

Exhibit A

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

NAKEMIA STANLEY,

Plaintiff,

v.

THE CITY OF NEW YORK, OFFICE OF THE CHIEF
MEDICAL EXAMINER, OFFICE OF THE CHIEF
MEDICAL EXAMINER DEPUTY DIRECTOR OF
FORENSIC INVESTIGATIONS ADEN NAKA,
OFFICE OF THE CHIEF MEDICAL EXAMINER
SPECIAL COUNSEL LITIGATION AND POLICY
LESLIE KAMELHAR,

Defendants

Hon. Dakota D. Ramseur, J.S.C.

Index No. 151098/2020

**MEMORANDUM OF LAW ON BEHALF OF COMPASSION & CHOICES
AS PROPOSED *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Each of us knows that we will one day die. That universal certainty has led nearly every culture throughout history to imbue the rituals surrounding the treatment of the body after death with particular significance. Likewise, honoring a decedent's preferred disposition and burial rituals provides comfort to the living, assuring that our own final wishes will be fulfilled.

Failure to promptly honor a decedent's directive on how to be treated in death violates New York law, inhibits religious freedom, and places at risk the most vulnerable segments of society. As this case illustrates, it undermines an individual's end-of-life choices and causes uncertainty for the patient and for surviving loved ones; it hinders religious freedom for those whose religious death ritual wishes are not fulfilled; and it disproportionately harms lesbian, gay, bisexual, transgender, intersex, and other individuals who identify as gender nonbinary, gender minorities, and/or sexual minorities. This Court should make clear that such a failure will not be tolerated in the State of New York.

STATEMENT OF INTEREST

Compassion & Choices (C&C) is a 501(c)(3) nonprofit organization that works in legislatures, courts, and medical settings to educate the public about end-of-life options, to empower individuals to guide their own end-of-life care, and to advocate for expanded choices for managing terminal illness. The organization's stated vision is of a "society that affirms life and accepts the inevitability of death, embraces expanded options for compassionate dying, and empowers everyone to choose end-of-life care that reflects their values, priorities and beliefs." To support this vision, C&C has worked for decades to empower patients' voices and agency in end-of-life care, regardless of gender identity, age, sexuality, race, ethnicity, religion, national origin, wealth, marital status, or disability. Therefore, C&C has a particular interest in ensuring that the State of New York honors patients' end-of-life directives, such as the properly executed

Form DOH-5211 at issue here. It is in support of this interest, and in support of Plaintiff's motion for partial summary judgment¹, that C&C files this amicus brief.

ARGUMENT

Strictly following a decedent's preferred ritual for the treatment of the body after death provides both comfort to the decedent before death and solace to surviving loved ones after death. Such rituals have played an important role throughout human history and are enshrined in common law and in New York statutory law. Honoring a decedent's preferred disposition and burial rituals also provides comfort to all of us who will one day die, assuring that our own final wishes will be fulfilled. Doing so promptly, without unnecessary administrative delay, offers closure to those who survive. And respect for the dead—regardless of identity or religious affiliation—further reflects broader societal values of equality and tolerance.

New York recognizes a common law right of sepulcher that affords a decedent's next of kin an "absolute right to the immediate possession of a decedent's body for preservation and burial." *Shipley v. City of New York*, 25 N.Y.3d 645, 653 (2015) (internal citation omitted). The right is intended to provide "solace and comfort in the ritual of burial." *Id.* (internal quotation marks and citation omitted).

Recognizing the importance of clear laws governing the timely disposition of human remains in the wake of the tragic attacks of September 11, 2001, New York passed Public Health Law § 4201. *Mack v. Brown*, 82 A.D.3d 133, 138 (2011). That law lays out, in descending priority, who has the right to dispose of a decedent's remains. *Id.* Highest priority is given to the person designated in a duly witnessed written instrument executed by the decedent prior to death

¹ Counsel for plaintiff was provided the opportunity to review this brief prior to filing. See Rules of Ct. of Appeals (22 N.Y.C.R.R.) § 500.23(a)(4)(iii)(a).

and accepted by the designee, known as a Disposition of Remains directive (DOR directive), like the DOH-5211 here. *Id.*

Addressing this statute, New York courts have noted that decisions about the treatment of one's body after death are "deeply personal, and often spiritual." *Lipiner v. Plaza Jewish Cmty. Chapel*, 54 Misc. 3d 664, 665 (N.Y. Sup. Ct. 2016). Because of this, "survivors must strive, to the extent practicable, to fulfill the decedent's wishes" and "[u]ltimately, the wishes of the deceased must prevail over the survivors' own preferences." *Id.*

