No. _____

In The
Supreme Court of the United States

ELIZABETH BROKAMP,

Petitioner,

v.

LETITIA JAMES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT E. JOHNSON
Institute for Justice
16781 Chagrin Blvd.
#256
Shaker Heights, OH
44120

JEFFERY H. REDFERN
Counsel of Record
ROBERT J. MCNAMARA
PAUL M. SHERMAN
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Ste. 900
Arlington, VA 22203
(703) 682-9320
jredfern@ij.org

Counsel for Petitioner

QUESTIONS PRESENTED

In *Reed* v. *Town of Gilbert*, this court held that laws that "defin[e] regulated speech by particular subject matter" are "obvious[ly]" content-based and "subject to strict scrutiny." 576 U.S. 155, 163–164 (2015). In *City of Austin* v. *Reagan National Advertising of Austin, LLC*, this Court reaffirmed that rule, but clarified that a "content-agnostic on-/off-premises distinction" regulates based on location and "does not, on its face, single out specific subject matter for differential treatment." 596 U.S. 61, 76 (2022) (cleaned up). The Second and Third Circuits have since held that *City of Austin* provides government with broad latitude to regulate speech according to its content, while the Ninth Circuit has held that *City of Austin* applies only to content-neutral, location-based distinctions.

1. The first question presented is whether a New York law requiring speakers to obtain a license before offering talk therapy pertaining to "disabilit[ies], problem[s], or disorder[s] of behavior, character, development, emotion, personality or relationships," N.Y. Educ. Law § 8402(1), is content-based.

This Court has repeatedly held that under First Amendment intermediate scrutiny, the government has the burden to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 188 (1999). The Second, Fourth, and Seventh Circuits have held, however, that the government can prevail at the motion to dismiss stage by relying on

reasonable speculation or legislative history. The Third and Sixth Circuits have held that the government has an evidentiary burden that it cannot carry on a motion to dismiss.

2. The second question presented is whether the government can defeat a First Amendment challenge to a licensing scheme for talk therapists at the motion-to-dismiss stage by relying on legislative history and "reasonable" speculation that contradicts the allegations in the complaint.

PARTIES TO THE PROCEEDING

Petitioner Dr. Elizabeth Brokamp.

Respondents Letitia James, in her official capacity as Attorney General of the State of New York; Betty A. Rosa, in her official capacity as the New York State Commissioner Of Education; New York State Education Department Board of Regents; New York State Board of Mental Health Practitioners; and Thomas Biglin, Rodney Means, Timothy Mooney, Helena Boersma, Sargam Jain, Rene Jones, Susan L. Boxer Kappel, Sara Lin Friedman Mcmullian, Angela Musolino, Michele Landers Meyer, Natalie Z. Riccio, Holly Vollink-Lent, Jill R. Weldum, and Susan Wheeler Weeks, all in their official capacities as members of the New York State Board of Mental Health Practitioners.

RELATED PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

Elizabeth Brokamp petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1a, is reported at 66 F.4th 374 (2d Cir. 2023). The opinion of the district court, App. 67a, is reported at 573 F. Supp. 3d 696 (N.D.N.Y. 2021).

JURISDICTION

The court of appeals entered its judgment on April 27, 2023. On June 1, 2023, the Second Circuit entered an order denying a timely filed petition for rehearing en banc. App. 91a. On August 10, 2023, Justice Sotomayor extended the time to file a petition for a writ of certiorari to October 30, 2023. This petition is timely filed on October 30, 2023. Petitioner invokes this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law * * * abridging the freedom of speech." The text of New York's Education Law § 8402 is set forth at App. 93a.

STATEMENT

This case raises an important question concerning the right to conduct talk therapy across state lines—an issue that has become increasingly important for therapists and their clients following the pandemic. The Second Circuit resolved that question in a way that implicates two separate circuit splits, and that also splits with decisions from this Court.

The pandemic led to a dramatic increase in online talk therapy, and, even as the pandemic has abated, online therapy has remained. Online therapy is easy, convenient, and accessible. Online therapy increases access to care, as it allows therapists to provide assistance in areas that might otherwise face a shortage of providers. And online therapy also makes it possible for clients to maintain a relationship with their therapist over a long distance. Today, if you move to a new city for work or school, you should in theory be able to continue talking to your therapist online.

As online talk therapy has grown, however, it has come into conflict with a thicket of licensing laws. Licensing varies state-to-state, and many states take the position that a therapist must be licensed in the state where their client is located—even if they themselves are located elsewhere. Given the burdens associated with licensure—including paperwork, fees, and continuing education—it would be impractical for a therapist to become licensed in every state where they would otherwise talk to clients.

As applied to online talk therapy, that thicket of state licensing laws violates the First Amendment.

After all, talk therapy is speech: "If speaking to clients is not speech, the world is truly upside down." *Otto* v. *City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020). And, as a general rule under the First Amendment, "speakers need not obtain a license to speak." *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988). States therefore cannot "reduce a group's First Amendment rights by simply imposing a licensing requirement." *National Institute of Family and Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2374–2375 (2018) ("*NIFLA*"). Simply put, states cannot apply licensing laws to prohibit conversations over the internet or telephone.

The Second Circuit held otherwise and, to duck that straightforward conclusion, split with this Court's decisions in two separate ways. First, the Second Circuit held that therapy licensing laws are content neutral, App. 32a, even though they only apply to conversations about certain topics, and in doing so split with *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015). Then, applying intermediate scrutiny, the Second Circuit held that laws requiring a license to talk are so obviously constitutional that they can be upheld on a motion to dismiss, without any need for a factual record. App. 49a. In doing so, the Second Circuit split with decisions from this Court holding that intermediate scrutiny requires meaningful review, including this Court's decision in *NIFLA*, 138 S. Ct. at 2376.

In addition to splitting with decisions from this Court, the Second Circuit also deepened two separate circuit splits. First, the Second Circuit deepened a split between the Third and Ninth Circuits as to

whether *Reed* meant what it said when it laid out the standard for content neutrality. Compare *Mazo* v. *N.J. Sec'y of State*, 54 F.4th 124 (3d Cir. 2022), with *Project Veritas* v. *Schmidt*, 72 F.4th 1043 (9th Cir. 2023). Second, the Second Circuit also deepened a split between the Third, Fourth, Sixth, and Ninth Circuits as to whether courts can resolve the application of intermediate scrutiny on a motion to dismiss, without a factual record. *Bruni* v. *City of Pittsburgh*, 824 F.3d 353 (3d Cir. 2016); *Anheuser-Busch, Inc.* v. *Schmoke*, 101 F.3d 325 (4th Cir. 1996); *Kiser* v. *Kamdar*, 831 F.3d 784 (6th Cir. 2016); *Dahlstrom* v. *Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir. 2015).

The Petition provides a vehicle both to resolve these specific circuit splits and to provide broader guidance on the First Amendment status of talk therapy. Courts have split over whether talk therapy is speech at all, with the Ninth Circuit holding that it is not. Compare *Tingley* v. *Ferguson*, 47 F.4th 1055 (9th Cir. 2022), with *Otto*, 981 F.3d at 859. The Second Circuit here adopted a third approach, holding that talk therapy is speech but, nonetheless, declining to subject restrictions on talk therapy to meaningful First Amendment scrutiny. By granting this Petition, the Court can resolve all these issues in one case.[1]

[1] The Court has repeatedly relisted a petition for certiorari asking the Court to review the Ninth Circuit's decision in *Tingley*. See Pet. for Certiorari, *Tingley* v. *Ferguson*, No. 22-942. As discussed in Part III, *infra*, if the Court grants certiorari in *Tingley* the Court should hold this Petition. Alternately, the Court may wish to instead grant this Petition as a better vehicle to resolve the issues raised in *Tingley*.

These issues merit the Court's review. For many Americans, their relationship with their therapist is among the most important relationships in their life. Nobody should be forced to stop talking to their therapist just because they move across state lines.

Factual and Legal Background: Petitioner Dr. Elizabeth Brokamp is a highly experienced and educated talk therapist. She has Master's Degree in counseling from Columbia University and a PhD from the University of the Cumberlands. She also holds a number of voluntary certifications, including one in telemental health. App. 102a.

Dr. Brokamp's services consist solely of having conversations with her clients, in an effort to improve their emotional well-being. She does not prescribe medicine, conduct medical procedures, or offer any services other than conversation. App. 105a.

Prior to the pandemic, Dr. Brokamp provided services in person in Virginia, and she is licensed in that state. During the pandemic, however, Dr. Brokamp moved her counseling practice online, and Dr. Brokamp has continued to provide online counseling as the pandemic has abated. App. 103a. This has made it possible, as a practical matter, for her to continue counseling clients who have relocated to other jurisdictions, including New York. It has also brought her into conflict with the nation's patchwork of counseling licensing laws, as it simply is not practical for Elizabeth to be licensed in every state where her clients might move.

For a time, Elizabeth's conversations with clients in New York were perfectly legal. During the pandemic, New York suspended the enforcement of its professional counselor licensing law, at least for licensed counselors located in other states. App. 106a. One of Dr. Brokamp's patients relocated to New York during that period, and they were able to continue having regular counseling sessions because of this suspension. (Incidentally, these conversations would also have been legal prior to 2005 because counseling was a totally unregulated profession in the State of New York before then. N.Y. Educ. Law § 8402.) New York has since resumed enforcement of its licensing law, and Dr. Brokamp is no longer speaking with clients in New York because doing so would be a felony.

The statute requires that anyone who practices "mental health counseling" within the state maintain a license. Mental health counseling is defined as:

> (a) the evaluation, assessment, amelioration, treatment, modification, or adjustment to a disability, problem, or disorder of behavior, character, development, emotion, personality or relationships by the use of verbal or behavioral methods with individuals, couples, families or groups in private practice, group, or organized settings; and
>
> (b) the use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate mental health counseling services.

N.Y. Educ. Law § 8402(1). Dr. Brokamp's conversations clearly fall within this statutory definition because they include the subjects listed in the statute. App. 105a.

At the same time, the Licensing Law contains a number of exemptions. Most notably, it allows for "individuals" to "provid[e] instruction, advice, support, encouragement, or information to individuals, families, and relational groups." N.Y. Educ. Law § 8410(5). The distinction between "instruction, advice, support, encouragement, or information," on the one hand, and "amelioration" of a "disorder of behavior, character, development, emotion, personality or relationships by the use of verbal * * * methods," on the other, is unclear.

Dr. Brokamp alleged, however, that the State of New York enforces its licensing law against people like Dr. Brokamp, who possess extensive qualifications and expertise, but not against comparatively untrained life-coaches, mentors, self-help gurus, or friends and family who provide advice that would otherwise fall within the definition of "mental health counseling." App. 108a–112a. The State Board for Mental Health Practitioners, in an email to Dr. Brokamp, confirmed that it would enforce the law against her. App. 106a.

Obtaining a license is not easy. The statute requires, among other things: an exam, 3,000 hours of supervised experience, a master's degree, "good moral character," and recurring fees. N.Y. Educ. Law § 8402(3). There are also continuing education requirements that can be satisfied only by attending New York-approved courses. N.Y. Comp. Codes R. &

Regs. tit. 8, § 79-9.8(e)(3). It is difficult to obtain the required educational hours outside of New York because providers are required to be approved by New York regulators months in advance and to pay a fee. *Id.* The system is quite unlike continuing legal education, where most courses can fulfill the requirements of most states.

While these burdens may not be insurmountable, they are significant enough that Dr. Brokamp chose to stop counseling clients in New York rather than try to obtain and maintain a New York license. App. 102a–103a. She is not alone. It is relatively rare for therapists to be licensed in multiple states, and one survey found that "70% percent of therapists reported that they had to stop seeing a client who moved to a different state," which can be "profoundly damaging in a health care category where therapeutic alliance and fit are so critical to outcomes."[2] With the rise of teletherapy, therapists must "try to keep track of where their clients are living and whether they can legally counsel them," and "therapists, afraid of breaking the law, have stopped seeing some of their patients."[3]

Notwithstanding the burdens of maintaining more than one license, some therapists choose to do so. But

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[2] Harry Ritter, *How cross-state licensure reform can ease America's mental health crisis*, STAT News (Mar. 8, 2023), https://www.statnews.com/2023/03/08/cross-state-licensure-reform-telehealth-ease-mental-health-crisis/.

[3] Ruth Reader, *The frustrating reason why your therapist may have to break up with you*, Fast Company (Nov. 23, 2020), https://www.fastcompany.com/90578222/telehealth-therapy-pandemic-laws.

it would be a practical impossibility to maintain a 50-state practice. The application fees alone would total over $11,000 (the last we checked). Because Dr. Brokamp speaks to her clients exclusively online, she would like to have such a 50-state practice.

Procedural Background: In 2021, Dr. Brokamp became concerned that New York's enforcement suspension might end, forcing her to stop speaking to her client in New York. Accordingly, she filed this lawsuit in the United States District Court for the Northern District of New York, invoking federal question jurisdiction under 28 U.S.C. 1331. She alleged that the licensing law violated the First Amendment, both facially and as applied, and she sought declaratory and injunctive relief.

The district court dismissed the complaint in its entirety under Rule 12, on November 22, 2021. App. 69a. The court held that Dr. Brokamp had no standing to assert an as-applied challenge because she had not yet tried to obtain a New York license. App. 78a. It also dismissed her facial claim, without noting which level of First Amendment scrutiny applied or conducting any tailoring analysis. App. 86a–89a.

Dr. Brokamp timely appealed to the Second Circuit, which affirmed on April 27, 2023. The court held that Dr. Brokamp did have standing to challenge the licensing law, both facially and as applied, but it rejected her claim on the merits. The panel assumed that the law regulated pure speech, rather than conduct, as the State had argued. App. 34a. It then held that, under this Court's decision in *City of Austin* v. *Reagan National Advertising of Austin, LLC*, 596 U.S.

61 (2022), the law was content-neutral because it applied to speech with a "therapeutic purpose" rather than speech with a particular subject matter. App. 45a; but see *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015) (holding that the government may not escape strict scrutiny by "defining regulated speech by its function or purpose"). The court also did not discuss whether the statute could be "justified without reference to the content of the regulated speech." *Reed*, 576 U.S. at 165.

Having determined that the law was not content based, the court proceeded to apply its version of intermediate scrutiny. It noted that courts *generally* cannot conduct the intermediate scrutiny analysis until at least summary judgment—because it is the government's evidentiary burden to bear—but it proceeded to do so anyway. App. 44a. On the basis of sparse legislative history, the court held that the "New York could reasonably conclude" that its law was sufficiently tailored to protect the health and safety of New Yorkers. App. 51a–52a.

The court required no evidence that, prior to the licensing law in 2005, unlicensed therapy had ever been a problem. It required no evidence that New York had seriously considered alternatives to licensure—such as voluntary certification and prosecution of deceptive business practices. It required no evidence that, during the pandemic-related suspension of enforcement, *anyone* had been harmed by a therapist unlicensed in New York. And it required no evidence explaining why New York only enforces its licensing law against the most qualified individuals,

leaving comparatively unqualified life-coaches and the like free to speak to whomever they wish.

REASONS FOR GRANTING THE PETITION

The decision below is flatly inconsistent with this Court's precedents, and it deepens a growing split with regard to both questions presented.

The Second Circuit joins the Third Circuit in allowing the government broad latitude to regulate speech according to its content. By contrast, the Ninth Circuit has correctly recognized that this Court's decision in *City of Austin* v. *Reagan National Advertising* actually reaffirmed this Court's free speech precedents regarding content-based speech burdens.

Having misinterpreted this Court's precedents to save the government from strict scrutiny, the Second Circuit allows the government to satisfy its intermediate scrutiny burden with nothing more than speculation and bald statements in the legislative record. In the process, it departs from this Court's many decisions holding that, even under intermediate scrutiny, the government bears a heavy evidentiary burden to prove that its laws are narrowly tailored. The Second Circuit joins the Fourth and Seventh Circuits in diluting intermediate scrutiny into something far closer to rational basis review. On the other side of the split, the Third and Sixth Circuits have correctly held the government to its evidentiary burden.

