"THE BEST PATH FORWARD": THE CONSTITUTIONALITY OF ADULT CONVERSION THERAPY BANS

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I. Introduction

"[Conversion therapy] is barbaric and inhumane," New York City Council Speaker Corey Johnson declared in a September 2019 statement.[1] Therefore, Johnson announced that "the best path forward" was to repeal the City's conversion therapy ban, Local Law 22. Although this may seem backwards, the decision was backed by anti-conversion therapy advocates as a necessary measure to secure existing protections against conversion therapy.[2]

In January 2019, Local Law 22 was challenged on First and Fourteenth Amendment Grounds.[3] Johnson remarked that, "[t]he sad reality is the courts have changed considerably over the last few years, and we cannot count on them to rule in favor of much-needed protections for the LGBTQ community."[4] To avoid litigation and a potential precedential decision rolling back LGBTQ protections, LGBTQ advocates requested that the Council repeal the Law.[5] The Council obliged.[6] While the Second Circuit has yet to hear a challenge to a conversion therapy ban, the U.S. Supreme Court denied cert for decisions upholding bans in the Ninth and Third Circuits.[7] Local Law 22, however, was unique from the bans upheld in the Ninth and Third Circuits. The Law prohibited providing conversion therapy services to minors *and* adults.[8] Moreover, the

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[1] Joe Anuta, *Council set to Repeal its Conversion Therapy Ban in Face of Lawsuit*, POLITICO (Sept. 11, 2019, 5:04 PM), https://www.politico.com/states/new-york/city-hall/story/2019/09/11/council-set-to-repeal-its-conversion-therapy-ban-in-face-of-lawsuit-1183672.

[2] *Id.*

[3] Schwartz v. City of New York, No. 19–CV–463, 2019 WL 3369537 (E.D.N.Y. Jan. 23, 2019).

[4] *Id.*

[5] Joe Anuta, *supra* note 1.

[6] *Id.*

[7] King v. Christie, 135 S. Ct. 2048 (2014); Pickup v. Brown, 573 U.S. 945 (2014).

[8] N.Y.C. ADMIN. CODE § 20-824 (2017).

Law prohibited any person, not just licensed professionals, from offering or providing conversion therapy services for a fee.[9]

While New York City's repeal of Local Law 22 nullifies the constitutional challenges, this repeal raises concern about the future of conversion therapy bans. The repeal also raises questions about *is* the best path forward for stopping conversion therapy treatments and protecting LGBTQ individuals. Existing precedent primarily addresses bans on conversion therapy for minors, performed by licensed professionals.[10] These decisions rely, in part, on states' legitimate interest in protecting minors as legitimate and states' legitimate authority to regulate the behavior of licensed professionals.[11] This note analyzes the constitutional challenges against Local Law 22 under relevant United States Supreme Court and Second Circuit precedent and recent Circuit Court decisions on conversion therapy bans across the country. In doing so, this note shows how Local Law 22 should have survived if it was not appealed.

II. Background

A. Conversion Therapy

Conversion therapy, also known as sexual orientation change efforts (SOCE), includes a variety of techniques designed to alter one's sexual orientation, as well as one's gender identity or expression.[12] Such efforts are generally attempted on LGBTQ individuals, designed to "change" their LGBTQ sexual orientation

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[9] *Id*. (prohibiting "any person" from "offer[ing] or provid[ing] conversion therapy services").

[10] King v. Gov. of the State of New Jersey, 767 F.3d 216, 226 (3d Cir. 2014) (holding that a New Jersey statute prohibiting licensed counselors from "engag[ing] in sexual orientation change efforts with a person under 18 years of age" was contitutional); Pickup v. Brown, 740 F.3d 1208, 1223 (9th Cir. 2014) (holding that a California statute prohibiting licensed mental health provider's "use of [conversion therapy] on a patient under 18 years of age" was constitutional).

