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July 14, 2014

Via FedEx

Councilmembers of the District of Columbia
COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: *Statement to the Committee on Health regarding Conversion Therapy for Minors Prohibition Amendment Act*

Dear Honorable Councilmembers:

Freedom X represents Parents and Friends of Ex-Gays & Gays (“PFOX”). On behalf of PFOX, we write to express our united opposition to Bill 20-501 (the “Bill”), the “Conversion Therapy for Minors Prohibition Amendment Act of 2013.” The proposed law seeks to censure sexual orientation change efforts (“SOCE”) administered to minors as “unacceptable conduct within the mental health profession” and to subject practitioners to harsh penalties and professional discipline, even while allowing SOCE to be administered to individuals over the arbitrary age of 18 and while the age of consent in Washington D.C. is 16.

By way of introduction, Freedom X is a non-profit public interest law firm dedicated to protecting our freedom of religious, political and intellectual expression. Freedom X focuses its advocacy on protecting the rights of conservatives, Christians and others who have been targeted for discrimination on the basis of their moral and patriotic beliefs, practices and values. Freedom X believes that discrimination on the basis of the sexual orientation of individuals, no matter their age, who wish to transition from one orientation to another, whether from heterosexual to homosexual *or conversely*, remains *unlawful discrimination* and thus a violation of a person’s civil rights. Moreover, insofar as the proposed law interferes with the right of parents to raise their children to follow particular moral and religious choices, the law potentially violates the Establishment Clause of the U.S. Constitution.

Since its inception, PFOX, a national non-profit organization, has supported many thousands of families of individuals with unwanted same-sex attraction who have made the personal decision to leave homosexuality. PFOX advocates for the civil rights of the ex-gay community. As a family organization, PFOX believes a ban on therapy harms children who have been sexually molested by a same-sex predator, are now confused about their sexual orientation, and yet are prohibited in seeing a licensed therapist of their choice. PFOX is concerned that children are being denied full access to mental health care because of state disapproval of the content of certain therapy talk sessions.



Councilmembers of the District of Columbia

COUNCIL OF THE DISTRICT OF COLUMBIA

July 14, 2014

Page | 2

A growing number of organizations and governmental authorities recognize the existence of ex-gays; that is, that there are individuals who have successfully changed their sexual orientation and are now living as heterosexuals even though they once lived as homosexuals. Indeed, such is the case within this jurisdiction. In *PFOX v. Government of the District of Columbia Office of Human Rights*, No. 08--003662, slip. op. at *5-6 (D.C. Super. Ct. June 26, 2009), the Superior Court of the District of Columbia ordered the D.C. Office of Human Rights to recognize former homosexuals as a protected class for sexual orientation nondiscrimination purposes. *See* Exh. 1, Memorandum Opinion of Judge Maurice Ross, attached hereto.

Accordingly, the D.C. Human Rights Act prohibits discrimination against ex-gays. *See* Statement from the D.C. Office of Human Rights, August 12, 2013 by Elliot E. Imse, Policy and Public Affairs Officer, D.C. Office of Human Rights, attached hereto. (“We are fortunate that in the District of Columbia, individuals cannot be discriminated because of their sexual orientation or gender identity and expression. In 2009, the D.C. Superior Court ruled that those who identify as ex-gay are protected under the sexual orientation trait of the D.C. Human Rights Act, the District’s non-discrimination law. Therefore people who identify as ex-gay can file a complaint with our office if they believe they have been discriminated against while accessing housing, employment, a public accommodation or educational institution.”)

Additionally, Mayor Vincent Gray’s own Order forbids the District government and its agencies from discriminating on the basis of sexual orientation under any circumstances. *See* Exh. 2, Mayor’s Order 2011-155, Amendment of Mayor’s Order 2006-151, dated November 6, 2006, *Uniform Language in D.C. Government Anti-Discrimination Issuances and Equal Employment Opportunity Notices* (September 9, 2011), attached hereto (“The Director of the D.C. Office of Human Rights, or the designee thereof, is authorized and directed to implement this Order and to monitor the compliance of executive departments and agencies with its directives.”) And because the D.C. Superior Court has ruled that ex-gays are protected under the definition of sexual orientation, ex-gays are included under the Mayor’s Non-discrimination Order. The Councilmembers should follow the Mayor’s order. Because the Mayor’s Order proclaims “[d]iscrimination in violation of the Act *will not be tolerated*” and provides that “[v]iolators will be subject to disciplinary action,” passage of the Bill would result in an irreconcilable and unenforceable conflict between these mandates.

