UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELIZABETH BROKAMP, Plaintiff, v. DISTRICT OF COLUMBIA, Defendant.	Civil Action No. 20-3574 (TJK)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

INTRODUCTION

Plaintiff, a licensed professional counselor (LPC), claims that the District's licensing requirement for her profession violates the First Amendment because LPCs treat their patients through talk therapy, which she alleges is fully protected speech. Plaintiff is incorrect.

First, plaintiff fails to allege that the District's licensing requirement is unconstitutional as applied to her (Count 1). The free speech clause of the First Amendment protects speech, not conduct. Because the licensing requirement at issue regulates only conduct, it does not implicate any fundamental right and is subject only to rational basis review, which it easily satisfies. Even if the licensing requirement imposes an incidental burden on speech, it would be subject to intermediate scrutiny because it is content-neutral. The licensing requirement survives intermediate scrutiny because it advances important government interests

and does not substantially burden more speech than necessary. Even if the practice of professional counseling was considered pure speech, Count 1 would still fail because the licensing requirement directly advances a compelling government interest and is narrowly tailored to achieve that interest.

Second, plaintiff fails to allege that the District's licensing requirement is unconstitutionally overbroad on its face or underinclusive in its application (Count 2). Professional counseling is a widely recognized profession akin to the practice of law or accounting. The District's licensing requirement targets only those who engage in the practice of professional counseling. Nothing is overbroad or underinclusive about that approach.

Third, plaintiff fails to allege that the District's licensing requirement is unconstitutionally vague (Count 3). Plaintiff cannot claim a lack of notice because she admits she knew that (1) the District regulates LPCs and (2) as an LPC who was seeking to practice her profession in the District, she was required to have a license—just as she was required to have a license before practicing in Virginia. And plaintiff cannot claim discriminatory enforcement because the District's definition of professional counseling tracks well-established principles about what it means to work as an LPC—as opposed to, for example, work as a "life coach." The Complaint should be dismissed with prejudice.

BACKGROUND

I. The Practice of Licensed Professional Counseling

The American Counseling Association (ACA), with more than 50,000 members, is the largest counseling organization in the world that exclusively represents LPCs.[1] Plaintiff is a member.[2] According to the ACA, LPCs are "master's-degreed mental health service providers, trained to work with individuals, families, and groups in treating mental, behavioral, and emotional problems and disorders."[3] The ACA explains that "[t]he practice of professional counseling includes, but is not limited to, the diagnosis and treatment of mental and emotional disorders." *Id.* An LPC's training "in the provision of counseling and therapy includes the etiology of mental illness and substance abuse disorders, and the provision of the well-established treatments of cognitive-behavioral, interpersonal, and psychodynamic therapy." *Id.*

Every state has established licensure or certification standards for LPCs "to protect public safety."[4] As noted by the ACA, "[l]icensure laws establish minimum standards in the areas of education, examination, and experience." *Id.* The ACA provides an overview of the generally applicable requirements. In terms of education,

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[1] Ex. 1, Letter from Richard Yep, CEO of Am. Counseling Ass'n, to Joseph Biden, President-elect of the United States (Dec. 7, 2020).

[2] Ex. 2, Nova Terra Therapy, https://novaterratherapy.com (last visited Jan. 29, 2021) (Website for Elizabeth Brokamp's counseling practice).

[3] Ex. 3, Am. Counseling Ass'n, *Who are Licensed Professional Counselors?* (2011).

[4] Am. Counseling Ass'n, *State Licensing of Professional Counselors*, https://www.counseling.org/knowledge-center/licensure-requirements/overview-of-state-licensing-of-professional-counselors (last visited Jan. 29, 2021).

"states require applicants for licensure to obtain a master's degree in counseling," and "[t]he majority of states require individuals to complete 60 semester hours of graduate study, including at least a 48-semester hour master's degree." *Id.*

States also require LPCs to be experienced. For example, "[a]pplicants for licensure are required to obtain a minimum amount of supervised experience prior to being licensed," and "[t]ypically, states require individuals to accumulate between 2,000 and 3,000 hours of supervised experience within a certain time period, including a specific number of face-to-face supervision hours." *Id.*

On top of the education and experience requirements, "[a]ll states require licensure applicants to pass a comprehensive examination on counseling practice," and "[a]ll states require that counselors conduct themselves ethically, in accordance with generally accepted standards of practice." *Id.*

II. The District's Regulatory Framework for LPCs

The District requires individuals to have a "license" if they want "to practice" certain professions "in the District," including dentistry, personal fitness trainer and "professional counseling." D.C. Code § 3-1205.01(a)(1).

"Practice of professional counseling" is defined as:

> engaging in counseling or psychotherapy activities, including cognitive behavioral therapy or other modality, with or without compensation, to facilitate human development and to identify and remediate mental, emotional, or behavioral conditions and associated difficulties that interfere with mental health and wellness. The practice of professional counseling includes:
>
> (A) The processes of conducting interviews, tests, and other forms of assessment for the purpose of diagnosing individuals, families, and groups, as outlined in the Diagnostic and Statistical

> Manual of Disorders or other appropriate classification schemes, and determining treatment goals and objectives; and
>
> (B) Assisting individuals, families, and groups through a professional relationship to achieve long-term effective mental, emotional, physical, spiritual, social, educational, or career development and adjustment.

