**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| ELIZABETH BROKAMP,<br><br>*Plaintiff*,<br><br>v.<br><br>DISTRICT OF COLUMBIA,<br><br>*Defendant*. | ) | Civil Action No. 20-3574 (TJK) |

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

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## INTRODUCTION

Elizabeth Brokamp filed this First Amendment challenge because it is illegal for her to talk about certain subject matters with D.C. residents at their D.C. homes without a license from the D.C. government. Elizabeth is a professional counselor, meaning she talks to people about their feelings and other problems in their lives in an effort to help them feel better. She is licensed and located in Northern Virginia, and, if not for the pandemic, she could meet with D.C. residents in person in Virginia. But she has moved her counseling online during the pandemic, and, as a result, she can no longer speak with D.C. residents without a D.C. professional counselor license. All that she wants to do in D.C. is talk over the internet.

At this stage of the proceedings, the only question before the Court is whether Elizabeth has adequately alleged a First Amendment claim. That is not a difficult question: When government regulates speech, the government bears the burden to prove *with evidence* that its regulation survives First Amendment scrutiny; for that reason, "courts typically do not reach the *merits* of a First Amendment challenge at the motion-to-dismiss stage." *Brown v. District of Columbia*, 390 F. Supp. 3d 114, 123 (D.D.C. 2019). The District "will have ample opportunity" to "'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree,'" *id.* at 126 (citation omitted), but it cannot do so on a motion to dismiss.

The District's contrary view primarily rests on the assertion that the normal rules of First Amendment analysis should not apply to occupational licensing, particularly when licensing targets so-called professional speech. Until recently, some courts took that view, and the District relies on several cases from that line of authority. But that position is no longer tenable following the Supreme Court's recent recognition that "[s]peech is not unprotected merely because it is uttered by professionals" and that government cannot claim "unfettered power to reduce a group's

First Amendment rights by simply imposing a licensing requirement." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72, 2375 (2018) ("*NIFLA*"). The District cannot dispose of Elizabeth's claims merely by invoking its authority to license the professions.

Applying ordinary First Amendment principles, there is no real question that the Complaint states a claim. Elizabeth's speech to her clients is speech, not conduct. The District's regulation of that speech is content based, as it turns on what Elizabeth says: Elizabeth can talk to her clients over internet video about the weather or the news, but she cannot talk to them about their feelings to help them feel better. And, while the District will of course have an opportunity to attempt to develop a factual record to justify its regulation, at this stage the District has not even said what harm it is attempting to prevent by limiting Elizabeth's speech—much less produced actual evidence to show narrow tailoring.

Moreover, in addition to stating an as-applied claim, Elizabeth has also stated a viable facial challenge to the District's licensing law. The District, faced with the task of defining exactly what it means by "professional counseling," has enacted a sweepingly broad prohibition, which it then applies according to its gestalt impression of what professional counseling should involve. But that kind of sweeping prohibition is exactly what the First Amendment overbreadth doctrine is designed to prevent. And that approach also results in an impermissibly vague law, as it does not sufficiently define the type of speech that requires a license. The District's motion casts about for language to describe the type of speech that it is trying to regulate—which it describes as "formal" or "scientific"—but those terms do not provide meaningful guidance for counselors like Elizabeth and, in any event, appear nowhere in the statute.

Because the District is restricting Elizabeth's ability to speak with its residents, the District bears a heavy burden to justify its law. The District can of course attempt to carry that heavy

burden with actual evidence, upon an actual factual record. But the District cannot simply wave its hand at unspecified harms, and the District cannot regulate Elizabeth's speech simply because she is a professional. The motion to dismiss should be denied.

## BACKGROUND

### A. Elizabeth Brokamp's Counseling Services

Elizabeth Brokamp has over twenty years' experience as a professional counselor. Compl. ¶ 8. She has a Master's Degree in counseling from Columbia University, and she is currently pursuing a PhD. *Id.* ¶ 9. She also holds voluntary certifications related to professional counseling, including a certification in tele-mental health. *Id.* ¶ 10.

The Complaint explains that "[p]rofessional counselors like Elizabeth talk to their clients about their feelings, their relationships, and their lives." *Id.* ¶ 1. "Elizabeth advises her clients on a variety of topics, including anxiety, relationships, and mindfulness." *Id.* ¶ 20. Her "services consist entirely of conversations between her and her clients." *Id.* ¶ 23. "Through these conversations, Elizabeth seeks to improve her clients' well-being." *Id.* ¶ 24. Elizabeth "does not prescribe medication or conduct any medical procedures." *Id.* ¶ 22.

Elizabeth is licensed as a professional counselor in Virginia, and, just prior to the pandemic, she was in the process of opening a new office in Northern Virginia. *Id.* ¶¶ 8, 15. Because of the pandemic, however, Elizabeth has moved all of her counseling online, and she currently provides counseling out of her home in Virginia. *Id.* ¶¶ 6, 15. While that online move was initially driven by the pandemic, Elizabeth has subsequently found that teletherapy provides "significant benefits for clients, as it allows clients to seek out help without having to make a trip to a counselor's office." *Id.* ¶ 19. That flexibility is "beneficial for new mothers," a group who Elizabeth serves in her practice, "as the demands of a newborn child can make it particularly difficult to schedule in-

person counseling." *Id.*; *see also id.* ¶ 20 (explaining that Elizabeth has a "specialty assisting women who are facing issues related to infertility and postpartum depression"). Elizabeth also believes teletherapy is helpful for clients who need to be seen imminently, and who cannot wait for an in-person appointment. *Id.* ¶ 19. As a result, Elizabeth "intends to continue providing online teletherapy for the indefinite future," including "when the pandemic is over." *Id.* ¶ 18.

Elizabeth has been contacted by D.C. residents seeking to engage her counseling services during the pandemic. *Id.* ¶ 27. If allowed, Elizabeth would use teletherapy to talk to these D.C. residents in D.C., while she herself was located at her home in Virginia. *Id.* ¶¶ 6, 8, 48-49. "Elizabeth's teletherapy conversations with her clients are just that: conversations, consisting of nothing other than speech." *Id.* ¶ 34. As a result, "[t]he only thing Elizabeth wants to do in D.C. is talk to clients over the internet." *Id.* ¶ 85.

**B. D.C.'s Licensing Requirement**

D.C. law prohibits the unlicensed practice of "professional counseling." D.C. Code § 3-1205.01(a)(1). The "[p]ractice of professional counseling" is, in turn, 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." *Id.* § 3-1201.02(15B). Excluding language marked off by the use of "or" or "including," the statute defines "professional counseling" as "counseling . . . to facilitate human development and to identify and remediate mental, emotional, or behavioral conditions and associated difficulties that interfere with mental health and wellness."

Having provided this definition, the statute goes on to provide that professional counseling "includes" at least two courses of conduct. First, professional counseling "includes" 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 scheme, and determining treatment goals and objectives." *Id.* Second, professional counseling also "includes" "[a]ssisting individuals, families, and groups through a professional relationship to achieve long-term effective mental, emotional, physical, spiritual, social, educational, or career development and adjustment." *Id.* The unlicensed practice of professional counseling is a misdemeanor offense that is punishable by imprisonment up to a year or by fines up to $10,000. *Id.* § 3-1210.07.

D.C. law exempts some categories of individuals from licensing requirements for all the various "health occupations" that it licenses, including the licensing requirement for professional counselors. *See* D.C. Code § 3-1201.03(d). These statutory exemptions include:

- A "minister, priest, rabbi, officer, or agent of any religious body or any practitioner of any religious belief" but only if "engaging in prayer or any other religious practice or nursing practiced solely in accordance with the religious tenets of any church." *Id.* § 3-1201.03(d)(1).
- A "person engaged in the care of a friend or member of the family . . . whether employed regularly or because of an emergency or illness." *Id.* § 3-1201.03(d)(2).
- An individual "engaged in the practice of cosmetology or the operation of a health club." *Id.* § 3-1201.03(d)(5).
- "Marriage and family therapists, marriage counselors, art therapists, drama therapists, attorneys, or other professionals working within the standards and ethics of their respective professions." *Id.* § 3-1201.03(d)(7).

Notably, however, these exemptions apply only if the person does not "hold themselves out, by title, *description of services*, or otherwise, to be practicing any of the health occupations regulated by this chapter." *Id.* § 3-1201.03(d) (emphasis added).

