological sex, the Counseling Censorship Law threatens fines as

high as \$10,000 against a psychotherapist if he or she offers any thoughts—or indeed says anything at all—to assist the patient in pursuing a personally chosen goal of reducing same-sex attraction, increasing sexual attraction to the opposite sex, or achieving comfort in a gender identity congruent with the patient’s physical body and reproductive nature.

3. As a result, the Counseling Censorship Law prevents adult 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 life that they choose for themselves and desire to pursue.

4. The Counseling Censorship Law is premised on a denial of free will and the possibility of personal growth and change—particularly with respect to matters of sexuality—that is not only debated by doctors and psychologists today, but has been debated by philosophers and religious teachers across millennia. If freedom of thought, speech, and personal identity mean anything, New York City has no business attempting to resolve such questions for its millions of residents and has no constitutional authority to enforce its viewpoint with heavy penalties of the law.

5. The Counseling Censorship Law is unprecedented. It is the first in the nation to censor speech between counselors and adult patients. Across the years, various psychological theories and therapies (including, for example, Freudian analysis) have been denounced as wrong, dangerous, and harmful to patients and

society, yet never before has government dared to intrude into the counseling room to censor desired conversations between a counselor and an adult patient because those conversations reflect disfavored psychological theories or personal goals. Instead, the evolution and weeding out of therapeutic methods has been left to the “uninhibited marketplace of ideas”—a marketplace at least as critical in areas of science and psychology as in any other.

6. The Counseling Censorship Law is entirely one-sided, presuming to decide which ideas about sexuality shall prevail, and to suppress those ideas with which the City Council disagrees. Most glaringly, while the Counseling Censorship Law prohibits mere words if they aim to help an individual patient achieve a gender identity congruent with the patient’s biological body and reproductive potential, the Counseling Censorship Law expressly allows any method of therapy at all if it aims to help an individual “change” his gender identity to that of the opposite biological sex.

7. Dr. Schwartz and virtually all of his patients are Orthodox Jews. The personal goals relating to sexuality, marriage, and family of Dr. Schwartz’s patients, 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 Dr. Schwartz shares that faith and those convictions, he is able to provide psychotherapy that understands, respects, and assists these patients towards their goals.

8. For these reasons, it is difficult to imagine a more direct violation of freedom of speech and of free exercise of religion protected by the First Amendment than that threatened by the Counseling Censorship Law.

9. In sum, and as detailed in this Complaint, New York City Law Number 2018/22 is unconstitutional in its entirety.

10. Plaintiff Dr. David Schwartz is a counselor and psychotherapist practicing in New York City who has a general practice but who has regularly had, and currently has, patients who desire counseling that the Counseling Censorship Law prohibits.

11. Dr. Schwartz and almost all of his patients are members of the Orthodox Jewish community. Both his patients' personal goals and Dr. Schwartz's counsel are often informed by views about human nature and the nature of a life well lived that are grounded in their Jewish faith and Torah teachings.

12. In Dr. Schwartz's general psychotherapeutic practice, he encounters patients with concerns relating to sexuality, among a wide range of other issues. Dr. Schwartz's approach to psychotherapy seeks to help patients achieve goals with respect to themselves and their relationships that they choose for themselves. Dr. Schwartz works only with willing patients—patients who voluntarily walk into his office and talk with him because they want and value his counsel. And Dr. Schwartz does nothing to or with his patients other than listen to them and talk with them.

13. Now, the Counseling Censorship Law threatens Dr. Schwartz with fines quickly escalating to \$10,000 per patient if he participates with those patients in the discussions that they desire.

14. Accordingly, Dr. Schwartz brings this action seeking a declaration that the Counseling Censorship Law is unconstitutional, and injunctive relief against its enforcement.

I. JURISDICTION AND VENUE

15. This civil rights action pursuant to 42 U.S.C. § 1983 raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments.

16. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

17. This Court has authority to award the requested declaratory relief under 28 U.S.C. §§ 2201-02 and Federal Rule of Civil Procedure 57; the requested injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65; and costs and attorneys' fees under 42 U.S.C. §1988.

18. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in this District and Defendant the City of New York is located in relevant part in this District.

II. PARTIES

19. Plaintiff Dr. David Schwartz is a licensed clinical social worker in the State of New York. He resides and practices in Brooklyn, New York.

20. Dr. Schwartz obtained his Masters in Social Work from the University of Michigan in 1968, and his doctorate in psychology from California Southern University in 2005.

21. He is 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.

22. Among other positions, Dr. Schwartz was employed at the Veterans Administration Medical Center in Northampton, Massachusetts from 1970 through 1996, where he served on the hospital's Ethics Advisory Committee from 1987 through 1996, and chaired that committee from 1994 through 1996.

23. Dr. Schwartz 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.

24. Dr. Schwartz has served as a consultant on eating disorders with the Magen Avroham Eating Disorder Program in Borough Park, Brooklyn from 2005 to the present.

25. Dr. Schwartz has 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.

26. Dr. Schwartz has 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, Hunter College, University of Connecticut, Boston College, University of Massachusetts, University of Michigan, and Michigan State University.

27. Dr. Schwartz is 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.

28. The City of New York is a municipal corporation, a subdivision of the State of New York, existing in relevant part within the Eastern District of New York.

29. Ms. Lorelei Salas is Commissioner of the Department of Consumer Affairs of the City of New York.

30. Ms. Salas acted under color of the law of the City of New York when performing the acts attributed to her in this Complaint. Her responsibility and authority in her official capacity include directing the activities of the Department of Consumer Affairs.

31. The Department of Consumer Affairs, under the direction of Commissioner Salas, claims the right to investigate and assess penalties for

violations of the Counseling Censorship Law in response to consumer complaints, and on its own initiative.

32. At the direction of Ms. Salas, the Department of Consumer Affairs promulgated a new rule, Section 6-69 of Subchapter B of Chapter 6 of Title 6 of the Rules of the City of New York, fixing maximum penalties for first, second, and subsequent violations of the Counseling Censorship Law in amounts of \$750, \$4,500, and \$10,000 respectively per patient.

33. Also at the direction of Ms. Salas, the Department of Consumer Affairs has actively worked to recruit anonymous informants to accuse counselors and psychotherapists of violating the Counseling Censorship Law, posting on its website a notice encouraging anonymous complaints, and promising that “DCA will investigate” even anonymous complaints, and impose fines on violators.

III. FACTUAL BACKGROUND

A. The City Law & Implementing Rules

34. On December 31, 2017, the Council of the City of New York enacted Law Number 2018/22, effective as of April 30, 2018, and now codified at New York City Administrative Code Chapter 5 § 20-824-827.

35. The Counseling Censorship Law declares that “It is unlawful for any person to offer or provide conversion therapy services.”

36. The Counseling Censorship Law defines “conversion therapy” services to mean “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.”

37. The Counseling Censorship Law excludes 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.”

38. The Counseling Censorship Law does not explain how an individual's sexual orientation can “develop” without undergoing “change.”

39. While prohibiting counseling services that seek to assist an individual to achieve a felt gender identity consistent with that individual's biological sex (“the sex of such individual that was recorded at birth”), the Counseling Censorship Law excludes from its prohibition counseling services that “seek to change a person's gender identity” away from that individual's biological sex.

40. The Counseling Censorship Law provides no definitions of “gender identity,” “sexual orientation,” or “identity exploration and development.”

41. The Counseling Censorship Law also does not define what constitutes “offering” conversion therapy services.

42. In a report from the Committee on Civil Rights submitted to the City Council on June 19, 2017 (the “June 19 Report”), and again in almost identical form on November 29, 2017 (the “November 29 Report”), shortly before the Counseling Censorship Law was passed, the Committee on Civil Rights expressly asserted that

“groups” engaging in the practices intended to be prohibited are “often religious in nature.”

