U.S. District Court

District of Columbia

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Case Name: BROKAMP v. DISTRICT OF COLUMBIA
Case Number: 1:20-cv-03574-TJK
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MINUTE ORDER denying in part Defendant's Motion to Dismiss.

In this case, Plaintiff, a professional counselor in Virginia who seeks to counsel clients in the District of Columbia over internet video, challenges the District of Columbia's licensing requirement for professional counselors, D.C. Code §§ 3-1205.01(a)(1) & 3-1201.02(15B), claiming that the requirement (1) violates the First Amendment, (2) is unconstitutionally overbroad, and (3) is unconstitutionally vague. Defendant moves to dismiss all three claims.

A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of a complaint: dismissal is inappropriate unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (cleaned up). Under that standard, the Court cannot dismiss either of Plaintiff's first two claims.

First, she has stated a viable claim under the First Amendment. The licensing requirement regulates counseling, which is speech, not conduct. And Defendant's "characterization of [the licensing requirement] as [a] professional regulation[] cannot lower that bar. The Supreme Court has consistently rejected attempts to set aside the dangers of content-based speech regulation in professional settings." *Otto v. Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) (citing *Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra*, 138 S. Ct. 2361, 2374 (2018)). The Circuit's decision in *National Association for Advancement of Multijurisdiction Practice (NAAMJP) v. Howell* does not counsel differently, 851 F.3d 12, 19 (D.C. Cir. 2017) ("*[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'" (emphasis added)), but in any event, it was decided before *NIFLA*.

The licensing requirement is also content-based, given that it only applies to Plaintiff's speech if she speaks about certain topics, such as her clients' mental, emotional, or behavioral issues; meanwhile, she is able to discuss other topics with them without a license. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality). Because the District's licensing requirement is content-based regulation of speech, strict scrutiny applies, and Plaintiff has adequately alleged that the requirement does not survive such scrutiny. Thus, Defendant's motion to dismiss the claim fails. *See Brown v. District of Columbia*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019); *Smith v. District of Columbia*, 387 F. Supp. 3d 8, 30 (D.D.C. 2019) (a strict-scrutiny claim cannot be resolved on a motion to dismiss because the government "bears the burden...to prove the infringement is narrowly tailored to serve a compelling state interest").

Second, Plaintiff has stated an overbreadth claim as well. A law is unconstitutionally overbroad if a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Wash. State Grange v. Wash. Republican Party*, 552 U.S. 442, 449 n.6 (2008) (cleaned up). But at this stage, before the Court has decided what speech the licensing requirement may constitutionally cover, it cannot decide whether it is overbroad, and so it will deny the motion to dismiss this claim as well. *Bruni v. Pittsburgh*, 824 F.3d 353, 374 (3d Cir. 2016) (declining to consider an overbreadth challenge where the lower court had not yet decided the as-applied challenge); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 486 (1989) (same). Thus, it is hereby ORDERED that Defendant's Motion is DENIED IN PART, with respect to Plaintiff's First Amendment and overbreadth claims.

Plaintiff has not sufficiently stated a claim for unconstitutional vagueness. "Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Plaintiff does not raise a "lack of notice" argument; she claims only that the District of Columbia's licensing requirement is so standardless that it is unconstitutional. ECF No. 1 ¶¶ 109-12. According to her, the "licensing requirement sweeps up vast swaths of speech," yet is only enforced narrowly. Id. ¶ 110. "But Supreme Court precedent teaches that the presence of enforcement discretion alone does not render a statutory scheme unconstitutionally vague." *Kincaid v. District of Columbia*, 854 F.3d 721, 729 (D.C. Cir. 2017). The licensing requirement may be broad -- indeed, potentially overbroad -- but it sets "reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement." *Act Now to Stop War & End Racism Coal. & Muslim Am. Soc'y Freedom Found. v. District of Columbia*, 846 F.3d 391, 410 (D.C. Cir. 2017) (cleaned up). The law includes a comprehensive multi-part definition for the practice of professional counseling, no part of which relies on subjective standards courts have found problematic, like "credible," "reliable," or "objectionable." *Id.* at 411. Thus, it is hereby ORDERED that the Motion is GRANTED IN PART, with respect to Plaintiff's vagueness claim.

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