Finally, the questions are important, and this case presents an ideal vehicle to decide both. Because the case was dismissed on the pleadings, there are no factual disputes at this stage, and either question would

be outcome determinative if answered in Petitioner's favor.

I. The Second Circuit split with this Court's decisions, and deepened an existing circuit split, over the standard to determine when a law is content based.

A. The decision below split with *Reed* v. *Town of Gilbert*.

1. This Court's ruling in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015), resolved decades of confusion that had plagued lower federal courts about the distinction between speech regulations that are content based and those that are content neutral. Much of that confusion stemmed from this Court's ruling in *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). For 25 years, lower courts seized on that ruling to conclude that speech restrictions may escape strict scrutiny, even if they facially distinguish regulated speech based on its content, as long as those distinctions can be "*justified* without reference to the content of the regulated speech." *Reed*, 576 U.S. at 165 (emphasis added).

But as *Reed* recognized, that "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Ibid.* Cutting through this confusion, *Reed* confirmed that all laws that draw facial content distinctions are content based—and thus 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." *Ibid.*

Reed discussed a variety of facial content distinctions that trigger strict scrutiny. But of all the ways that a law might draw facial content distinctions, there was one that this Court considered so plain as to be "obvious": "defining regulated speech by particular subject matter." *Id.* at 163.

This Court reaffirmed *Reed*'s holding just last year in *City of Austin* v. *Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022). There, this Court rejected a First Amendment challenge to a municipal sign ordinance that treated "on-premises" differently from "off-premises" signs. In doing so, the Court distinguished the sign code challenged in *Reed* as "a very different regulatory scheme" that "singled out specific subject matter for differential treatment." *Id.* at 69 (cleaned up). In contrast, the Court held, Austin's on-/off-premises distinction "distinguish[ed] based on location." *Id.* at 71. Thus, "[t]he message on the sign matter[ed] only to the extent that it inform[ed] the sign's relative location * * * similar to ordinary time, place, or manner restrictions." *Ibid.*

City of Austin did not overrule or, in the majority's view, even modify *Reed*. Indeed, this Court expressly held that its ruling did not "cast doubt on *any* of [this Court's] precedents recognizing examples of topic or subject-matter discrimination as content based." *Id.* at 76 (emphasis added). *City of Austin* "merely appl[ied] those precedents to reach the 'commonsense' result that a location-based and content-agnostic on-/off-premises distinction does not, on its face, 'singl[e] out specific subject matter for differential treatment.'" *Ibid.* (quoting *Reed*, 576 U.S. at 163, 169).

The upshot of *Reed* and *City of Austin* should be clear: Laws that define regulated speech by its subject matter are always content based and subject to strict scrutiny. It just happens that on-/off-premises distinctions generally define regulated speech by location, not subject matter.

2. Despite the pains this Court went to in *City of Austin* to make clear that it was not modifying *Reed*'s holding that subject-matter distinctions are content-based distinctions, the Court below interpreted *City of Austin* as effectively overruling *Reed*. In doing so, the Second Circuit split with this Court's decisions.

Under a straightforward application of *Reed*, the law challenged here is content based. The law requires speakers to obtain a license if they use "verbal * * * methods" to "evaluat[e], assess[], ameliorat[e], treat[], modif[y], or adjust[]" a "disorder of behavior, character, development, emotion, personality or relationships." N.Y. Educ. Law § 8402(1). As the Second Circuit recognized, New York's law applies not just to self-described "mental health counselors." App. 52a. It applies to anyone—including "life coaches, mentors, and self-help gurus"—"if they [speak] to others for a therapeutic purpose *pertaining to a mental disorder or problem* in the particular circumstances specified in the definition of mental health counseling." App. 52a. (emphasis added).

That is simply another way to say that the "subject matter" of the regulated speech is "mental disorders and problems." After all, what is the subject matter of

speech if not the thing to which that speech pertains?[4] New York's law does not apply to a speaker who uses "verbal methods" to "treat" indigestion by recommending a modified diet or to "modify" a golfer's backswing. The law applies only to speech about mental health. Under *Reed*, this facial distinction should have been "obvious." 576 U.S. at 163.

But the Second Circuit rejected that conclusion, relying on *City of Austin*. The court specifically latched on to language in *City of Austin* rejecting the argument that regulations are "automatically content based" whenever the government must ask "who is the speaker and what is the speaker saying to apply [the] regulation." App. 41a (cleaned up).

As the Second Circuit correctly noted, *City of Austin* rejected the view that "*any* examination of speech or expression inherently triggers heightened First Amendment concerns." 596 U.S. at 73. Instead, *City of Austin* held that government may make a cursory examination of a sign's content, without triggering strict scrutiny, so long as it does so for the limited purpose of "drawing neutral, location-based lines." *Id.* at 69.

Citing those principles, the Second Circuit analogized the New York law to the location-based sign restriction in *City of Austin*. The Second Circuit concluded that the New York law was not content based even though its application turned on the content of

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[4] See*, e.g.*, Merriam-Webster Thesaurus, *Pertaining (to)* ("to have (something) as a subject matter"), https://www.merriam-webster.com/thesaurus/pertaining-to (last visited October 27, 2023).

speech because, in examining the content of therapists' speech, "[a]ll that matters is that the conversations be for one of the statutorily identified therapeutic purposes." App. 43a. Thus, under the Second Circuit's approach, a law that singles out for regulation speech about mental health disorders and treatments does not regulate speech based on its subject matter. It is instead a content-neutral regulation—akin to a time, manner, or place regulation—to which only intermediate scrutiny applies.

That decision is irreconcilable with the central holding of *Reed* that a law is content based if it "define[s] regulated speech by its function or purpose." 576 U.S. at 163. It is also contrary to *City of Austin*, which held that "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." 596 U.S. at 74. A law that targets speech about mental health for special burdens is content based, and the government cannot evade that rule by saying that it is targeting speech because it has the "purpose to improve mental health."

The Second Circuit's contrary conclusion would make it possible to reclassify *any* content-based restriction on speech as content neutral. For instance, a law might regulate speech "with the function of informing people about recent events" (journalism), "with the function of making people laugh at elected officials" (satire), or "with the function of undermining the government" (sedition). The regulation at issue in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), which the Court found content based, could

easily have been characterized as a restriction on speech with the "function" of supporting terrorism. And the regulation in *Barr* v. *American Ass'n. of Political Consultants, Inc.,*, 140 S. Ct. 2335 (2020), could have been characterized as a restriction on phone calls with the "function" of collecting government debt. Of course that is not the law.

B. The Second Circuit's decision deepens a rapidly growing split about the meaning of *City of Austin*.

The Second Circuit is not alone in misunderstanding this Court's clear admonition that *City of Austin* did not "cast doubt on *any* of [this Court's] precedents recognizing examples of topic or subject-matter discrimination as content based." 596 U.S. at 76 (emphasis added). A split has already developed among lower federal courts on precisely that point. On one side stand the Second and Third Circuits, which have both interpreted *City of Austin* as having created an exception to *Reed* that essentially swallows the rule. On the other side stands the Ninth Circuit, which interprets *City of Austin* as having merely recognized that location-based time, manner, and place regulations are not converted into content-based regulations, even if assessing their application requires some minimal examination of content. If left unaddressed, this split threatens to reintroduce all the confusion that *Reed* sought to dispel.

1. The Third Circuit took a similarly expansive view of *City of Austin* in *Mazo* v. *New Jersey Secretary of State*, 54 F.4th 124 (3d Cir. 2022), cert. denied, No. 22-1033 (Oct. 2, 2023). That case involved a First

Amendment challenge to a New Jersey law that regulated political slogans that appeared on electoral ballots. Under the law, candidates running in primary elections could include a six-word slogan next to their name. *Id.* at 131. But the state also required that candidates obtain consent from individuals or New Jersey incorporated associations before naming them in their slogans. *Id.* at 132. Thus, a candidate who wanted to use the slogan "Bernie Sanders Betrayed the NJ Revolution" could not do so without first obtaining consent from Senator Sanders. *Id.* at 133.

Plaintiffs challenged the consent requirement as a content-based restriction on speech because "whether it applies to a given ballot slogan will depend on whether the slogan names an individual or a New Jersey incorporated association." *Id.* at 148. In other words, New Jersy's law imposed additional burdens only on slogans touching on specific subject matter—the names of individuals or New Jersey incorporated associations. By contrast, if a slogan named an association incorporated outside New Jersey—such as "I'm the pro-NRA candidate"—then it was not subject to those burdens.

Once again, under *Reed*, this content discrimination should have been "obvious." 576 U.S. at 163. But the Third Circuit rejected that argument, again relying on this Court's decision in *City of Austin.* In the Third Circuit's view, under *City of Austin* "a law is 'agnostic as to content,' if it 'requires an examination of speech only in service of drawing neutral' lines." 54 F.4th at 149. That is a selective quotation of *City of Austin*, whose original language referred to "neutral,

location-based lines." 596 U.S. at 69 (emphasis added). And that selective quotation was intentional, because in the Third Circuit's view *City of Austin* allows not just location-based lines to escape strict scrutiny, but any supposedly "neutral" line.

The Third Circuit then concluded that New Jersey's consent requirement fell into a "category of permissible neutral line-drawing that distinguishes between speech based on extrinsic features unrelated to the message conveyed." *Mazo*, 54 F.4th at 149. Under this interpretation of *City of Austin*, New Jersey's law was content neutral because "the communicative content of the slogan—*i.e.*, whether the slogan names an individual or a New Jersey incorporated association—only matters to determine whether the consent requirement applies at all." *Ibid.*

This sweeping interpretation of *City of Austin* is impossible to reconcile with that decision's repeated assurances that it did not "cast doubt on *any* of [this Court's] precedents recognizing examples of topic or subject-matter discrimination as content based." 596 U.S. at 76 (emphasis added). It also supports the concerns expressed by the dissenters in *City of Austin*, who feared that lower courts would interpret the Court's ruling as having transformed "*Reed*'s clear rule for content-based restrictions" back into "an opaque and malleable 'term of art.'" *Id.* at 86, 104 (Thomas J., dissenting). Indeed, as one commentator described it, the Third Circuit's interpretation of *City of Austin* "threatens to swallow the content-based versus content-neutral distinction altogether." Recent Case, Mazo v. New Jersey Secretary of State, 136 Harv. L. Rev. 2168, 2175 (2023).

2. The Ninth Circuit, unlike the Second and Third, has read *City of Austin* far more narrowly. In *Project Veritas* v. *Schmidt*, 72 F.4th 1043 (9th Cir. 2023), that court considered a First Amendment challenge to an Oregon law that forbade most unannounced recordings of conversations. *Id.* at 1050. But the law contained two relevant exceptions. First, it did not apply to a "person who records a conversation during a felony that endangers human life." *Id.* at 1050–1051. Second, it did not apply to conversations "in which a law enforcement officer is a participant if the recording [was] made while the officer [was] performing official duties and [met] other criteria." *Ibid.* (cleaned up).

Project Veritas, "a non-profit media organization that engages in undercover investigative journalism," *id.* at 1052, challenged the law as an unconstitutional, content-based restriction on speech. The Ninth Circuit agreed, and its interpretation of *City of Austin* and its effect on Ninth Circuit precedent interpreting *Reed* is markedly different from the views of the Second and Third Circuits.

To resolve Project Veritas's case, the panel relied extensively on the Ninth Circuit's earlier ruling in *Animal Legal Defense Fund* v. *Wasden*, 878 F.3d 1184 (9th Cir. 2018), which was decided after *Reed* but before *City of Austin*. That case involved a First Amendment challenge to an Idaho law that forbade secretly recording the "conduct of an agricultural production facility's operations." *Id.* at 1203. The Ninth Circuit found that law content-based for two reasons. First, the law was "an 'obvious' example of a content-based regulation of speech because it 'defin[ed] regulated

speech by particular subject matter.'" *Id.* at 1204 (citing *Reed*, 576 U.S. at 163). Second, the court reasoned that "only by viewing the recording [could] the Idaho authorities make a determination about criminal liability." *Ibid.*

As the Ninth Circuit in *Project Veritas* recognized, that second rationale "require[d] some further examination" following *City of Austin*'s rejection of the "per se rule 'that a regulation cannot be content neutral if it requires reading the [speech] at issue.'" 72 F.4th at 1056. Unlike the Second and Third Circuits, however, the Ninth Circuit interpreted *City of Austin* as simply clarifying how *Reed* applied to "location-based rules." And, as the Ninth Circuit also recognized, "this exception for location-based rules [did] not affect the Court's longstanding holding that 'regulations that discriminate based on the topic discussed * * * are content based.'" *Ibid.* (citing *City of Austin*, 596 U.S. at 73–74).

Based on that interpretation of *City of Austin*, the Ninth Circuit concluded that whether Oregon's law applied "plainly pivots on the content of the recording—namely, what the recording captures." *Project Veritas*, 72 F.4th at 1057 (cleaned up). Recordings of police engaged in their official duties were legal, while recordings of other government officials engaged in theirs were not. *Ibid.* Recordings of felonies endangering human lives were legal, while recordings of misdemeanors were not. *Ibid.* These, the court held, were all "obvious examples of a content-based regulation of speech because they define regulated speech by particular subject matter" and that subject matter's

presence could be determined "only by viewing the recording." *Ibid.* (cleaned up).

The Ninth Circuit also expressly rejected the argument—made by Oregon and accepted by the Second Circuit below—that the law was content neutral because the statute's application was "not based on the words spoken." *Id.* at 1057. As the Ninth Circuit recognized, this argument simply ignores that subject-matter discrimination is a type of content discrimination. *Ibid.* Thus, in *Project Veritas*, "it [was] the statute's differential treatment of recordings based on their subject matter (e.g., whether the speaker's recording obtains the conversation of Oregon police officers or Oregon executive officers) that [made] the statute content based, not the words exchanged in the conversation." *Ibid.*

Compare that to the Second Circuit below. That court acknowledged that New York's law regulates only speech "pertaining to a mental disorder or problem." App. 52a. But it still found the law to be content-neutral because, in those conversations about mental health, "it matters not at all whether a counselor speaks to a client about personal relationships, professional anxieties, medical challenges, world events, planned travel, hobbies, sports, favorite movies, or any other subject." App. 43a.

3. As shown above, there is a clear split between the Second and Third Circuits and the Ninth Circuit on the degree to which *City of Austin* modified *Reed*'s general rule that subject-matter based laws are content based and subject to strict scrutiny. The Second and Third Circuit read *City of Austin* as allowing a

potentially limitless array of subject-matter-based discrimination that *Reed* sought to expressly prohibit. The Ninth Circuit, by contrast, takes *City of Austin* at its word when it claimed not to "cast doubt on *any* of [this Court's] precedents recognizing examples of topic or subject-matter discrimination as content based." 596 U.S. at 76 (emphasis added). That is no small disagreement—it matters for countless First Amendment cases nationwide. This Court should grant certiorari to resolve these Circuits' irreconcilable views on this question of fundamental constitutional importance. Sup. Ct. R. 10.

II. The Second Circuit split with this Court's decisions and deepened an existing circuit split over whether the government is required to prove, with evidence, that speech-burdening laws are narrowly tailored.

A. The decision below split with decades of this Court's precedents.

In affirming the dismissal of Dr. Brokamp's complaint, the Second Circuit held that New York's law was "sufficiently tailored to ensure that its licensing requirement does not burden more speech than necessary to allow the state to protect residents against incompetent and deceptive mental health counselors." App. 56a–57a. How did the court conclude this? Based on "the record" in this case. App. 45a. But of course, there is no record in this case–it was dismissed on the pleadings. The court's entire intermediate scrutiny analysis is based on legislative history and the text of the statute. Moreover, the legislative history in this

case was extraordinarily weak—bald statements by sponsors of the bill and letters from industry participants.