[11] *King*, 767 F.3d at 226 (holding that protecting minors from significant risk of harm was a legitimate government interest rationally related to New Jersey's conversion therapy ban and therefore the ban did not violate the First Amendment); Pickup, 740 F.3d at 1226 (holding protecting minors from significant risk of harm was a legitimate government interest rationally related to California's conversion therapy ban and therefore the ban did not violate the First Amendment).

[12] Christy Mallory et al., *Conversion Therapy and LGBT Youth*, WILLIAMS INST. 1 (January 2018), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf.

or gender identity to be in line with heterosexual and cisgender norms.[13] Conversion therapy is provided by some licensed professionals, as well as spiritual advisors for religious purposes.[14] Such efforts, however, lack scientific merit and have been uniformly rejected by the United States' leading professional medical and mental health associations. The American Medical Association, American Psychiatric Association, American Psychological Association, United States Department of Health and Human Services, and World Health Organization all publicly denounce conversion therapy and affirm that these efforts cannot "change" individual's sexual orientation or gender identity.[15]

Conversion therapy is not only found to be ineffective, but harmful dangerous to patients. The American Academy of Nursing found that "therapies aimed at 'curing' or changing same-sex orientation to heterosexual orientation are pseudo-scientific, ineffective, unethical, abusive and harmful practices . . . ."[16] LGBTQ individuals who undergo conversion therapy report higher rates of depression, suicidal thoughts, and suicide attempts.[17] One study found that suicide attempt rates were "nearly triple for LGBTQ individuals who reported both home-based efforts to change their sexual orientation by parents and intervention efforts by therapists and religious leaders.[18]

Despite these findings, it is estimated that roughly 700,000 LGBTQ adults in the United States have undergone conversion therapy at some point in their lives, half of whom did so as adolescents.[19] In response to growing awareness of the prevalence, harm, and illegitimacy of conversion therapy, fifteen states and the District of Columbia, along with 43 cities and counties across the

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[13] *Id*.
[14] *Id*.
[15] Brief for the Trevor Project as Amicus Curiae, p. 7, Schwartz v. City of New York, No. 19–CV–463, 2019 WL 3369537 (E.D.N.Y. Jan. 23, 2019) (internal citations omitted).
[16] *Position Statement on Reparative Therapy*, AM. ACAD. OF NURSING ON POL'Y 1 (2015), http://www.nursingoutlook.org/article/ S0029-6554(15)00125-6/pdf.
[17] Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, J. HOMOSEXUALITY 6 (Nov. 7, 2018), https://www.tandfonline.com/doi/full/10.1080/00918369.2018.1538407.
[18] *Id*. at 10.
[19] Mallory, *supra* note 12.

country, have enacted legislation strictly regulating or prohibiting conversion therapy.[20]

B. Local Law 22

In December 2017,the New York City Council passed Local Law 22.[21] Local Law 22 prohibits "any person" from "offer[ing] or provid[ing] conversion therapy services."[22] "Conversion therapy" is defined by the Law as, "any services, offered or provided to consumers for a fee, that seek to change a person's sexual orientation or seek to change a person's gender identity to conform to the sex of such individual that was recorded at birth."[23] The Law does not, however, prohibit "services that provide assistant to a person "undergoing gender transition," "counseling that provides acceptance, support, and understanding of a person's sexual orientation," services that "facilitates a person's coping, social support, and identity exploration and development."[24] Violators would be subject to a civil penalty.[25]

C. Challenging the Constitutionality of Local Law 22

In January 2019, Dr. Charles Schwartz, a licensed counselor and psychotherapist and Orthodox Jew, filed suit against New York City for declaratory and injunctive relief against Local Law 22's enforcement.[26] Schwartz was represented by the Alliance Defending Freedom (ADF), a conservative legal group designated as an anti-LGBTQ hate group by the Southern Poverty Law Center. [27] Schwartz argued that the law, "prevents adult patients from hearing ideas and suggestions from skilled professionals that the

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[20] *Equality Maps: Conversion Therapy Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/conversion_therapy (last visited Oct. 22, 2019).