43. Testimony taken by the Committee on Civil Rights in support of the Counseling Censorship Law repeatedly associated alleged “conversion therapy” with religious groups, expressed hostility towards the beliefs of religious groups, and expressed a goal of forcing religious groups to change their practices.

44. Not a single example of any group or individual performing what is labelled “conversion therapy” in New York City is cited in the Reports of the Committee on Civil Rights or the testimony of the witnesses recorded in the official legislative history of the Counseling Censorship Law, other than religious groups.

45. The June 19 Report and November 29 Report both assert that, “In the past” conversion therapy practices “have included measures such as institutionalization, castration, and electroconvulsive shock therapy.”

46. But the Reports identify no instances of such measures having ever taken place in New York City, do not indicate when “in the past” the Committee is referring to, and do not assert that any group or individual is using such measures anywhere, much less in New York City, today.

47. Citing and quoting nothing except newspaper articles and advocacy papers by advocacy organizations, the Reports asserted that an American Psychological Association study “concluded that [sexual orientation change efforts] were not scientifically supported,” that “it is unlikely that individuals will be able to reduce same-sex attractions or increase other sex-attractions,” and that “[t]he

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.”

48. In fact, the cited 2009 APA report reached a number of conclusions that the Committee Report did not quote and indeed inaccurately summarized.

49. These conclusions include the following::

- “[F]or some, sexual orientation identity . . . is fluid or has an indefinite outcome”;
- “Some individuals choose to live their lives in accordance with personal or religious values”;
- “None of the recent research (1999-2007) [concerning sexual orientation change efforts] meets methodological standards that permit conclusions regarding efficacy or safety”;
- “Some individuals perceived that they had benefited from SOCE, while others perceived that they had been harmed”;
- “Some individuals modified their sexual orientation identity . . . and other aspects of sexuality (e.g., values and behavior)”;
- “Some individuals [expressing a same-sex orientation] reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity.”

50. §20-827 of the Counseling Censorship Law provides that the New York City Department of Consumer Affairs “may promulgate such rules and regulations as it deems necessary to implement and enforce the provisions of this subchapter.”

51. Effective July 22, 2018, the Department of Consumer Affairs, under the direction of Commissioner Salas, promulgated Section 6-69 of Subchapter B of Chapter 6 of Title 6 of the Rules of the City of New York, fixing mandatory penalties for first, second, and subsequent violations of the Counseling Censorship Law (“the Penalties Rule”) rising as high as \$10,000 per violation.

B. Plaintiff's Patients and Practice

52. Plaintiff Dr. David Schwartz practiced as a licensed clinical social worker in Massachusetts for 29 years.

53. He has lived and maintained an independent general counseling and psychotherapy practice within the Orthodox Jewish community throughout New York City since 1999.

54. Almost all of Dr. Schwartz's patients are members of the religious community of which he is a part. Dr. Schwartz does not advertise; his patients come to him as a result of referrals from former patients, other members of the community, and area rabbis.

55. As a general practitioner, Dr. Schwartz encounters in his patients a wide scope of the emotional, family, relational, and mental difficulties to which members of any human community are vulnerable.

56. In this regard, his practice is similar to that of any general practice psychotherapist.

57. Because he is a member of the Orthodox community, however, Dr. Schwartz is able to engage with his 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.

58. Although he is religiously observant and actively involved in the religious and cultural life of the Lubavitcher community, Dr. Schwartz is not a rabbi. He does not view it as the psychotherapist's role to rebuke patients or to tell them the direction they "ought" to go.

59. Rather, Dr. Schwartz works 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.

60. Dr. Schwartz's patients come to him for help with a very wide range of issues. However, his practice regularly includes a few individuals who experience undesired same-sex attractions.

61. In some cases, patients come to Dr. Schwartz seeking his assistance in pursuing their personal goal of reducing their same-sex attractions and developing their sense of sexual attraction to the opposite sex.