The decision below squarely conflicts with this Court's precedents: It is the government's burden to *prove* that its speech burdening laws are narrowly tailored to an important governmental interest. And the government cannot satisfy this burden with "mere speculation or conjecture; rather * * * [it] must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173, 188 (1999) (quoting *Edenfield* v. *Fane*, 507 U.S. 761, 770–771 (1993)).

In other words, the government needs actual evidence to win an intermediate scrutiny case. For instance, in *McCullen* v. *Coakley* this Court unanimously struck down a Massachusetts statute creating "buffer zones" around abortion clinics. 573 U.S. 464 (2014). The law failed intermediate scrutiny because Massachusetts had "not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id* at 494. Notably, *McCullen* was decided after a bench trial—not on a motion to dismiss.[5]

[5] To be sure, even under intermediate scrutiny, it is still possible for a plaintiff to plead himself out of court. See *Libertarian Party of Erie Cnty.* v. *Cuomo*, 970 F.3d 106, 128 (2d Cir. 2020) (dismissing Second Amendment claim where plaintiff's own complaint alleged that he had "frequently violat[ed] court orders,' had been "arrested some 50 times," and "jailed several times.").

So too in *NIFLA* v. *Becerra*, where this Court struck down a California requirement that crisis pregnancy centers disclose that the state offered free and low-cost abortion services. 138 S. Ct. 2361, 2368 (2018). This Court held that the law failed intermediate scrutiny because "California ha[d] identified no evidence" demonstrating that less burdensome alternatives would not work, and it was California's "burden to prove" that its law was narrowly tailored. *Id.* at 2376–2377.

The decision below is irreconcilable with this Court's intermediate scrutiny cases. The State of New York never had to explain (much less prove):

- Why licensed out-of-state counselors were dangerous to the welfare of New Yorkers;
- Why it was unnecessary to require out-of-state practitioners to obtain New York licensing during the pandemic if, in fact, such practitioners are a threat to the health and safety of New Yorkers;
- That unlicensed counseling had, in fact, been a problem in New York prior to 2005 when the licensing law took effect;
- That less restrictive alternatives, such as voluntary certification and prosecution of deceptive marketing practices, would not sufficiently advance its objectives, *cf. McCullen*, 573 U.S. at 494 (noting that the state had "identif[ed] not a single prosecution brought" under supposedly inadequate statutes "within at least the last 17 years");
- Why reducing New Yorkers' access to trained, professional counselors from other states was good for the health and safety of New Yorkers; and

- Why New York enforces the law only against highly trained professionals (presumably the *least* dangerous people), yet not against relatively untrained life coaches and the like–who, according to the complaint, are having the same kinds of conversations with New Yorkers that Dr. Brokamp wants to have. App. 111a.

Instead of requiring the state to produce evidence on any of these points, the Second Circuit simply said that "New York could reasonably conclude" that its law made sense. App. 51a–52a (citing *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905)). If this sounds like rational basis review, that's because it is. Indeed, the court underscored the point by citing a police power case–not a First Amendment case–as support for this proposition. But see *Edwards* v. *District of Columbia*, 755 F.3d 996, 1000 n.3 (D.C. Cir. 2014) (suggesting that a licensing scheme for tour guides was so "incoheren[t]" that it would likely fail rational basis review). And that seems to be what's really going on here. This Court rejected the so-called "professional speech doctrine" in *NIFLA*, holding that speech by professionals is subject to ordinary First Amendment protections. 138 S. Ct. at 2375. The Second Circuit revives the doctrine by allowing the government to carry its intermediate scrutiny burden, not with evidence, but with "reasonable" speculation.

B. The decision below deepens a split of authority about the role of evidence in intermediate scrutiny cases.

Notwithstanding this Court's guidance, the lower courts remain confused and divided over what it means for the government to bear the burden of proof

under intermediate scrutiny. Some courts have properly held that the government cannot prevail on a motion to dismiss by pointing to extrinsic evidence, such as legislative history. Others have taken the Second Circuit's approach, allowing the government to prevail by pointing to legislative history and "reasonable" speculation.

1. The Fourth Circuit, like the Second, allows the government to prevail under intermediate scrutiny at the motion to dismiss stage, even when the challenged laws were seriously burdensome. In *Anheuser-Busch* v. *Schmoke*, the court upheld a location-specific prohibition on alcoholic beverage advertising under intermediate scrutiny. 101 F.3d 325, 327 (4th Cir. 1996). The plaintiffs in that case objected that they had not had the opportunity to conduct discovery, but the court held that this was irrelevant because intermediate scrutiny requires only that "the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest." *Anheuser-Busch, Inc.* v. *Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995), cert. granted, judgment vacated, 517 U.S. 1206 (1996), and opinion adopted in part, 101 F.3d 325 (4th Cir. 1996). Relying primarily on legislative history, the court held that the government had carried its burden. The dissent, however, correctly explained that courts cannot assess "whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest" without "factual records." *Ibid.* (Butzner, J., dissenting).

Although *Schmoke* is now almost 30 years old, it has continued to do mischief both in the Fourth Circuit and elsewhere, where courts have allowed the government to carry its intermediate scrutiny burden with no real evidence, but simply "history, consensus, and 'simple common sense.'" *W. Va. Ass'n of Club Owners & Fraternal Servs., Inc.* v. *Musgrave*, 553 F.3d 292, 305 (4th Cir. 2009); see also *Second Amend. Arms* v. *City of Chicago*, 135 F. Supp. 3d 743, 756 (N.D. Ill. 2015) ("The plain text of a law, its legislative history, and simple common sense could allow a district court to dismiss a facial challenge to a provision restricting commercial speech at the pleading stage.").

2. The Seventh Circuit has also adopted the Fourth Circuit's erroneous approach to intermediate scrutiny. In *Dahlstrom* v. *Sun-Times Media, LLC*, 777 F.3d 937 (7th Cir. 2015), the court upheld the Driver's Privacy Protection Act, 18 U.S.C. 2721 *et seq.*, against a First Amendment challenge. The Act flatly prohibited the disclosure of personal information obtained from motor vehicle records. After concluding that the Act was content-neutral, the court proceeded to hold that it survived intermediate scrutiny, based on the plain text of the statute, which, among other things, contained fourteen "permissible use" exceptions. Without any evidence, the court was satisfied that the Act "does not burden substantially more speech than necessary to further the government's legitimate interests." *Id.* at 954.

3. The Third Circuit, by contrast, has hewed to this Court's precedents. *Bruni* v. *City of Pittsburgh* discussed this Court's intermediate scrutiny precedents in some depth and concluded that "narrow

tailoring analysis must depend on the particular facts at issue." 824 F.3d 353, 366 (3d Cir. 2016). *Bruni* concerned another abortion clinic "buffer zone." The district court had dismissed the complaint, relying in part on government testimony beyond the four-corners of the complaint. The Third Circuit reversed, holding that it was improper for the district court to consider extrinsic evidence at that stage and that, after discovery, it would be the government's burden on remand to prove narrow tailoring. The government "would have to show either that substantially less-restrictive alternatives were tried and failed, or that alternatives were closely examined and ruled out for good reason." *Id.* at 370.

The *Bruni* court did note, in passing, that there may be "rare[]" cases where it appropriate to dismiss an intermediate scrutiny case on the pleadings. The court emphasized that this would likely only occur in situations where the burden on speech was *de minimis*. *Id.* at 372 & n.20.

Under the Third Circuit's approach, it would have been impossible to dismiss Dr. Brokamp's complaint at the pleading stage. Surely a legal burden cannot be *de minimis* if it actually silenced her, leaving no alternative means of communication other than her client traveling weekly between New York and Virginia. Nor, under *Bruni*, could the court have relied on legislative history to determine that the licensing law was sufficiently tailored. Any consideration of the state's evidence would have had to wait until summary judgment.

4. The Sixth Circuit has likewise held the government to its burden in intermediate scrutiny cases.

In reversing a dismissal to a regulation of dental advertising, the court held that "when First Amendment rights are at stake, the government's assertions cannot be taken at face value," that the "government bears the burden of satisfying" intermediate scrutiny, and that "the court must scrutinize the government's arguments as they are presented." *Kiser* v. *Kamdar*, 831 F.3d 784, 789 (6th Cir. 2016). It admonished the district court on remand to "consider the facts and evidence." *Id.* at 790.

5. The split outlined above almost certainly undersells the need for further guidance. At the very least, the resolution of the second question presented implicates every intermediate scrutiny case in which a motion to dismiss is filed, yet courts frequently neglect to squarely address the issue. See, *e.g., StreetMediaGroup, LLC* v. *Stockinger*, 79 F.4th 1243, 1252 (10th Cir. 2023) (requiring plaintiff in intermediate scrutiny to affirmatively plead facts negating tailoring); *Mai* v. *United States*, 952 F.3d 1106, 1121 (9th Cir. 2020) (granting motion to dismiss in intermediate scrutiny case without any discussion of the burden of proof). Courts have also dismissed Second Amendment cases under intermediate scrutiny at the pleading stage, without requiring the government to make any evidentiary showing. See*, e.g., States* v. *Skoien*, 614 F.3d 638, 653 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (criticizing the majority for not permitting the plaintiff to challenge the government's evidence). Although this Court has since rejected the use of tiers of scrutiny in the Second Amendment context, these cases threaten to infect First Amendment jurisprudence, as these courts typically purported to be

importing the First Amendment test. See *Drummond* v. *Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021).

III. This case is an ideal vehicle to provide guidance on the application of the First Amendment to talk therapy.

A. Beyond the specific splits discussed above, this case implicates a broader split concerning the constitutional status of talk therapy. This case offers an ideal vehicle for the Court to grant certiorari and to make clear that talk therapy is speech entitled to full First Amendment protection.

Courts have split over the question whether talk therapy is speech ***at all***, with at least one court refusing to grant talk therapy any First Amendment protection. The Ninth Circuit, in *Tingley*, held that a regulation of talk therapy (barring so-called "conversion therapy") was a regulation of conduct, not speech, and so had only to satisfy rational basis review (which the law was able to survive). 47 F.4th at 1077–78. On the other hand, the Eleventh Circuit held in *Otto* that talk therapy was speech, and it applied ordinary First Amendment scrutiny to strike down a similar regulation. 983 F.3d at 861. Layered on top of these decisions, the Second Circuit here adopted a ***third*** approach, recognizing that talk therapy is speech but subjecting restrictions on talk therapy to a toothless standard of review that does not in any way resemble ordinary First Amendment analysis.

This case provides an ideal vehicle for this Court to clarify the First Amendment status of talk therapy. Because the Second Circuit held that talk therapy is

speech, the Court can address that antecedent question in the course of reviewing the Second Circuit's opinion here—and thus can resolve the specific doctrinal split at issue in *Otto* and *Tingley*. The Court can do so in a context that does not involve the polarizing culture war issues at issue in those cases, and it can do so in a way that would not require the Court to directly address the constitutionality of conversion therapy bans—and that would therefore allow the lower courts to continue to address the question whether bans on conversion therapy might be able to survive strict scrutiny review.

In many ways, this is a superior vehicle to resolve these important First Amendment questions. Unlike in *Tingley*, the Second Circuit addressed not only the threshold question of whether talk therapy qualifies as "speech" but also addressed other critical questions—including when regulations of therapy are content based and whether regulations of therapy require meaningful First Amendment review. This case therefore offers an opportunity to more broadly affirm that the First Amendment applies to talk therapy.

If, instead, the Court grants certiorari in *Tingley*, then the Court should hold this case pending resolution of that appeal. While the Ninth Circuit's decision in *Tingley* rested on the categorization of therapy as "conduct," the question presented by the petition in *Tingley* is broader—asking whether "a law that censors conversation between counselors and clients as 'unprofessional conduct' violates the Free Speech Clause." Pet. for Certiorari at i, *Tingley* v. *Ferguson*, No. 22-942. If the Court takes up that broader question, the Court will inevitably have to address

issues—including whether the law is content based—that will bear on the Second Circuit's analysis here. And even if the Court limits itself to the more narrow question of whether therapy qualifies as "speech," the Court's reasoning may well bear on the Second Circuit's opinion here. Among other things, while the Second Circuit treated therapy as speech, its analysis was more akin to rational basis review; an opinion reaffirming that talk therapy is entitled to full First Amendment protection would have obvious implications for the Second Circuit's reasoning here.

These questions concerning the constitutional status of talk therapy call out for review. Millions of Americans have deep and meaningful relationships with their therapists, and those relationships are founded on speech. Yet, for years, courts have struggled with the fundamental question whether those relationships fall within the constitutional protection of the First Amendment. That question needs an answer, and the Court can resolve it here.

B. Even apart from the broader context, the specific questions raised by this Petition also merit this Court's review, and this case provides an ideal vehicle to resolve them.

Either question in isolation is important, but together, they amplify each other. If the government can satisfy intermediate scrutiny at the pleading stage with nothing more than speculation and legislative history, then the appropriate level of scrutiny will become nearly outcome determinative. And if the government can escape strict scrutiny whenever it defines speech by its purpose or function, rather than its

subject, then strict scrutiny will rarely feature unless the government is engaging in blatant viewpoint discrimination. The decision below undoes decades of this Court's free speech jurisprudence and provides a roadmap for courts to uphold laws that severely burden speech.

This Court should also resolve these splits now. There is nothing to gain by allowing lower courts to continue debating how to properly interpret *Reed* and *City of Austin*. By contrast, there is much to lose. As noted above, this Court's ruling in *Ward* v. *Rock Against Racism* sparked a quarter-century of confusion that only ended with this Court's definitive statement in *Reed* that subject-matter based laws are content based and must be reviewed with strict scrutiny. The Second and Third Circuit's erroneous interpretation of *City of Austin* should be corrected before it can reignite that confusion, to the detriment of speakers nationwide.

The intermediate scrutiny split is also ripe for adjudication. Notwithstanding this Court's repeated holdings that intermediate scrutiny requires the government to present real evidence to prove its laws are sufficiently tailored, the Second, Fourth, and Seventh Circuits have diluted the test beyond recognition, putting free speech rights in these jurisdictions in jeopardy. And while it is true that some judges in these circuits will sometimes apply a more rigorous version of intermediate scrutiny, there is no way for a litigant to know ex ante whether she is going to draw a panel that feels like doing real constitutional review.

The context of this specific case also heightens the stakes for these questions. The counseling profession has observed a "mental health crisis" in recent years. Many areas of the country have too few mental health professionals, and many people struggle to find a counselor. Moreover, successful counseling depends on developing a long-term relationship with the right fit between counselor and client. Dr. Brokamp, for instance, specializes in counseling clients with post-partum depression, a relatively rare specialty. App. 104a. Preventing people like Dr. Brokamp from practicing across state lines exacerbates these problems.

Finally, this case is an ideal vehicle in which to resolve these questions. The case comes to this Court on a motion to dismiss, so there are no facts in dispute. The Second Circuit's approach to both questions was outcome determinative. If New York's law is content based and subject to strict scrutiny, then the burden is on the government show that New York's licensure requirement "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 576 U.S. at 171. But the government has not tried to satisfy that most demanding standard of review. Indeed, at the Second Circuit, the government's only response to Petitioner's argument that New York's law fails strict scrutiny was a single, conclusory footnote stating that it does not. See Brief for Defendants-Appellees at 49 n.15, *Brokamp* v. *James*, 66 F.4th 374 (2d Cir. 2023) (Doc. 44) (filed Mar. 18, 2022). That is plainly insufficient to carry the government's heavy burden, particularly at the motion-to-dismiss stage, when all the allegations of Petitioner's complaint must be taken as true. And, of course, if the government needs real evidence to satisfy intermediate

scrutiny, then it cannot prevail on a motion to dismiss. Either way, Dr. Brokamp would be entitled to discovery, and the case would have to proceed to summary judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. JOHNSON
Institute for Justice
16781 Chagrin Blvd.
#256
Shaker Heights, OH
44120

JEFFERY H. REDFERN
Counsel of Record
ROBERT J. MCNAMARA
PAUL M. SHERMAN
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.Ste. 900
Arlington, VA 22203
(703) 682-9320
jredfern@ij.org

October 30, 2023

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Appendix A

In the United States Court of Appeals for the Second Circuit

AUGUST TERM 2022

No. 21-3050-cv

ELIZABETH BROKAMP,

Plaintiff-Appellant,

v.