Yet despite these proclamations, the Bill would directly discriminate against individuals based on their sexual orientation by refusing to allow them public access to the licensed therapist of their choice. How can the District of Columbia demand home rule and equal voting rights when its own legislators refuse to grant equal rights to a legally protected and recognized class like ex-gays?



Councilmembers of the District of Columbia

COUNCIL OF THE DISTRICT OF COLUMBIA

July 14, 2014

Page | 3

We also contend that the Bill is content- and viewpoint-based discrimination in violation of the First Amendment freedom of speech clause. The “health” rationale for the proposed law is pretextual and therefore derived from a discriminatory motive. There simply is no *objective* medical evidence—only anecdotal arguments—that SOCE therapy causes harm. The U.S. Supreme Court has “decline[d] the invitation to rest constitutional law upon such uncertain foundations” such as “public opinion polls, the views of interest groups, and the positions adopted by various professional associations.” *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), overruled on other grounds, *Roper v. Simmons*, 543 U.S. 551 (2005).

SOCE therapy is in essence talk therapy. Psychological therapy always starts with a conversation involving only private talking between the therapist and the patient. As such, the bill operates as a prior restraint on patient-therapist speech. “[A]s a general matter [under the First Amendment], . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Brown v. Entm’t Merchants Ass’n*, 131 S. Ct. 2729, 2733 (2011) (quoting and citing *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 573 (2002)). The well-known exceptions to that rule fall into “limited areas” that restrict or prohibit obscenity, incitement, and fighting words. *Brown*, 131 S. Ct. at 2733 (citing authorities). Those exceptions “represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.” *Id.* (internal quotations and citation omitted).

A law, like the Bill, which would impose a restriction on the content of protected speech is invalid unless the District of Columbia can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest. The District of Columbia must specifically identify an actual problem in need of solving, and the curtailment of free speech must be actually necessary to the solution. That is a demanding standard.

Does the language of the Bill restrict speech? The Bill prohibits a licensed mental health provider from engaging in SOCE with a person under age 18. Under the Bill, SOCE means:

a practice by a provider that seeks to change a person's sexual orientation, including efforts to change behaviors, gender identity or expression, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same sex or gender; provided, that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices in a manner that does not seek to change a person's sexual orientation."



Councilmembers of the District of Columbia
COUNCIL OF THE DISTRICT OF COLUMBIA
July 14, 2014
Page | 4

Under the Bill, SOCE is prohibited in the treatment of individuals 18 years of age or younger. 214a (D.C. Official Code 7-1231.14a).

We contend that the **Bill** discriminates against those who reject homosexuality and its cognate forms of sexual behavior (i.e., LGBTQ) on moral and religious grounds, and thus is content- and viewpoint based. We further contend that rationales for the Bill are pretexts concealing a legislative intent to prohibit voluntary non-coercive speech (between a mental health professional and a minor patient) because of the content and ideas of that speech.

Although courts accord deference to the predictive judgments of a legislative body, its obligation is to assure that, in formulating their judgments, the legislature *has drawn reasonable inferences based on substantial evidence*. “This is not to suggest that a 10,000–page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and supposition. The question is whether an actual problem has been proved. . . .” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822 (2000). No problem with SOCE therapy exists in the District of Columbia. Indeed, according to a Freedom of Information Act (FOIA) request received from Phillip L. Husband, Esq., General Counsel and FOIA Officer for the Department of Health, Office of the Attorney General for the District of Columbia, no complaints have ever been filed against a licensed mental health practitioner practicing SOCE therapy in Washington, D.C. “Based on my work for the Department of Health since 2001, I must admit that I do not remember a complaint or grievance involving Sexual Orientation Change Effort or conversion therapy,” stated Husband in an e-mail from June 20, 2014.

We strongly contend that the proposed law violates the Equal Protection Clause of the United States Constitution because it treats ex-gays and homosexuals with unwanted same sex attractions differently from the rest of the population, by placing therapeutic restrictions on a disfavored and politically powerless sexual minority. Because no evidence exists that SOCE is a problem in the District and the legislative history shows that the Bill is agenda-driven by ideology opposed to the sexual orientation of former homosexuals, it is evident that the Bill is based on animus against the ex-gay community; thereby depriving homosexuals with unwanted same sex attractions of their equal rights. *See U.S. v. Windsor*, 133 S. Ct. 2675 (2013) (“In determining whether a law is motivated by an improper animus or purpose, discriminations of an unusual character especially require careful consideration.”)