62. In other cases, patients come to Dr. Schwartz initially seeking therapy concerning other perceived difficulties, but in the course of therapy seek Dr. Schwartz's assistance to develop or strengthen opposite-sex attraction.

63. In still other cases, patients who experience same-sex attraction have come to Dr. Schwartz for his help on different issues, and have not expressed any desire for his help on issues relating to sexuality. Dr. Schwartz is willing to and does work with such individuals on such other issues.

64. In his psychotherapeutic practice, Dr. Schwartz does not attempt to increase opposite-sex attraction or change same-sex attraction in patients who do not desire his assistance in that direction.

65. In working with patients who desire to decrease same-sex attraction or increase their attraction to the opposite sex, Dr. Schwartz never promises that these goals will be achieved.

66. In counseling patients who desire to decrease same-sex attraction or increase their attraction to the opposite sex, Dr. Schwartz engages 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.

67. Dr. Schwartz does not use electro-shock therapy, he does not recommend that patients view heterosexual pornography or that they subject themselves to painful or other adverse stimulations in response to undesired sexual thoughts.

68. Dr. Schwartz simply listens to what his patients share with him, and talks to them.

69. Not all of Dr. Schwartz's patients who have asked him to help them achieve increased opposite-sex attraction have achieved that goal. Some have chosen to stop pursuing it.

70. However, across the years of his practice and recently, Dr. Schwartz has had a number of patients who have both pursued and achieved their personal goal in this regard with the aid of his 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.

71. These changes have enabled Dr. Schwartz's patients to enter into the heterosexual marriage that they desired, and to build a natural biological family consistent with their personal desires, the instruction of their faith, and an integrated life within their chosen and intentionally traditional community.

72. Over the years, Dr. Schwartz has worked with a number of motivated patients who have experienced meaningful success in achieving their self-identified goal of reducing unwanted same-sex attraction and developing or increasing opposite-sex attraction, enabling them to live more successfully and happily the lives that they desire.

73. Conversations with colleagues as well as published reports from other practitioners over many years, have confirmed to Dr. Schwartz 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 that goal.

74. For example, Dr. Nicholas Cummings—former President of the American Psychological Association, one of the sponsors of the 1975 APA resolution that stated that homosexuality is not a mental disorder, and former Chief Psychologist of the Kaiser Permanente clinic in San Francisco—has stated that at that clinic they found that a significant percentage of patients who were highly motivated to reduce same-sex attraction and increase opposite-sex attraction were able to make progress towards that goal.

75. While Dr. Schwartz shares the widely-held professional view that changing sexual attraction is often difficult, and is aware that therapies for patients who desire to decrease same-sex attraction are controversial, it is his 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.

76. While patient confidentiality precludes disclosing details, Dr. Schwartz is currently providing psychotherapeutic counseling to several patients who (among other difficulties) are experiencing unwanted same-sex attraction, and who have asked Dr. Schwartz to work with them towards their personally chosen goal of

reducing or eliminating that attraction and developing or increasing a sense of sexual attraction to the opposite sex.

C. The Personal Goals and Motivations of Plaintiff's Patients

77. An individual's choice to accept, or to work to change, his sexual orientation and desires is not necessarily or exclusively a medical question.

78. An individual's choice and personal goals in this regard may be driven by factors including family considerations, religious conviction, and personal philosophy.

79. This is true regardless of whether same-sex attraction is considered to be a "disorder" in any medical or psychological sense.

80. Some patients who seek Dr. Schwartz's assistance to change sexual orientation 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.

81. Indeed, the ability to reproduce—to be a father or mother to children, as the case may be, and to participate in the small society that consists of two parents and their children—has been widely held across cultures and across history to be one of the greatest sources of joy in life.

82. The right to reproduce has also been recognized as one of the most basic human rights, protected under the Constitution.