[21] Madina Toure, *New York City Council Passes Conversion Therapy Ban*, OBSERVER (Dec. 1, 2017 10:20 AM) https://observer.com/2017/12/new-york-city-council-passes-conversion-therapy-ban/.

[22] N.Y.C. ADMIN. CODE § 20-824 (2017).

[23] *See id*. § 20-825.

[24] *Id*.

[25] *See id*. § 20-826 (stating that violators will be held liable for a civil penalty "not to exceed $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation").

[26] Complaint at 1, *Schwartz*, No. 19–CV–463, 2019 WL 3369537.

[27] *Alliance Defending Freedom*, S. POVERTY L. CTR., https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom.

patients want to hear, and from obtaining help from such professionals to pursue the attractions, identity, relationships, and indeed life that they choose for themselves and desire to pursue."[28] In turn, Schwartz argued that the law prevents adults from "liv[ing] consistently with their religious values" in violation of patients' First Amendments rights.[29] Moreover, Schwartz argues that practitioners' First and Fourteenth Amendment rights are violated by the law as well because the law regulates practitioners' speech[30] and is unconstitutionally vague.[31]

III. Analysis

A. Conversion Therapy Jurisprudence

As conversion therapy bans have been enacted across the country, they have faced challenges in the courts. Most prominently, New Jersey and California's bans were challenged up to the Third and Ninth Circuits, respectively, where both courts rejected the free speech, free exercise, and unconstitutional vagueness challenges.[32] These are the only Circuit Courts to hear such challenges to conversion therapy bans. Moreover, the U.S. Supreme Court declined to hear either case and made no criticism of the rulings.[33] These decisions, and subsequent denials of certiorari, are informative and beneficial to the defense of Local Law 22.

B. Predicting the Outcome for Local Law 22

This note predicts the potential outcome of the challenges to Local Law 22. Relying on U.S. Supreme Court and Second Circuit precedent, as well as the *King* and *Pickup* decisions from the Third and Ninth Circuits, this note discusses and analyzes Schwartz's claims as laid out in his Complaint.[34]

i. First Amendment Free Speech Claims

First, Schwartz argued that Local Law 22 violates his First Amendment "right to discuss ideas with his patients in his

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[28] Complaint, *Schwartz*, No. 19–CV–463, 2019 WL 3369537.
[29] *Id*. at ¶¶ 133-144, 157-62.
[30] *Id*. at ¶ 104.
[31] *Id*. at ¶ 118.
[32] *King*, 767 F.3d at 216; *Pickup*, 740 F.3d at 1208.
[33] King v. Christie, 135 S. Ct. 2048 (2014); *Pickup*, 573 U.S. at 945.
[34] Complaint, *Schwartz*, No. 19–CV–463, 2019 WL 3369537.

professional capacity, to talk about his patients' goals for themselves including goals relating to changes in sexual orientation and relationships, and to offer advice for achieving those goals."[35] [36]

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[37] But the First Amendment is not absolute.[38] The First Amendment was crafted to "assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[39] The Supreme Court has found that while free speech is preferred, the First Amendment affords less protection to speech in at least two circumstances.[40] First, the Supreme Court has held that States may regulate professional conduct, even when this incidentally involves speech.[41] Second, the Supreme Court has applied "deferential review" to laws that require professionals to disclose factual, noncontroversial information in their "commercial speech."[42] Commercial speech, "relies upon the 'commonsense' distinction between speech proposing a commercial transaction . . . and other varieties of speech."[43]

First, New York City can succeed in arguing that Local Law 22 does not prohibit speech at all, but rather prohibits professional conduct that incidentally involves speech. In addressing a petitioner's First Amendment claim that physicians could not be mandated by law to provide information about the risks of abortion, the Supreme Court stated:

> To be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . . We see no

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[35] Compl. at ¶ 104.

[36] For brevity's sake, this analysis focuses on Schwartz's First Amendment rights. Nothing in the plain language of Local Law 22 suggests that patients' rights are implicated. Local Law 22 prohibits individuals from "[o]ffer[ing] or provid[ing], not accepting, requesting, or receiving. N.Y.C. ADMIN. CODE §§ 20-(824) – (825) (2017).