We have an additional concern with the language of the Bill and the harsh penalties it would impose on therapists who, because of the confidential nature of talk therapy, sit like sitting ducks against charges they have violated it. Because SOCE is talk therapy, the proposed law lends itself to fraudulent abuse by individuals making false accusations against a therapist. The D.C. Circuit long ago recognized the destructive power of mere accusations and the danger of blackmail, when it stated: “as in all acute conflicts between ... public and private interests, the law must be exceedingly careful in its processes. While enforcement of this particular [sex conduct] statute



Councilmembers of the District of Columbia

COUNCIL OF THE DISTRICT OF COLUMBIA

July 14, 2014

Page | 5

must seek the prevention of the offense, it must also seek to prevent unwarranted irreparable destruction to reputations, and it must seek to prevent the equally criminal offense of blackmail; [enforcement of the sex conduct law] *must not foster conditions or practices which make easy and encourage [blackmail].*” *Kelly v. U.S.*, 194 F.2d 150, 154 (D.C. Cir. 1952) (emphasis added). Judicial eyes must still watch out for situations where one person with a grudge or agenda accuses another person of unlawful conduct that is nothing but words.

In *Coltrane v. U.S.*, 418 F.2d 1131 (D.C. Cir. 1969), the D.C. Circuit cited its “long line of decisions” in which the court “consistently held that corroboration of the testimony of complainants in so-called ‘sex cases’ is *indispensably prerequisite* to conviction, and for the cogent reason that for these offenses the risk of unjust conviction is high.” *Id.* at 1134 (emphasis added; footnotes omitted).

Coltrane highlighted a persistent serious problem with prosecutions initiated on the say-so of one person without any corroborating evidence. In the present context, the Bill fails to define any method for identifying the words and phrases constituting conduct that would support a disciplinary action against a therapist. There is no safe harbor, and no set of proscribed words or phrases. A prohibition of private conversations so uncertain as this creates the risk of disappointed, hostile, or agenda-driven patients or individuals masquerading as patients lodging formal complaints against mental health therapists. And, of course, litigious patients incur no cost in filing a disciplinary charge against a therapist—the therapist incurs all of the litigation expenses as well as suffering the obloquy of the accusation.

To resolve a patient’s complaint, the licensing board has to examine the content of the conversations. Unless the sessions are recorded, the evidence can only be personal testimony. Who said what to whom and when and how?

The only way to adjudicate such complaints is to examine conversation content and decide who is accurately revealing that content. How is the content evaluated? By whether the persons listening to it agree or disagree with it. “As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citation omitted).

It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995). Indeed, the government may not “impose special prohibitions on those speakers who express views on disfavored subjects” or on the basis of “hostility—or favoritism—towards the underlying message expressed.” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).



Councilmembers of the District of Columbia
COUNCIL OF THE DISTRICT OF COLUMBIA
July 14, 2014
Page | 6

The Bill creates a system of speech content prohibition that opens new avenues for unhappy or agenda-driven patients to damage mental health therapists. The conceivable unintended consequences of the Bill's prohibition operate to squelch any speech by a therapist that makes any reference to SOCE. Such a prohibition is content and viewpoint discriminatory, and therefore unconstitutional.

The proposed law is a study in social engineering. It cannot be justified on the basis of credible medical evidence, and it deprives individuals who willingly seek out SOCE counseling from getting what they or their parents and guardians desire. The political motivation for the law is especially insidious, since it denies individuals the opportunity to address their sexuality during the years when they are most vulnerable and impressionable.

There can be no serious argument that individuals at age 18 can be harmed by SOCE but that they cannot be harmed at age 19. The dividing line is illusory and irrational, especially when the age of consent in D.C. is 16. Moreover, there simply is no reason to treat individuals *under* the age of 18 who wish to alleviate their homosexual urges in favor of heterosexual urges differently from individuals *over* the age of 18 who wish to alleviate their homosexual urges in favor of heterosexual urges. The Bill allows children to change their gender but not their sexual orientation unless it is gay affirming, thereby discriminating on the basis of sexual orientation. We urge the City Council to deny the Bill passage and permit therapists to provide useful and non-coercive SOCE consultation to individuals, regardless of their age.