83. The functional *reason* that the human species (like almost all higher species) is biologically dimorphic—that is, that there are two sexes characterized by different reproductive organs and functions—is to serve the purpose of reproduction and perpetuation of the species.

84. With this in view, 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 from a philosophical point of view to bring his or her subjective desires into line with the objective purposes of sexual differentiation and sexual reproduction.

85. Patients who seek the assistance of Dr. Schwartz 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.

86. Like anyone who endeavors to be faithful to a spouse, 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.

87. 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.

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

89. As noted above, both Dr. Schwartz and the large majority of his 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.

90. The majority of patients who seek Dr. Schwartz's 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.

91. 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.

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

93. 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."

94. Recognizing that fighting to change a “congenital” tendency can be extremely difficult, the Rebbe applied the principle that the Creator does not burden a person with a challenge he is incapable of overcoming, albeit perhaps with great effort, a fundamental teaching of traditional Judaism, 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.”

95. 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.

96. 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 historic Jewish practice, is channeled exclusively to heterosexual marital relationships.

97. Thus—in addition to Dr. Schwartz’s empirical reasons discussed above—Dr. Schwartz 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 necessarily immutable.

98. In Dr. Schwartz's experience, patients who ask him to help them change their sexual orientation towards heterosexual attraction 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.

99. For human, professional, and religious reasons, Dr. Schwartz desires to continue to help both current and future patients who seek his help in reducing unwanted same-sex attraction and developing or increasing opposite-sex attraction.

100. In providing this help to patients who request it, Dr. Schwartz fears that he 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, Dr. Schwartz is forced to choose between risking the severe penalties mandated by that law and the Penalties Rule, or self-censoring his conversations with his 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."

101. Indeed, even if Dr. Schwartz makes the choice to provide his patients the counseling help that they desire and to exercise and vindicate his own First Amendment rights—and by so doing, to violate the law—he cannot help but be conscious of the risk that the City of New York may impose tens of thousands of dollars of fines on him.

102. This knowledge in turn inevitably chills what should be a free and unfettered confidential conversation between psychotherapist and patient concerning deeply personal feelings and decisions, where candor is crucial.

COUNT I

For Denial of Free Speech Rights of Dr. Schwartz That Are Guaranteed by the First Amendment

103. Plaintiff incorporates all paragraphs above by reference.

104. Dr. Schwartz’s rights of free speech protected by the First Amendment include the right to discuss ideas with his patients in his professional capacity, to talk about his patients’ goals for themselves including goals relating to changes in sexual orientation and relationships, and to offer advice for achieving those goals—even if other professionals or the New York City Council disagree with those goals or those ideas—free from government efforts to suppress ideas or information of which it disapproves.

105. Because the Counseling Censorship Law purports to *prohibit* the provision of services to help a patient achieve congruence between his subjective sense of gender and his objective biological and reproductive sex (“the sex of such individual recorded at birth”) while *permitting* the provision of services to assist a

patient towards a subjective sense of gender at odds with his objective biological and reproductive sex, it is neither viewpoint nor content neutral.

106. Similarly, while the boundary between “change” and “develop” is hopelessly vague in the Counseling Censorship Law, the statute allows those who provide counseling services to assist individuals in directing and redirecting their sexual desires and relationships in any imaginable direction except towards congruence with the natural reproductive function—that is, towards stable heterosexual attraction.

107. Thus, far from being viewpoint and content neutral, the Counseling Censorship Law violates the separation between ideology and medical discourse, aiming to suppress the dissemination of ideas and information about human sexuality and the human capacity for change in this area that are unpopular with and disapproved by the New York City Council.

108. The Counseling Censorship Law does not adopt the least restrictive means to pursue a compelling government interest.

109. The government has no cognizable interest at all—let alone a compelling interest—in preventing citizens from hearing ideas that those citizens wish to hear in a counseling relationship.

110. The Counseling Censorship Law is overbroad rather than narrowly tailored. Assuming that there are particular physical or pharmaceutical therapies that the state may legitimately regulate, the Counseling Censorship Law makes no attempt at all to identify those therapies and target its prohibitions against them.