[37] U.S. CONST. amend. I.

[38] Emp. Div., Dept. of Hum. Res. of Oregon v. Smith, 494 U.S. 872, 893 (1990).

[39] Roth v. United States, 354 U.S. 476, 484 (1957).

[40] Although the Third and Ninth Circuits relied upon an additional exception, "professional speech," in holding that conversion therapy bans did not violate First Amendment free speech, the U.S. Supreme Court does not recognize this exception. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371-72 (2018).

[41] Planned Parenthood of S. E. Pennsylvania v. Casey, 505 U.S. 833, 838 (1992).

[42] Zauderer v. Off. of Disc. Counsel of S. Ct. of Ohio, 471 U.S. 626, 637 (1985).

[43] *Id.*

> constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[44]

Although conversion therapy services likely involve speech, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[45]

New York City has the authority to regulate healthcare services.[46] Schwartz is a counselor and psychotherapist.[47] Schwartz himself acknowledges that "in [his] general psychotherapeutic practice, he encounters patients with concerns relating to sexuality."[48] The Schwartz's relationship with these patients "is to advance the welfare of the clients, rather than to contribute to public debate."[49] There is a difference between engaging in public dialogue or speaking with a patient and providing services that incidentally involve speech.[50] "Offer[ing]" and "provid[ing]" conversion therapy services "for a fee" is falls into the latter category, rather than his expression into the market place of ideas.[51] Schwartz is not prohibited from offering or providing clients conversion therapy services for free. Nor does it prohibit Schwartz from talking about conversion therapy services or sexual orientation and gender identity. As a counselor and psychotherapist, regulating individuals' ability to offer mental health services in exchange for payment only regulates a transactional aspect of one's profession.

Additionally, the Third and Ninth Circuits held that the regulation of conversion therapy services does not trigger heightened scrutiny under the First Amendment. While not binding, these analyses are instructive. The Ninth Circuit recognized that California's ban, which prohibits mental health

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[44] *Casey*, 505 U.S. at 884.
[45] Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).
[46] *United States of America: Regulation*, WORLD HEALTH ORG. 3 (Feb. 2017), https://www.who.int/health-laws/countries/usa-en.pdf?ua=1.
[47] Compl. at ¶ 10.
[48] *Id.*
[49] Lowe v. S.E.C., 472 U.S. 181, 232 (1995) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").
[50] *Id.*
[51] N.Y.C. ADMIN. CODE §§ 20-(824) – (825) (2017).

practitioners from engaging in conversion therapy[52], "does not restrain [practitioners] from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic."[53] The Third Circuit similarly recognized that "'[t]he practice of medicine, like all human behavior, transpires through the medium of speech. In regulating the practice, therefore, the state must necessarily also regulate professional speech.'"[54] The intent of the First Amendment as established by U.S. Supreme Court, as well as the Third and Ninth Circuit's analysis, demonstrate that Local Law 22 prohibits conduct that is subject only to deferential review by the Court.

Even if the Court were to find that "[o]ffering" "for a fee"[55] is not professional conduct, it is still commercial speech subject to deferential review.[56] The Supreme Court has consistently held that governments' "power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is 'linked inextricably' to those transactions."[57] This includes "offerors communicating offers to offerees."[58] By prohibiting individuals from "[o]ffering" conversion therapy services "for a fee," Local Law 22 regulates individuals ability to perform a specific commercial transaction.[59] Once again, the Law does not prohibit from discussing conversion therapy services or offering them for free, therefore individuals free speech is not unnecessarily inhibited.