Very truly yours,

FREEDOM X

William J. Becker, Jr.

cc: Regina Griggs, Executive Director, Parents and Friends of Ex-Gays & Gays (PFOX)
Mayor Vincent C. Gray
Rayna Smith, Health Committee Director (via e-mail only: RSmith@DCCouncil.us)

EXHIBIT 1

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
Civil Division

PARENTS AND FRIENDS OF)	
EX-GAYS, INC.)	
)	
Petitioner,)	C.A. No.: 2008 CA 003662 P (MPA)
)	Judge: Maurice Ross
v.)	
)	
GOVERNMENT OF THE DISTRICT)	
OFFICE OF HUMAN RIGHTS)	
)	
Respondent.)	
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MEMORANDUM OPINION

I. FACTUAL AND PROCEDURAL HISTORY

A. Introduction

This is an appeal of a decision of the Office of Human Rights (“OHR”) in a Letter of Determination dated May 24, 2005, and a subsequent Determination on Complainant’s Request for Reconsideration dated November 1, 2005.¹ AR 285-94; 298-98. On May 15, 2008, Petitioner, Parents and Friends of Ex-Gays, Inc. (“PFOX”), brought a Merit Personnel Action before this Court. Petitioner submitted its brief on January 8, 2009, requesting that the Court reverse OHR’s decision. On April 7, 2009, Intervenor, National Education Association (“NEA”), and Respondent, District of Columbia (“DC”), submitted their briefs. Respondent joined Intervenor’s brief except as to its argument regarding jurisdiction. Finally, Petitioner submitted its reply brief on May 19, 2009.

¹ Reference to the Agency Record will be referred to herein as “AR” followed by the appropriate page number.

B. Factual History

This matter arises from PFOX's application, sent in March 2002, to lease an exhibit booth at NEA's annual convention, EXPO 2002, in Dallas, Texas. AR 286. NEA is headquartered in Washington, DC. Its headquarters include a cafeteria open to the public. Int's Br. 24. EXPO 2002 was a function organized and funded by the NEA for the purpose of supporting NEA delegates in their roles as association leaders. Int's Br. 7. Approximately 9,000 NEA elected delegates and officers from the millions of dues-paying members attend the annual conventions. Id. Exhibitors whose applications were approved by NEA also attended the conference. Id. Admission to the conference was monitored by security guards and all exhibitors and attendees were required to wear NEA badges at all times. Id.

PFOX sought to participate in the convention, in part, to provide information to the public in an effort to promote tolerance and equality for the ex-gay community. AR 286. To complete the application process, PFOX submitted a check for payment of the deposit for the booth to Conventions, Exhibits, Promotions, Inc. ("CEPI"). Id. NEA cashed the deposit check on April 4, 2002. On June 7, 2002, an NEA executive officer, Carolyn Cruise ("Cruise"), called PFOX and spoke with Estella Salvatierra ("Salvatierra"), Vice President of PFOX. Cruise stated that she contacted PFOX to get more information about the organization, even though PFOX's booth application was complete and contained detailed information. Id. At the conclusion of the conversation, Cruise informed PFOX that booth space was very limited and that priority was given to past participants. Id. Immediately after this call, PFOX contacted CEPI to determine the availability of exhibit booths at EXPO 2002. CEPI informed PFOX that two booths were still available and other booths were likely to come open as other organizations canceled. Id.

Furthermore, NEA's website indicated that past patronage by an organization gave them a priority in booth location, but not booth availability. Id.

On June 10, 2002, NEA rejected PFOX's application. AR 286. In the letter of rejection, a lack of exhibit space was cited as the reason for rejection, which at the time the application was rejected, appears to be true. Id. In its briefs to OHR and this Court, however, NEA cites the fact that NEA can reject exhibitors if a group's message or policies are contrary to NEA's policies or has the potential to create a disruption at the convention. AR 36; 287-88. NEA determined PFOX's message contravened NEA's policies and was potentially disruptive because PFOX is a "conversion" group, which the NEA views as hostile to people of various sexual orientations. AR 288.

C. OHR's Determinations

PFOX brought their charge before OHR on the grounds that the organization and its members had been discriminated against on the basis of sexual orientation in the denial of services as a public accommodation. AR 69. On May 24, 2005, OHR issued a no probable cause determination letter finding against PFOX. AR 285-292. OHR made the following findings: (1) OHR had jurisdiction over the dispute because the denial of PFOX's application occurred in D.C.; (2) NEA provides a public accommodation pursuant to D.C. Code § 2-1401.02; (3) ex-gays are not members of a protected class under the HRA based on the plain language of the statute; and (4) even if PFOX was part of a protected class, NEA rejected PFOX's application for non-discriminatory reasons. AR 285-292. PFOX then filed a request for reconsideration of OHR's determination.