D.C. Code § 3-1201.02(15B). The scope of section 3-1205.01 is expressly limited by section 3-1201.03(d), which provides that:

> Nothing in this chapter shall be construed to require licensure for or to otherwise regulate, restrict, or prohibit individuals from engaging in the practices, services, or activities set forth in the paragraphs of this subsection if the individuals do not hold themselves out, by title, description of services, or otherwise, to be practicing any of the health occupations regulated by this chapter.

The individuals covered by section 3-1201.03(d) include "[a]ny minister, priest, rabbi, office, or agent of any religious body or any practitioner of any religious belief," as well as "[a]ny person engaged in the case of a friend or a member of the family."

Regulations governing the practice of professional counseling are administered and enforced in the District by the Board of Professional Counseling. *See Professional Counseling Licensing*, D.C. Health, https://dchealth.dc.gov/service/professional-counseling-licensing (last visited Jan. 29, 2021). The Board "evaluates applicants' qualifications, recommends standards and procedures, and issues licenses." *Id.* The Board also "receives and reviews complaints, requests investigations, and conducts hearings." *Id.*

To become licensed in the District as an LPC, an individual must (1) complete a 5-page application; (2) complete a 3-page form about the applicant's practical

experience in the field; (3) complete a 2-page form about completed coursework; (4) submit to a criminal background check; (5) submit an official score report from an acceptable national examination; (6) provide an official transcript showing a master's degree or higher in counseling or a related field; and (7) pay a filing fee.[5]

The District has also specifically addressed the ability of LPCs who are licensed in Virginia or Maryland to treat patients in the District. D.C. Code § 3-1205.02. The District does not require a license if:

> (A) The health professional does not have an office or other regularly appointed place in the District to meet patients;
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> (B) The health professional registers with the appropriate board and pays the registration fee prescribed by the board prior to practicing in the District; and
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> (C) The state in which the individual is licensed allows individuals licensed by the District in that particular health profession to practice in that state under the conditions set forth in this section.

Id. However, Virginia does not allow LPCs licensed in the District to practice professional counseling in Virginia without a Virginia license.[6]

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[5] *See* Ex. 4, Board of Professional Counseling Licensure Checklist; Ex. 5, Board of Professional Counseling Application for Licensure; Ex. 6, Coursework Completion Form; Ex. 7, Post-Graduate Supervised Experience Form; *see also* Ex. 8, Application Instructions to Practice Professional Counseling in the District of Columbia.

[6] *See* Ex. 9, Second Amended Executive Order 57 (June 10, 2020) (explaining that the temporary waiver of the license requirement for LPCs would end on September 8, 2020, and requiring all LPCs who treat patients in Virginia to be licensed in Virginia after that date); Compl. ¶ 37.

III. Plaintiff's Professional Background and Complaint

Plaintiff is a licensed professional counselor in Virginia. Compl. ¶ 1. Virginia defines "professional counselor" to mean

> a person trained in the application of principles, standards, and methods of the counseling profession, including counseling interventions designed to facilitate an individual's achievement of human development goals and remediating mental, emotional, or behavioral disorders and associated distresses that interfere with mental health and development.

Virginia Code § 54.1-3500. As highlighted on her website, plaintiff has had extensive training in the field of professional counseling, and she draws on that training when treating patients as an LPC.[7]

Plaintiff currently practices as an LPC while physically located at her office in Virginia. Compl. ¶ 1. She currently treats her patients over the Internet. *Id.* ¶ 2. Plaintiff "is not licensed as a professional counselor in D.C. and has no intention to apply to become licensed." *Id.* ¶ 35. However, plaintiff would still like to advertise her services to District residents and treat those patients in the District from her office in Virginia. *Id.* ¶¶ 28–29. Plaintiff acknowledges that the conduct she seeks to engage in "constitute[s] the practice of 'professional counseling' as that term is defined by D.C. law." Compl. ¶ 33.

In Count 1, plaintiff alleges that the District's licensing requirement violates the First Amendment as applied to her because the practice of professional counseling qualifies as "fully protected" speech under the First Amendment, and the District has

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[7] *See* Ex. 2.

no legitimate interest in regulating the practice of professional counseling that would justify burdening her purportedly fully protected speech. *Id.* ¶¶ 87–94. Plaintiff also alleges that the licensing requirement is content-based because it "prevent[s] her from talking depending on what she says." *Id.*

In Count 2, plaintiff alleges that the District's licensing requirement violates the First Amendment because it is both overbroad and underinclusive. Plaintiff alleges that the requirement is overbroad because it purportedly covers "life coaches, self-help gurus, mentors, religious leaders, or even close friends, because each routinely offers advice that falls within the legal definition of 'professional counseling.'" *Id.* ¶¶ 99–101. Plaintiff alleges that the requirement is, in practice, underinclusive because the District does not enforce it against "life coaches, self-help gurus, mentors, religious leaders, or peoples' friends." *Id.* ¶¶ 103–05.