D.C. also exempts counselors who are licensed in another state adjoining the District, but only if the other state provides reciprocal privileges. *See* D.C. Code § 3-1205.02(a)(4). Under this provision, an individual licensed in another state can practice in D.C. if they register, pay a fee,

and do not "have an office or other regularly appointed place in the District to meet patients," so long as 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 same terms. *Id.* Elizabeth cannot take advantage of this provision because Virginia does not provide reciprocal privileges to D.C.-licensed professional counselors. *See* Compl. ¶ 37; MTD at 6.[1]

In response to the COVID-19 pandemic, D.C. has also adopted a limited and temporary waiver of its licensing requirement. Compl. ¶ 39. Under the COVID-19 waiver, D.C. has waived licensing requirements for out-of-state healthcare providers who are providing services in affiliation with a D.C.-licensed healthcare facility or who have "an existing relationship with a patient who has returned to the District." *Id.* Neither condition currently applies to Elizabeth. *Id.* ¶¶ 41-42. And even that temporary waiver will expire after the pandemic ends. *Id.* ¶ 40.

**C. D.C.'s Enforcement of Its Licensing Law**

In October 2020, Elizabeth contacted the D.C. Board of Professional Counseling to ask if she could provide counseling services to D.C. residents over the internet. Compl. ¶ 45. In response, "[t]he Board confirmed that Elizabeth would violate D.C.'s licensing requirements if she offered counseling to a D.C. resident via teletherapy." *Id.* ¶ 46.

These burdens apply to Elizabeth even if she fully discloses that she is not licensed in D.C. In addition to prohibiting the unlicensed practice of professional counseling, D.C. also has a separate law that prohibits an unlicensed person from calling herself a "licensed professional counselor," but which specifically states that it does not "restrict the use of the generic terms

[1] D.C. also allows an individual who is licensed in another state to "provid[e] care . . . for a limited period of time" if working "in affiliation with a comparable health professional" licensed in D.C. D.C. Code § 3-1205.02(a)(3). This exception also does not apply to Elizabeth, as she is not affiliated with any D.C.-licensed providers. Compl. ¶ 37.

'counseling' or 'counselor.'" D.C. Code § 3-1210.03(t). Elizabeth therefore asked the D.C. licensing board if she could offer her services "so long as she discloses that she is licensed in Virginia and not in D.C. and describes her services as 'counseling' rather than 'licensed professional counseling.'" Compl. ¶ 64. But, in response, "the Board informed Elizabeth that any attempt to do so would be against the law." *Id.* In other words, "D.C. officials have made clear that no amount of truthful factual disclosure about Elizabeth's training or licensure status would affect the prohibition" imposed by the licensing law. *Id.* ¶ 86.

The Complaint also explains that Elizabeth is subject to these burdens precisely because of her training and expertise. "D.C.'s general practice is to enforce its professional counseling licensing law against individuals with significant training and expertise relevant to the provision of counseling," *id.* ¶ 60, and "individuals who do not have significant training and expertise . . . can provide services falling within the definition of licensed professional counseling so long as they refrain from calling themselves 'licensed professional counselors,'" *id.* ¶ 61. For instance, "unlicensed and untrained individuals frequently call themselves 'life coaches' and offer services that fall within the definition of professional counseling under the label 'life coaching.'" *Id.* ¶ 62. "If Elizabeth were less qualified she could in practice offer her services as an unlicensed 'life coach,' but, paradoxically, Elizabeth's training and expertise restrict her ability to talk to D.C. residents without a license." *Id.* ¶ 3. In other words, "Elizabeth is subject to greater burdens on her speech because she possesses greater qualifications to talk." *Id.* ¶ 66.

## STANDARD OF REVIEW

A complaint will survive a motion to dismiss if it "contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Green v. U.S. Dep't of Justice*, 392 F. Supp. 3d 68, 80 (D.D.C. 2019) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678

(2009)). "Plausibility does not mean certainty, or that a claim is more likely to succeed than not, but rather that the claim at issue rises 'above the speculative level.'" *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 11 (D.D.C. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). This Court therefore asks: "if what plaintiffs lay out in the complaint actually happened, is it more than merely possible that the law has been violated?" *Id.* at 11. In answering that question, "[t]he court must give the plaintiff the benefit of all inferences that can be derived from the facts alleged." *Green*, 392 F. Supp. 3d at 80-81 (marks and citation omitted).

## ARGUMENT

Part I briefly makes the point that the Court cannot consider the District's various exhibits on a motion to dismiss. Part II addresses the District's overarching argument—that Elizabeth cannot state a First Amendment claim because she speaks as a "professional"—and explains that it is refuted by recent Supreme Court precedent. Part III explains that Elizabeth has stated a claim that the District's law violates her First Amendment right to talk to D.C. residents. Part IV explains that Elizabeth has stated a claim that the District's law is substantially overbroad, as it sweeps in broad swaths of speech and yet primarily burdens the speech of speakers who are *most* qualified. Finally, Part V explains that the District's attempts to offer a limiting construction for its law fail because they result in a restriction that is impermissibly vague.

### I. The Court Cannot Consider Factual Materials From Outside The Complaint On A Motion To Dismiss.

The District appends a motley assortment of factual materials as exhibits to its motion—including a letter to President Biden, a pamphlet, and a website print-out—but nowhere explains why it believes any of those materials can be considered in this posture. The Court should disregard those materials, as "Federal Rule of Civil Procedure 12(d) forbids considering facts beyond the

complaint in connection with a motion to dismiss the complaint for failure to state a claim." *United States ex rel. Shea v. Cellco P'ship*, 863 F.3d 923, 936 (D.C. Cir. 2017).

The District does not offer and therefore waives any possible argument why the Court should consider its exhibits. Exhibits 1 and 3 are documents conveying the views of a professional association, which are of dubious relevance to begin with and certainly cannot be considered on a motion to dismiss. *See Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020) (explaining that the "institutional positions" of professional associations "cannot define the boundaries of constitutional rights"). Exhibit 2 is a print-out from Elizabeth's website, which is shorn from its context, does not distinguish between in-person and online therapy, and is otherwise offered without explanation; to the extent that the District believes the website somehow contradicts the Complaint, it is "material outside the Complaint, offered to disprove the facts as alleged therein, and the Court thus cannot consider it." *Search v. Uber Techs., Inc.*, 128 F. Supp. 3d 222, 235 (D.D.C. 2015). The Court might conceivably be able to take judicial notice of Exhibits 4-9, which appear to be government documents, but the District does not invoke that doctrine or explain why it should apply. *See Hurd v. District of Columbia*, 864 F.3d 671, 686 (D.C. Cir. 2017) (noting limits on judicial notice). The Court should decline to consider the District's exhibits.

## II. Speech Does Not Receive Lesser Protection Simply Because It Is Uttered By A "Professional."

The District argues repeatedly—in different ways and under a variety of doctrinal headings—that Elizabeth's speech is entitled to lesser protection because she is a professional. The District argues that it is regulating Elizabeth's "practice of a specialized profession," MTD at 10, that professional counselors are "health care professionals who diagnose and treat patients," *id.* at 17, and that the statute supposedly "excludes casual, spontaneous, non-expert or non-medical communications," *id.* at 23. The District also warns that Elizabeth's claims would "open the

floodgates to the unlicensed practice of law, medicine and other professions." *Id.* at 10; *see also id.* at 15. These arguments are contrary to precedent and meritless.

A. The Supreme Court Has Rejected The Professional Speech Doctrine.

The District's arguments invoke the so-called "professional speech doctrine," under which "[s]ome Courts of Appeals have recognized 'professional speech' as a separate category of speech that is subject to different rules." *NIFLA*, 138 S. Ct. at 2371. Indeed, the District cites Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), which is generally recognized as the font of the professional speech doctrine, as well as lower court decisions applying that doctrine. *See*, *e.g.*, MTD at 9, 12-13. Unfortunately for the District's position, however, the Supreme Court in *NIFLA* rejected the professional speech doctrine.