On November 1, 2005, OHR granted PFOX's request for reconsideration of its no probable cause determination and affirmed its prior no probable cause determination. AR 295 -

298. OHR ruled that ex-gays are not a protected class because they, by definition, do not possess an immutable characteristic. Citing multiple D.C. and Maryland cases, OHR noted that PFOX defined ex-gays as individuals who chose to leave homosexuality and practice heterosexuality by preference. AR 297.² Furthermore, OHR found that even though PFOX represents gays and ex-gays, it did not establish a case of prima facie discrimination because other gay individuals were permitted to attend EXPO 2002. AR 297. Thus, there are two primary issues before the Court: (1) whether OHR properly determined that there was no probable cause to believe that NEA discriminated against PFOX on the basis of sexual orientation and (2) whether OHR had jurisdiction over PFOX's charge of discrimination.

II. STANDARD OF REVIEW

The Superior Court has jurisdiction to review a final decision of an agency of the District of Columbia, including an agency's determination of no probable cause. Super. Ct. Agency Rev. R. 1; see Simpson v. Office of Human Rights, 597 A.2d 392, 397-399 (D.C. 1991). The court, however, cannot "set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." Super. Ct. Agency Rev. R. 1(g). "Substantial evidence is relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." Mills v. District of Columbia Dep't of Empl. Servs., 838 A.2d 325, 328 (D.C. 2003) (quoting Black v. District of Columbia Dep't of Employment Servs., 801 A.2d 983, 985 (D.C. 2002)); see also Vogel v. D.C. Office of Planning, 944 A.2d 456, 463-464 (D.C. 2008). As long as the agency's decision is supported by substantial evidence in the record, it must be affirmed "notwithstanding that there may be contrary evidence in the record (as there

² OHR cites the following cases for the proposition that immutably must be present for a group to be considered a protected class: Batson v. Powell, 912 F. Supp. 565 (D.D.C. 1996); Arnold v. U.S. Postal Serv., 274 305 (D.C. Cir. 1988); Dean v. D.C., 653 A.2d 307 (D.C. 1995); and Callwood v. Dave & Buster's Inc., 98 F. Supp.2d 694 (D. Md. 2000).

usually is).” Ferreira v. District of Columbia Dep't of Employment Servs., 667 A.2d 310, 312 (D.C. 1995).

III. ANALYSIS

A. Discrimination Based on Sexual Orientation

1. Ex-gays as a Protected Class

OHR’s determination that a characteristic must be immutable to be protected under the HRA is clearly erroneous as a matter of law. OHR ignores the plain language and explicitly stated intent of the HRA. Indeed, the HRA lists numerous protected categories such as religion, personal appearance, familial status, and source of income, which are subject to change. The HRA’s purpose is “to secure an end in the District of Columbia to discrimination for any reason other than that of individual merit....” D.C. Code § 2-1401.01; see also Executive Sandwich Shoppe, Inc. v. Carr Realty Corp., 749 A.2d 724, 732 (D.C. 2000) (citation and internal quotations omitted) (holding that the HRA is a powerful, flexible, and far-reaching prohibition against discrimination of many kinds). Pertaining to sexual orientation, moreover, the HRA in §2-1401.02(28) defines sexual orientation as “male or female homosexuality, heterosexuality and bisexuality, by preference or practice.” Thus, the HRA's intent and plain language eschews narrow interpretation.

While OHR's analysis and the Title VII cases cited by OHR speak in terms of immutable characteristics, the HRA clearly does not limit itself only to immutable characteristics. The premise of the HRA is simple: to end all discrimination based on anything other than individual merit. Numerous protected classes listed in the HRA include mutable traits. Furthermore, the definition of sexual orientation defines an

individual's sexuality as a "preference" or "practice." D.C. Code §2-1401.01. OHR's analysis posits that the immutability of a person's preferred sexual orientation categorizes them as a member of a protected class. In focusing on federal discrimination cases, however, the OHR misses the broad scope of the HRA and the explicit inclusion of the term "practice" in the HRA's definition of sexual orientation.