111. Instead, and by design, it sweeps across the realm of the free exchange of ideas about the most intimate matters of life, emotional attractions, and personal relationships.

112. The Counseling Censorship Law is also severely underinclusive, because it allows counselors to assist or steer patients towards any form and direction of sexual desire and activity whatsoever, with the sole exception of prohibiting assistance towards congruence between a patient's objective sex and biological reproductive nature and his or her felt sense of gender identity and sexual attractions.

113. In addition to restricting speech, the Counseling Censorship Law also impermissibly compels speech. If a patient seeks Dr. Schwartz's help to change his or her sexual attractions to align with that patient's reproductive biology, the law effectively requires Dr. Schwartz to tell the patient that no such change is possible, which Dr. Schwartz does not believe to be true.

114. For all these reasons, the Counseling Censorship Law and Penalties Rule deprive Dr. Schwartz of his free speech rights guaranteed by the First Amendment.

115. This deprivation of constitutional right constitutes irreparable injury.

116. Wherefore, Dr. Schwartz respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law and Penalties Rule pursuant to 28 U.S.C §§ 2201 and 2202, as set forth in the Prayer for Relief.

COUNT II

For Denial of the Due Process Rights of Dr. Schwartz in Violation of the Fourteenth Amendment Because the Counseling Censorship Law Is Unduly Vague

117. Plaintiff incorporates all paragraphs above by reference.

118. The Counseling Censorship Law is unconstitutionally vague in that a provider of counseling or psychological services is required to guess at the entirely undefined line between services that permissibly seek to assist a patient to “develop” his or her sexual orientation or gender identity, and those that unlawfully seek to “change” that person’s sexual orientation or gender identity.

119. Given that “development” necessarily involves “change,” the purported distinction is incoherent, and thus, as a regulation of speech, vague.

120. That law’s prohibition on “seek[ing] to change a person’s gender identity” is also impermissibly vague because the term “gender identity” is undefined in the law and is vague.

121. This vagueness is made worse rather than resolved by reference to publications and governmental position statements in the field.

122. One such publication states that “Gender identity can be conceptualized as a continuum, a Mobius, or patchwork.”¹ Another states that “Gender is comprised of a person’s physical and genetic traits, their own sense of gender identity and their gender expression. Given the numerous combinations that these factors can create, gender is better understood as a spectrum.” That

¹ *Principles of Transgender Medicine and Surgery* 43 (Randi Ettner, Stan Monstrey & Eli Coleman eds., 2nd ed. 2016).

source goes on to say that an individual may have an “internal sense of self as male, female, both or neither,” and that “each person is in the best position to define their own place on the gender spectrum.”²

123. New York City’s Commission on Human Rights has issued Guidance on Discrimination on the Basis of Gender Identity or Expression that amorphously defines “gender identity” as “one’s internal deeply-held sense of one’s gender which may be the same or different from one’s sex assigned at birth. One’s gender identity may be male, female, neither or both, e.g., non-binary. Everyone has a gender identity. Gender identity is distinct from sexual orientation.”

124. It further defines “gender” as “an individual’s actual or perceived sex, gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned at birth.”

125. It is impossible to know from such definitions—even if they were included or referenced in the Counseling Censorship Law, which they are not—what changes to behavior, dress, or emotional feelings would or would not constitute a change (or attempt to change) “gender identity.”

126. Particularly in the context of psychotherapy, the law’s undefined prohibition on “offering” counseling services is also impermissibly vague. As explained above, psychotherapeutic counseling relationships and goals often

² Asaf Orr et al., National Center for Lesbian Rights, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* 5, 6 (2015), <http://bit.ly/2di0ltr>.

develop over time, and Dr. Schwartz not infrequently finds himself working with a patient on issues that were not identified or presented by the patient at the beginning of the counseling relationship.