The Court in *NIFLA* explained that "this Court has not recognized 'professional speech' as a separate category of speech," and that "[s]peech is not unprotected merely because it is uttered by professionals." 138 S. Ct. at 2371-72. The Court identified and criticized some of the lower court cases applying the professional speech doctrine, *id.*, and the Court noted that its own cases had applied strict scrutiny to laws regulating the speech of lawyers, professional fundraisers, and organizations that provide specialized advice about international law, *id.* at 2374. The Court also specifically expressed concern that the professional speech doctrine would "give[ ] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* at 2375. Under *NIFLA*, the District's attempts to treat professional licensing as somehow exempt from First Amendment scrutiny cannot be sustained.

Other courts have recognized *NIFLA*'s significance. "*NIFLA* makes clear that occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections." *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020). "The Supreme Court's decision in *NIFLA* also refused to recognize professional speech as a new speech

category deserving less protection," and makes clear that the "idea that [laws] target 'professional speech' does not loosen the First Amendment's restraints." *Otto v. City of Boca Raton*, 981 F.3d 854, 867 (11th Cir. 2020). Following *NIFLA*, the "First Amendment deprives the states of 'unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.'" *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (quoting 138 S. Ct. at 2375). These decisions recognize that *NIFLA* abrogated previous lower court decisions applying less rigorous scrutiny to restrictions on professional speech. *See, e.g.*, *Vizaline*, 949 F.3d at 934; *Pacific Horseshoeing*, 961 F.3d at 1069. To the extent that any cases cited by the District suggest otherwise, they likewise are no longer good law.

B. The District's Contrary Policy Arguments Are Irrelevant And Meritless.

Given this authority, there is no merit to the District's argument that allowing this case to proceed would "open the floodgates to the unlicensed practice of law, medicine and other professions across state lines over the Internet." MTD at 10. The First Amendment determines the permissible scope of occupational licensing, not vice versa. *See Nat'l Ass'n of Manufacturers v. SEC*, 800 F.3d 518, 521 (D.C. Cir. 2015) (responding to a similar argument by the SEC with Charles Dickens' observation that the aphorism "[w]hatever is is right" is as "final as it is lazy"). The District's policy arguments are not a reason to disregard controlling law.

In any event, the District's policy concerns are vastly overstated. Only licensing laws that primarily target speech are vulnerable to facial challenge. *See*, *e.g.*, *Serafine v. Branaman*, 810 F.3d 354 (5th Cir. 2016). Most of what "doctors," accountants," and "physical therapists" (MTD at 15) do has nothing to do with speech. Licensing laws are vulnerable to challenge when they are applied to bar or limit speech, but even challenges to restrictions on speech will not always succeed—either because the speech occurs in a special type of nonpublic forum (*i.e.*, a court of law) or because the regulation is supported by a sufficiently compelling governmental interest. *See*

*infra* p. 18 & n.4 (discussing lawyer licensing). Licensing laws are most vulnerable to challenge when applied to pure advice, but the fact is that most unauthorized practice prosecutions do not involve pure advice. To the extent that zealous licensing boards pursue individuals for nothing more than talking about the law, medicine, or physical therapy, it is hardly unreasonable to ask the government to justify such restrictions under the First Amendment.

If any legal theory would "open the floodgates" it is, in fact, the District's assertion of regulatory authority over professional speech. If the District's view were accepted, regulatory authorities in California could prosecute a lawyer in D.C. for the unauthorized practice of law simply because the lawyer took a phone call from a businessman located in California seeking advice about a legal problem. (Surely this would be deeply troubling for the many law firms located in D.C. that speak every day with clients across the country!) And the District's theory would allow the government to mark off whole areas of discourse on the ground that they can only be addressed by members of particular professions: only lawyers could talk about the law, only doctors could talk about medicine, and only physical therapists could talk about physical therapy. Of course that is not the law. *See, e.g.*, *Rosemond v. Markham*, 135 F. Supp. 3d 574, 584 (E.D. Ky. 2015) (licensing authorities violated the First Amendment by punishing a newspaper column as the unlicensed practice of psychology); *Jarlstrom v. Aldridge*, 366 F. Supp. 3d 1205, 1212 (D. Or. 2018) (licensing authorities violated the First Amendment by punishing an email about traffic lights as the unlicensed practice of engineering). To the contrary, when licensing laws regulate speech, they must pass First Amendment scrutiny.

## III. Elizabeth Has Stated A Claim That The District's Licensing Requirement Violates The First Amendment As Applied To Her Speech.

Turning from the District's overarching argument to the nuts and bolts of the Complaint, the first count states an as-applied claim under the First Amendment. *See* Compl. ¶¶ 83-96. "The

only thing Elizabeth wants to do in D.C. is talk to clients over the internet," as her "teletherapy services consist of ideas, opinions, and guidance that she communicates based on her extensive education in counseling, as well as her professional experience." *Id.* ¶ 85. Yet Elizabeth "is prohibited from having those conversations no matter what disclosures she makes." *Id.* ¶ 86. That prohibition is content based, as "Elizabeth could talk to clients about a range of topics, but if she talks about topics that fall within the definition of 'professional counseling' she is required to have a license." *Id.* ¶ 89. And "D.C. has no interest—compelling or otherwise—in preventing Elizabeth from speaking with clients over the internet." *Id.* ¶ 94.

The District, however, asserts that this infringement on Elizabeth's speech is so obviously constitutional that this claim can be dismissed on the pleadings. The District asserts that conversations with clients over the internet are not speech at all; that its regulation of Elizabeth's speech is not content based because it is not seeking to suppress a particular viewpoint; and that its purported interest in restricting Elizabeth's speech is so obviously compelling that it can survive First Amendment scrutiny without any need to support its claims with actual evidence. Each of these assertions is foreclosed by precedent.

A. Elizabeth's Conversations With Her Clients Are Speech, Not Conduct.

The Complaint is clear that the "only thing Elizabeth wants to do in D.C. is talk to clients over the internet," Compl. ¶ 85, and that "Elizabeth's counseling services consist entirely of conversations between her and her clients," *id.* ¶ 23. Yet, incredibly, the District asserts that Elizabeth "has failed to identify any aspect of the District's licensing requirement that affects her speech as opposed to her conduct." MTD at 12. The District arrives at this remarkable and counterintuitive assertion by reasoning that its law merely regulates "who can and cannot practice certain professions." *Id.* at 11. This strained analysis was contrary to D.C. Circuit law even before the *NIFLA* decision, and it certainly cannot be accepted today.

*1. Even Before* NIFLA*, The D.C. Circuit Applied The First Amendment To Licensing Laws That Limit Speech.*

Even before *NIFLA*, the D.C. Circuit recognized in *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), that licensing laws are subject to First Amendment scrutiny when they are applied to limit speech. *Edwards* involved a First Amendment challenge to an occupational licensing law for tour guides; the "District require[d] that certain tour guides obtain a tour-guide license, which can be procured by paying application, license, and exam fees totaling $200, and passing the exam." *Id.* at 356. Under the District's theory in this case, the tour guide licensing law at issue in *Edwards* would not have been a regulation of speech at all, as it would simply have required a prospective guide to "demonstrate through her conduct that she possesses the education and experience necessary to work as a [tour guide] in the District." MTD at 12. But the D.C. Circuit did not see things that way at all. The D.C. Circuit explained, instead, that "[t]his case is about speech," as tour guides "talk about points of interest or the history of the city while escorting or guiding a person who paid [them] to do so." 755 F.3d at 356. And, in fact, the D.C. Circuit went on to hold that the District's licensing law could not survive First Amendment scrutiny. *See id.* The decision in *Edwards* makes clear that a licensing law restricting entry into an occupation is a restriction on "speech" if it limits a person's ability to talk.

*Edwards*, meanwhile, was a straightforward application of *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). In *Holder*, the Supreme Court considered whether a federal law barring "material support" to terrorist organizations was unconstitutional as applied to organizations that provided legal services and other similar aid. The Court there explained that even if a law "generally functions as a regulation of conduct," the law regulates speech if "the conduct triggering the statute consists of communicating a message." *Id.* at 28.

*2. Post-*NIFLA*, Elizabeth's Speech To Her Clients Cannot Possibly Be Labeled "Conduct."*

The Supreme Court's decision in *NIFLA* confirms the holding of *Edwards*, as it refuses to "give[ ] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 138 S. Ct. at 2375. Numerous post-*NIFLA* decisions recognize that government cannot evade the First Amendment by characterizing a licensing restriction that limits speech as a regulation of "professional conduct."