Refusal to promptly honor DOR directives violates New York law, undermines religious freedom, and places at risk the most vulnerable segments of society. *First*, it undermines an individual's end-of-life choices and risks uncertainty for the patient and for surviving loved ones. *Second*, refusal to honor DOR directives undermines religious freedom for those whose religious death ritual wishes are not fulfilled. And *finally*, as this case particularly illustrates, ignoring DOR directives disproportionately harms lesbian, gay, bisexual, transgender, intersex, and other individuals who identify as gender nonbinary, gender minorities, and/or sexual minorities ("LGBTQIA+ individuals").²

I. Promptly honoring DOR directives upholds patient autonomy and provides reassurance to the decedent and to survivors.

As noted above, the right of sepulcher provides a common law right to the next of kin to dispose of a decedent's remains. Under New York statutory law, the first in line to dispose of a decedent's remains is the person chosen by the decedent. Together, this mix of common and statutory law emphasizes respect for personal autonomy in end-of-life decisions. An effective policy of promptly honoring DOR directives regarding death, disposition, and burial is consistent with these laws and with patient-directed care, informed consent, and existing New York legal

² U.S. Center for Disease Control and Prevention, Health Disparities, Health Considerations for LGBTQ Youth, <https://www.cdc.gov/healthyyouth/terminology/sexual-and-gender-identity-terms.htm>.

tenets. Such a policy also offers solace to both the dying and the surviving, offering the patient—and loved ones—comfort in death.

That end-of-life decisions will be promptly respected—even past the ability of the individual to actively advocate for such decisions—provides empowerment and assurance to all undergoing medical care, particularly at the end of life. It also provides comfort to those who survive by offering timely closure, not marred by administrative proceedings and delay. Furthermore, if an individual’s post-mortem wishes are not respected, the living will have good reason to doubt that their own wishes will be respected after their death.

The importance of personal autonomy in medical settings—including on one’s deathbed—has been repeatedly reinforced in federal and state courts. *See, e.g., Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 262 (1990) (a competent person has a “constitutionally protected right to refuse lifesaving hydration and nutrition”). In New York, the principle of informed consent gives patients a right to dictate their medical care, even if it means rejecting medically indicated care. *See Rivers v. Katz*, 67 N.Y.2d 485, 493 (1986) (holding that the right to determine the course of medical care, even in death, is “paramount”). And even where a patient’s desires are not clear—whether because of incapacitation or unpreparedness—courts focus primarily on trying to honor the dying patient’s desires. *Matter of Westchester Cty. Med. Ctr. on Behalf of O’Connor*, 72 N.Y.2d 517, 530 (1988) (holding that “despite its pitfalls and inevitable uncertainties,” an inquiry about appropriate end-of-life care “must always be narrowed to the patient’s expressed intent, with every effort made to minimize the opportunity for error.”)

Here, Mr. Frederick’s desires could not have been clearer. The valid DOH-5211 he signed conformed with all of the State’s requirements. Contrary to public policy and state law, however, defendants did not minimize opportunities for error—rather, they exacerbated them. These errors could have been avoided if Defendants had simply honored Mr. Fredrick’s wishes

and released his remains immediately to Ms. Stanley—and, at the very least, had not released his remains to others contrary to his wishes.

Even after death, New York courts will go to great lengths to honor end-of-life wishes and to ensure compliance with New York Public Health Law § 4201. For example, in *Lipiner*, a New York court ordered that a decedent's body be exhumed to move the remains from Queens to Jerusalem, Israel—in line with the decedent's dying wishes, as expressed to the home health aides who were at her bedside. 54 Misc. 3d at 664. And in *Bochnik v. Gate of Heaven Cemetery*, 32 Misc. 3d 269 (N.Y. Sup. Ct. 2011), the court ordered that the cemetery move the remains of the decedent from one cemetery to another, to comply with the hierarchy set out in New York Public Health Law § 4201. *Id.*

Indeed, honoring the decedent's wishes in death was the motivating purpose of the 2005 bill that created New York Public Health Law § 4201.³ Here, where Mr. Frederick followed every instruction under this law, his wishes should have been respected promptly and without hesitation.

Honoring DOR directives is also consistent with existing New York legal constructs that support autonomy in medical decisions, even after death and incapacitation. Respect for DOR directives must survive death and incapacitation to comfort the living—and the dying—so that their end-of-life decisions and privacy will be protected. For example, New York advance directives allow a patient to guide future healthcare decisions by appointing a healthcare proxy in

³ In a July 8, 2005, letter supporting the bill, Richard Gottfried (NY Assembly Committee on Health), wrote: "This bill would create a written document (similar to a health care proxy) to be used in the designation of an agent to be responsible for making those decisions, as well such costs as burial or cremation, and enable the person to spell out his or her wishes concerning disposition." Letter from R. Gottfried, Chair, NY Assembly Comm. on Health, to R. Platkin Counsel to Gov. of NY (July 8, 2005), N.Y. Bill Jacket, 2005 S.B. 1924, Ch. 768. And in its justification for the bill, the New York Senate Introducer's Memorandum in Support read: "This bill creates a process that allows an individual, before he or she dies, to name a person or people who would make decisions about burial after the individual dies." Introducer's Memorandum in Support of Bill No. S1924A (June 27, 2005), N.Y. Bill Jacket, 2005 S.B. 1924, Ch. 768.