Certainly no parties in this matter would argue that the phenomenon of individuals practicing heterosexuality, homosexuality, or any combination thereof exists in D.C. and the rest of the world. Indeed, PFOX partially consists of individuals who practiced homosexuality and now practice heterosexuality. Thus, OHR's fixation on the "preference" element of the sexual orientation definition in its analysis is clearly erroneous. Indeed, the inclusion of the word "practice" in the HRA's sexual orientation definition makes sexual orientation and immutability mutually exclusive under the HRA. Indeed, the Court does not need to delve into the voluminous studies discussed in OHR's and NEA's cited cases regarding the immutability of sexual preferences. The HRA took such an analysis out of the equation by protecting an individual's sexual practices as well. Furthermore, the HRA's broad language does not make immutability a requirement to be a member of a protected class. Therefore, the Court reverses the OHR's ruling that ex-gays are not protected from discrimination under the HRA because it directly contravenes the plain language and intent of the statute.

2. NEA's Rejection of PFOX's Application

The Court affirms OHR's ultimate determination that PFOX's application was denied legally. In NEA's judgment, PFOX is a conversion group hostile toward gays and lesbians. Thus, even though PFOX vehemently disagrees with NEA's characterization, it is within NEA's

right to exclude PFOX's presence at NEA's conventions. NEA cites Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995), to support its jurisdictional argument, but the Court also finds it helpful in the analysis of whether or not NEA's reasons for rejecting PFOX's application were proper. In Hurley, the Supreme Court reversed the Supreme Court of Massachusetts in a unanimous opinion because the state court misapplied the Massachusetts public accommodations law to require private citizens who organize a parade to include among the marchers a group imparting a message that the organizers do not wish to convey. In Hurley, South Boston Allied War Veterans Council (the "Council") denied defendant GLIB's request to march in the Council's St. Patrick's Day parade. Hurley at 557-58. The Supreme Court agreed with the Council's argument that it had no prohibition against homosexuals marching in the parade, rather the Council objected to the message GLIB sought to express in the parade. Id. at 572. The Supreme Court reversed the state court because the state court's interpretation of Massachusetts's public accommodations law essentially forced the Council to alter the message of its parade. Id. at 578-579.

Furthermore, NEA persuasively argues that its rejection of PFOX's application was proper in light of the facts and Hurley. Indeed, the HRA would not require NEA to accept an application from the Ku Klux Klan or a group viewed by the NEA as anti-labor union or racist. Int's Br. 8-9. Similarly, military organizations and the Boy Scouts of America are excluded from renting exhibit space at the NEA Annual Meetings because of the positions those organizations take with regard to gay and lesbian rights. The analogy is persuasive because NEA rejected PFOX's application not based on their personal traits, but rather because of PFOX's mission and message. Certainly, other exhibitors at EXPO 2002 were homosexuals or heterosexuals, like the members of PFOX, but they were distinguishable from PFOX because the other exhibitors

presented exhibits the NEA deemed to be agreement with its policies. Thus, PFOX's arguments miss the point. The NEA did not reject its application because PFOX's members include ex-gays, homosexuals, heterosexuals, or members of any other sexual orientation. Rather, NEA rejected PFOX's application because PFOX's **message and policies** were, in NEA's opinion, contrary to NEA's policies regarding sexual orientation.

PFOX attempts to distinguish Hurley by citing NEA's resolution promoting tolerance of different sexual orientations, unlike the position of the South Boston Allied War Veterans Council. NEA's resolutions are immaterial because it is not for OHR or the Court to use its own interpretation of NEA's resolutions in place of NEA's own good faith interpretation. PFOX, furthermore, cites no legal authority to support its assertion that it is proper for the Court to usurp NEA's ability to interpret its own policies. Essentially, PFOX asks the Court, through the HRA, to do the very thing that the Supreme Court in Hurley held that anti-discrimination laws must not do: force a group or individual to alter their message by including another's message which is at odds with a position taken by the group or individual. Hurley at 580. PFOX asks the Court to force NEA to give PFOX an exhibit booth at its annual convention. Therefore, the Court affirms OHR's ultimate finding that NEA did not discriminate against PFOX on the basis of sexual orientation when NEA denied PFOX's application for an exhibit booth at EXPO 2002.

There is substantial record evidence to support OHR's finding. In its answers to OHR's interrogatories and Request for Production of Documents, NEA explained the reasons for its denial of exhibit space to PFOX as follows:

As th[e] application [for exhibit space EXPO 2002] makes clear, NEA "reserves the right to deny applications on the basis of proposed exhibit content, as set for in the GENERAL PURPOSE STATEMENT." The General Purpose Statement indicates that information presented by exhibitors on social issues should be "in accordance with NEA policy." Complainant's application was denied because the proposed content of the exhibit booth was deemed contrary to NEA policy, which

inter alia, promotes acceptance of gays and lesbians, supports educational initiatives designed to eliminate misconceptions about gays and lesbians, and seeks to improve conditions and opportunities for gay and lesbian students and teachers. Complainant's mission, which advocates "promoting alternatives to homosexuality" so that more gays and lesbians "can have the opportunity to make the choice to leave homosexuality," was determined to be inconsistent with those policies.