127. Specifically, Dr. Schwartz has had multiple patients who have initially presented with concerns and counseling goals not associated with sexual attractions, but who in the course of the counseling relationship have come to identify unwanted same-sex attraction as an issue that they desire Dr. Schwartz to assist them with.

128. The Counseling Censorship Law is impermissibly vague in that a provider of counseling or psychological services such as Dr. Schwartz is required to guess, in the midst of an evolving therapeutic relationship, whether a particular comment or response to a patient's questions or concerns may be construed as an "offer" of "conversion therapy services."

129. The Counseling Censorship Law is further impermissibly vague because it prohibits "services . . . that *seek* to change . . ." sexual orientation or gender identity. The law does not specify whether this refers to the subjective intent of the patient, or that of the counselor, or both. The patient's personal purpose in raising a subject relating to sexuality may or may not be known to the counselor, and may change from one meeting to the next. The psychotherapist is threatened with heavy penalties that may depend on subjective thoughts of the patient that the psychotherapist may not either know or be able to control.

130. As a result of the pervasive vagueness of the Counseling Censorship Law, Dr. Schwartz is put at peril of tens of thousands of dollars in penalties without reasonable notice, in violation of his right to due process guaranteed by the Fourteenth Amendment.

131. This deprivation of constitutional right constitutes irreparable injury.

132. Wherefore, Dr. Schwartz respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law and Penalties Rule pursuant to 28 U.S.C §§ 2201 and 2202, as set forth in the Prayer for Relief.

COUNT III

For Denial of the Free Speech Rights of Patients of Dr. Schwartz
That are Guaranteed by the First Amendment

133. Plaintiff incorporates all paragraphs above by reference.

134. By prohibiting Dr. Schwartz from talking to patients with a view towards helping them achieve their personal goals of changing their sexual orientation by reducing same-sex attraction or increasing opposite-sex attraction, the Counseling Censorship Law violates the patients' First Amendment right to hear desired speech.

135. To comply with the Counseling Censorship Law, Dr. Schwartz must terminate or self-censor in any conversation with a patient that may tend in that direction, regardless of his patient's desire to discuss the matter and seek his counsel.

136. Because of this, the Counseling Censorship Law indirectly infringes his patients' First Amendment right to talk freely and with complete candor with Dr. Schwartz about these deeply personal matters, and to receive ideas and suggestions from Dr. Schwartz, without governmental interference.

137. Plaintiff has standing to assert and seek redress for the First Amendment rights of his patients that will be violated by actual enforcement of New York City's Counseling Censorship Law, and also by chilling free and open communications between Dr. Schwartz and those patients by the very existence of the law.

138. Dr. Schwartz has a close therapeutic relationship with the patients who seek his assistance to pursue personal goals relating to sexual attractions, behaviors, and orientation.

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

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

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

142. 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.

143. The violation of the right of free speech of patients of Dr. Schwartz that is protected by the First Amendment constitutes irreparable injury.

144. Wherefore, Dr. Schwartz respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law and Penalties Rule pursuant to 28 U.S.C §§ 2201 and 2202, as set forth in the Prayer for Relief.

COUNT IV

For Denial of Dr. Schwartz's Right to Free Exercise of Religion That Is Guaranteed by the First Amendment

145. Plaintiff incorporates all paragraphs above by reference.

146. Dr. Schwartz has a right to use his professional skills to assist patients to live in accordance with their shared religious faith, including the religious mandates of the Torah and the teachings of the Lubavitcher Rebbe and other respected Orthodox Jewish authorities based on the Torah.

147. The Counseling Censorship Law purports to be justified, in its legislative history, by a supposed finding that "changing" sexual orientation is impossible.

148. The Lubavitcher Rebbe, whose teachings inform the core of Dr. Schwartz's religious convictions, taught exactly the opposite.

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

150. Based on both his religious conviction and his own professional experience and discussions with colleagues over the years, Dr. Schwartz believes that the New York City Council is mistaken in its understanding of human nature as created by G-d, and the Torah is right.