In Count 3, plaintiff alleges the licensing requirement is unconstitutionally vague because the District "has not articulated any standard that guides its decisions about when the restriction on professional counseling does or does not apply." *Id.* ¶¶ 109–10.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a] reasonable inference that the

defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 557). "Courts may consider documents 'incorporated in the complaint' when considering a 12(b)(6) motion." *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997).

ARGUMENT

I. Plaintiff Fails To Allege That the District's Licensing Requirement for Professional Counselors Violates Her First Amendment Rights (Count 1).

The First Amendment prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. Under the free speech clause, the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). But "restrictions on protected expression are distinct from restrictions on economic activity, or more generally, on nonexpressive conduct." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011). As a result, "[g]enerally, the government may license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment." *NAAMJP v. Howell*, 851 F.3d 12, 19 (D.C. Cir. 2017).

Plaintiff's physical location, which she repeatedly emphasizes, is irrelevant to this analysis. *See, e.g.*, Compl. ¶ 31 ("Elizabeth cannot provide teletherapy services to D.C. residents at their homes in D.C., although Elizabeth could provide the same

services to those same people at a physical office in Virginia."); *id.* ¶ 85 ("The only thing Elizabeth wants to do in D.C. is talk to clients over the internet."). Plaintiff never actually alleges that the District's ability to regulate her conduct—which is providing specialized health care services—turns on her physical location as opposed to the location where her services are being delivered. And for good reason. Such an argument would open the floodgates to the unlicensed practice of law, medicine and other professions across state lines over the Internet. Here, plaintiff's argument is necessarily that the District should not be allowed to require *anyone* to have a license before treating patients in the District as an LPC, regardless of the health care provider's location, because plaintiff views the treatment as just talking. *Id.* The First Amendment does not support this view.

In Count 1, plaintiff alleges that the District's licensing requirement unconstitutionally abridges her speech. It does not. The District is regulating her conduct, namely her practice of a specialized profession. Because the District's licensing requirement does not limit plaintiff's protected speech, it is subject only to rational review basis, and it satisfies that standard. Even if the licensing requirement does incidentally burden speech, the District's licensing requirement satisfies intermediate scrutiny because (1) the District has an important interest in protecting its residents against the unlicensed practice of professional counseling and (2) the licensing requirement does not substantially burden more speech than necessary to advance the government's interests. Finally, any argument that the District's

licensing requirement must satisfy strict scrutiny because working as a licensed professional counselor involves "pure speech" is without support.

A. The District's Licensing Requirement Is Subject To Rational Basis Review Because It Regulates Conduct and Not Speech Protected by the First Amendment.

It is beyond dispute that the police power of the District includes the ability to protect the safety and welfare of its residents by regulating who can and cannot practice certain professions, such as law or medicine. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."); *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910) (explaining that it is "too well settled to require discussion" that "the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health"); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely.").

More than 50 years ago, Justice Jackson explained the difference between regulating the conduct of professionals and regulating the speech of professionals. He noted that:

> A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor … . Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.

Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). Justice White expressed similar views when he explained that:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.

Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring in the result); *see id.* at 228 ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.").

Here, plaintiff has failed to identify any aspect of the District's licensing requirement that affects her speech as opposed to her conduct. To become licensed as a professional counselor in the District, plaintiff must complete several forms, submit to a criminal background check, and pay a filing fee. *See* Ex. 4. None of those requirements compel her to speak or limit her speech. They simply require her to demonstrate through her conduct that she possesses the education and experience necessary to work as a LPC in the District.

Plaintiff's claim here is nearly identical to the claim that was rejected in *National Association for Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000). There, the plaintiff challenged California's licensure requirement for psychoanalysts on the ground that psychoanalysis was "pure speech" because it is a "talking cure." *Id.* at 1054. The Ninth Circuit rejected that claim because "the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech," and although "psychoanalysts employ speech to treat their clients," the use of speech "does not entitle them, or their

profession, to special First Amendment protection." *Id.* California was not "dictat[ing] the content of what [was] said in therapy." *Id.* at 1056. It was "merely determin[ing] who is qualified as a mental health professional." *Id.* Because the licensing requirement did not limit speech and was instead a regulation of conduct, the Ninth Circuit applied rational basis review and upheld the licensing requirement because it "was adopted for the important purpose of protecting public health, safety, and welfare." *Id.*

Similarly, in *Liberty Coins v. Goodman*, 748 F.3d 682, 691 (6th Cir. 2014), the Sixth Circuit addressed a challenge on First Amendment grounds to an Ohio statute that required dealers of precious metals to have a license. The court emphasized that the Ohio statute only applied to individuals who held themselves out as purchasers of precious metal and that it did not apply to, for example, persons who casually and infrequently stop at garage sales to purchase precious metals. *Id.* at 692. Because Ohio was merely distinguishing between purchasers who operate businesses open to the public and those who make isolated purchases, the licensing requirement did not implicate the plaintiff's free speech rights and was subject only to rational basis review. *Id.* at 693.