The Court should find Local Law 22 to regulate professional conduct and/or commercial speech subject only to deferential, or rational basis, review.[60] Under deferential review, the government must prove that it has a legitimate interest that the law rationally

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[52] CAL. BUS. & PROF. CODE § 865(b)(1) (prohibiting "any practices by mental health providers that seek to change an individual's sexual orientation.).
[53] *Pickup*, 740 F.3d at 1231 (citing *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2350 (2011)).
[54] *King*, 767 F.3d at 232 (citing Robert Post, I*nformed Consent to Abortion: A First Amendment Analysis of Compelled Physician* Speech, 2007 U. ILL. L. REV. 939, 950 (2007)).
[55] N.Y.C. ADMIN. CODE §§ 20-(824) – (825) (2017).
[56] *Zauderer*, 471 U.S. at 637 (1985) (holding that laws regulating commercial speech require deferential review).
[57] Liquormart v. R.I., 517 U.S. 484, 499 (1996) (citing *Friedman v. Rogers*, 440 U.S. 1, 10 n. 9 (1979); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456 (1978).
[58] Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 96 (1977).
[59] N.Y.C. ADMIN. CODE §§ 20-(824) – (825) (2017).
[60] *Becerra*, 138 S. Ct. at 2372 (stating that the U.S. Supreme Court applies deferential review to commercial speech and professional speech that incidentally involves speech).

relates to.[61] The City of New York has a legitimate interest in protecting individuals' safety from the harms of conversion therapy.[62] Local Law 22, in prohibiting individuals from providing or offering services which are proven to jeopardize the health and safety of others for a fee, is rationally related to this goal.[63] Therefore, Local Law 22 should survive Schwartz's First Amendment Free Speech claims.

ii. First Amendment Free Exercise Claims

If Local Law 22 were to survive Schwartz's Free Speech challenges, it would likely survive on Free Exercise grounds as well. Schwartz argued that Local Law 22 violates his and other practitioners' First Amendment "right[s] to use . . . professional skills to assist patients to live in accordance with their shared religious faith, including the religious mandates of the Torah and the teachings of . . . respected Orthodox Jewish authorities . . . ."[64] Consequentially, Schwartz argues that the Law "indirectly violate the patients' First Amendment right to freely exercise their religion" by preventing patients from "liv[ing] their lives in personal and family relationships consistent with the teachings of their faith."[65]

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the Free Exercise thereof."[66] As it is for speech, the First Amendment's protection of religious expression is not absolute.[67] The First Amendment protects against laws that "impose[ ] special disabilities on the basis of . . . religious status."[68] Governments may prohibit conduct so long as that prohibition is facially neutral and generally applicable.[69] If these criteria are met, the law in question must also be rationally related to a legitimate government

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[61] Schweiker v. Wilson, 450 U.S. 221, 234 (1981).
[62] Hill v. Colorado, 530 U.S. 703, 729 (2000) (holding that the state had a legitimate interest in protecting the health and safety of its citizens from confrontational and harassing conduct).
[63] Ryan, *supra* note 17 (study finding that individuals who undergo conversion therapy report higher rates of depression, suicidal thoughts, and suicide attempts).
[64] Compl. at ¶ 146.
[65] *Id*. at ¶¶ 158-59.
[66] U.S. CONST. amend. I.
[67] Emp. Div. v. Smith, 494 U. S. 872, 893 (1990).
[68] *Id*. at 877.
[69] *Id*. at 893.

interest.[70] This is true even if the law "has the incidental effect of burdening a particular religious practice."[71]

Schwartz's First Amendment Free Exercise claims would likely fail as laid out in his Complaint.[72] While Schwartz alleges two distinct claims for himself and his patients, the analysis is the same: whether Local Law 22 is facially neutral and generally applicable. Schwartz argued that Local Law 22 is not a neutral nor generally applicable because it targets the practices of those adhering to traditional religious beliefs.[73]

As a preliminary matter, Local 22 is facially neutral. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context. Local Law 22 makes no reference to any religious practice, custom, or motivation.[74] Conversion therapy is widely recognized as mental health treatment, separate and distinct from any religious practice.[75]