LETITIA JAMES, in her official capacity as Attorney General of the State of New York, BETTY A. ROSA, in her official capacity as the New York State Commissioner of Education, NEW YORK STATE EDUCATION DEPARTMENT BOARD OF REGENTS, NEW YORK STATE BOARD OF MENTAL HEALTH PRACTITIONERS, THOMAS BIGLIN, in his official capacity as a member of the New York State Board of Mental Health Practitioners, RODNEY MEANS, in his official capacity as a member of the New York State Board of Mental Health Practitioners, TIMOTHY MOONEY, in his official capacity as a member of the New York State Board of Mental Health Practitioners, HELENA BOERSMA, in her official capacity as a member of the New York State Board of Mental Health Practitioners, SARGAM JAIN, in her official capacity as a member of the New York State Board of Mental Health Practitioners, RENE

JONES, in her official capacity as a member of the New York State Board of Mental Health Practitioners, SUSAN L. BOXER KAPPEL, in her official capacity as a member of the New York State Board of Mental Health Practitioners, SARA LIN FRIEDMAN MCMULLIAN, in her official capacity as a member of the New York State Board of Mental Health Practitioners, ANGELA MUSOLINO, in her official capacity as a member of the New York State Board of Mental Health Practitioners, MICHELE LANDERS MEYER, in her official capacity as a member of the New York State Board of Mental Health Practitioners, NATALIE Z. RICCIO, in her official capacity as a member of the New York State Board of Mental Health Practitioners, HOLLY VOLLINK-LENT, in her official capacity as a member of the New York State Board of Mental Health Practitioners, JILL R. WELDUM, in her official capacity as a member of the New York State Board of Mental Health Practitioners, and SUSAN WHEELER WEEKS, in her official capacity as a member of the New York State Board of Mental Health Practitioners,

Defendants-Appellees.

ARGUED: SEPTEMBER 19, 2022

DECIDED: APRIL 27, 2023

Before: RAGGI, WESLEY, and LOHIER, *Circuit Judges*.

Appendix A

Plaintiff Elizabeth Brokamp, a Virginia-licensed mental health counselor, appeals from a judgment entered in the United States District Court for the Northern District of New York (David N. Hurd, *J.*), dismissing her First Amendment and Due Process challenges to a New York law requiring her to obtain a further license in that state to provide mental health counseling to New York residents. Brokamp argues that the district court erred in (1) dismissing her as-applied challenges for lack of standing and, therefore, lack of jurisdiction, *see* Fed. R. Civ. P. 12(b)(1); (2) construing her First Amendment facial challenge as alleging overbreadth and concluding therefrom that she failed to state a plausible claim for relief, *see* Fed. R. Civ. P. 12(b)(6); and (3) overlooking her facial Due Process claim. Because Brokamp alleges that the very fact of New York's license requirement chills her speech, she did not have to apply for and be denied a license to demonstrate standing to pursue her First Amendment and Due Process claims. Nevertheless, because New York permits her to obtain a New York license by endorsement of her Virginia license without need to satisfy the many particular requirements for initial licensure, her claimed injury is attributable to the former endorsement provision and, thus, it is that provision rather than the particular requirements for initial licensure that she has standing to challenge, whether facially or as applied. In all other respects, her claims are properly dismissed for lack of standing. As to licensure by endorsement, accepting Brokamp's express disavowal of a First Amendment overbreadth challenge and construing her Due Process claim as both a facial and as-

applied challenge, we conclude that her claims are properly dismissed for failure to state a plausible claim for relief.

Affirmed.

JEFFREY H. REDFERN, Institute for Justice, Arlington, VA (Robert J. McNamara; Robert Johnson, Institute for Justice, Shaker Heights, OH; Alan J. Pierce, Hancock Estabrook LLP, Syracuse, NY, *on the brief*), *for Plaintiff-Appellant*.

FREDERICK A. BRODIE, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Jeffrey W. Lang, Deputy Solicitor General, *on the brief*) *for* Letitia James, Attorney General, State of New York, Albany, NY, *for Defendants-Appellees*.

REENA RAGGI, *Circuit Judge*:

Plaintiff Elizabeth Brokamp is a Virginia-licensed mental health counselor who, for a fee, treats patients online with "talk therapy." Compl. ¶ 1.[1] Pursuant to

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[1] The National Institute of Mental Health explains that "talk therapy" is another name for "psychotherapy," which "refers to a variety of treatments that aim to help a person identify and change troubling emotions, thoughts, and behaviors. Most psychotherapy takes place when a licensed mental health professional and a patient meet one-on-one or with other patients in a group setting." *Psychotherapies*, NAT'L INST. OF MENTAL HEALTH,

42 U.S.C. § 1983, she sued various New York state agencies and named officials in the United States District Court for the Northern District of New York (David N. Hurd, *Judge*), seeking (1) a judicial declaration that New York's mental health counselor licensing laws violate the First Amendment right to free speech and the Due Process Clause's prohibition on statutory vagueness, *see* U.S. Const. amends. I, XIV; and (2) an injunction prohibiting defendants from enforcing those laws as against her. On November 22, 2021, the district court dismissed Brokamp's complaint in its entirety as against defendant state agencies on sovereign immunity grounds, *see id.* amend. XI; and as against defendant state officials in part for lack of jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), and in part for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6). *See Brokamp v. James*, 573 F. Supp. 3d 696 (N.D.N.Y. 2021). Brokamp now appeals that dismissal as against the state officials, arguing that the district court (1) erred in ruling that she had to apply for a New York license to establish standing to pursue as-applied challenges to the state license requirements, (2) mischaracterized her facial First Amendment claim as an overbreadth challenge in concluding that she failed to state a plausible claim for relief, and (3) overlooked her facial Due Process claim.[2]

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https://www.nimh.nih.gov/health/topics/psychothera-pies (last updated Jan. 2023).

[2] Because Brokamp has confirmed that she does not appeal the district court's sovereign immunity dismissal of her claims

For reasons stated in this opinion, we affirm the judgment of dismissal. While Brokamp did not have to apply for a license to demonstrate standing to complain that New York's license requirement unconstitutionally chilled her speech in vaguely defined ways, she nevertheless has standing only to challenge New York's requirement for licensure by endorsement as that provision, providing a streamlined license process for persons already holding out-of-state licenses, is the one causing her alleged concrete injury. Insofar as Brokamp challenges New York's initial license requirement—whether under the First Amendment or the Due Process Clause, whether on its face or as applied—dismissal for lack of jurisdiction is warranted because she need not satisfy the particular requirements for initial licensure to procure a New York license, thus, she cannot demonstrate a risk of real and concrete injury as necessary for standing. Finally, accepting Brokamp's express disavowal of any overbreadth challenge and construing her vagueness challenge to be both facial and as applied, we conclude that her First Amendment and Due Process challenges to New York's license-by-endorsement requirement are properly dismissed for failure to state plausible claims for relief. *See Jusino v. Fed'n of Cath. Tchrs., Inc.*, 54 F.4th 95, 100 (2d Cir. 2022) (holding that appeals court can affirm judgment on any ground supported by record).

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against defendant state agencies, *see* Appellant Br. 10 n.1, we do not here review that part of the judgment.

Appendix A

BACKGROUND

The following facts are drawn from Brokamp's complaint, documents attached thereto or incorporated therein, and facts of which we may take judicial notice. *See Melendez v. City of New York*, 16 F.4th 992, 996 (2d Cir. 2021). Our recitation assumes the truth of Brokamp's factual allegations and casts all facts in the light most favorable to her. *See id.* (discussing Rule 12(b)(6) dismissal); *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016) (discussing Rule 12(b)(1) dismissal).

I. Brokamp's Talk Therapy Practice

Plaintiff Brokamp is highly educated and Virginia licensed to provide mental health counseling. In 1994, she was awarded a master's degree in Counseling Psychology by Columbia University, and, in 2018, she began work toward a doctoral degree in Counseling at the University of the Cumberlands, which degree she has since been awarded. Brokamp was first licensed to practice mental health counseling in 2004 by Virginia's Board of Counseling.[3] She continues to hold

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[3] *See License Lookup: License No. 0701003683*, VA. DEP'T OF HEALTH PROFESSIONS, https://dhp.virginia interactive.org/Lookup/Detail/0701003683 (last accessed Apr. 25, 2023); *see also Cangemi v. United States*, 13 F.4th 115, 124 n.4 (2d Cir. 2021) (taking judicial notice of record published on government website). To secure a license in Virginia, Brokamp had to (1) satisfy certain educational and experiential requirements; (2) pass a standardized exam; and (3) submit an application including, *inter alia*, (a) proof of her completion of required education and

that Virginia license, having renewed it at required intervals through the present date.[4] Brokamp has never challenged Virginia's licensing requirement. *See* Oral Arg. Tr. 3:14–23. To the contrary, Brokamp plainly recognizes the value of her state license. In promoting herself to clients,[5] the first thing Brokamp says is that she is "a *licensed* professional counselor." *See* NOVA TERRA THERAPY, https://novaterratherapy.com/ (last accessed Nov. 2, 2022) (emphasis added).

Until 2018, Brokamp provided mental health counseling to clients in person at her office in Alexandria, Virginia. Brokamp closed her office that year to pursue her doctoral degree. When she resumed her counseling practice in 2020—during the early stages of the COVID-19 pandemic—Brokamp offered only online services, operating out of her Virginia home under the name Nova Terra Therapy. That remained the case as of the date of the operative complaint.

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experience, and (b) application processing and licensure fees. *See* 18 Va. Admin. Code § 115-20-40.

[4] To renew her Virginia license, Brokamp must annually complete a minimum of 20 hours of continuing education—two of which must be "in courses that emphasize the ethics, standards of practice, or laws governing behavioral science professions in Virginia"—and pay a renewal fee. *See* 18 Va. Admin. Code §§ 115-20-100, 115-20-105.

[5] Because Brokamp refers to the persons she counsels as "clients" rather than patients, *e.g.*, Compl. ¶ 1, we do the same in this opinion, *but see supra* Note 1.

Under ordinary circumstances, New York law would not permit Brokamp to provide mental health counseling to persons residing in New York without being licensed by that state. *See* N.Y. Educ. Law § 8402(2) ("Only a person licensed or exempt under this article shall practice mental health counseling or use the title 'mental health counselor.'"). Among the many executive orders signed by New York's governor in response to the COVID-19 pandemic, however, was one suspending this (and other) in-state licensing requirements for persons, such as Brokamp, holding valid out-of-state licenses. *See* N.Y. Exec. Order 202.15 (temporarily suspending § 8402 "to the extent necessary to allow mental health counselors . . . in current good standing in any state in the United States to practice in New York State without civil or criminal penalty related to lack of licensure"). As a result, for a time, Brokamp provided online counseling to one client who had relocated to New York during the pandemic. She declined, however, to initiate a counseling relationship with another former client then residing in New York because, in response to Brokamp's inquiry, the New York State Board of Mental Health Practitioners ("N.Y. Board") advised that she would not be able to continue such counseling after Executive Order 202.15 expired. Thus, since expiration of that order on June 25, 2021, Brokamp has provided no mental health counseling to any New York resident, although she wishes to do so.

Brokamp asserts that she should be permitted to provide online counseling to New York residents without having to obtain a New York license. She main-

tains that New York's licensing requirement cannot stand because it is content-based and vague, violating the First Amendment's guarantee of free speech both on its face and as applied, as well as the Due Process Clause.

II. New York's Mental Health Counselor Licensing Requirement.

Before addressing Brokamp's claims, it is helpful to review certain provisions of New York law.

The practice of certain professions in New York without a required license is a class E felony, *see* N.Y. Educ. Law § 6512(1), punishable by a prison term of up to four years and a monetary fine, *see* N.Y. Penal Law §§ 70.00(2)(e), 80.00(1). In 2002, having found that the practice of mental health counseling "affects the public safety and welfare," the New York legislature enacted a licensing requirement for such counselors to "protect the public from unprofessional, improper, unauthorized and unqualified practice of counseling and psychotherapy." 2002 N.Y. Sess. Laws ch. 676, § 7.[6] Thus, New York Education Law §

[6] All fifty states, the District of Columbia, and Puerto Rico have license requirements for mental health counselors. *See* Ala. Code § 34-8A-18; Alaska Stat. § 08.29.100; Ariz. Rev. Stat. Ann. § 32-3286; Ark. Code Ann. § 17-27-104; Cal. Bus. & Prof. Code § 4999.30; Colo. Rev. Stat. § 12-245-218; Conn. Gen. Stat. § 20-195bb; Del. Code Ann. tit. 24, § 3030; D.C. Code § 3-1205.01; Fla. Stat. § 491.003; Ga. Code Ann. § 43-10A-7; Haw. Rev. Stat. § 453D-5; Idaho Code § 54-3402; 225 Ill. Comp. Stat. 107/21; Ind. Code § 25-23.6-4.5-1; Iowa Code § 147.2; Kan. Stat. Ann. § 65-5803; Ky. Rev. Stat. Ann. § 335.505; La. Stat. Ann. § 37:1122;

8402(2) states that "[o]nly a person licensed or exempt under this article shall practice mental health counseling or use the title 'mental health counselor.'"[7]

In requiring such licensure, the legislature defined the "practice of the profession of mental health counseling" as follows:

Me. Stat. tit. 32, § 13854; Md. Code Ann., Health Occ. § 17-301; Mass. Gen. Laws ch. 112, § 164; Mich. Comp. Laws § 333.18105; Minn. Stat. § 148B.591; Miss. Code Ann. § 73-30-19; Mo. Rev. Stat. § 337.505; Mont. Code Ann. § 37-23-201; Neb. Rev. Stat. § 38-2116; Nev. Rev. Stat. § 641A.410; N.H. Rev. Stat. Ann. § 330-A:23; N.J. Stat. Ann. § 45:8B-39; N.M. Stat. Ann. § 61-9A-4; N.Y. Educ. Law § 8402; N.C. Gen. Stat. § 90-331; N.D. Cent. Code § 43-47-06; Ohio Rev. Code Ann. § 4757.02; Okla. Stat. tit. 59, § 1911; Or. Rev. Stat. § 675.825; 63 Pa. Stat. and Cons. Stat. Ann. § 1904; P.R. Laws Ann. tit. 20, § 3254; 5 R.I. Gen. Laws § 5-63.2-11; S.C. Code Ann. § 40-75-30; S.D. Codified Laws § 36-32-58; Tenn. Code Ann. § 63-22-117; Tex. Occ. Code Ann. § 503.301; Utah Code Ann. § 58-60-103; Vt. Stat. Ann. tit. 26, § 3262; Va. Code Ann. § 54.1-3506; Wash. Rev. Code § 18.225.020; W. Va. Code § 30-31-1; Wis. Stat. § 457.04; Wyo. Stat. Ann. § 33-38-110.

In 2002, New York already required the licensure of four professions addressing mental health concerns: medicine, nursing, psychology, and social work. *See* N.Y. Educ. Law §§ 6522, 6903, 7601, 7702. That year, the state extended a license requirement to mental health counselors, psychoanalysts, marriage and family therapists, and creative arts therapists. *See id.* §§ 8402–8405.

[7] Hereafter, when we use the phrase "the license requirement" or "New York license requirement" in this opinion, we refer to the requirement for a *mental health counselor*, unless otherwise indicated.

> (a) the evaluation, assessment, amelioration, treatment, modification, or adjustment to a disability, problem, or disorder of behavior, character, development, emotion, personality or relationships by the use of verbal or behavioral methods with individuals, couples, families or groups in private practice, group, or organized settings; and
>
> (b) the use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate mental health counseling services.