The same conclusion was reached in *Doyle v. Palmer*, 365 F. Supp. 3d 295, 304 (E.D.N.Y.), aff'd, 787 F. App'x 794 (2d Cir. 2019). The plaintiff in *Doyle* argued that the requirement that lawyers seeking admission to the Eastern District of New York submit a "sponsor affidavit" violated his free speech rights. *Id.* The court rejected plaintiff's challenge because the requirement "did not target any speech based on its

content or on the viewpoint of the speaker." *Id.* Instead, it was "nothing more than a standard regulation of the legal profession that … passes rational basis review." *Id.*

This Court should reach the same conclusion. Because the District's licensing requirement for professional counselors does not implicate the First Amendment's right to free speech, it is subject to only rational basis review. The licensing requirement is meant to ensure that those who hold themselves as health professionals called "licensed professional counselors" are actually qualified to practice as LPCs. Thus, the requirement is plainly related to a legitimate government interest, and it satisfies rational basis review.

B. Even Assuming the District's Licensing Requirement Incidentally Burdens Speech, It Survives Intermediate Scrutiny.

Even if the licensing requirement does affect more than conduct, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech," and "professionals are no exception to this rule." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018); *see also Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

An "incidental burden" on speech would occur, for example, if an anti-discrimination law required an employer to take down a sign that read "White Applicants Only" because the law is targeted at conduct not speech. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Likewise, an

ordinance against outdoor fires does not target speech merely because the ordinance also may effectively prohibit flag burning. *See Sorrell*, 564 U.S. at 566–67.

Here, at most, plaintiff alleges that the District's licensing requirement imposes an incidental burden on her speech. When a regulation imposes an incidental burden on speech, the appropriate standard of review is determined by whether the regulation is content-neutral or content-based. "The 'principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted [the] regulation ... because of [agreement or] disagreement with the message it conveys.'" *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

Like the licensing requirement discussed in *California Board of Psychology*, the District's licensing requirement for LPCs is plainly content-neutral because it regulates only who can practice as an LPC in the District and says nothing about the way in which LPCs treat their patients. Plaintiff attempts to argue that the requirement is content-based because the District would need to look at the content of her speech to know whether she was engaged in the practice of professional counseling. *See* Compl. ¶ 88. But plaintiff's argument proves too much. Under plaintiff's logic, *any* regulation of *any* profession that relies on "speech" as part of the job, *e.g.*, lawyers, doctors, accountants or physical therapists, would qualify as content-based because one would need to consider what the person said to know if

they were engaged in the profession. The Supreme Court has already rejected such a broad definition of content.

In *Ohralik*, the Court cited several examples of communications that are regulated without offending the First Amendment, including the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors and employers' threats of retaliation for the labor activities of employees. 436 U.S. at 456. In each situation, under plaintiff's theory, one would have to look at the "content" of the communication—e.g., whether the information exchanged was about securities—to know whether it was covered by the applicable law, but no authority exists for such an unbounded definition of what is content-based.

Therefore, if rational basis review is inapplicable, the District's licensing requirement should be subject to intermediate scrutiny as a content-neutral regulation that has an incidental effect on speech. *See Edwards v. District of Columbia*, 755 F.3d 996, 1001 (D.C. Cir. 2014). Under intermediate scrutiny, a government regulation is constitutional if "(1) it is within the constitutional power of the Government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest; and (5) the regulation leaves open ample alternative channels for communication." *Id.* at 1002. The District's licensing requirement satisfies each criterion.

The first, third and fifth prongs of the test are straightforward here. First, plaintiff cannot not reasonably dispute that the District has the constitutional power to regulate LPCs. *See Edwards*, 755 F.3d at 1002 (explaining that a "serious argument" could not be made against the District's ability to regulate tour guides under its police power). If the District can regulate tour guides, then it can certainly regulate health care professionals like LPCs. The third prong is met because as elaborated above, the licensing requirement is content-neutral. *See id.* And the fifth prong is met because the District's licensing regulation is not restricting any form of communication. Plaintiff does not allege that the District prohibits her in any way from communicating with anyone in the District about any topic. Plaintiff alleges only that the District prohibits her from providing professional counseling services and holding herself out as a "professional counselor."

As to the second prong, it is well-established that "States have a compelling interest in the practice of professions within their boundaries, and ... as part of their power to protect the public, health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995). LPCs are health care professionals who diagnose and treat patients. Plaintiff does not allege that LPCs should be exempt from state regulation because they "just talk," and if she did, that allegation would run headlong into the ACA's view that licensing of professional counselors protects public safety. *See* above at 3–4.

With regard to the fourth prong, a regulation is "narrowly tailored" when it does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on ... speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993). The Supreme Court has "permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and simple common sense." *Edwards*, 755 F.3d at 1003. The means chosen "need not be the least restrictive or least intrusive." *See Ward*, 491 U.S. at 798. "Rather, the requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Edwards*, 755 F.3d at 1009.