Particularly relevant here, the Eleventh Circuit recently rejected the claim that therapy "consist[ing] entirely of speech" is somehow "conduct" subject to reduced constitutional protection. *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). There, therapists challenged ordinances prohibiting certain types of talk therapy, *id.* at 859-60, and the defendant governments argued that the therapists received "less protection or no protection" because their speech fell "into a kind of twilight zone of 'professional speech' or 'professional conduct.'" *Id.* at 864-65. But the court rejected that argument, explaining: "What the governments call a 'medical procedure' consists—entirely—of words." *Id.* at 865. The court continued:

> If [therapy] is conduct, the same could be said of teaching or protesting—both are activities, after all. Debating? Also an activity. Book clubs? Same answer. But the law does not require us to flip back and forth between perspectives until our eyes hurt. Our precedent says the opposite: Speech is speech, and it must be analyzed as such for purposes of the First Amendment.

*Id.* at 865–66 (marks and citation omitted). The same reasoning applies here: Even if the District is right to characterize professional counseling as a "structured course of formal and scientific medical treatment," MTD at 24, that treatment is still ultimately speech. For instance, if Elizabeth engages in a structured course of talking to somebody about depression resulting from struggles with infertility, that does not change the fact that Elizabeth is talking. "If speaking to clients is not speech, the world is truly upside down." *Otto*, 981 F.3d at 866.

Similarly, the Fifth Circuit recently rejected the argument that telemedicine falls outside the First Amendment. *See Hines v. Quillivan*, 982 F.3d 266 (5th Cir. 2020) (*Hines II*). In that case, state law prohibited veterinarians from practicing veterinary medicine on an animal without first examining the animal in person, and the state had determined that the plaintiff violated that provision by providing veterinary advice over email and phone. *Id.* at 269-70. Prior to *NIFLA*, the Fifth Circuit held that this restriction did not implicate the First Amendment because it only burdened "conduct" via a "generally applicable licensing provision[.]" *Hines v. Alldredge*, 783 F.3d 197, 202 (5th Cir. 2015) (*Hines I*). But, reconsidering the issue after *NIFLA*, the Fifth Circuit recognized that "*NIFLA* 'disavowed the notion that occupational-licensing regulations are exempt from First Amendment scrutiny'" and thus abrogated its prior decision. *Hines II*, 982 F.3d at 271 (quoting *Vizaline,* 949 F.3d at 928).

Finally, the Ninth Circuit, in *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062, 1068 (9th Cir. 2020), rejected the argument that a regulation prohibiting vocational schools from enrolling certain students did "not implicate speech at all" because it was "a consumer-protection provision that regulates only non-expressive conduct." Citing *NIFLA*, the Ninth Circuit determined that the law regulated speech because it affected the school's ability to talk to its students. *Id.* at 1069. After all, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011)). The same reasoning applies here: The District's licensing law regulates speech because it restricts Elizabeth's ability to talk to willing listeners within D.C.

*3. The District's Contrary Cases Are Inapposite.*

As contrary authority, the District cites decisions that either predate the Supreme Court's decision in *NIFLA* or address markedly different facts (or both). These decisions do not support the District's attempt to recast speech as conduct.

First, the District cites *National Association for Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000), which involved a challenge to California's licensing scheme for psychoanalysts. That case applied the now-discredited professional speech doctrine; the Ninth Circuit determined that the licensing law targeted conduct, rather than speech, because it "is properly within the state's police power to regulate and license professions, especially when public health concerns are affected." *Id.* at 1054. The Ninth Circuit's decision therefore is no longer good law. *See Otto*, 981 F.3d at 865.[2]

Second, the District cites *Liberty Coins, LLC v. Goodman*, 748 F.3d 682 (6th Cir. 2014), where a coin seller was investigated for violating the state's licensing scheme for precious metal dealers. That decision contains some language that is hard to square with the Supreme Court's later decision in *NIFLA*. *See id.* at 692-93. The decision is also easily distinguished on the ground that the occupation at issue did not involve speech, and instead involved a restriction on the ability to "purchas[e] articles made of or containing gold, silver, platinum, or other precious metals or jewels." *Id.* at 687 (marks and citation omitted). There is a vast difference between a restriction that limits who can buy gold (a form of conduct), as opposed to a restriction that limits who can speak to clients over internet video (a form of speech).

[2] The Ninth Circuit also separately held that the licensing requirement was content-neutral because it did not seek to dictate what could be said during treatment. *See* 228 F.3d at 1055 (citing *Crawford v. Lungren*, 96 F.3d 380, 384 (9th Cir. 1996)). As explained *infra* pp. 19-22, however, that conclusion also cannot be squared with subsequent Supreme Court authority.

Finally, *NAAMJP v. Howell*, 851 F.3d 12 (D.C. Cir. 2017), and *Doyle v. Palmer*, 365 F. Supp. 3d 295 (E.D.N.Y. 2019), involved challenges to local rules governing admission to the federal district court bar. *Howell* predates *NIFLA*, and both *Howell* and *Doyle* contain language that is difficult or even impossible to square with that decision.[3] On their facts, meanwhile, these decisions are best understood as resting on the fact that a courtroom is not remotely a public forum; while it is impossible to seriously deny that applicants to a district court bar seek admission in order to talk before the court, the nature of the forum means that the court can impose all manner of restrictions on speech (even some content based restrictions—*e.g.*, prohibitions on certain forms of argument to the jury). *Cf. Hodge v. Talkin*, 799 F.3d 1145, 1158 (D.C. Cir. 2015) (holding that even the plaza outside of a courtroom is a nonpublic forum where restrictions on speech "must survive only a much more limited review").[4] Again, there is a vast difference between a restriction that limits who can appear in a courtroom and a restriction that limits who can talk over the internet. None of the District's cited authorities seriously call into question the conclusion that Elizabeth's speech to her clients is, in fact, speech.

[3] The District quotes *Howell* for the proposition that "the government may license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment." MTD at 9. But *Howell* itself quoted that language from a Fourth Circuit decision that was specifically disapproved by the Supreme Court in *NIFLA*. *Compare Howell*, 851 F.3d at 114 (quoting *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013)), *with NIFLA*, 138 S. Ct. at 2371 (abrogating *Moore-King*).

[4] Because they involved federal district court bars, neither decision considered limits on aspects of legal practice beyond appearances in court. The other major component of lawyer licensing involves restrictions on transactional practice, but, in that context, licensing targets a significant element of conduct: The key act that triggers regulation is that a legal document is furnished to parties to be given binding effect. In this respect, restrictions on transactional practice are akin to restrictions on writing prescriptions or performing a marriage. *See United States v. Montana*, 199 F.3d 947, 950 (7th Cir. 1999) (discussing the category of "performative utterances," such as "a promise, offer, or demand," that "commit the speaker to a course of action").

B. The District's Licensing Requirement Is Content Based.

Because Elizabeth's speech to her clients is speech, the District's licensing law must, at a minimum, survive intermediate scrutiny. *See Edwards*, 755 F.3d at 1001-02. At this stage of the proceedings, the Court could stop the analysis there; after all, as explained *infra* pp. 23-27, the Complaint states a claim under an intermediate scrutiny standard. But, beyond that, the Complaint also alleges that the District's licensing law is a *content based* regulation of speech, meaning that it must survive strict scrutiny. *See* Compl. ¶¶ 76-77, 87-91.

1. *The District's Licensing Law Is Content Based Under The Supreme Court's Decision In* Reed.

The Supreme Court addressed the standard to determine if a law is content based in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The Court in *Reed* distinguished the question of whether a law is viewpoint based from the question of whether a law is content based; a law is content based if it "singles out specific subject matter for differential treatment, even if it does not target viewpoints within that subject matter." *Id.* at 169. The Court also explained that a law can be content based in two different ways: a law is content based if it "cannot be justified without reference to the content of the regulated speech" *or* if it "is content based on its face." *Id.* at 164. And the Court explained that a law is "content based on its face" so long as it "applies to particular speech because of the topic discussed"—either because it "defin[es] regulated speech by particular subject matter" or because it "defin[es] regulated speech by its function or purpose." *Id.* at 163. "Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* at 163-64. The upshot of *Reed* is that a law is content based whenever it is necessary to examine the content of speech in order to determine how the law applies: For instance, the sign code at issue in *Reed* was content based because it distinguished between "political," "ideological," and "directional" signs. *Id.* at 164.