N.Y. Educ. Law § 8402(1). The first paragraph—which the parties emphasize on this appeal—uses four factors to define "mental health counseling." These can be denominated: (1) purpose, (2) focus, (3) methods, and (4) circumstances. To begin with *methods,* the definition references both "verbal" and "behavioral" methods, thus plainly reaching speech. The other three factors cabin the speech qualifying as mental health counseling. Specifically, to constitute mental health counseling requiring licensure, speech must be used for a specific *purpose*, *i.e.*, "evaluation, assessment, amelioration, treatment, modification, or adjustment." These terms are not statutorily defined, but their plain meaning in the health context signals

a therapeutic purpose.[8] Further, to constitute mental health counseling requiring licensure, the *focus* of therapeutic speech must be more than "behavior, character, development, emotion, personality or relationships." It must be "a disability, problem, or disorder" in one of those areas. In other words, the therapeutic speech must address something wrong with a person's psyche. Finally, to constitute mental health counseling requiring licensure, therapeutic speech addressing a mental "disability, problem, or disorder" must occur in particular *circumstances*: "private practice, group or organized settings." This signals that

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[8] As pertinent to health, the dictionary defines the statute's purpose words as follows: (1) "evaluate"—"to examine and judge concerning the . . . condition of," as in "at the first visit, an attempt should be made to evaluate the patient as a whole," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 786 (Philip Babcock Gove ed. 1986); (2) "assess"—"to analyze critically and judge definitively the nature, significance, status or merit of" the matter under consideration, *id.* at 131; (3) "ameliorate"—"to make better," *id.* at 67; (4) "treat"—"to seek cure or relief of (as a disease)," *id.* at 2435; (5) "modification"—"the act or action of changing something without fundamentally altering it," *id.* at 1452; (6) "adjust"—"to bring to a more satisfactory state" or "to achieve a harmonious mental and behavioral balance between one's own personal needs and strivings and the demands of other individuals and of society," *id.* at 27; *see generally Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Yates v. United States*, 574 U.S. 528, 543 (2015) (relying on "principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words" (internal quotation marks omitted)).

mental health counseling is not something rendered casually or on the spur of the moment. To secure a counselor license, New York law requires a person to satisfy particular educational, experiential, examination, age, and character requirements, and to pay a fee. *See* N.Y. Educ. Law § 8402(3).[9]

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[9] "To qualify for a license as a 'licensed mental health counselor'" in New York, an applicant must fulfill the following requirements:

> (a) Application: File an application with the [Education Department];
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> (b) Education: Have received an education, including a master's or higher degree in counseling from a program registered by the department or determined by the department to be the substantial equivalent thereof, in accordance with the commissioner's regulations. The graduate coursework shall include, but not be limited to the following areas:
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> (i) human growth and development;
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> (ii) social and cultural foundations of counseling;
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> (iii) counseling theory and practice and psychopathology;
>
> (iv) group dynamics;
>
> (v) lifestyle and career development;
>
> (vi) assessment and appraisal of individuals, couples and families and groups;
>
> (vii) research and program evaluation;
>
> (viii) professional orientation and ethics;

New York permits persons (such as Brokamp) already licensed in another state to practice mental health counseling to practice in New York upon obtaining "endorsement" of their out-of-state licenses. *See* N.Y. Educ. Law § 6506(6) (granting Board of Regents authority to endorse licenses issued by other states); N.Y. Comp. Codes R. & Regs. tit. 8, § 79-9.7 (providing for mental health counseling licensure by

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(ix) foundations of mental health counseling and consultation;

(x) clinical instruction; and

(xi) completion of a minimum one year supervised internship or practicum in mental health counseling;

(c) Experience: An applicant shall complete a minimum of three thousand hours of post- master's supervised experience relevant to the practice of mental health counseling satisfactory to the board and in accordance with the commissioner's regulations [or such other experience as the statute identifies as satisfactory];

(d) Examination: Pass an examination satisfactory to the board and in accordance with the commissioner's regulations;

(e) Age: Be at least twenty-one years of age;

(f) Character: Be of good moral character as determined by the department; and

(g) Fees: Pay a fee of one hundred seventy-five dollars for an initial license and a fee of one hundred seventy dollars for each triennial registration period.

N.Y. Educ. Law § 8402(3).

endorsement).[10] It appears that Brokamp has never sought a license by endorsement to practice mental health counseling in New York.

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[10] "An applicant seeking [New York] endorsement of a license in mental health counseling issued by another state, country or territory shall present evidence of:

(a) age, the applicant shall be at least 21 years of age;

(b) licensure by another jurisdiction;

(c) completion of a graduate degree in mental health counseling or a related field that at the time of completion qualified the applicant for licensure as a mental health counselor in the other jurisdiction;

(d) completion of supervised experience in mental health counseling and psychotherapy that qualified the applicant for initial licensure in the other jurisdiction;

(e) passage of an examination acceptable to the department for the practice of mental health counseling;

(f) at least five years of experience in mental health counseling satisfactory to the State Board for Mental Health Practitioners, within the 10 years immediately preceding the application for licensure by endorsement in New York;

(g) completion of coursework in the identification and reporting of suspected child abuse and neglect or the exemption from such coursework, as specified in section 6507(3) of the Education Law;

(h) good moral character as determined by the department;

III. District Court Proceedings

On April 5, 2021, Brokamp initiated this action and, on June 21, 2021, filed the amended complaint here at issue.[11] On November 22, 2021, the district court dismissed that complaint in its entirety against the individual defendants under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). *See Brokamp v. James*, 573 F. Supp. 3d at 704–06, 709–10.

The district court ruled that because Brokamp had not (1) applied for a New York mental health counselor license, (2) alleged that applying for such a license would have been futile, or (3) alleged a credible threat of prosecution for engaging in unlicensed mental health counseling, she lacked standing to bring her as-applied First Amendment and Due Process challenges to New York's licensure regime. *See id.* at 704–

(i) acceptable licensure and discipline status in each jurisdiction in which the applicant holds a professional license.

N.Y. Comp. Codes R. & Regs. tit. 8, § 79-9.7. An applicant for licensure by endorsement must also pay a $371 fee. *See License Requirements for Mental Health Counselors*, N.Y. STATE EDUC. DEP'T OFF. OF THE PROFESSIONS, https://www.op.nysed.gov/professions/mental-health-counselors/license-requirements (last accessed Apr. 25, 2023).

[11] We note that on December 9, 2020, Brokamp also initiated an action in the United States District Court for the District of Columbia challenging the District's code requirement for licensure of the "practice of professional counseling," an action still pending in that court. *See Brokamp v. District of Columbia*, No. 20-cv-3574 (D.D.C.).

06. As to her First Amendment facial challenge—which the district court construed to complain of overbreadth, *see id.* at 709—the district ordered dismissal based on Brokamp's failure to plead that New York's licensing laws would have a substantial chilling effect on protected conduct, *see id.* at 709–10.

The district court entered judgment on the same day, and Brokamp timely appealed.

DISCUSSION

I. Standard of Review

"A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court 'lacks the statutory or constitutional power to adjudicate it,' such as when . . . the plaintiff lacks constitutional standing to bring the action." *Cortlandt St. Recovery Corp. v. Hellas Telecomms., S.a.r.l.*, 790 F.3d 411, 416–17 (2d Cir. 2015) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). "On appeal from a dismissal under [Fed. R. Civ. P.] 12(b)(1), we review the court's factual findings for clear error and its legal conclusions *de novo*." *Id.* at 417; *accord Cangemi v. United States*, 13 F.4th 115, 129 (2d Cir. 2021).

A district court properly dismisses an action under Fed. R. Civ. P. 12(b)(6) when the pleadings fail to "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"Because a judgment of dismissal pursuant to Fed. R. Civ. P. 12(b)(6) can only be entered if a court determines that, as a matter of law, a plaintiff failed to state a claim upon which relief can be granted, we review that legal determination *de novo*." *Melendez v. City of New York*, 16 F.4th at 1010.

II. Standing

The Constitution limits federal courts' jurisdiction to actual cases or controversies. *See* U.S. Const. art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014), by requiring a plaintiff to "allege[] such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf," *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (internal quotation marks omitted). Thus, to plead Article III standing, a plaintiff must allege facts plausibly demonstrating "(1) an'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. at 157–58 (alteration in original) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). To satisfy the first requirement, a plaintiff must plead an injury that is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. at 560 (internal quotation marks, citations, and footnote omitted). A threatened injury

may be sufficiently imminent if it "is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. at 158 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (employing "certainly impending" standard while acknowledging cases referencing "substantial risk" standard, but declining to address possible distinction)).

A. Brokamp's Failure To Apply for a License Does Not Deprive Her of Standing

The district court found Brokamp to lack standing to pursue as-applied challenges to New York's license requirements for mental health counselors because she did not allege that she had ever applied for such a license or that such an application would have been futile. *See Brokamp v. James*, 573 F. Supp. 3d at 704–05. The district court located such an application requirement in *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091 (2d Cir. 1997). In that case, an inmate alleged religious discrimination by prison officials who denied his request to wear certain garments allegedly prescribed by his Moorish Science Temple faith, rather than standard issued clothing, when taken to attend his father's funeral. *See id.* at 1094. Prisoners have no right to wear garments of their choosing. Nevertheless, record evidence indicated that the defendant prison authorities accommodated requests to wear garments prescribed by an inmate's *registered* religion. *See id.* Jackson-Bey did not challenge the constitutionality of the registration requirement or dispute his failure to comply with it, despite opportunities to

do so. *See id.* at 1096. In those circumstances, this court concluded that Jackson-Bey lacked standing to claim religious discrimination because "any injury suffered by Jackson-Bey result[ed] from his own decision not to follow the simple procedure of registering his religion." *Id.* at 1095. It was in that context that the court noted that, "[a]s a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy" or "make[] a substantial showing that application for the benefit . . . would have been futile." *Id.* at 1096.

This case is plainly distinguishable from *Jackson-Bey* in that Brokamp is certainly challenging the constitutionality of New York's mental health counselor license requirement as an impermissible restraint on free speech. Her complaint is not that a permissible licensing requirement is being applied to her in an unconstitutional or unlawful manner. As the cases cited in *Jackson-Bey* to support the above-quoted statement show, an application requirement is apt when a party complains that he is being denied a benefit that is not itself constitutionally guaranteed—*e.g.*, a club membership, admission to a private school, a job, a parking permit—for unconstitutional (or other unlawful) reasons.[12] In those circumstances, because

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[12] In *Jackson-Bey,* this court discussed the supporting authority as follows:

> [I]n *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167–68 (1972), the Supreme Court held that an African-American who never actually applied for membership to the Moose Lodge lacked standing to challenge the club's all-white mem-

there is no legally cognizable injury until there is a denial, a party must apply for the benefit or allege that application would be futile to plead the injury element of standing.

The same conclusion does not obtain in this case. Brokamp asserts that talk therapy is speech, in which she is constitutionally entitled to engage without state limitation or license. In that circumstance, Brokamp's alleged First Amendment injury does not arise only upon application for or denial of a license. Rather, injury arises from the very fact of a licensure requirement which *presently* silences Brokamp—un-

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bership requirement. Similarly, in *Allen v. Wright*, 468 U.S. [737,] 755 [(1984)], the Court held that plaintiffs, parents of children who had never applied for admission to private schools with allegedly racially discriminatory admissions policies, had no standing to challenge the tax-exempt status of those private schools. *See also Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220 (9th Cir. 1992) (denying standing to university student who failed to apply for handicap parking permit); *Albuquerque* [*Indian Rts. v. Lujan*], 930 F.2d [49,] 57 [(D.C. Cir. 1991)] (denying standing to plaintiffs who sought to extend Indian hiring preferences to jobs for which they had never applied); *Doe v. Blum*, 729 F.2d 186, 189–90 (2d Cir. 1984) (denying standing to plaintiffs—sexually active teenagers—who never applied for and therefore were never denied desired family planning benefits); *cf. Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43 (1993) (holding that claims of immigrants who never applied for amnesty, challenging alleged mistakes made in administration of amnesty provision, were not ripe).

115 F.3d at 1096.

der pain of criminal prosecution—from engaging in the professed protected speech. Further, Brokamp maintains that the extent to which she is silenced is informed by the vagueness of the law's proscriptions. She contends that speech that she could, and did, engage in while Executive Order 202.15 was in effect has become speech that she cannot, and does not, engage in because of the challenged license requirement.

To be sure, defendants may defend against Brokamp's First Amendment and Due Process claims by demonstrating that the challenged licensure requirement passes the requisite level of constitutional scrutiny. But that goes to the merits of her claims. It is the present chilling effect of that requirement on Brokamp's speech that demonstrates actual injury sufficient for standing without need to submit a license application. *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (holding that plaintiffs pleaded Article III injury where they alleged "actual and well-founded fear that the law will be enforced against them," explaining that "alleged danger of this statute is . . . one of self-censorship; a harm that can be realized even without an actual prosecution"); *Bordell v. Gen. Elec. Co.*, 922 F.2d 1057, 1060 (2d Cir. 1991) ("[T]he fact that a plaintiff's speech has actually been chilled can establish an injury in fact").

The district court nevertheless concluded that Brokamp lacked standing because she failed to allege a credible threat of prosecution. *See Brokamp v. James*, 573 F. Supp. 3d at 705–06. That conclusion appears

to rest on the well-settled principle that a plaintiff may bring a pre-enforcement challenge to a statute by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List v. Driehaus*, 573 U.S. at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The district court reasoned that Brokamp's conceded cessation of online counseling in New York (after expiration of Executive Order 202.15) meant she was at no present risk of prosecution. *See Brokamp v. James*, 573 F. Supp. 3d at 705–06. That, however, misperceives Brokamp's burden.

The law does "not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007). That Brokamp would have faced a credible threat of prosecution if she had continued counseling New York residents after expiration of Executive Order 202.15 is evident both from the N.Y. Board's explicit communication to Brokamp that she could not lawfully continue unlicensed mental health counseling of New York residents after expiration of Executive Order 202.15, *see supra* at 7; and from caselaw demonstrating New York's prosecution of persons who practice certain professions without obtaining required licenses.[13]

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[13] *See, e.g.*, *People v. Hollander*, 177 A.D.3d 683, 113 N.Y.S.3d 712 (2d Dep't 2019) (unauthorized practice of dentistry); *People v. Mobley*, 144 A.D.3d 477, 40 N.Y.S.3d 426 (1st Dep't 2016)

Thus, contrary to the district court, we conclude that Brokamp was not required to apply for a New York mental health counselor license to demonstrate standing to pursue her as-applied First Amendment and Due Process challenges. Rather, we hold that Brokamp satisfactorily demonstrated standing by "ceas[ing]" her online counseling of New York residents "unless and until" the challenged licensing law, as applied to her, is "declared unconstitutional and the threat . . . of . . . sanctions . . . thereby removed." *Vermont Rt. to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 381–84 (2d Cir. 2000).

B. Only New York's Licensure by Endorsement Requirement Causes Brokamp Injury Supporting Standing

While we recognize Brokamp's standing generally to challenge New York's requirement that mental health counselors be licensed to practice in that state, that does not mean that she has standing to challenge "[t]he entire licensing law." Oral Arg. Tr. 2:25–3:7. As discussed *supra* at 10–11, New York provides different means for obtaining a mental health counselor license depending on whether a person is seeking an initial license or endorsement of a license already obtained in another state. Brokamp draws no distinction between the two. She does not dispute, however, that as a Virginia-licensed mental health counselor in

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(unauthorized practice of medicine); *People v. Eun Sil Jang*, 17 A.D.3d 693, 793 N.Y.S.2d 540 (2d Dep't 2005) (unauthorized practice of massage therapy).

good standing, she does not need to satisfy the many particulars of New York's initial license requirement to provide mental health counseling in that state. She need only satisfy New York's streamlined requirement for licensure by endorsement.[14] Thus, Brokamp cannot plausibly claim imminent and concrete (as opposed to hypothetical and speculative) injury from the eleven specific coursework requirements and 3,000 hours of supervised counseling demanded of applicants for initial licensure, but not required of her. She can claim imminent and concrete injury from, and therefore standing to challenge, only the endorsement part of New York's licensing regime. As the Supreme Court has observed, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *see also Davis v. FEC,* 554 U.S. 724, 733–34 (2008) ("The fact that Davis has standing to challenge § 319(b) does not necessarily mean that he also has standing to challenge the scheme of contribution limitations that applies when § 319(a) comes into play."). Thus, while Brokamp has standing to challenge New York's licensure by endorsement requirement, the

[14] Brokamp does not contend that any person already licensed as a mental health counselor in a state other than New York would seek to satisfy New York's detailed requirements for initial licensure rather than its streamlined requirements for licensure by endorsement. Thus, injury to such a party from the former requirements is hypothetical and speculative in nature. Accordingly, we need not here consider a party's standing to challenge alternative statutory requirements when either might reasonably apply.

same conclusion does not obtain for her challenges to New York's particular provisions for initial licensure. Her First Amendment and Due Process claims as to these provisions are properly dismissed.