NEA also reserves the right to deny an application if "[t]he applicant's booth activities will be disruptive and/or will interfere with the business proceedings." Another factor contributing to the denial of Complainant's application was the potential for disruption that the organization's proposed exhibit would present. Because of the opposition of NEA's gay and lesbian caucus to "conversion" groups such as Complainant, NEA . . . believed that Complainant's exhibit could result in protests or other demonstrations which might be disruptive and/or interfere with business proceedings.

AR at 159-60.

3. Pretext

There also is substantial record evidence to support OHR's finding that NEA's denial of PFOX's was not a pretext for discrimination. In considering claims of discrimination under HRA, the D.C. courts apply the familiar three-part test from McDonnell Douglas and its progeny.³ The plaintiff has the initial burden to make a prima facie showing of discrimination by a preponderance of the evidence. The burden then shifts to the defendant to produce evidence that it took the challenged action for legitimate, nondiscriminatory reasons. The burden then shifts back to the plaintiff to prove, by the preponderance of the evidence, that each of the defendant's articulated justifications for its decision was not true, i.e., did not actually motivate the defendant, but was a pretext for discrimination.

As set forth in its Answers to OHR's Interrogatories and Request for Production of Documents, NEA articulated three legitimate, nondiscriminatory reasons for its denial of exhibit

³ McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Hollis v. Fed. Nat'l Mortg. Ass'n, 760 A.2d 563, 571-72 (D.C. 2009); O'Donnell v. Associated Gen. Contractors of Am., Inc., 645 A.2d 1084, 1086 (D.C. 1994); Atl. Richfield Co v. D.C. Comm'n on Human Rights, 515 A.2 1095, 1099 (D.C. 1986).

space to PFOX: (1) NEA believed that the information PFOX sought to distribute to NEA delegates at EXPO 2002 was inconsistent with NEA's policies supporting gay rights, (2) NEA believed that PFOX's booth could provoke protests and other demonstrations that would be potentially disruptive of the Annual Meeting; and (3) on June 10, 2002, when the decision was made to deny PFOX's application, CEPI had informed NEA that exhibit space was sold out. (R. at 159-60.) Because NEA met its burden of production, the burden then shifted back to PFOX to prove by the preponderance of the evidence that NEA's legitimate, nondiscriminatory reasons for denying exhibit space to PFOX were not its true reasons, but were in fact, a pretext for discriminating against it on the basis of sexual orientation.

The OHR found that even if PFOX had established a prima facie case of discrimination, NEA articulated legitimate nondiscriminatory reason for its actions. Although PFOX contested NEA's evidence, the OHR sided with NEA. OHR's findings are supported by NEA's answers to the complaint, briefs, and sworn statements. Accordingly, there is substantial record evidence to support OHR's decision, and it shall be affirmed.

C. OHR's Jurisdiction

The Court affirms OHR's determination that it had jurisdiction over PFOX's charge of discrimination. The HRA "is a broad remedial statute, to be generously construed," but it does have jurisdictional limits. Blodgett v. The University Club, 930 A.2d 210, 218 (D.C. 2007). The discrimination PFOX alleges must have occurred in a place of public accommodation for the HRA to apply. A place of public accommodation is defined by D.C. Code §2-1401.02(34) as almost any place, except "any institution, club, or place of accommodation which is in its nature distinctly private...." Even distinctly private places can be considered places of public accommodation, however, if such a place: "(A) has 350 or more members; (B) serves meals on a

regular basis; and (C) regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business.” D.C. Code § 2-1401.02(24).

It is undisputed that the NEA, in some respect, meets the criteria for a place of public accommodation under the HRA because it has over 350 members, sells meals at its cafeteria in its D.C. headquarters, and accepts membership dues. NEA does dispute, however, that EXPO 2002 was a place of public accommodation under the HRA. Int’s Br. 21. OHR asserted jurisdiction over NEA in this case because the broad construction of the HRA and because of the Supreme Court’s ruling in Directors of Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537 (1987), regarding public accommodations. NEA argues that because EXPO 2002 was in Texas and by invitation only, the HRA does not apply. Both of NEA’s arguments, however, are unpersuasive.