Applying *Reed*, the District's licensing law is content based because its application depends on the subject matter, function, and purpose of Elizabeth's speech. Under the licensing law, Elizabeth cannot speak to her clients "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). On its face, that restriction applies only to speech on certain subject matters; the District cannot possibly determine whether speech concerns "mental, emotional, or behavioral conditions" without assessing its content. Moreover, the restriction also requires a judgment whether speech seeks "to identify and remediate" such conditions. The restriction therefore simultaneously defines the type of speech that requires a license both in terms of its "subject matter" and its "function or purpose," and *Reed* explains that both types of distinctions are content based. 491 U.S. at 163-64. Put differently, the District's licensing law is content based under *Reed* because Elizabeth is free to talk over the internet about football or current events but cannot talk to people about their feelings to help them feel better.

The Ninth Circuit's recent decision in *Pacific Horseshoeing* illustrates the point. In that case, the challenged restrictions on vocational education did not apply to courses that were "solely avocational or recreational." 961 F.3d at 1071. The Ninth Circuit found that distinction content based, explaining: "The fact that the Act distinguishes between, say, golf lessons because they are 'solely avocational or recreational,' and horseshoeing lessons because they are not, is significant—even if we assume that the state has no particular interest in encouraging speech related to golf lessons or suppressing speech related to horseshoeing." *Id.* The law in *Pacific Horseshoeing* was content based because the application of the law turned on the subject that was being taught. And the same is true here: Just as a school in *Pacific Horseshoeing* could teach golf lessons but not horseshoeing, Elizabeth can talk to her clients about history or interior decorating but cannot

provide advice that falls within the definition of professional counseling. *See* Compl. ¶¶ 88-91. That is a content based regulation of speech.

The District's own attempts to offer some kind of narrowing construction of its statute further drive home the point. As discussed *infra* pp. 29-33, those attempts are divorced from the language of the statute. But, even setting that aside, the District draws a content based distinction when it contends that "the statute clearly excludes casual, spontaneous, non-expert or non-medical communications." MTD at 23. The District refers to these allowable communications as "general life advice," and it contrasts "general life advice" with conversations that bear "indicia of a structured course of medical treatment designed to ameliorate a specifically-identified mental health diagnosis." *Id.* at 25. These distinctions are content based, as they simultaneously "defin[e] regulated speech by particular subject matter" (*i.e.*, whether speech is, or is not, "general life advice") and "defin[e] regulated speech by its function or purpose" (*i.e.*, whether speech is, or is not, "designed to ameliorate a specifically-identified mental health diagnosis"). *Reed*, 576 U.S. at 163. The District's own exegesis of the challenged statute thus walks the District right into the briar patch of content based regulation of speech.

*2. The District's Contrary Arguments Are Inconsistent With Binding Precedent.*

The District's contrary view relies on two arguments, both of which have been explicitly rejected by the Supreme Court.

First, the District argues that a law is only content based if the government adopted it "because of [agreement or] disagreement with the message it conveys." MTD at 15 (citation omitted). But precisely that argument was raised and rejected in *Reed*. The defendant in *Reed* argued that its sign code was content neutral because it "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed," *Reed*, 576 U.S. at 165, but the Court rejected that argument and explained that language articulates an *additional* way that a law can be

content based rather than the sole test to determine whether strict scrutiny applies. *Id.* The Court held: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.*

Second, the District makes a slippery-slope argument, arguing that its licensing requirement cannot be content based because that would mean "*any* regulation of *any* profession that relies on 'speech' as part of the job . . . would need to consider what a person said to know if they were engaged in the profession." MTD at 15-16. This, however, is just another attempt to reintroduce the professional speech doctrine through the back door. The District argues that a different standard should apply to the speech of "lawyers," "doctors," accountants," and "physical therapists," *id.*, not because of something inherent to their speech but rather because they are members of a profession. But that argument cannot survive *NIFLA*: Indeed, in *NIFLA*, the Court identified several cases in which content based laws were subject to strict scrutiny regardless of the speaker's profession, including the "noncommercial speech of lawyers," "professional fundraisers," and "organizations that provided specialized advice about international law." *NIFLA*, 138 S. Ct. at 2374 (citations omitted); *see also id.* (noting that "the lawyer's statements in *Zauderer* would have been 'fully protected' if they were made in a context other than advertising).[5] And in any event, as explained *supra* pp. 11-12, the District's policy argument is not only irrelevant but also badly exaggerated.

[5] The District cites *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), as contrary authority, but that decision was limited by *Edenfield v. Fane*, 507 U.S. 761, 765 (1993), and also predates *NIFLA*, *Holder*, and *Reed*. It is also easily distinguished, as it involved only commercial speech. The District's law is not a commercial speech regulation, as it does not target speech "proposing a commercial transaction." *Cent. Hudson v. Pub. Serv. Comm'n*, 447 U.S. 557, 562 (1980).

C. The District Cannot Justify Its Restriction Of Elizabeth's Speech On A Motion To Dismiss, Without Any Factual Record.

Because the District's licensing requirement is a content based restriction on Elizabeth's speech, the requirement is presumptively unconstitutional and survives only if the District proves that it is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. But even if the court were to assume otherwise, the District's licensing law would *still* need to pass intermediate scrutiny, meaning that "(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." *Edwards*, 755 F.3d at 1002 (marks and citations omitted). The Complaint states a claim under either of these standards.

*1. Under Either Strict Or Intermediate Scrutiny, The District Bears The Burden To Justify Its Law.*

The District bears the burden to justify its law under either strict or intermediate scrutiny, and the Court should reject the District's invitation to excuse it from that burden by deciding the case on the pleadings. *See* MTD at 16-19. "[I]ntermediate scrutiny does indeed require the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden." *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015). While the District asserts that it can identify a governmental interest sufficient to justify its law, and that it can show that its licensing law is narrowly tailored to that interest, those arguments "have not been fully explored on the current record, and certainly cannot be resolved on the face of the complaint." *Billups v. City of Charleston*, 194 F. Supp. 3d 452, 475 (D.S.C. 2016); *see also Sandvig*, 315 F. Supp. 3d at 28.

*2. The District Has Not Sufficiently Identified The Interest Allegedly Served By Its Licensing Law.*

Under either strict or intermediate scrutiny, the District is required to identify a governmental interest (either compelling or substantial) that supposedly justifies its regulation. The District's motion, however, fails to articulate the interest supposedly served by its licensing law. The District asserts, vaguely, that it has a compelling interest here because "LPCs are health care professionals who diagnose and treat patients." MTD at 17. But that kind of "abstract" invocation of health and safety "is not enough here." *Wollschlaeger v. Governor*, 848 F.3d 1293, 1316 (11th Cir. 2017). The government "does not have carte blanche to restrict the speech of doctors and medical professionals." *Id.* Rather than identify any more specific interest, the District points to the opinion of the American Counseling Association, which it says believes that licensing professional counselors protects public health. MTD at 17. But the District cannot satisfy the First Amendment by substituting the ACA's beliefs about licensing for its own. *See Otto*, 981 F.3d at 869 (explaining that the "institutional positions" of professional associations "cannot define the boundaries of constitutional rights"). Having failed even to identify the specific danger that its restriction is designed to combat, the District certainly cannot prevail on a motion to dismiss.

*3. The District Cannot Demonstrate The Necessary Fit Between Ends And Means On A Motion To Dismiss.*

Finally, under either strict or intermediate scrutiny, the District must demonstrate an appropriate degree of "fit" between its stated interest and the regulation that it has adopted. The Complaint, however, alleges that the necessary degree of fit is lacking in numerous respects.

First, in assessing Elizabeth's as-applied challenge, the District does not even attempt to explain why its hypothetical interest is "implicated on these facts." *Sandvig*, 315 F. Supp. 3d at 30 (marks and citation omitted). The Complaint alleges that D.C. "has no interest—compelling or otherwise—in preventing Elizabeth from speaking with clients over the internet." Compl. ¶ 94. On

a motion to dismiss, that allegation must be taken as true, and, indeed, the District does not explain what about Elizabeth's speech is so harmful that it cannot be allowed.