the event of incapacitation. N.Y. Public Health Law § 2980, et seq.; N.Y. Compilation of Codes, Rules & Regulations, Title 10 § 400.21. A patient can also instruct a doctor to execute a Do Not Resuscitate Order or other Medical Order on Life Sustaining Treatment, which instructs health professionals not to initiate CPR or other lifesaving care when heartbeat and breathing stops. N.Y. Public Health Law, § 2944, et seq. And living wills allow individuals to leave written instructions that explain health care wishes, especially about end-of-life care, which are valid so long as they provide “clear and convincing” evidence of their end-of-life wishes. *Matter of O’Connor*, 72 N.Y.2d at 530-531.

Moreover, New York law recognizes that medical decisions related to bodily integrity and privacy survive death. In New York, competent persons 18 years of age or older may donate any or all parts of their body after death to medical use or research. N.Y. Public Health Law § 4301, et seq. And under federal law, HIPAA protects individually identifiable health information about a decedent for 50 years following the date of death. 45 C.F.R. § 160, et seq.

Together, these laws demonstrate an overarching state policy that rights and decisions relating to medical care, bodily integrity, and privacy survive death and that the living owe a duty to the dead to protect their dying wishes. Here, Mr. Frederick’s dying wish—clearly and expressly stated in the DOH-5211—was that his body immediately be given to Ms. Stanley, his life partner, for cremation and final disposition. Defendants violated this clear directive and violated Mr. Frederick’s rights and decisions related to informed consent, bodily integrity, and privacy—the importance of which have been enshrined in federal and New York law.

II. Promptly honoring DOR directives respects religious and moral values.

In addition to respecting patient autonomy and privacy, promptly honoring DOR directives and end-of-life decisions aligns with this country’s fierce protection of sincerely held religious beliefs. There is likely no more lasting demonstration of religious belief than to rest in

eternity in a manner consistent with the teachings of one's religion. And here—where Defendants retreated to a lengthy administrative process, rather than promptly complying with the express wishes of the deceased—the decedent's religiously required treatment was rendered impossible. A policy that does not immediately honor end-of-life decisions about disposition and burial unduly inhibits religious freedom in irreversible and irreparable ways.

Here, the decedent was Muslim. In Islam, burial must take place as quickly as possible after death—preferably within 24 hours.⁴ Here, Ms. Stanley was forced to wait nearly a full month to cremate and lay to rest Mr. Frederick. In the interim, she lived in anguish, knowing that his dying wishes were being violated.

Islam is not the only religion that lays out strict temporal requirements for honoring and burying the dead. As just one example, in some forms of Judaism, the deceased is never to be left alone between death and burial.⁵ In addition, for most Jews, burial is to take place as quickly as possible following death. Therefore, not honoring these kinds of temporal requirements under a DOR directive would risk similar irreparable harm to followers of Judaism.

New York strictly upholds the religious beliefs of its citizenry, even after death. The New York Constitution protects “[t]he free exercise and enjoyment of religious profession and worship, without discrimination or preference...”. N.Y. Const. art. I, § 3. As such, “[r]eligious freedoms rise above mere property rights, public inconvenience, annoyance and unrest.” *Slevin v. Long Island Jewish Med. Ctr.*, 66 Misc. 2d 312, 320 (N.Y. Sup. Ct. 1971). Religious freedoms are indeed so fundamental in New York that even the disturbance of a party's religiously based testamentary direction is protected by the State's constitution. *Est. of Newkirk*, 86 Misc. 2d 930,

⁴ Rema Rahman, *Who, What, Why: What are the burial customs in Islam?*, BBC NEWS (October 25, 2011), <https://www.bbc.com/news/magazine-15444275>.

⁵ Lisa Alcalay Klug, *Jewish Funeral Customs: Saying Goodbye to a Loved One*, JEWISH FEDERATION OF GREATER METROWEST NJ, <https://www.jfedgmw.org/jewish-funeral-customs-saying-goodbye-to-a-loved-one/>.

932 (N.Y. Sur. Ct. 1974) (“A testamentary direction that is an endeavor by a party to assure the repose of their eternal soul consistent with the practice of their faith must be deemed to be a constitutionally protected exercise of religious freedom that should not be lightly infringed upon after their death.”).