Moreover, that dismissal properly extends to both Brokamp's as-applied and facial First Amendment challenges, without regard to whether the latter is based on overbreadth. The substantial overbreadth doctrine permits a plaintiff to plead a facial First Amendment challenge to a statute "with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Parker v. Levy*, 417 U.S. 733, 759 (1974) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965)). But that doctrine does not absolve the plaintiff of the initial obligation to plead the injury in fact required for standing. As this court has explained, "the overbreadth doctrine speaks to whose interests a plaintiff suffering Article III injury may represent. It does not provide a reason to find [personal] injury where none is present or imminently threatened in the first instance." *Hedges v. Obama*, 724 F.3d 170, 204 (2d Cir. 2013); *see also Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake. The crucial issues are whether Munson

satisfies the requirement of 'injury-in-fact,' and whether it can be expected satisfactorily to frame the issues in the case.").[15]

Because Brokamp can plead concrete injury only from New York's license-by-endorsement requirement, and not from its particular requirements for initial licensure, all claims as to the latter are properly dismissed.

III. Failure to State a Claim

A. First Amendment Claims

Brokamp contends that New York's licensing regime for mental health counselors is, both on its face

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[15] Because Brokamp here specifically disavows any overbreadth claim, this case is distinguishable from those holding that in resolving disputes as to whether a First Amendment is facial or as-applied, "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010); *accord Vermont Rt. to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 126 (2d Cir. 2014). Here, Brokamp not only disavows an overbreadth claim, she argues that it was error for the district court to construe her facial First Amendment challenge to allege overbreadth: "Because Dr. Brokamp alleges that her speech is constitutionally protected, the 'substantial overbreadth' doctrine is inapplicable." Appellant Br. 32. In these circumstances, we take Brokamp at her word, mindful both that "the party who brings a suit is master to decide what law he will rely upon," *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913), and that facial challenges are frequently pleaded with as-applied challenges simply to expand "the breadth of the remedy employed by the Court," *Citizens United v. FEC*, 558 U.S. 310, 331 (2010). That, however, does not alter "what must be pleaded in a complaint" to demonstrate standing to pursue any claim or remedy. *Id.*

and as applied, a content-based restriction on speech that cannot satisfy strict scrutiny. *See* Appellant Br. 24–38.[16] The First Amendment generally prevents government from "proscribing speech . . . because [it] disapprov[es] of the ideas expressed," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), or mandating speech because it seeks to promote particular views, *see Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 213 (2013) (reiterating "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say" (internal quotation marks omitted)). *See generally Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2354 (2020) (plurality opinion) (describing First Amendment as "a kind of Equal Protection Clause for ideas" (internal quotation marks omitted)). For this reason, "[c]ontent-based regulations are presumptively invalid" and must satisfy strict scrutiny to withstand constitutional attack. *R.A.V. v. City of St. Paul*, 505 U.S. at 382. To pass that test,

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[16] Our use of the phrase "licensing regime" should not be interpreted as a departure from our ruling that Brokamp has standing to challenge only the licensure by endorsement requirement of that regime. *See supra* at 18–20. Rather, we use the phrase simply as shorthand, recognizing that certain statutory provisions apply equally to New York's initial license and license-by-endorsement requirements. *See, e.g.*, N.Y. Educ. Law § 8402(1) (defining "mental health counseling"); *id.* § 8410 (identifying exemptions from license requirements); *id.* § 6512(1) (criminally proscribing unlicensed mental health counseling by "[a]nyone not authorized to practice under this title," regardless of license method applicable to particular person).

challenged regulations must be "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."). No exception to this principle applies for speech engaged in by professional persons subject to state licensure. *See National Inst. of Fam. & Life Advocs. ("NIFLA") v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'"); *id.* at 2375 (observing that "licensing requirement" does not give state "unfettered power to reduce a group's First Amendment rights").

Defendants submit that New York's licensing regime is content-neutral and, in fact, is directed at the *conduct* of mental health counselors, while only incidentally burdening speech. In these circumstances, they maintain that licensing requirements need satisfy only the "less stringent test" of intermediate scrutiny, *Hobbs v. County of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005), which can be satisfied by a showing that the challenged license requirement "(1) advances important governmental interests unrelated to the suppression of free speech and (2) does not burden substantially more speech than necessary to further those interests," *Cornelio v. Connecticut*, 32 F.4th 160, 171 (2d Cir. 2022) (internal quotation marks omitted). *See generally Vincenty v. Bloomberg*, 476 F.3d 74, 84 (2d Cir. 2007) (emphasizing that in-

termediate scrutiny does not demand "'least speech-restrictive means of advancing the Government's interests,'" as required for strict scrutiny (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994))). Under this standard, states have been permitted to "regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA v. Becerra*, 138 S. Ct. at 2372; *see, e.g.*, *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225– 26 (11th Cir. 2022) (upholding license requirement for nutritionists as regulation of "occupational conduct"); *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207– 08 (4th Cir. 2019) (upholding ban on corporate practice of law because the relevant "statutes [did not] target the communicative aspects of practicing law").[17]

Brokamp maintains that these professional licensing cases are inapt here because, in each, the professional engaged in at least some non-expressive conduct. She submits that mental health counseling—as

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[17] Regulation of conduct, directed not against but incidentally burdening speech, has also been upheld in other contexts because of the strong state interest in the conduct. As the Supreme Court has explained, "[t]hat is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs; why an ordinance against outdoor fires may forbid burning a flag; and why antitrust laws can prohibit agreements in restraint of trade." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (internal quotation marks and citations omitted); *see R.A.V. v. City of St. Paul*, 505 U.S. at 389 (stating that "law against treason . . . is violated by telling the enemy the Nation's defense secrets").

she practices it, using talk therapy—consists of nothing but speech. For this reason, Brokamp argues that it is "unconstitutional to require *any* license for this kind of a mental health professional." Oral Arg. Tr. 8:13–22 (emphasis added).

For purposes of reviewing the dismissal of Brokamp's First Amendment challenge to New York's licensure-by-endorsement requirement, we will assume, without deciding, that her counseling services consist only of speech without any non-verbal conduct. *Cf. Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (assuming, without deciding, that certain conduct was expressive for purposes of First Amendment claim). Thus, in deciding the appropriate level of scrutiny, we focus only on whether the licensing requirement is a content-based or content-neutral limitation on speech. For reasons we now explain, we conclude that the requirement is content neutral and, therefore, subject to intermediate rather than strict scrutiny.

1. New York's License Requirement Is Content Neutral

The Supreme Court has repeatedly emphasized the First Amendment's intolerance for content discrimination—most obviously, government censorship of controversial, unpopular, or simply disfavored viewpoints. *See, e.g.*, *Police Dep't of Chi. v. Mosley*, 408 U.S. 92 (1972). In *Mosley*, the Court invalidated a city ordinance that prohibited picketing within 150 feet of a school except for picketing involving a labor dispute, ruling that "government may not grant the use of a

forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 96. The Court explained that such content discrimination was unconstitutional because,

> above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.

Id. at 95–96 (internal quotation marks and citations omitted).

Consistent with the First Amendment's strict prohibition on content censorship, the Supreme Court in *Boos v. Barry*, 485 U.S. 312 (1988), invalidated a District of Columbia code provision that forbade "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute,'" *id.* at 315. Though the prohibition might have appeared "not viewpoint based" insofar as acceptable and unac-

ceptable viewpoints were identified "in a neutral fashion by looking to the policies of foreign governments," *id.* at 319, the Court ruled it unconstitutional, reasoning that "a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends to prohibition of public discussion of an entire topic,'" *id.* (ellipsis omitted) (quoting *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)). More recently, the Court has reiterated that "content discrimination" is constitutionally proscribed because it "'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *R.A.V. v. City of St. Paul*, 505 U.S. at 387 (quoting *Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

Applying these principles here, we conclude that New York's mental health licensing regime, particularly the licensing-by-endorsement requirement applicable to Brokamp, is not a content-based restriction on speech. Like any license requirement, the one here at issue regulates—and to that extent limits— who can use the title "mental health counselor," or "practice mental health counseling," N.Y. Educ. Law § 8402(2)—activity that, for purposes of this appeal, we presume to consist only of speech. But New York's mental health counseling license requirement does not turn on the content of what a person says. Specifically, it does not license "views it finds acceptable," while refusing to license "less favored or more controversial views." *Police Dep't of Chi. v. Mosley*, 408 U.S.

at 96. It does not condemn "certain ideas or viewpoints." *R.A.V. v. City of St. Paul*, 505 U.S. at 387 (internal quotation marks omitted). It does not "prohibit[] public discussion of an entire topic." *Boos v. Barry*, 485 U.S. at 319 (internal quotation marks omitted). Rather, New York's license requirement applies—regardless of what is said—only to speech having a particular purpose, focus, and circumstance.[18] Thus, we conclude that New York's license-by-endorsement requirement is not content based, but rather content neutral.

That conclusion finds support in the rulings of our sister circuits, notably, *National Association for Advancement of Psychoanalysts v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP v. Cal. Bd.*"), and *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020).

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[18] *See supra* at 8–9 (discussing statutory definition of "mental health counseling"). We note that in Brokamp's challenge to the District of Columbia code requirement for licensure of the practice of professional counseling, the district court, in a minute order denying dismissal of her First Amendment claim, ruled that the D.C. code "is . . . 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." *See Brokamp v. District of Columbia*, No. 20-cv-3574, Minute Order (D.D.C. Mar. 7, 2022). We need not decide whether we agree with this conclusion about the D.C. code because we consider only New York's license laws. For reasons discussed in text, we conclude that New York's license requirement depends not on any topic that a counselor may discuss with a client, but on the purpose, focus, and circumstance of any discussion.

In *NAAP*, psychoanalysts challenged California's psychologist licensing requirement on First and Fourteenth Amendment grounds. Like the challenged New York law, a California law required license applicants to satisfy educational, experiential, and examination requirements. *See* 228 F.3d at 1046–47. In rejecting the psychoanalysts' First Amendment challenge, the Ninth Circuit ruled that California's license requirement was a content-neutral exercise of the state's police power, explaining that "California's mental health licensing laws . . . do not dictate *what can be said* between psychologists and patients during treatment," *id.* at 1055 (emphasis added); they "merely determine[] who is qualified as a mental health professional," *id.* at 1056. The same conclusion obtains here. New York's license-by-endorsement requirement determines what persons, already licensed by another state to provide mental health counseling, can provide such counseling in New York upon a less detailed showing of competency than that required by the state's initial licensure procedure. The license-by-endorsement requirement does not "dictate what can be said" between a mental health counselor and client; it merely determines "who is qualified" as a mental health counseling professional. *Id.* at 1055–56.

In *Otto*, the Eleventh Circuit struck down as content-based restrictions on speech a pair of ordinances prohibiting talk therapy practices designed to change a minor's sexual orientation or gender identity (practices more commonly known as "conversion therapy"). *See* 981 F.3d at 859. The court there explained that, under the challenged ordinances,

> [w]hether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it. And whether the government's disagreement is for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the ordinances based solely on its content.

Id. at 863. By contrast to these ordinances, which were "based solely on [the] content" of a therapist's speech to a minor client, *id.*, the licensing requirements in this case do not depend on anything that is said between a counselor and a client seeking mental health care. What matters is that—whatever is said—the speech (1) have a therapeutic purpose, (2) relating to a mental disorder or problem, (3) in the context of a professional practice or organized setting. *See supra* at 8–9. Brokamp may disagree with New York's determination that mental health counselors licensed in other states, such as herself, must make some (streamlined) showing of competency to be licensed to treat New York residents. But that does not alter the fact that New York's license-by-endorsement requirement for such counselors places no limits or conditions on what a licensed counselor may hear and say in providing mental health counseling. Thus, like the license requirement in *NAAP*, and unlike the ordi-

nances at issue in *Otto*, New York's license-by-endorsement requirement is content neutral.[19]

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[19] A trio of Supreme Court cases identifying content-based restrictions on speech are also distinguishable from this case and, thus, further support our conclusion that the licensing requirement here at issue is content neutral. Insofar as New York's license requirement does not depend on the topics discussed between counselor and client, this case is not akin to *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. at 2347 (striking down government-debt exception to federal restriction on robocalls to cell phones as content-based restriction on speech because "law here focuses on whether the caller is speaking about a particular topic" (emphasis omitted)). Its singular concern is on whether the counselor purports to be speaking for a therapeutic purpose in order to treat a condition of the psyche in a professional context. Nor does New York mandate that a licensed counselor provide any information or convey any message when treating a client, distinguishing this case from *NIFLA v. Becerra*, 138 S. Ct. at 2371 (holding California statute requiring licensed clinics to notify women that state provides free or low-cost health care services, including abortions, is "content-based regulation of speech" because "[b]y compelling individuals to speak a particular message, such notices alter the content of their speech" (brackets and internal quotation marks omitted)). Further, New York imposes criminal penalties only for providing mental health counseling without a license; the content of that counseling is irrelevant. *Cf. Holder v. Humanitarian L. Project*, 561 U.S. 1, 8–9, 27 (2010) (ruling that statute criminalizing provision of material support for foreign terrorist organizations, including by providing "expert advice or assistance," "regulates speech on the basis of its content" because "[p]laintiffs want to speak to [two groups designated as foreign terrorist organizations], and whether they may do so under [the statute] depends on what they say[;] [i]f plaintiffs' speech to those groups imparts a 'specific skill' or communicates advice derived from 'specialized knowledge' . . . then it is barred [whereas] plaintiffs' speech is

In urging otherwise, Brokamp relies on *Reed v. Town of Gilbert*, 576 U.S. 155. In that case, a church and its pastor raised a First Amendment challenge to a town code prohibiting the display of outdoor signs anywhere in the town without a permit but providing for 23 exemptions, each of which was subject to different restrictions. *See id.* at 159. Among these were exemptions for "Ideological Signs," "Political Signs," and "Temporary Directional Signs Relating to a Qualifying Event." *Id.* at 159–60 (brackets omitted). The Supreme Court ruled that the sign code was a content-based restriction on speech because its application to any particular sign "depend[ed] entirely on the communicative content of the sign." *Id.* at 164.[20] The Court explained:

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to

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not barred if it imparts only general or unspecialized knowledge" (internal quotation marks omitted)).

[20] The Court illustrated with a hypothetical: "If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view in Locke's theory of government." *Reed v. Town of Gilbert*, 576 U.S. at 164.

> consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Id. at 163–64 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).

Brokamp argues that "[t]he 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." Appellant Br. 29. She submits that New York law requires such an examination of content because the law "defines the type of speech that requires a license both in terms of its 'subject matter' and its 'function or purpose.'" *Id.* at 30 (quoting *Reed v. Town of Gilbert*, 576 U.S. at 163–64). Like the Seventh Circuit, we cannot construe *Reed* as Brokamp urges because the Supreme Court specifically disavowed that construction last term in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464 (2022). *See GEFT Outdoor, LLC v. City of Westfield*, 39 F.4th 821, 825 (7th Cir. 2022) (observing that, in *City of Austin*, Supreme Court "altogether rejected [idea] that a need-to-read requirement" to determine whether communication falls within statu-

tory prohibition "necessarily shows regulation based on the content of speech").