Second, any regulatory interest that the District might hypothetically assert is undermined by the various exceptions to its licensing law. *See Edwards*, 755 F.3d at 365-66 (explaining that District's claimed interest in regulating tour guides was undermined by exceptions to the law). If the District believes that unlicensed counseling presents a danger to health and safety, why does the District permit unlicensed counseling by a wide array of individuals including religious leaders; friends and family members; individuals engaged in the practice of cosmetology or the operation of a health club; and marriage counselors, drama therapists, and other professionals? *See* D.C. Code § 3-1201.03(d). Why is it that a health club manager or drama therapist can help a new mother work through issues with postpartum depression without satisfying the District's licensing requirements for professional counselors, but Elizabeth cannot? Why is it that a priest or marriage counselor can provide counseling sessions to a married couple struggling with infertility, but Elizabeth cannot? Perhaps the District has answers to these questions, but it does not provide them in its motion. And, in any event, those questions cannot be addressed on a motion to dismiss.

Third, the law's statutory exceptions are exacerbated by the District's attempt (both in its motion and as alleged in the Complaint) to carve out the "general life advice that might be provided by a life coach or self-help guru" from the statute's scope. MTD at 25; *see also* Compl. ¶¶ 62-63. The District takes the view that untrained individuals who provide counseling services merely offer "general life advice," and thus, under the District's interpretation, fall outside the statute's proper scope. *See* MTD at 23, 25. Whether this is a correct interpretation of the statute or not (and it is not, *see infra* pp. 29-33), the upshot of this view is that "Elizabeth is subject to greater burdens on her speech because she possesses greater qualifications to talk." Compl. ¶ 66. "If Elizabeth

were less qualified she could in practice offer her services as an unlicensed 'life coach,' but, paradoxically, Elizabeth's training and expertise restrict her ability to talk to D.C. residents without a license." *Id.* ¶ 3. Whatever hypothetical interest the District might be attempting to advance, it is hard to see how that interest is advanced by a regulatory scheme that primarily burdens the speech of *qualified* speakers; to the contrary, "D.C. possesses no evidence that counseling provided by individuals with *more* qualifications is somehow more dangerous than counseling provided by less qualified individuals." *Id.* ¶ 67.

Fourth, this overall lack of fit is exacerbated by the fact that the District would allow Elizabeth herself to speak to clients in D.C. without a license under a variety of circumstances. *See Edwards*, 755 F.3d at 1008. Most notably, the District would allow Elizabeth to provide her services in D.C. if only Virginia extended reciprocal privileges to D.C.-licensed professional counselors. *See* Compl. ¶¶ 36-37. And, under the COVID-19 waiver, Elizabeth could provide services to an existing client who returned to the District during the pandemic, and she could provide her services if she was affiliated with a D.C.-licensed healthcare facility. *See id.* ¶¶ 41-42. If Elizabeth could safely speak to D.C. residents without a license under those circumstances, why is her speech otherwise so dangerous? Again, the District may eventually attempt to offer answers to those questions, but it must provide those answers *and* support its claims with actual evidence. These issues cannot be addressed on a motion to dismiss.

Finally, the District also must grapple with possible less restrictive alternatives to its licensing law. *See Edwards*, 755 F.3d at 1009 (finding that the "existence of less restrictive means" was "fatal to the District's regulatory scheme"). Most notably, the District must explain why any hypothetical interest it might seek to advance could not be addressed through a titling restriction—which would prohibit unlicensed individuals from falsely claiming to be licensed in the District,

but which would not otherwise prohibit anyone from speaking. *See id.* (pointing to a "voluntary certification program" as an available less restrictive alternative). The District already has a titling law, which restricts who can use the term "licensed professional counselor," and Elizabeth asked if she could provide her services so long as she complied with that law. *See* Compl. ¶ 64; *see also* D.C. Code § 3-1210.03(t). The District's titling law ensures that unqualified individuals do not falsely claim to be licensed by the District, and the District could (if necessary) pair its existing titling law with additional voluntary certification programs or additional prohibitions on misleading marketing.

Other alternatives may also become relevant, depending on the interest that the District ultimately claims to be pursuing. For instance, if the District claims to be seeking to prevent professional misconduct, the District will need to explain why it does not simply prohibit that misconduct directly. *See Edwards*, 755 F.3d at 1009. And the District will also need to present actual evidence to demonstrate that it has considered these alternatives and found them insufficient. *See Billups v. City of Charleston*, 961 F.3d 673, 689 (4th Cir. 2020). The District does not address these issues in its motion to dismiss, and it cannot even begin to make the necessary evidentiary showing at this stage of the proceedings.

## IV. Elizabeth Has Stated A Claim That The District's Licensing Requirement Is Facially Overbroad.

In addition to challenging the District's licensing law as applied to Elizabeth's teletherapy services, the Complaint also challenges the law on its face. *See* Compl. ¶¶ 97-107. Indeed, the Fifth Circuit sustained a facial challenge to similar provisions in a psychology licensing law. *See Serafine*, 810 F.3d at 369-70. The District responds by attempting to limit the law's scope, but the interpretation that it advances cannot be squared with the statute's plain language. And, in any event, the Complaint states a claim under any interpretation of the District's law.

A. Elizabeth Has Standing To Raise A Facial Overbreadth Claim.

At the outset, the District briefly suggests that Elizabeth does not have "standing" to raise a facial overbreadth claim because she cannot raise the rights of "non-LPCs" who engage in "precisely the same conduct that she engages in." MTD at 20-21. This argument badly misunderstands the nature of a facial overbreadth claim.

Elizabeth has standing to raise a facial challenge to the District's licensing law because her speech is limited by the licensing law. *See* Compl. ¶ 68 (alleging that Elizabeth "is significantly limited in her ability to share her advice and counseling expertise with D.C. residents"); *see also id.* ¶¶ 69-82. The District argues that Elizabeth cannot raise a facial overbreadth claim because that claim challenges the law's potential application to *other* individuals in addition to herself, but that is exactly what the overbreadth doctrine allows: A plaintiff whose speech is affected by a challenged law may "challenge [the] statute by showing that it substantially abridges the First Amendment rights of other parties not before the court." *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980); *see also United States v. Stevens*, 559 U.S. 460, 472-73 (2010). Cases cited by the District, *see* MTD at 21, do not involve overbreadth claims.

B. On Its Face, The District's Licensing Law Sweeps In A Vast Universe Of Speech.

The "first step" in an overbreadth analysis is to construe the statute to "determine whether [it] reaches too far." *United States v. Williams*, 553 U.S. 285, 293 (2008). The District advances a proposed limiting construction of its licensing law, under which the law is "replete with indications that it is strictly limited to counseling akin to a structured course of formal and scientific medical treatment." MTD at 24. Putting aside the problem that it is entirely unclear what that means (a problem addressed *infra* pp. 38-39), the District's proposed limiting construction must be rejected because it cannot be reconciled with the text of the statute.

*1. When Assessing A Facial Overbreadth Challenge, The Court Must Construe The Law According To Its Text.*

In a First Amendment case, the government cannot avoid an overbreadth challenge by declaring that its law means something different than what it says. Rather, when the government proposes a limiting construction, the question for the court is whether the statute is "'readily susceptible' to such an interpretation." *Stevens*, 559 U.S. at 481; *see also City of Houston v. Hill*, 482 U.S. 451, 468 (1987).

Similarly, a policy of non-enforcement will not save a statute from an overbreadth challenge. "A limiting construction of [a statute] is 'distinct from a policy of limited enforcement or prosecutorial discretion.'" *Langford v. City of St. Louis*, 443 F. Supp. 3d 962, 983 (E.D. Mo. 2020). And a court cannot "uphold an unconstitutional statute merely because the Government promised to use it responsibly." *Stevens*, 559 U.S. at 480. The District has, it appears, opted to define professional counseling by enacting a sweepingly broad law and then enforcing the law only in those cases where it decides enforcement is warranted. *See* Compl. ¶¶ 101-04; MTD at 20-21. But that legislative approach is exactly what the overbreadth doctrine is designed to prevent. *See Stevens*, 559 U.S. at 480. A contrary rule would "delegat[e] standardless discretionary power" to the government to prosecute speech within the statute's broad sweep, *Langford*, 443 F. Supp. 3d at 983, and the First Amendment "does not leave [citizens] at the mercy of *noblesse oblige*," *Stevens*, 559 U.S. at 480. The statute itself—not the District's enforcement policy—must be narrowly tailored to the harms the District seeks to prevent.