As here—where Mr. Frederick’s dying wish, to be quickly cremated and laid to rest, was not honored—failing to promptly honor DOR directives prevents any actual choice in religious end-of-life decisions. Defendants’ policy (or lack of policy) was completely inadequate to address Mr. Frederick’s death and preferred disposition. Such a policy or practice can have irreversible effects that can never be remedied, especially in the context of strict death rituals. A policy (or lack of policy) that does not respect the wishes of the dying undermines religious freedom for not only the decedent, but also for surviving loved ones—who experience additional stress and grief as a result.

III. The City’s actions demonstrate larger end-of-life equity issues for LGBTQIA+ individuals.

The facts of the present case are even more egregious given that Mr. Frederick’s biological family—to whom the OCME released his body—rejected and denied his existence both as a transgender man and as a Muslim. It is, in part, for this very reason that Mr. Frederick executed the advance planning directive in the first place: he specifically did not want his biological family to have any access to or control over his body after his death. As such, the indignity and harm imposed on Mr. Frederick and his loved ones was compounded given that the decedent’s family used his dead-name, misgendered him, and arranged for an open casket funeral service and Christian burial.

The City's actions fit within a larger pattern of discrimination against LGBTQIA+ generally, and in health care⁶—especially at the end of life—in particular, despite the existence of general laws aimed at protecting the LGBTQIA+ community. For example, in the context of public accommodations, New York City Administrative Code § 8-107(4) provides:

It shall be an unlawful discriminatory practice for any person, being the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent, or employee of any place or provider of public accommodation . . . **[b]ecause of any person's actual or perceived . . . gender, . . . marital status, partnership status, sexual orientation . . .**, directly or indirectly . . . [t]o refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation

Furthermore, as discussed above *supra* Section I, New York Public Health Law § 4201 was passed with the intent, among others, of preventing discrimination against LGBTQIA+ in this precise manner. Following the tragic events of 9/11, surviving domestic partners of LGBTQIA+ victims, in particular, faced difficult challenges when trying to claim rights to a lost loved one's remains, and were often left powerless. *See id.* This statewide effort to codify LGBTQIA+ individuals' rights should encompass end-of-life decisions as well.

Issues relating to gender identity during the dying and/or end-of-life process have been recognized by other states, particularly by California. For example, in 2014, California enacted the Respect After Death Act (AB 1577) inspired by Christopher Lee, a transgender man who had identified as male for twenty years, but was issued a death certificate designating him as female following his death.⁷ Likewise, in July, 2021, California Governor Gavin Newsom signed into

⁶ A 2016 study found that approximately 30% of transgender individuals delayed or did not seek healthcare due to discrimination. Kim D. Jaffee, PhD, MSW, Deirdre A. Shires, MPH, MSW, & Daphna Stroumsa, MD, MPHw, *Discrimination and Delayed Health Care Among Transgender Women and Men Implications for Improving Medical Education and Health Care Delivery*, 54 MED. CARE 1010 (Nov. 1, 2016). In particular, and exceedingly relevant to the matter at hand, discrimination experienced by transgender individuals often directly implicates infringements upon bodily autonomy. *See* Marisa Pogofsky, *Transgender Persons Have A Fundamental Right to Use Public Bathrooms Matching Their Gender Identity*, 67 DEPAUL L. REV. 733 (2018).

⁷ *CA Governor Signs Respect After Death Act*, TRANSGENDER LAW CENTER (Sept. 26, 2014), <https://transgenderlawcenter.org/archives/11140>.

law an amendment to the state’s Health and Safety Code to allow Californians who are nonbinary to be identified as such on their death certificates.⁸ Illinois passed HB 3552 in 2015, which allows a person to specify their gender identity and preferred gender pronouns in funeral and burial instructions.⁹

Until the New York State legislature takes similar specific action, it is up to the courts to ensure that LGBTQIA+ individuals—some of the most marginalized and least protected individuals in our country—are given the protections they deserve both at end-of-life and in death.

Therefore, in addition to recognizing that promptly honoring DOR directives respects patient autonomy and religious beliefs more broadly, this Court should further recognize that safeguarding LGBTQIA+ individuals’ end-of-life choices, in particular, ensures that equal dignity and rights are fully extended to such particularly vulnerable New Yorkers.

⁸ See Cal. Assembly Bill No. 439 (July 9, 2021), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB439.

⁹ See Ill. Pub. Act. 099-0417 (Aug. 20, 2015), <https://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0417>.

CONCLUSION

For all the reasons above, *amicus* urges the Court to grant Plaintiffs the relief they seek.

Dated: November 30, 2021
New York, New York

Respectfully Submitted,

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WORD COUNT CERTIFICATION

As required by the Uniform Rules for the Supreme Court and the County Court § 202.8-b, I certify that this memorandum complies with the 7,000 word limit for a primary memorandum of law. Using the word count feature in Microsoft Word, with permitted exclusions, I have determined this memorandum contains 3234 words.

Dated: November 30, 2021

/s/ David B. Bassett

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