To succeed, Schwartz would have to prove that Local Law 22 is not generally applicable. Laws are not generally applicable if they must burden religious conduct because of its religious motivation or burden religiously motivated conduct but exempt substantial comparable conduct that is not religiously motivated.[76] For example, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, a municipal government ordinance utilized definitions and exemptions to prohibit religious killings of animals by Santeria church members but not almost all other animal killings.[77] Schwartz neither provides nor suggests such facts or evidence in his Complaint. His argument, rather, is that conversion therapy is "particularly associated with persons and communities adhering to traditional religious beliefs."[78] This argument alone is not sufficient to demonstrate that a law targets a particular religious group and its practices. Otherwise prohibitable conduct cannot be

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[70] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 534 (1993).
[71] *Id*. at 542.
[72] While Schwartz did not file any briefs before New York City repealed Local Law 22, his Complaint provides valuable insight into potential arguments.
[73] Compl. at ¶ 146.
[74] N.Y.C. ADMIN. CODE §§ 20-(824) – (825) (2017).
[75] Mallory, *supra* note 12 (explaining the history of conversion therapy in religious and non-religious contexts).
[76] *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 540-43.
[77] *Id*. at 521.
[78] Compl. at ¶ 152.

free of government regulation simply because it "is accompanied by religious beliefs."[79]

Shwartz claims that his religious beliefs that individuals have "'the capacity to . . . change' in the area of sexual orientation . . . and that faithful Jews have an obligation to strive to achieve heterosexual attraction and marriage" are violated by Local Law 22.[80] Local Law 22, however, does not prevent individuals from teaching or living by this belief. Nor does the Law force affected individuals into violating their religious beliefs.[81] It simply prohibits individuals from offering or providing conversion therapy services.

The First Amendment is, therefore, not implicate on free exercise grounds. With no fundamental right implicated, the Court must apply rational basis review.[82] As established, Local Law 22 would pass rational basis review because the Law is rationally related to a legitimate government interest.

ii. Fourteenth Amendment Due Process Claim

If Local Law 22 were to survive all First Amendment claims, it still must overcome Schwartz's Fourteenth Amendment claim for vagueness. Local Law 22 defines "conversion therapy as "any services, offered or provided to consumers for a fee, that seek to change a person's sexual orientation or seek to change a person's gender identity to conform to the sex of such individual that was recorded at birth."[83] Schwartz's Fourteenth Amendment claim is centered on the allegation that this definition leaves an "undefined line" between "services that permissibly seek to assist a patient to 'develop' his or her sexual orientation or gender identity, and those that unlawfully seek to 'change' that person's sexual orientation or gender identity."[84] Moreover, Schwartz alleges an unconstitutional

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[79] *Smith*, 494 U.S. at 882.
[80] Compl. at ¶ 142.
[81] *Smith*, 494 U.S. at 877 (holding that the government "may not compel affirmation of religious belief" or "impose special disabilities on the basis of religious views.").
[82] Jacoby & Meyers, LLP v. Presiding JJ. of the First, Second, Third & Fourth Dep'ts, App. Div. of the S. Ct. of New York, 852 F.3d 178 (2d Cir. 2017) (stating that when no First Amendment right is implicated, rational basis review applies).
[83] N.Y.C. ADMIN. CODE § 20-824 (2017).
[84] Compl. at ¶ 118.

lack of clarity as to whether the law "refers to the subjective intent of the patient, or that of the counselor, or both."[85]

Despite Schwartz's claims, Local Law 22 should pass constitutional muster. When a law's "prohibitions are not clearly defined," it can be overturned for being so vague that those under the law do not whether or not they are in violation.[86] "[U]ncertainty at a statute's margins," however, "will not warrant facial invalidation if it is clear what the statute proscribes 'in the vast majority of its intended applications."[87] Moreover, laws with civil consequences, like Local Law 22, receive less exacting vagueness scrutiny than those with criminal consequences.[88] A civil statute is generally deemed unconstitutionally vague if its terms are "so vague and indefinite as really to be no rule or standard at all."[89]