*2. The Text Of The District's Licensing Law Is Extraordinarily Broad.*

While the District strives to transform its intuitions about enforcement into an actual limiting construction, these efforts run squarely into the text of the licensing law. In full, the law defines professional counseling as follows:

> "Practice of professional counseling" means 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). This language includes both a general definition of "professional counseling" and two examples of what the definition "includes." Both the general definition and the supporting examples sweep in broad categories of speech.

*a.* The District's licensing law begins by defining professional counseling as "engaging in counseling or psychotherapy activities, including cognitive behavioral therapy or other modality, with or without compensation." D.C. Code § 3-1201.02(15B). Because of the use of the words "or" and "including," this language ultimately defines "professional counseling" as "engaging in counseling." After all, the first phrase refers to "counseling *or* psychotherapy activities," and the second phrase broadens the first with "*including* cognitive behavioral therapy or other modality." The third phrase then clarifies that this counseling can be "with or without compensation." This part of the definition is thus both profoundly unhelpful and incredibly broad.[6]

[6] Because of the reductive definition of "professional counseling" as "counseling," it is worth noting that the word "counseling" itself suggests only that the law targets the giving of advice about peoples' lives and feelings and does not otherwise limit the statute's scope. The word "counseling" refers broadly to "professional guidance in resolving personal conflicts and emotional problems." Webster's New Universal Unabridged (1996); *see also* Oxford English Dictionary (2021) (defining "counseling" to include "the giving of advice on personal, social, psychological, etc. problems as an occupation"). Recognizing the broad meaning of the word "counseling," the District's licensing laws use the word in the definitions of "addiction

From there, the licensing law wraps up the general definition by stating that professional counseling seeks "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). The first phrase is no limitation; as the District observes, "updating a client's wardrobe or furnishings may very well 'facilitat[e] their human development.'" MTD at 24-25. The District thus emphasizes the second phrase, which limits the definition to counseling undertaken "to identify and remediate mental, emotional, or behavioral conditions and associated difficulties that interfere with mental health and wellness." *Id.* at 23. But this language merely suggests that counselors speak with people in order to figure out and then work through ("identify and remediate") problems in their lives or their feelings ("mental, emotional, or behavioral conditions") that make them feel bad or otherwise cause negative effects ("interfere with mental health and wellness"). In other words, the statute defines professional counseling as talking to people about their feelings to help them feel better.[7]

*b.* The two supporting examples proffered by the licensing law cannot narrow this general definition, as they merely provide examples of what the definition "includes." D.C. Code § 3-1201.02(15B). But, in any event, the two examples confirm the breadth of the law.

The first example is arguably somewhat cabined to the type of speech the District claims to have in mind, but it also shows how difficult that category is to define with precision. It states that professional counseling "includes" the "processes of conducting interviews, tests, and other

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counseling," D.C. Code § 3-1201.02(1A), "athletic training," *id.* § (2A-ii), "audiology," *id.* § (2B), "midwifery," *id.* § (2D), "chiropractic," *id.* § (3), "dietics and nutrition," *id.* § (6), "practical nursing," *id.* § (15), "psychology," *id.* § (16), "registered nursing," *id.* § (17), "social work," *id.* § (18), and "speech-language pathology," *id.* § (19).

[7] And, indeed, the Complaint alleges that this is exactly what professional counselors like Elizabeth do for their clients. *See* Compl. ¶¶ 20-24, 48.

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." D.C. Code § 3-1201.02(15B)(A). This would reach anyone who conducts "interviews" in order to identify and help with conditions listed in the *Diagnostic and Statistical Manual of Disorders*, which includes ADHD, autism, eating disorders, gender dysphoria, depression, internet gaming disorder, anxiety, impulse control, and substance use and addiction disorders.[8] And, beyond that, the statute also reaches individuals who help with conditions listed in other "appropriate classification schemes," whatever that might mean.

The second example, meanwhile, confirms the breadth of the statutory definition. Under the second example, professional counseling "includes" "[a]ssisting 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)(B). If anything, this second example is even broader than the general definition; what kind of "professional relationship" does *not* in some sense help a person "achieve long-term effective mental, emotional, physical, spiritual, social, educational, or career development and adjustment"? This second example covers the universe of almost any professional relationship, seemingly to give enforcement authorities virtually unlimited authority to identify and limit speech that they decide should qualify as professional counseling.

*c.* The District has enacted a number of statutory exemptions to its licensing law. *See* D.C. Code § 3-1201.03(d). But the District does not emphasize those statutory exemptions in its overbreadth analysis, mentioning them only in a footnote. *See* MTD at 24 n.8. And for good reason:

[8] *See generally* American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013). The Court can take judicial notice of the types of conditions covered by this publication. *See*, *e.g.*, *United States v. Long*, 562 F.3d 325, 334 n.22 (5th Cir. 2009).

Those statutory exceptions are themselves subject to an exception-to-the-exception, under which they apply only to individuals who do not "hold themselves out, by title, *description of services*, or otherwise" to be practicing professional counseling. D.C. Code § 3-1201.03(d) (emphasis added). Thus, while these exceptions provide some protection for a "minister, priest, [or] rabbi," friends and family members, and "marriage counselors," "drama therapists," and "other professionals," they do so only if an individual does not hold him or herself out by "description of services" as doing anything that comes within the sweeping definition of professional counseling.[9] These various exceptions raise serious questions about what interest the District's licensing law actually serves (*see supra* p. 25), but, at the same time, they still leave the individuals they claim to protect vulnerable to prosecution for unlicensed professional counseling. And, of course, these exceptions provide no solace at all to individuals who are not listed.

C. Under Any Interpretation Of The Licensing Law, The Complaint States A Facial First Amendment Claim.

Under the First Amendment, a law may be "invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473 (marks and citation omitted). The Complaint alleges just that: "D.C.'s professional counseling licensing law is substantially overbroad, as it sweeps in significant amounts of speech that D.C. has no conceivable interest in regulating." Compl. ¶ 99. Under any interpretation of the licensing law, the Complaint states a facial First Amendment claim.

[9] Moreover, these exceptions are limited in other ways as well: The exception for religious clergy, for instance, is limited to clergy who are "engaging in prayer or any other religious practice." D.C. Code § 3-1201.03(d)(1). And the exception for "[m]arriage and family therapists, marriage counselors, art therapists, drama therapists, attorneys, or other professionals" is limited to individuals who are "working within the standards and ethics of their respective professions." *Id.* § (d)(7). This language leaves clergy vulnerable to accusations that their counseling activities do not constitute "religious practice," and it leaves drama therapists, marriage counselors, and "other professionals" vulnerable to accusations that their counseling has somehow transgressed as-of-yet unidentified "standards and ethics" of their profession.

*1. The District Has Not Sufficiently Identified The Interest Supposedly Served By Its Licensing Law.*

At the outset, the overbreadth doctrine requires an assessment of a statute's "legitimate sweep," *Stevens*, 559 U.S. at 473, and at this stage of the proceedings the District has not identified the legitimate interest served by its licensing law with any specificity—much less identified the speech that is legitimately swept up under that interest. *See supra* p. 24. The District appears to believe that its interest is self-evident, but it is not at all clear why the District would need to license all speech intended "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). And if there is some core area of legitimate concern within that definition, the District has not identified what it is. The District vaguely gestures towards "formal" and "scientific medical" speech, MTD at 24, but the District cannot regulate speech just because it can be characterized as "formal," "scientific," or even "medical." *See*, *e.g.*, *Wollschlaeger*, 858 F.3d at 1316. The District must identify the specific concerns it is attempting to redress, but, at least at this stage, has not done so.

*2. Under Any Interpretation Of The Licensing Law, The District Cannot Establish Narrow Tailoring On A Motion To Dismiss.*

Even if the District had identified such an interest, the District cannot meet its burden to establish narrow tailoring without actual evidence; for that reason, courts recognize that the government "will rarely be able to satisfy narrow tailoring at the pleading stage." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 372 (3d Cir. 2016).