The District's licensing requirement ensures that practitioners of professional counseling in the District satisfy the same generally accepted requirements that are required in every state. The burden imposed on applicants is that they must complete several forms, submit to a criminal background check and pay a filing fee. *See* Ex. 4. If the District did not require applicants to demonstrate their qualifications to practice as an LPC, the District's interest in protecting its residents against receiving

professional counseling from those who are not qualified would be achieved less effectively. Therefore, the licensing regulation satisfies intermediate scrutiny.

C. Even Assuming the District's Licensing Requirement Burdens "Pure Speech," It Survives Strict Scrutiny.

Plaintiff alleges both that the licensing requirement is a content-based regulation and that the practice of professional counseling involves fully protected pure speech. Compl. ¶¶ 87–88. If either is true, then the licensing requirement would be subject to strict scrutiny and to pass constitutional muster it would have to be "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

As explained above, the District has a compelling interest in protecting the health and safety of its residents from unqualified health care providers. And, as also explained above, the District advances that interest by requiring prospective health care providers to answer written questions about their education and experience. With regard to plaintiff specifically, as a Virginia-licensed LPC, the District advances its interests in an even more narrowly tailored manner. The District does not require plaintiff to have a license under all circumstances. The District only requires a license if Virginia does not extend similar reciprocity to LPCs licensed in the District.

Because the District could not protect against the unlicensed practice of professional counseling in any less burdensome way, the licensing requirement survives strict scrutiny.

II. Plaintiff Fails To Allege That the District's Licensing Requirement for Professional Counselors Is Unconstitutionally Overbroad or Underinclusive (Count 2).

A law may be facially invalidated on grounds of overbreadth if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). "[I]nvalidation for First Amendment overbreadth is strong medicine that is not to be casually employed." *United States v. Sineneng-Smith*, 140 S Ct. 1575, 1581 (2020) (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008)). Plaintiff fails to identify *any* application of the statute that is unconstitutional, and the statute, properly construed, has a narrow and plainly legitimate scope. Plaintiff therefore has not demonstrated that the balance between potentially chilled speech and the legitimate applications of the statute tips impermissibly towards the former, and her overbreadth claim should be dismissed.

A. Plaintiff Does Not Identify Constitutionally-Protected Conduct Covered by the District's Licensing Requirement.

The crux of an overbreadth claim is "whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). As an initial matter, plaintiff here completely fails to specify what sort of conduct "life coaches" or other non-LPCs engage in that would fall under the statute. Compl. ¶ 54. To the extent plaintiff merely challenges the District's failure to prosecute non-LPCs for precisely the same conduct that she

engages in, the practice of professional counseling, she has failed to allege a concrete injury for standing purposes. Compl. ¶¶ 68–82 (failing to allege that non-enforcement of the licensing regime against others constitutes an injury to plaintiff); *Arpaio v. Obama*, 27 F. Supp. 3d 185, 200 (D.D.C. 2014) ("[A] plaintiff who seeks to vindicate only the general interest in the proper application of the Constitution and the laws does not suffer the type of direct, concrete and tangible harm that confers standing and warrants the exercise of jurisdiction."); *see also Metro. Wash. Chapter, Associated Builders & Contractors, Inc. v. District of Columbia*, 57 F. Supp. 3d 1, 31 (D.D.C. 2014) ("It is simply common sense that officials must use some discretion in deciding when and where to enforce city ordinances."). Without a showing that the statute in fact impairs any constitutionally-protected conduct, plaintiff's overbreadth claim fails out of the gate.

B. Plaintiff Overstates the Licensing Requirement's Reach by Omitting Key Context and Failing To Read the Statute As a Whole.

Even if plaintiff had identified some protected speech by non-LPCs that fell within the statute's scope, that is not enough to succeed on a facial overbreadth attack. The overbreadth of the statute must be "substantial … , judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473. The basis for this requirement is simply that "the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *New York v. Ferber*, 458 U.S. 747, 772 (1982); *see also id.* at 772 n.27 ("Without a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable

application.") (quoting Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 859 n.61 (1970)). The first step to this process requires an analysis of the facial text of the statute in question. *Stevens*, 559 U.S. at 474. A proper analysis demonstrates that this statute is substantially narrower than plaintiff implies, and as such presents a minimal risk, at most, of chilling protected speech.

Plaintiff stitches the two subsections of the definitional provision at issue here, characterizing the definition of "practice of professional counseling" as including "interviews designed to assist individuals, families, and groups through a professional relationship to achieve long-term effective mental, emotional, physical, spiritual, social, education or career development and adjustment." Compl. ¶ 54. Merging the two subsections like this, however, obliterates essential context. The "interviews" to which plaintiff refers must be conducted "for the purpose of diagnosing individuals, families, and groups, as outlined in the Diagnostic and Statistical Manual of Disorders [DSM] or other appropriate classification schemes, and determining treatment goals and objectives." D.C. Code § 3-1201.02(15B)(A). Additionally, the word "interview" is given further definition by the words that immediately follow it in the statute: "tests, and other forms of assessment." *Id.* With this additional context, it becomes clear that "interview" is not given its broadest possible application, which might encompass any kind of conversation, but is limited to interviews constituting "tests" or "forms of assessment." *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps … . This rule we rely upon to avoid ascribing to one word a meaning so broad it is inconsistent

with its accompanying words, thus giving unintended breadth to [statutes].") (quotation omitted). Similarly, the specification in the second subsection of a "professional relationship" limits the scope of the phrase "assisting individuals, families, and groups … to achieve long-term mental … development and adjustment." D.C. Code § 3-1201.02(15B)(B).