As an initial matter, it is useful to recite some pertinent facts. While EXPO 2002 did occur in Texas, the application process occurred at least in part through NEA’s headquarters in D.C. Furthermore, PFOX is not alleging that their membership showed up at EXPO 2002 and NEA discriminated against them. Indeed, PFOX argues that they were discriminated against in the course of the exhibit booth application process. Thus, the location of NEA’s convention is inapposite. To find otherwise would vitiate the broad intent of the HRA.

The fact that EXPO 2002 was not open to the public, moreover, is equally unpersuasive based on the facts in this matter. While attendance at EXPO 2002 required an ID badge, the application process was open to the public. Indeed, any group could fill out an application form, include a check, and send the package to NEA for consideration. Thus, the Rotary does not apply here. PFOX filed its complaint based on NEA’s discrimination of it and its members in the

application process, which was open to the public. Therefore, the Court affirms OHR's finding that it had jurisdiction over this matter.

IV. CONCLUSION AND RELIEF

PFOX asks the Court to reverse OHR's final decision finding no probable cause that NEA discriminated against PFOX on the basis of sexual orientation when it denied public accommodation services to PFOX by refusing to provide PFOX with exhibit space at EXPO 2002. As a matter of law, OHR erred in determining that ex-gays are not a protected class under the HRA. Regardless of whether or not OHR erred in its classification of ex-gays, it correctly found that PFOX's exhibit booth application was rejected for non-discriminatory reasons. Furthermore, while EXPO 2002 was held in Texas, OHR did have jurisdiction over the charge because the rejection of PFOX's application occurred in D.C., where NEA was headquartered. Therefore, Petitioner's request to reverse the OHR's decision, the requested relief, is **DENIED**. An order denying PFOX's request will be concurrently issued with this Memorandum Opinion.

Accordingly, it is this, 26th day of **June 2009**, hereby,

ORDERED that the Petition for Review be, and it hereby is, **GRANTED**,

FURTHER ORDERED that the decision of OHR that there is no probable cause for Petitioner's complaint of discrimination is hereby **AFFIRMED**; and

FURTHER ORDERED that the status hearing previously set for October 2, 2009, at 9:00 A.M. is hereby **VACATED**.

Maurice A. Ross

JUDGE MAURICE A. ROSS

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EXHIBIT 2

GOVERNMENT OF THE DISTRICT OF COLUMBIA

ADMINISTRATIVE ISSUANCE SYSTEM

Mayor's Order 2011-155
September 9, 2011

SUBJECT: Amendment of Mayor's Order 2006-151, dated November 6, 2006
Uniform Language in D.C. Government Anti-Discrimination Issuances
and Equal Employment Opportunity Notices

ORIGINATING AGENCY: Office of the Mayor

By virtue of the authority vested in me as Mayor of the District of Columbia by section 422(11) of the District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 790, Pub. L. 93-198, D.C. Official Code § 1-204.22(11) (2011 Supp.), it is hereby **ORDERED** that Mayor's Order 2006-151, dated November 6, 2006, is modified as follows:

1. All documents that recite the District of Columbia's policy against discrimination shall fully enumerate all categories of discrimination protected from discrimination by the Human Rights Act of 1977, as amended, effective December 13, 1977 (D.C. Law 2-38; D.C. Official Code §§ 2-1401.01 *et seq.*) The following language shall be stated in all such documents:

NOTICE OF NON-DISCRIMINATION

In accordance with the D.C. Human Rights Act of 1977, as amended, D.C. Official Code §§2-1401.01 *et seq.* (Act), the District of Columbia does not discriminate on the basis of actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, or place of residence or business. Sexual harassment is a form of sex discrimination which is prohibited by the Act. In addition, harassment based on any of the above protected categories is prohibited by the Act. Discrimination in violation of the Act will not be tolerated. Violators will be subject to disciplinary action.

2. This Order shall be applicable to all agencies under the direction and control of the Mayor. This Order governs uniform language which shall be placed in any document that recites the District's anti-discrimination policy. Examples of such documents are: job postings, job applications, program brochures, equal opportunity notices and postings, general orders, department directives, special instructions, and materials processed through the Administrative Issuance System which recites the District's anti discrimination policy.
3. The Director of the D.C. Office of Human Rights, or the designee thereof, is authorized and directed to implement this Order and to monitor the compliance of executive departments and agencies with its directives.
4. **EFFECTIVE DATE:** This order shall become effective 30 days after the date of this order.



VINCENT C. GRAY
MAYOR

ATTEST: 

CYNTHIA BROCK-SMITH
SECRETARY OF THE DISTRICT OF COLUMBIA