In *City of Austin*, a pair of companies that owned outdoor billboards raised a First Amendment challenge to a municipal sign code that distinguished between on-premises signs (*i.e.*, signs advertising products or services offered on the same premises as the signs) and off-premises signs (*i.e.*, signs advertising products or services not available on the same premises or directing people to other locations) in more strictly limiting the latter. *See* 142 S. Ct. at 1468–70. In ruling for the billboard owners, the Fifth Circuit construed *Reed*, as Brokamp here urges, "to mean that if 'a reader must ask[,] who is the speaker and what is the speaker saying' to apply a regulation, then the regulation is automatically content based." *Id.* at 1471 (brackets omitted) (quoting *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin*, 972 F.3d 696, 706 (5th Cir. 2020)). The Supreme Court reversed, characterizing the quoted language from the Fifth Circuit as "too extreme an interpretation" of *Reed*. *Id.* The Supreme Court concluded that the Austin sign code presented no facial First Amendment violation because, while enforcement of the challenged code required "reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location," the law did "not single out any topic or subject matter for differential treatment." *Id.* at 1472.

Of particular relevance here, the Supreme Court clarified that *Reed*'s "function or purpose" language

did not upset well-settled precedent that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473–74. It explained that "a regulation of speech cannot escape classification as facially content based simply by swapping an obvious subject-matter distinction for a 'function or purpose' proxy that achieves the same result." *Id.* at 1474. But "[t]hat does not mean that any classification that considers function or purpose is *always* content based." *Id.* (emphasis in original).

The four dissenting justices in *City of Austin* did not take exception to this last statement, much less urge, as Brokamp does here, that *any* function or purpose classification is *necessarily* content based. Rather, the dissenters appear to have questioned the majority's conclusion that the particular classifications drawn by the Austin sign code did not depend on the message conveyed. *See id.* at 1481–84 (Thomas, *J.*, with Gorsuch, Barrett, *JJ.*, dissenting) (stating that "per *Reed*, it does not matter that Austin's code defines regulated speech by its function or purpose[;] . . . all that matters is that the regulation draws distinctions based on a sign's communicative content, which the off-premises restriction plainly does" (brackets and internal quotation marks omitted)); *see also id.* at 1480 (Alito, *J.*, concurring in part and dissenting in part) (rejecting majority's "categorical" statement that challenged code provision did "not discriminate on the basis of the topic discussed or the idea or message expressed" (internal quotation marks omitted)). To illustrate its concern, the dissent offered hypotheticals suggesting that Austin enforcing offi-

cials would have to know not only "*where* the sign is" located, but also "*what* the sign says" to determine if there was a violation of law. *Id.* at 1484 (Thomas, *J.*, dissenting) (emphasis in original) (distinguishing between sign on Catholic bookstore's premises saying "'Visit the Holy Land,'" which dissent deemed "likely an off-premises sign because it conveys a message directing people elsewhere (unless the name of the bookstore is 'Holy Land Books')" and sign saying "'Buy More Books,'" which it deemed "likely a permissible on-premises sign (unless the sign also contains the address of another bookstore across town)").

The license requirement here raises no concerns akin to those presented by these hypotheticals. New York law does not condition its mental health licensing requirement on the topics or subject matters discussed. Indeed, for purposes of licensure, it matters not at all whether a counselor speaks to a client about personal relationships, professional anxieties, medical challenges, world events, planned travel, hobbies, sports, favorite movies, or any other subject. All that matters is that the conversations be for one of the statutorily identified therapeutic purposes, in addressing a mental disorder or problem, in the context of a private practice, group, or organized setting.[21]

Thus, we conclude that New York's mental health counseling license requirement is content neutral,

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[21] This conclusion obtains with particular force to Brokamp, who holds herself out as acting with a therapeutic purpose to address mental health problems in the context of her private Nova Terra Therapy practice. *See supra* at 6.

and we apply intermediate, rather than strict, scrutiny in deciding whether Brokamp's First Amendment challenge was correctly dismissed for failure to state a claim.

2. Application of Intermediate Scrutiny

To defeat Brokamp's claim that New York's license-by-endorsement requirement impermissibly limits speech—even in a content-neutral way—it is defendants' burden to demonstrate that the requirement withstands intermediate scrutiny, *i.e.*, that it "(1) advances important governmental interests unrelated to the suppression of free speech and (2) does not burden substantially more speech than necessary to further those interests." *Cornelio v. Connecticut*, 32 F.4th at 171 (internal quotation marks omitted). To make the first showing, defendants must do more than demonstrate that "'the recited harms are real, not merely conjectural'"; they must show "'that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. at 664). "To establish that the law does not burden substantially more speech than necessary, the government must demonstrate that the law is 'narrowly tailored' to serve the relevant interest." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989)). Because the intermediate scrutiny burden will frequently require the government to "identify evidence—or, at least, provide sound reasoning that draws reasonable inferences based on substantial evidence," courts will generally "wait until the summary judgment stage of the litigation" to

determine if the burden has been carried as a matter of law. *Id.* at 172 (brackets and internal quotation marks omitted). Nevertheless, in some circumstances, the determination can be made on a motion to dismiss. *See, e.g.*, *Citizens United v. Schneiderman*, 882 F.3d 374, 380–85 (2d Cir. 2018) (affirming judgment of dismissal upon district court determination that challenged New York regulations of charitable organizations withstood intermediate scrutiny). This is such a case.

a. Advances Important State Interest in Public Health

Brokamp does not seriously dispute that New York's license requirement addresses an important government interest, *i.e.*, promoting and protecting public health, specifically, mental health. As her counsel stated at oral argument: "[W]e don't really dispute that [the challenged licensure] involves the health of New Yorkers." Oral Arg. Tr. 5:16–17 (arguing that point in dispute was tailoring). This appears to abandon the assertion made in Brokamp's brief that New York "has not actually said what harm it believes it is combatting with its licensing law." Appellant Br. 36. In any event, the record is to the contrary.

Defendants have detailed at length findings made by the New York State legislature, and contemporaneously memorialized in the enactment record, that (1) mental health counseling "affects the public safety and welfare"; and (2) there is a demonstrated need (a) "to protect the public from unprofessional, improper,

unauthorized and unqualified practice of [mental health] counseling and psychotherapy"; (b) "to protect both the mental health profession and the public by clearly defining the scope of practice of the profession of mental health counselor"; and (c) "to increase access to vital mental health services from recognized professionals." Appellees Br. 39–43 (internal quotation marks omitted); *see Goe v. Zucker*, 43 F.4th 19, 29 (2d Cir. 2022) (recognizing that, in considering state interest in vaccination mandate challenged as unconstitutional, "courts may take judicial notice of legislative history" (citing *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226–27 (1959)).[22]

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[22] Defendants support the quoted text with citations to 2002 N.Y. Sess. Laws ch. 676, § 7, N.Y. Educ. Law §§ 6509–6511, as well as to various materials included in the licensure legislation's Bill Jacket. *See Vatore v. Comm'r of Consumer Affs.*, 83 N.Y.2d 645, 651 (1994) (referencing bill jacket in observing that "contemporaneous interpretation of a statute is entitled to considerable weight in discerning legislative intent" (internal quotation marks omitted)); *accord Doe v. Pataki*, 120 F.3d 1263, 1277 (2d Cir. 1997). The latter included letters from academicians, mental health and counseling associations, and other entities providing mental health services (*e.g.*, American Red Cross), *see* Bill Jacket for L.2002, ch. 676, at 17–40, citing anecdotal and statistical evidence "that patients can suffer significant, traumatic damage at the hands of mental health professionals who are unscrupulous, unethical, or untrained," *id.* at 29, 36; and emphasizing the value of a uniform credential that could be recognized by institutions and insurers, *id.* at 21, 32, 77. It included a Sponsor Letter indicating that the licensure legislation was intended to "ensure that those professionals offering services identified in their scope of practice have met the education, experience, and examination requirements established by law" and to increase access to mental health services from recognized professionals. *Id.* at 3. It in-

The Supreme Court has long recognized the states' strong interest in protecting public health "against the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). On this basis, the Court in *Dent* unanimously rejected the argument that a state certification requirement to practice medicine violated the Due Process right to pursue a profession. The Court explained that while everyone may at some time have occasion to consult a physician,

> comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who

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cluded a Budget Report, *see id.* at 5–7, concluding that licensing requirements would protect persons seeking mental health care from "exploitation by incompetent, unqualified and fraudulent practitioners," and that standards for licensure would "raise the quality of mental health services available in the State," *id.* at 6; as well as a State Education Department Recommendation, *see id.* at 8–12, advising that the legislation's "entry standards" and the department's ability to discipline counselors who failed to comply with these standards would ensure "substantially increased public protection" consistent with standards "refined over a period of years" by the mental health counseling profession, *id.* at 11.

> are found upon examination not to be fully qualified.

Id. at 122–23. [23]The Supreme Court has extended this reasoning to health professionals other than physicians. *See, e.g.*, *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) ("That the state may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. The state may thus afford protection against ignorance, incapacity[,] and imposition." (citations omitted)). Indeed, the Court has observed that a state's "broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there" extends "naturally to the regulation of *all* professions concerned with health." *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) (emphasis added).[24] As noted *supra* at Note 6, at present, all fifty states, the District of Columbia, and

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[23] Brokamp herself appears to recognize the value of a license to persons seeking health care from competent and ethical practitioners. As noted earlier, in her promotional materials, the first thing she says about herself is that she is a "*licensed* professional." *See* NOVA TERRA THERAPY, *supra* at 6 (emphasis added).

[24] This case thus does not raise concerns about over-licensing professions involving less apparent state interests than public health. *See, e.g.*, Claudia E. Haupt, *Licensing Knowledge*, 72 VAND. L. REV. 501, 515–24 (2019); *see generally* David E. Bernstein, *The Due Process Right To Pursue a Lawful Occupation: A Brighter Future Ahead?*, 126 YALE L.J.F. 287 (2016).

Puerto Rico have established licensure standards for mental health counselors.

Thus, at the first step of intermediate scrutiny, we conclude as a matter of law that New York's license requirement for mental health counselors both (1) addresses a significant state interest in safeguarding and promoting public health, and (2) does so in a way—licensure based on specified standards of education, experience, and testing—long recognized by the Supreme Court directly and materially to alleviate concerns about ignorant, incompetent, and/or deceptive health care providers.

In urging against the second of these findings, Brokamp points to the numerous statutory exemptions from New York's license requirements for mental health counselors, which she submits "necessarily allow whatever harm the State supposedly wants to prevent." Appellant Br. 34. But, as Brokamp herself acknowledges, underinclusiveness does not necessarily mean that a statute fails the government-interest prong of intermediate scrutiny. *See id.* at 37. Precedent has long held that laws need not address all aspects of a problem to pass scrutiny. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) (observing, in context of First Amendment strict scrutiny, "[t]his Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it"). Nevertheless, to the extent underinclusiveness might bear on intermediate scrutiny, *cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015) (ob-

serving that underinclusiveness can "raise[] a red flag" as to whether law advances "compelling interest" required for strict scrutiny); *see also Trans Union Corp. v. FTC*, 267 F.3d 1138, 1143 (D.C. Cir. 2001) (stating, in applying intermediate scrutiny, that "[u]nderinclusiveness analysis ensures that the proffered state interest actually underlies the law, so a rule is struck for *under*inclusiveness only if it cannot fairly be said to advance any genuinely substantial government interest" (brackets and internal quotation marks omitted)), the exemptions here at issue raise no colorable claim as to the license requirement's direct and material alleviation of public health concerns.

In general, the exemptions stated in N.Y. Educ. Law § 8410 identify persons acting in circumstances reducing the risk of incompetent or deceptive counseling. These include persons already licensed in a related health field such as licensed physicians, physician's assistants, registered professional nurses, nurse practitioners, psychologists, master social workers, clinical social workers, and behavior analysts. *See* N.Y. Educ. Law § 8410(1). Such persons need not obtain a further license to provide what New York defines as mental health counseling provided that they do not represent themselves as "licensed mental health counselor[s]." *Id.* An exemption also pertains to persons already licensed or credentialed in other fields—attorneys, rape crisis counselors, and alcohol and substance abuse counselors—but only insofar as they may provide counseling "within their respective established authorities." *Id.* § 8410(2). These

two exemptions effectively acknowledge the reality that mental health issues can arise in various professional contexts and reflect a legislative judgment that other professional licenses provide a sufficient safeguard against incompetent or deceptive practices, at least when the professional refrains from holding himself out as a "licensed mental health counselor" or limits his discussions to the scope of his licensed authority. Other exemptions, applying to persons training in a state-approved educational program or acting through, with, or at the direction of an otherwise duly licensed counselor, *see id.* § 8410(3), (7), (8), similarly present circumstances thought to present reduced risks of incompetent or deceptive counseling. As for the exemption afforded members of the clergy, to the extent they provide "pastoral counseling services . . . within the context of [their] ministerial charge or obligation," *id.* § 8410(4), this avoids any possible infringement of First Amendment religion rights.

Brokamp does not suggest otherwise. Instead, she focuses her exemption argument largely on § 8410(5), which says that New York's license requirement does not "[p]rohibit or limit individuals, churches, schools, teachers, organizations, or not-for-profit businesses[] from providing instruction, advice, support, encouragement, or information" to others. To the extent this assures relatives, friends, teachers, church groups, and support organizations such as the Salvation Army, the Red Cross, and Alcoholics Anonymous that they can offer instruction, advice, support, encouragement, and information without a mental health counselor license, New York could reasonably conclude

that the benefits of such interactions sufficiently outweigh the risks to public health as to be excused from license requirements. *See generally Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (recognizing state police power to embrace "reasonable regulations" to protect public health, "mode or manner" of which "is within the discretion of the state, subject . . . to the condition that no rule prescribed by a state . . . shall contravene the Constitution of the United States").

In urging otherwise, Brokamp submits that the exemption can reach such a wide variety of persons—"life coaches, mentors, and self-help gurus"—as to risk the very harm that New York purportedly wants to prevent. Appellant Br. 42 (internal quotation marks omitted). Brokamp's concern is overstated. The license requirement would still reach such persons, however they characterized themselves, if they spoke to others for a therapeutic purpose pertaining to a mental disorder or problem in the particular circumstances specified in the definition of mental health counseling.

In sum, Brokamp's complaint has not plausibly alleged that New York's exemptions from its license requirements for mental health counselors belie a conclusion that those requirements serve a significant state interest in protecting public mental health by directly and materially alleviating concerns about incompetent and deceptive counselors.

b. Tailoring

In arguing at the second step of intermediate scrutiny that defendants have not carried their tailoring burden, Brokamp reiterates certain points already addressed: (1) New York's expansive definition of mental health counseling means that its licensing requirements burden substantially more speech than necessary to further the state's interest in protecting public health, and (2) numerous license exemptions in fact allow the very harms that the state purportedly seeks to prevent. Further, she submits that this tailoring defect is particularly apparent in the application of New York's license requirement to her because, by virtue of Brokamp's Virginia license, extensive education and experience, and satisfactory unlicensed counseling in New York during the pandemic, it is plain that she poses no threat to public health. Neither argument persuades.

We have already detailed how New York's four-part definition of "the profession of mental health counseling" limits the speech requiring a mental health counselor license to that (1) engaged in for a therapeutic purpose, (2) focused on a disorder or problem of the psyche, and (3) given in the particular circumstances of a private practice, group, or otherwise organized setting. *See supra* at 8–9. These limits serve to tailor the license requirement to those circumstances where persons are most likely to present as professional mental health counselors in order to gain client trust and, thus, where there is a state interest in minimizing the risks incompetence or deception pose to public health.