As to the base definition, plaintiff's selective quotation drastically expands the scope of the statute beyond its plain text. Plaintiff asserts that "individuals who speak with other people in order to 'facilitate' their 'human development' fall with D.C.'s definition … ." Compl. ¶ 100. But the entire text of the statute belies such an interpretation: "'Practice of professional counseling' means engaging in counseling or psychotherapy activities, including cognitive behavioral therapy or other modality, … to facilitate human development and to identify and remediate mental, emotional, or behavioral conditions and associated difficulties that interfere with mental health and wellness." D.C. Code § 3-1201.02(15B). Thus, the activity being regulated is not "speaking" or even "facilitating" but rather "engaging in counseling or psychotherapy activities," and the object of this conduct is not merely "to facilitate human development," but to do so as part of "identify[ing] and remediat[ing] mental, emotional, or behavioral conditions … ." *Id.*

Taken together, the statute clearly excludes casual, spontaneous, non-expert or non-medical communications of the sort that life coaches, self-help gurus, mentors, spiritual leaders and friends and family might typically be expected to engage in. *See*

Compl. ¶ 63 (characterizing such non-LPC communications as "advice").[8] The statute is instead replete with indications that it is strictly limited to counseling akin to a structured course of formal and scientific medical treatment: "psychotherapy activities," "cognitive behavioral therapy or other modality," "mental, emotional, or behavioral conditions," "diagnosing individuals … as outlined in the [DSM]," "professional relationship." D.C. Code § 3-1201.02(15B); *see also Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) ("In sum, we do not construe statutory phrases in insolation; we read statutes as a whole.") (quotation omitted); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.") (quotation omitted).

Plaintiff's argument implicitly recognizes this distinction, as she suggests that she would be able under this statute to "give clients fashion advice," or "interior decorating advice" without a license. Compl. ¶¶ 90, 91. Plaintiff's own unreasonably broad interpretation of the statute would include such conduct under the statute's definition, because updating a client's wardrobe or furnishings may very well

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[8] The statute's reach as applied to religious clergy and friends and family in particular is limited further by a separate provision of the licensing code. D.C. Code § 3-1201.03(d)(1) excludes from licensing requirements "[a]ny minister, priest, rabbi, officer, or agent of any religious body or any practitioner of any religious belief engaging in prayer or any other religious practice … practiced solely in accordance with the religious tenets of any church for the purpose of fostering the physical, mental, or spiritual well-being of any person." D.C. Code § 3-1201.03(d)(2) excludes "[a]ny person engaged in the care of a friend or member of the family … ." These exceptions apply only to the extent such persons "do not hold themselves out, by title, description of services, or otherwise, to be practicing any of the health occupations regulated by this chapter." D.C. Code § 3-1201.03(d).

"facilitat[e] their human development." *Id.* ¶ 100. But giving fashion or interior decorating advice, without more, lacks any indicia of a structured course of medical treatment designed to ameliorate a specifically-identified mental health diagnosis, and so it properly falls outside the statute's scope. The statute's limitations thus perfectly track with the District's Congressionally-delegated police power to regulate businesses and occupations, rather than extending to cover general life advice that might be provided by a life coach or self-help guru. *See Edwards*, 755 F.3d at 1002.

C. Plaintiff Fails To Demonstrate That Impermissible Applications of the Licensing Requirement Are Substantial, Relative to the Statute's Legitimate Sweep.

Even if the statute might in some instances apply to protected speech by those not practicing the profession of counseling, plaintiffs fail to make any allegation, much less a convincing showing, that such applications are "substantial, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (quotation omitted). *Stevens* provides an illustrative example of the degree and specificity of the overbreadth necessary to facially invalidate a statute. In that case, the Supreme Court considered a federal statute establishing a criminal penalty for one who "creates, sells, or possesses a depiction of animal cruelty," in which "a depiction of animal cruelty" was defined as one "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed," if such conduct was illegal where the depiction was created, sold or possessed. *Id.* at 464–65. In its overbreadth analysis, the *Stevens* Court examined various types of depictions which fell under that definition, and concluded that there was a substantially wider interest and larger

market in materials presumptively protected by the First Amendment, compared to that of materials that were not. *Id.* at 476, 481–82 (comparing market in magazines, television programs, videos, and websites dedicated to hunting, with the market for "crush" and dogfighting videos).