151. By purporting to prohibit Dr. Schwartz from providing counseling to his fellow Jews that is guided by and consistent with his religious convictions concerning human nature and the possibility of change, and that seeks to assist his patients in living consistently with their own religious convictions, the Counseling Censorship Law violates his right to freely exercise his religion guaranteed by the First Amendment.

152. Because the New York City Council enacted the Counseling Censorship Law with the knowledge and intent that it was hostile to and targeting practices particularly associated with persons and communities adhering to traditional religious beliefs, the Counseling Censorship Law is not a neutral law of general applicability.

153. The Counseling Censorship Law is also not neutral or of general applicability, and it does not represent the least restrictive means of furthering any cognizable governmental interest, being both overbroad and underinclusive.

154. If a patient seeks Dr. Schwartz's assistance in reducing unwanted same-sex attraction and developing or increasing opposite-sex attraction, Dr. Schwartz cannot—consistent with his conscience, his religious convictions, or his general client-oriented approach to psychotherapy—counsel that individual that such change is impossible, or that the individual should not pursue it.

155. The deprivation of Dr. Schwartz's constitutional right to practice his beliefs by speaking to patients on topics of sexual attraction and orientation and change in a manner consistent with the teachings of his faith, and theirs, constitutes irreparable injury.

156. Wherefore, Dr. Schwartz respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law and Penalties Rule pursuant to 28 U.S.C §§ 2201 and 2202, as set forth in the Prayer for Relief.

COUNT V

For Denial of the Free Exercise Rights of Patients of Dr. Schwartz That Are Protected by the First Amendment

157. Plaintiff incorporates all paragraphs above by reference.

158. By prohibiting Dr. Schwartz from providing to patients counseling services to help them live their lives in personal and family relationships consistent with the teachings of their faith and their own religious convictions, the Counseling Censorship Law indirectly violates the patients' First Amendment right to freely exercise their religion.

159. By threatening Dr. Schwartz with large fines, the Counseling Censorship Law and Penalties Rule necessarily chill and impair Dr. Schwartz's provision of such services, and so indirectly violate the patients' First Amendment right to freely exercise their religion.

160. Dr. Schwartz has standing to assert and seek redress for the First Amendment rights of his patients that will be violated by actual enforcement of New York City's Counseling Censorship Law, and that are violated by the very existence of the law which chills free and open communications between Dr. Schwartz and those patients.

161. The violation of the right of free exercise of religion of patients of Dr. Schwartz that is protected by the First Amendment constitutes irreparable injury.

162. Wherefore, Dr. Schwartz respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law and Penalties Rule pursuant to 28 U.S.C §§ 2201 and 2202, as set forth in the Prayer for Relief.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court enter judgment against Defendants and grant Plaintiff the following relief:

(A) A declaration that the Counseling Censorship Law violates the free speech rights of Plaintiff Dr. Schwartz and of his patients who are seeking his professional assistance to reduce unwanted same-sex attraction and/or develop or increase opposite-sex attractions, both facially and as applied to these individuals;

(B) A declaration that the Counseling Censorship Law violates the right to free exercise of religion of Plaintiff Dr. Schwartz and of his patients who are seeking his professional assistance to reduce unwanted same-sex attraction and/or develop or increase opposite-sex attractions, both facially and as applied to these individuals;

(C) Preliminary and permanent injunctive relief prohibiting Defendants and any person acting under their authority or with their cooperation from taking any action to enforce the Counseling Censorship Law;

(D) That this Court award actual and nominal damages for the violation of Plaintiff's constitutional and statutory rights;

(E) That this Court award Plaintiff costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988;

(F) That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiff;

(G) That this Court grant any other relief that it deems equitable and just in the circumstances; and

(H) That this Court retain jurisdiction over this matter for the purpose of enforcing its orders.

Respectfully submitted this 23rd day of January, 2019.

By: s/Roger G. Brooks

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