Following these standards, Local Law 22 is not unconstitutionally vague. Laws found to be unconstitutionally vague are "almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms."[90] Local Law 22 does not. Services to change a client's sexual orientation or gender identity are recognized as a discrete practice within the mental health profession.[91] It has been recognized in professional organization's public statements and professional research publications.[92]

Schwartz specifically cites the vagueness of the words "gender" and "gender identity."[93] Despite Schwartz's confusion, these terms have plain language meanings that are objectively defined and understood in the mental health profession and in the context of conversion therapy.[94]

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[85] *Id*. at ¶ 129.
[86] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
[87] *Hill*, 530 U.S. at 733.
[88] Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (1982).
[89] Boutilier v. INS, 387 U.S. 118, 123 (1967).
[90] NAACP v. Button, 371 U.S. 415, 466 (1963).
[91] *See Position Statement on Reparative Therapy*, AM. ACAD. NURSING POL'Y 1 (2015), http://www.nursingoutlook.org/article/ S0029-6554(15)00125-6/pdf; Ryan, *supra* note 17; Mallory, *supra* note 12.
[92] *Id*.
[93] Compl. at ¶¶ 120-28.
[94] *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, AM. PSYCHOL. ASS'N 1-2, https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (last visited Oct. 29, 2019).

Schwartz also points to vagueness of the term "offer."[95] Schwartz alleges that he has had patients who "initially presented with concerns and counseling goals not associated with sexual attractions, but who in the course of the counseling relationship have come to identify unwanted same-sex attraction as an issue" they want services for.[96] But "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications."[97] Moreover, a reasonable person would understand that the ordinance does not regulate practitioners from inquiring about patients' thoughts and feelings regarding their sexual orientation or gender identity. This activity is not "offering" or "providing" conversion therapy services as understood by the plain meaning of the words.[98]

Local Law 22 sets a reasonably defined and objective rule for what conduct it prohibits. Therefore, under the precedent established by the U.S. Supreme Court, Local Law 22 should survive Schwartz's Fourteenth Amendment vagueness challenge.

IV. Conclusion

Looking to established precedent, Local Law 22 should have survived Schwartz's challenges. Local Law 22 does not unnecessarily impede upon First Amendment, as it does not regulate protected speech or religion. Local Law 22 merely regulates the professional conduct of offering and providing conversion therapy services, which is rationally related to New York City's legitimate interest in protecting individuals from the documented and accepted mental and physical harms of conversion therapy. Moreover, Local Law 22 is not unconstitutionally vague under the Fourteenth Amendment. The plain meaning of the Law delineates clear lines of prohibited and unprohibited conduct.

This analysis is, of course, hypothetical. New York City was not overreacting when it repealed Local Law 22. In 2018, the Supreme Court called the legitimacy of Ninth and Third Circuit

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[95] Compl. at ¶¶ 117-32.
[96] *Id*. at ¶ 127.
[97] *Hill*, 530 U.S. at 733.
[98] *Offer*, BLACK'S L. DICTIONARY, https://thelawdictionary.org/offer (last visited Oct. 31, 2019) (defining "offer" as "[t]o bring to or before; to present for acceptance or rejection . . . to make a proposal to . . . ."; *Provide*, BLACK'S L. DICTIONARY, https://thelawdictionary.org/provide/ (last visited Oct. 31, 2019) (defining "provide" as "the act of furnishing or supplying a person with a product").

precedent into question.[99] Given this uncertainty, the best path forward remains unclear. For now, New York City minors are protected by the State conversion therapy ban[100] and adults can sue conversion therapy providers under the City's consumer fraud protection act.[101]

[99] *Becerra*, 138 S. Ct. at 2371-72 (holding that the U.S. Supreme Court does not recognized the concept of "professional speech" as relied upon in the Ninth and Third Circuit's to uphold conversion therapy bans on First Amendment grounds).
[100] N.Y. EDUC. L. §§ 6509-e, 6531-a (2019).
[101] N.Y.C. ADMIN. CODE § 20-702 (2017).