Here, plaintiffs make no real showing of the scope of the life coach or self-help guru industry in the District compared to that of professional counseling, much less how frequently life coaches or self-help gurus engage in conduct that would constitute the "practice of professional counseling" as properly construed under District law, and to what extent such conduct would be protected under the First Amendment. But a proper understanding of the scope of potentially implicated conduct is essential, lest overbreadth analysis improperly devolve into "an endless stream of fanciful hypotheticals." *Williams*, 553 U.S. at 301. A statute which may include only a handful of hypothetically impermissible applications can be properly cabined by courts on a case-by-case basis through various as-applied challenges. *Id.* at 302–03; *Ferber*, 458 U.S. at 773–74. For a statute with a wide range of permissible applications, this approach provides a far more reasonable way of balancing its legitimate and illegitimate scope than facial invalidation, because it provides courts with a more accurate understanding of the scope of those potentially illegitimate applications. *See Ferber*, 458 U.S. at 780–81 (Stevens, J., concurring in the judgment) ("When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom.").

On the other hand, facial invalidation here would seriously hinder the District's legitimate interest in protecting the health of its residents through ensuring that those who seek to treat District residents' mental health are properly qualified to do so. Such "substantial social costs" cannot be outweighed by plaintiff's failure to show a serious risk of chilling constitutionally-protected conduct. *See Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003). Plaintiff's overbreadth challenge should be rejected.

III. Plaintiff's Vagueness Challenge Fails Because the Licensing Regulation Is Not Vague As Applied to Her and Does Not Grant the District Impermissibly Broad Discretion (Count 3).

Plaintiff's vagueness challenge fails for the simple reason that the statute is not unconstitutionally vague, either as applied to plaintiff or on its face. This claim centers on the allegation that "D.C.'s licensing requirement sweeps up vast swaths of speech," but, because "D.C. does not generally apply the licensing requirement to speech by life coaches, religious leaders, friends, or family members that falls within the statutory definition, … [i]ndividuals are … left to guess whether their speech will be subjected to D.C.'s licensing requirement." Compl. ¶¶ 110–11. Plaintiff, however, had clear notice that her particular conduct is regulated under the statute, and the statute's language and scope do not provide the District with unconstitutionally-broad discretion in enforcement. Plaintiff's vagueness claim should be dismissed.

A. Plaintiff Received Adequate Notice that Her Proposed Conduct Falls Within the Licensing Requirement.

To the extent plaintiff's vagueness challenge is based on the premise that the statute fails to "provide a person of ordinary intelligence fair notice of what is

prohibited," *Williams*, 553 U.S. at 304, the claim fails because plaintiff had adequate notice. As an initial matter, although plaintiff stylizes her Count 3 vagueness claim as falling under the First Amendment, "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment." *Id.*; *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 19–20 (2010) (distinguishing Fifth Amendment vagueness challenge from First Amendment overbreadth challenge). Even when a plaintiff's vagueness challenge is based on an alleged chilling effect on his or her free speech rights, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Williams*, 553 U.S. at 304 (quoting *Ward*, 491 U.S. at 794). Additionally, when the challenged provisions govern economic activity, such as the licensing scheme at issue here, the appropriate vagueness inquiry is more lenient because the applicable penalties are less severe than criminal sanctions, and business entities are expected to familiarize themselves with the regulatory landscape of their particular field. *See Village of Hoffman Estates*, 455 U.S. at 498–99.

A plaintiff's vagueness challenge based on lack of notice is fundamentally tied to the particular facts of the case presented. *Humanitarian Law Project*, 561 U.S. at 18–19. "[E]ven to the extent a heightened vagueness standard [under the First Amendment] applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim … for lack of notice." *Id.* at 20. Here, plaintiff's Complaint clearly alleges that her proposed conduct would constitute the practice of professional counseling in the District of Columbia. *See* Compl. ¶ 75 ("Elizabeth would provide

D.C. residents with teletherapy services … but for the fact that D.C.'s licensing regime makes it illegal to do so."); *see also id.* ¶¶ 20–25 (indicating that plaintiff's services include advising clients with particular mental health diagnoses based on personalized assessment over a course of treatment). *See generally* Ex. 2 (indicating that plaintiff's advertised services include treatment of anxiety, depression, trauma and posttraumatic stress disorder using techniques such as CBT (cognitive behavioral therapy) and EMDR (eye movement desensitization and reprocessing)); D.C. Code § 3-1201.02(15B) (including cognitive behavioral therapy within the definition of "practice of professional counseling"). As such, plaintiff had ample notice that her proposed conduct was prohibited, and her facial vagueness challenge based on notice fails.

Whether or not "life coaches, religious leaders, friends, or family members," Compl. ¶ 110, also act in ways that would constitute the practice of counseling yet escape enforcement is beside the point. A plaintiff's facial challenge to a statute based on lack of notice cannot be supported by the hypothetical speech of others. *Humanitarian Law Project*, 561 U.S. at 20; *see also Nat'l Ass'n of Mfrs. v. Taylor*, 549 F. Supp. 2d 33, 62 (D.D.C. 2008) ("[Courts] must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases.") (quoting *Wash. State Grange*, 552 U.S. at 450). Even if a statute's application may not be clear in every case, its clarity in plaintiff's own case means that plaintiff's case must fail. *Humanitarian Law Project*, 561 U.S. at 21.