The District cannot establish narrow tailoring on the pleadings with respect to the facial claims for largely the same reasons that it cannot do so for the as-applied claims. *See Edwards*, 755 F.3d at 359 ("The distinction between facial and as-applied challenges goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." (marks and citation

omitted)). As in the as-applied context, any regulatory interest that the District might hypothetically assert is undermined by the various exceptions to its licensing law. *See supra* pp. 25-26. And, as in the as-applied context, the District also must grapple with possible less restrictive alternatives—including an approach that restricts who can use the title "licensed professional counselor" without otherwise limiting anyone's ability to talk. *See supra* pp. 26-27. The government bears the burden of proof on these issues, and its "proof can only be considered . . . after a fair opportunity for discovery and the production of evidence." *Bruni*, 824 F.3d at 371-72.

Notably, this is true even under the District's proposed limiting construction. The District suggests that it would limit its law to "counseling akin to a structured course of formal and scientific medical treatment," MTD at 24, and would exclude "casual, spontaneous, non-expert or non-medical communications," *id.* at 23. But, in doing so, the District effectively seeks to formalize the enforcement policy alleged in the Complaint, under which "D.C. enforces its professional counseling licensing law against individuals with *more* qualifications but not against individuals with *fewer* qualifications." Compl. ¶ 104. And the Complaint specifically alleges that "D.C. cannot articulate any interest that would justify that approach." *Id.*; *see also id.* ¶ 67 ("D.C. possesses no evidence that counseling provided by individuals with *more* qualifications is somehow more dangerous than counseling provided by less qualified individuals."). The District will of course have an opportunity to attempt to justify its regulatory approach, but it cannot meet that burden on a motion to dismiss.

*3. Read Naturally, The District's Licensing Law Sweeps In Vast Quantities Of Speech.*

While the Complaint states a facial First Amendment claim under any interpretation of the licensing law, that is particularly true under the most natural reading of the statutory text—under which the law encompasses broad swaths of speech about peoples' feelings.

The Fifth Circuit invalidated similarly overbroad statutory language in *Serafine*, 810 F.3d at 369-70. There, the plaintiff challenged two subsections of the state's licensing law, under which "[t]he practice of psychology":

> (1) includes providing or offering to provide services to an individual or group, including providing computerized procedures, that include the application of established principles, methods, and procedures of describing, explaining, and ameliorating behavior;
>
> (2) addresses normal behavior and involves evaluating, preventing, and remediating psychological, emotional, mental, interpersonal, learning, and behavioral disorders of individuals or groups, as well as the psychological disorders that accompany medical problems, organizational structures, stress, and health[.]

*Id.* at 365. The government had argued that the statute's scope was sufficiently limited because it contained exemptions for clergy members and various licensed professionals, thereby limiting its application to "professional psychologists." *Id.* at 369. But the court rejected that argument, noting that, "under the canon of *expressio unius*, the presence of those exemptions suggests that anyone not granted an exemption . . . is affirmatively covered by the Act." *Id.* The court held that both sections could apply to "Alcoholics Anonymous (AA), Weight-Watchers, golf coaches, yoga teachers, life-coaches, and various self-help groups, which do remediate various 'psychological, emotional, mental, interpersonal, learning and behavioral disorders.'" *Id.* at 367. And the court concluded that such a sweeping restriction on "the ability of individuals to dispense personal advice about mental or emotional problems" was fatally overbroad. *Id.* at 369-70.

The District's definition of "the practice of professional counseling" is at least as overbroad as the invalidated definition in *Serafine*. Just as the statutory language at issue in *Serafine* threatened the speech of Alcoholics Anonymous, Weight-Watchers, golf coaches, yoga teachers, life-coaches, and various self-help groups, the Complaint alleges that the District's licensing requirement here threatens the speech of "life coaches, self-help gurus, mentors, religious leaders,

or even close friends." Compl. ¶ 101.[10] And that list is hardly exhaustive; as explored in detail *supra* pp. 29-33, anyone who talks to people about their feelings potentially falls within the scope of the District's licensing requirement.

The District responds that the Complaint "fails to specify what sort of conduct 'life coaches' or other non-LPCs engage in that would fall under the statute," MTD at 20, but that is not true. The Complaint alleges that all these various individuals "routinely offer advice that falls within the legal definition of 'professional counseling,'" Compl. ¶ 101, insofar as they speak with people 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); *see also* Compl. ¶ 62 (alleging that "unlicensed and untrained individuals frequently call themselves 'life coaches' and offer services that fall within the definition of professional counseling"); *id.* ¶ 63 (alleging that other individuals likewise "provide advice that falls within the scope of D.C.'s counseling regulations"). If these allegations encompass a large amount of potential interactions, that is because the District's licensing law is itself sweepingly broad. And, at this stage of the proceedings, these allegations are more than sufficient to state a claim. Plaintiff has "alleged a meaningful number of illegitimate applications sufficient to state a plausible claim," and, "[a]t the motion to dismiss stage, this Court need not determine whether these examples of allegedly illegitimate applications substantially outweigh the legitimate applications of the statute." *Animal Legal Def. Fund v. Reynolds*, No. 19-cv-124, 2019 WL 8301668, at *12 (S.D. Iowa Dec. 2, 2019).

[10] As noted *supra* pp. 32-33 & n.9, the statute exempts religious leaders, as well as friends and family members, but those exceptions are limited in scope because, among other things, they do not apply if a person holds themselves out "by description of services" as doing anything encompassed within the definition of professional counseling. And the definition of professional counseling itself makes clear those services can be provided "with or without compensation."

## V. Elizabeth Has Stated A Claim That The District's Licensing Requirement Is Impermissibly Vague.

Finally, the Complaint also states a claim that the District's licensing law is impermissibly vague, as the statute's sweeping language means that "D.C. officials have broad and standardless discretion to decide whether speech should or should not be subject to the licensing requirement." Compl. ¶ 112; *see also id.* ¶¶ 108-14.

The District's attempts to parse its licensing law demonstrate the viability of this claim. The District asserts that its licensing law applies to speech that bears "indicia of a structured course of medical treatment," MTD at 25, and that it is limited to counseling that is "akin to a structured course of formal and scientific medical treatment," *id.* at 24. Precisely what "indicia" regulators are looking for, or precisely how "akin" counseling must be to "formal and scientific medical treatment," or what exactly makes therapy "scientific" or "medical," is left unspecified. *Id.* This leaves a counselor like Elizabeth in a difficult position: Evidently there is some "general life advice" that Elizbeth can convey to her clients without crossing the border into a "structured course of medical treatment," but Elizabeth is left to guess what that might be or where that line is to be found. And, as explained *supra* pp. 29-33, the text of the statute itself is no help, as on its face it sweeps in a broad universe of speech.

This kind of fuzzy approach is not good enough when it comes to regulation of speech. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (marks and citation omitted). And a statute authorizes an impermissible degree of enforcement discretion when it "fails to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Act Now v. District of Columbia*, 846 F.3d 391, 410

(D.C. Cir. 2017) (marks and citation omitted). The District's approach to regulation—enacting a sweepingly broad statutory prohibition, and then applying it based on licensing authorities' ill-defined gestalt feeling of what "counseling" really means—introduces impermissible discretion into the licensing and enforcement process.

The District argues in response that this claim fails because Elizabeth supposedly had "ample notice" that her speech is prohibited. MTD at 29. But even assuming that is true, a statute can be vague *either* because it fails to provide adequate notice *or* because it is drafted in way that permits arbitrary enforcement, and a plaintiff can raise the second type of claim even if she cannot raise the first. *See Act Now*, 846 F.3d at 409. Elizabeth can challenge the District's standardless approach to regulation despite the fact (indeed, precisely because of the fact) that she has been told her speech has been singled out for special burdens. *See, e.g.*, *Forsyth*, 505 U.S. at 131.

In any event, the District is simply wrong to suggest that Elizabeth has "ample notice" of what speech is prohibited. Elizabeth had to email the District's licensing board to get even a vague sense of how the law applies. *See* Compl. ¶¶ 45-47. And, going forward, the District apparently takes the position that there is some form of "general life advice" that counselors can convey to their clients without crossing the border into a "structured course of formal and scientific medical treatment," MTD at 24-25, but counselors like Elizabeth must speculate where that line will be drawn in their particular case—or whether they can even take advantage of that line at all. "Individuals are therefore left to guess whether their speech will be subjected to D.C.'s licensing requirement." Compl. ¶ 111. The Complaint states a claim that the District's vague, standardless approach to regulation does not provide sufficient guidance for a limitation on speech.

## CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

Dated: February 19, 2021

Respectfully submitted,

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