B. The Licensing Requirement Provides Adequate Standards for Enforcement.

Plaintiff asserts that the District's licensing scheme fails "to articulate any standard to guide its enforcement … introduc[ing] impermissible discretion into the licensing process … ." Compl. ¶ 112. To the contrary, the District's law affords ample guidance to constrain enforcement.

A vagueness challenge to a law based on impermissible discretion turns on whether its provisions fail to "set reasonably clear guidelines for law enforcement officers and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Act Now to Stop War & Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 410–11 (D.C. Cir. 2017) (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)). Whether officials may exercise a certain amount of discretion in enforcement is insufficient to render a statute void for vagueness, because "[t]he Due Process Clause does not prevent officers from exercising discretion at all, but rather it prevents officials from exercising discretion with no clear objective or standard." *Metro. Wash. Chapter*, 57 F. Supp. 3d at 31.

Here, while plaintiff asserts that the statute's scope "sweeps up vast swaths of speech," Compl. ¶ 110, that alone does not render a statute vague. "[T]he breadth of the provision is not relevant to the vagueness question. … Vagueness is determined not by the range of activities covered by the statute but by whether the statute provides clarity as to which activities are covered and which are not." *Taylor*, 549 F. Supp. 2d at 67. Instead of directly resting on the vagueness of the provision itself, plaintiff's argument relies on the assertion that the District has declined to enforce

this allegedly broad statutory language against "speech by life coaches, religious leaders, friends, or family members." Compl. ¶ 110. But, as noted above, plaintiff does not assert that the application of the statute against such individuals if they do practice professional counseling without a license *would* be unconstitutional, merely that the statute's text covers some of those individuals' conduct but the District does not enforce the statute against them. This claim is insufficient to plead a case of unconstitutional vagueness.

The statute at issue, D.C. Code § 3-1201.02(15B), provides adequate limiting principles to guide officials' discretion in its enforcement, for much the same reasons that the statute is not overly broad. *See* above Section II.B. Tellingly, plaintiff completely fails to provide examples of specific communications or communicative context in which any of the non-LPC persons outlined might engage that would fit the precise contours of the statutory definition of professional counseling. *See* Compl. ¶ 61. Without such crucial details, plaintiff has failed to plausibly plead that the District's alleged failure to enforce its statute against life coaches, self-help gurus, and other non LPCs is a result of "standardless discretion" rather than a simple and prudent decision by District officials to prosecute those whose conduct falls within the statute while declining to prosecute those whose conduct falls outside it. Put another way, "the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion unlawfully, but whether there is anything in the ordinance preventing him from doing so." *See Act Now to Stop War*, 846 F.3d

at 412 (quoting *Forsyth Cty v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992)). Here, plaintiff's suggestion that the District has declined to enforce the statute against certain individuals who may fall within its bounds has no bearing on whether or not the statute lacks standards to guide District officials when they do seek to enforce the statute. Those standards clearly establish that the statute may only be enforced against providers offering a formal, medical course of treatment for clients with defined mental health diagnoses, thus constraining potentially discriminatory enforcement. *See* above Section II.B.

In the enforcement process, this provides sufficiently clear adjudicative standards. Although plaintiff suggests that life coaches and self-help gurus in some cases provide similar services to LPCs, "[c]lose cases can be imagined under any statute." *Williams*, 553 U.S. at 306. "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306. The "problem" of close cases is properly cured not by the facial invalidation of a law for vagueness, but by the requirement that the government carry the relevant burden of proof in each enforcement proceeding it seeks to bring. *See id.*; *see also Act Now to Stop War*, 846 F.3d at 411–12 (indicating that a statute's requirement that an officer "use their common sense and background knowledge to determine whether, in context," the activity falls under a statutory definition did not render the statute vague).

Here, the District's administrative tribunals and courts are fully capable of

adjudicating potentially close cases, including determining whether ambiguous conduct in fact falls within the statutory definitions. *See, e.g.*, *Carr v. Dep't of Health*, Case No. 2011-DOH-00002, 2013 WL 10608716 at *17–18 (D.C.O.A.H. May 22, 2013) (concluding after exhaustive analysis that the District had failed to show that petitioner was acting as a nurse-midwife, which required a license, rather than as a lay midwife, which did not). *See generally* D.C. Code §§ 3-1205.14, .16, .19, .20 (outlining procedures and standards for, respectively, revocation, suspension, and denials of permits, issuance of cease and desist orders, administrative hearings, and judicial review). Therefore, facial invalidation of the District's licensing scheme on the basis of impermissibly discretionary enforcement standards is inappropriate and plaintiff's vagueness challenge should be rejected.

CONCLUSION

For the foregoing reasons, the Court should grant this motion and dismiss plaintiff's Complaint with prejudice.

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Respectfully submitted,

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