At the same time, statutory exemptions serve to ensure that even speech qualifying as mental health counseling is not unduly burdened with a mental health counselor license requirement. Thus, as detailed more fully *supra* at 35–36, no mental health counselor license is required for persons already holding other New York health care licenses, nor for persons licensed in other specified professions, to the extent such persons provide counseling only within their licensed authorities or do not hold themselves out as mental health counselors. No license requirement is imposed on members of the clergy, or on students or persons working in state-approved programs or under the supervision or direction of licensed mental health counselors. No license is required for individuals, churches, schools, teachers, organizations, or not-for-profit businesses providing instruction, advice, support, encouragement, or information to others. Brokamp submits that mental health counseling often involves "instruction, advice, support, encouragement, or information." Appellant Br. 36 (internal quotation marks omitted). We expect that is so, but to constitute mental health counseling requiring a license, the instruction, advice, support, etc., must be more than empathetic. It must be given for a statutorily identified therapeutic purpose, in order to address a disorder or problem of the psyche, in private practice, group, or organized settings. *See* N.Y. Educ. Law § 8402(1)(a).

Thus, from the statutory definition of "mental health counseling" together with the statutory exemptions, we can conclude that the law is sufficiently

tailored to ensure that its licensing requirement does not burden more speech than necessary to allow the state to protect residents against incompetent and deceptive mental health counselors. *See Cornelio v. Connecticut*, 32 F.4th at 171.

Nor is a different conclusion warranted in Brokamp's particular case. As noted *supra* at 10–11, to provide mental health counseling services to New York residents, she need satisfy only the state's license-by-endorsement requirement, not the more detailed showing for initial licensure. This streamlined endorsement procedure itself tailors the licensing statute to avoid an undue burden on the speech of counselors, such as Brokamp, already licensed and in good standing in another state. Insofar as Brokamp might be understood to complain that even a license-by-endorsement requirement fails intermediate scrutiny, her argument falls short because New York's interest in protecting its residents from incompetent or deceptive counselors warrants the state ensuring, at a minimum, that persons really are licensed and in good standing in another state before exempting them from the state's initial license requirement. Similarly, requiring a showing that the out-of-state license was obtained by satisfying educational, experiential, and testing requirements comparable to New York's is sufficiently tailored to the state's public health interest to avoid unduly burdening First Amendment rights. Indeed, it appears that Brokamp can easily make this showing such that it is not seriously burdensome as applied to her. *See supra* at 5–6. As for New York's requirement that license-by-endorsement

applicants (as well as initial applicants) complete a course in the identification of child abuse, Brokamp raises no specific First Amendment tailoring challenge to this requirement, which is, in any event, tailored to yet a further state interest—this one implicating criminal law as well as public health—*i.e.*, maximizing the identification and prevention of abuse against particularly vulnerable victims: children.[25] Finally, no colorable claim of undue burden is raised by the $371 fee for licensure by endorsement. Although higher than the $175 fee for initial licensure, Brokamp does not allege that this fee is unreasonable to cover administrative costs in connection with confirming that a person seeking license by endorsement holds an out-of-state license, obtained that license by satisfying requirements comparable to New York's, and is in good standing. *See American Entertainers, LLC v. City of Rocky Mount*, 888 F.3d 707, 711 (4th Cir. 2018) (holding that "'ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity'" (quoting *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 274 F.3d 377, 395 (6th Cir. 2001))).

In sum, because licensure by endorsement is the only requirement that Brokamp must satisfy to pro-

[25] New York enlists a variety of professionals in this endeavor. *See* N.Y. Soc. Serv. Law § 413(1)(a).

vide mental health counseling services to New York residents and because that requirement, insofar as it affects speech, survives intermediate scrutiny both on its face and as applied, Brokamp fails to state a First Amendment claim for which relief can be granted.

B. Vagueness Claims[26]

A statute is unconstitutionally vague in violation of the Due Process Clause if it (1) "fails to provide a person of ordinary intelligence fair notice of what is prohibited," or (2) "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 18 (2010) (internal quotation marks omitted); *see Melendez v. City of New York*, 16 F.4th at 1015. Vagueness review is heightened when, as here, a challenged statute pertains to speech protected by the First Amendment. *See Holder v. Humanitarian L. Project*, 561 U.S. at 19. Nevertheless, to the extent Brokamp complains that New York's license requirement is unconstitutionally vague both on its face and as applied to her, we first consider her as-applied challenge because a "'plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id.* at 20 (brackets omitted) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*,

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[26] In her reply brief, Brokamp specifically disavows a Fourteenth Amendment vagueness claim, insisting that her claim is that "the licensing law is unconstitutionally vague *under the First Amendment*." Appellant Reply Br. 28 (emphasis in original). However, the Supreme Court has explained that "[v]agueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause." *United States v. Williams*, 553 U.S. 285, 304 (2008). Cognizant of our duty to read the pleadings in the light most favorable to Brokamp, we will interpret Brokamp's vagueness claims as brought under the Fourteenth Amendment.

455 U.S. 489, 495 (1982)). [27] "That rule makes no exception for conduct in the form of speech." *Id.*[28]

1. As-Applied Vagueness Claim

Brokamp argues that New York's mental health counselor license requirement is unconstitutionally vague because it effectively "both prohibits and permits the exact same conduct." Appellant Br. 39. To support this argument, Brokamp cites that phrase in the statutory definition of "mental health counseling" specifying the purpose for which "verbal methods" must be used to warrant licensing, *i.e.*, "evaluation, assessment, amelioration, treatment, modification, or

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[27] While Brokamp's vagueness claim, pleaded by frequent references to her by name, *see* Compl. ¶¶ 105– 12, might be construed, as the district court did, to allege an as-applied vagueness challenge, because she argues on appeal that "*nobody* can tell what speech is covered by the law," Appellant Br. 39 n.3 (emphasis in original), we assume that she wishes to pursue a vagueness challenge both facially and as applied and that Brokamp's complaint is properly read to address both challenges. Nevertheless, as we explain in text, the failure of Brokamp's as-applied challenge necessarily defeats her facial challenge.

[28] As the Supreme Court has explained, a plaintiff whose vagueness challenge is "based on the speech of others . . . may have a valid overbreadth claim under the First Amendment, but our precedents make clear that a [Due Process] vagueness challenge does not turn on whether a law applies to a substantial amount of protected expression." *Holder v. Humanitarian L. Project*, 561 U.S. at 20 (stating that, otherwise, vagueness and overbreadth doctrines "would be substantially redundant"). As noted *supra* at Note 15, Brokamp specifically disavows an overbreadth claim in this case.

adjustment." N.Y. Educ. Law § 8402(1)(a). She submits that this is coterminous with the statutory exemption from licensure for "instruction, advice, support, encouragement, or information." *Id.* § 8410(5). For the same reason we rejected this argument as a matter of law when advanced to challenge dismissal of Brokamp's First Amendment claims, *see supra* at 35–37, we reject it as a matter of law as advanced to challenge dismissal of Brokamp's vagueness claim. The quoted definitional phrase is particular, referencing speech used for a therapeutic purpose, having a prescribed focus, and occurring in a particular circumstance. Thus, while a mental health counselor may provide "instruction, advice, support, encouragement, or information" to clients, the statutory definition of mental health counseling serves clear notice that it is only when the counselor does so (1) for therapeutic purposes of "evaluation, assessment, amelioration, treatment, modification, or adjustment," (2) focused on a mental "disability, problem, or disorder," and (3) in the context of "private practice, group, or organized settings" that a mental health counselor license is required. Meanwhile, the exception serves notice that absent such prescribed purposes, foci, or circumstances, there is no limit placed on the ability to provide "instruction, advice, support, encouragement, or information" to others.[29]

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[29] This makes implausible Brokamp's pleading that "life coaches, self-help gurus, mentors, religious leaders, or even close friends . . . routinely offer[] advice that falls within the legal definition of 'mental health counseling.'" Compl. ¶ 96.

Here, there can be no question that Brokamp's professional talk therapy practice falls squarely within this statutory definition of mental health counseling requiring licensure and that both she and enforcement authorities so understood. In her promotional materials to clients, Brokamp describes herself as "a licensed professional counselor"—a reference to her Virginia mental health counselor license. *See* NOVA TERRA THERAPY, *supra* at 6. In short, she recognizes that she is no mere life coach, mentor, or self-help guru, but a professional mental health counselor. Further, her promotional materials state that she can provide "relief from trauma, stress, grief, and anxiety using CBT [cognitive behavioral therapy] and other research-supported counseling approaches." *Id.* "Relief" promises more than the "instruction, advice, support, encouragement, or information" that N.Y. Educ. Law § 8410(5) exempts from licensure. Rather, "relief" promises "amelioration," or at least "modification, or adjustment": the therapeutic purposes New York uses to define mental health counseling requiring licensure. N.Y. Educ. Law § 8402(1)(a). Further, what Brokamp promises relief from is "trauma, stress, grief, and anxiety," *id.*, which as a person with two graduate degrees in mental health counseling and two decades of mental health counseling experience and licensure, she would know can reflect a mental "disability, problem, or disorder," the statutorily prescribed focus of mental health counseling. Indeed, that conclusion is reinforced by Brokamp's representation that, in obtaining such relief for clients, she uses professional counseling methods: CBT—a widely used form of psychotherapy, *see Cognitive Behavior-*

al Therapy, MAYO CLINIC, https:// www.mayoclinic.org/tests-procedures/cognitive-behavioral-therapy/about/pac- 20384610 (last accessed Apr. 25, 2023)—as well as "other research-supported counseling approaches," NOVA TERRA THERAPY, *supra* at 6. Finally, Brokamp only provides such counseling in the context of her private practice, *see id.*, a factor further bringing her work squarely within New York's definition of "mental health counseling" requiring licensure, *see* N.Y. Educ. Law § 8402(1)(a).

Given these undisputed facts, it is no surprise that, in her Complaint, Brokamp herself acknowledges that her "teletherapy conversations with her clients constitute 'mental health counseling' under New York law because they include the 'assessment' and 'amelioration' of 'problem[s] or disorder[s] [of] behavior, character, development, emotion, personality or relationships.'" Compl.¶ 33 (alterations in original). Further, Brokamp had notice that her practice constituted "mental health counseling" when the N.Y. Board confirmed as much to her via email. *See id.* ¶ 38; *see supra* at 7. Thus, there is no colorable claim as to Brokamp having notice that the services she offers clients are mental health counseling subject to New York's license requirement.

For much the same reasons that Brokamp had notice that her counseling falls squarely within New York's definition of mental health counseling requiring licensure, so did state enforcement authorities. *See Farrell v. Burke*, 449 F.3d 470, 493–94 (2d Cir. 2006) (Sotomayor, *J.*) (observing that where party's

conduct falls "so squarely in the core" of statute, "no reasonable enforcing officer could doubt the law's application in the circumstances"). That is evident from the fact that when Brokamp inquired of the N.Y. Board whether she could continue providing unlicensed counseling to New York residents after expiration of Executive Order 202.15, the N.Y. Board promptly told her that she could not. *See* Compl.¶ 38.

Thus, Brokamp's as-applied vagueness challenge was properly dismissed for failure to state a claim.

2. Facial Vagueness Claim

Our ruling that Brokamp has failed to state an as-applied vagueness claim is fatal to her facial vagueness challenge. As this court has observed, "[a] facial vagueness challenge will succeed only when the challenged law can never be validly applied." *Vermont Rt. to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128 (2d Cir. 2014). That is because a party pursuing a facial challenge must plausibly allege that a legal requirement is "vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. Such a provision simply has *no* core." *Village of Hoffman Estates v. Flipside, Hoffman Ests., Inc.*, 455 U.S. at 495 n.7 (emphasis in original) (internal quotation marks and citation omitted). For reasons already discussed, New York's definition of "mental health counseling" provides a counseling "core" subject to licensure, which is here recognized by both Brokamp and the relevant state enforcement authority to apply to

her counseling practice. Thus, Brokamp cannot plausibly plead that New York's license requirement is unconstitutionally vague, either facially or as applied.

CONCLUSION

To summarize,

1. As to standing,

    a. Because Brokamp plausibly alleges that New York's prohibition of unlicensed mental health counseling—under threat of criminal prosecution—by itself chills her from engaging in First Amendment-protected speech, she need not apply for a license to plead injury sufficient for standing.

    b. Because New York allows Brokamp, a Virginia-licensed mental health counselor, to satisfy New York's streamlined process for licensure by endorsement, she can claim injury from, and therefore has standing to challenge, that part of New York's license requirement.

    c. Because Brokamp need not satisfy the particular requirements for initial licensure to provide mental health counseling to New York residents, she can allege no injury from, and therefore has no standing to challenge, that part of the law. To that extent her claims are properly dis-

missed for lack of jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

2. As to Brokamp's First Amendment claims,

   a. Assuming that New York's mental health counselor license requirement limits speech unrelated to conduct, the requirement is nevertheless subject to intermediate, not strict, scrutiny because the limitation, although defined in part by purpose and function, is nevertheless content neutral.

   b. New York's license requirement withstands intermediate scrutiny as a matter of law because there is no question that the law (i) serves an important government interest in promoting and protecting public health, specifically, public mental health; and (ii) is narrowly tailored by statutory definition and exemptions to advance that interest without unduly burdening speech. Thus, her First Amendment claims are properly dismissed for failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).

3. As to vagueness, because Brokamp fails plausibly to plead that New York's license requirement is unconstitutionally vague as applied to her, both her facial and as-applied Due Process claims are properly dismissed. *See id.*

Accordingly, for the reasons stated in this opinion, we **AFFIRM** the judgment dismissing plaintiff's claims in their entirety.

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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ELIZABETH BROKAMP,

Plaintiff,

v. No. 1:21-cv-00389-DNH-ATB

LETITIA JAMES; BETTY ROSA; NEW YORK STATE EDUCATION DEPARTMENT BOARD OF REGENTS; NEW YORK STATE BOARD OF MENTAL HEALTH PRACTITIONERS; and THOMAS BIGLIN, HELENA BOERSMA, SARGAM JAIN, REE JONES, SUSAN L. BOXER KAPPEL, SARA LIN FRIEDMAN MCMULLIAN, RODNEY MEANS, TIMOTHY MOONEY, ANGELA MUSOLINO, MICHELE LANDERS MEYER, NATALIE Z. RICCIO, HOLLY VOLLINK-LENT, JILL R. WELDUM, SUSAN WHEELER WEEKS,

Defendants.

- -

APPEARANCES: OF COUNSEL:

INSTITUTE FOR JUSTICE
Attorneys for Plaintiffs

JEFFREY REDFERN, ESQ.
ROBERT JOHNSON, ESQ.
ROBERT McNAMARA, ESQ.
ALAN J. PIERCE, ESQ.

Appendix B

901 N. Glebe Road,
Suite 900
Arlington, Va 22203

HON. LETITIA JAMES
Attorney General for the
State of New York
Attorneys for Defendants
The Capitol
Albany, New York 12224

MARK G. MITCHELL,
ESQ.
Ass't Attorney General

DAVID N. HURD
United States District Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

Plaintiff Elizabeth Brokamp ("Brokamp" or "plaintiff") brings this action against defendants Letitia James, in her official capacity as Attorney General of the State of New York (the "Attorney General"), Betty Rosa, in her official capacity as the New York State Commissioner of Education (the "Education Commissioner"), the New York State Education Department Board of Regents (the "Board of Regents"), the New York State Board of Mental Health Practitioners (the "Board of Mental Health Practitioners"), and the following individuals sued in their official capacity as members of the Board of Mental Health Practitioners: Thomas Biglin, Helena Boersma, Sargam Jain, Rene Jones, Susan L. Boxer Kappel, Sara Lin Friedman McMullian, Rodney Means, Timothy Mooney, Angela

Musolino, Michele Landers Meyer, Natalie Z. Riccio, Holly Vollinik-Lent, Jill R. Weldum, and Susan Wheeler Weeks (the "Mental Health Board defendants" and, together with the Attorney General, the Education Commissioner, the Board of Regents, and the Board of Mental Health Practitioners, "defendants").

Plaintiff, a Virginia-licensed professional counselor, seeks a declaratory judgment providing that N.Y. Educ. Law sections 8402-8405 violate the First and Fourteenth Amendments to the United States Constitution. Plaintiff also seeks a permanent injunction prohibiting defendants and their agents from applying New York's licensing requirements for mental health counselors to prevent plaintiff from providing teletherapy services to New York residents. Defendants have moved to dismiss the complaint in its entirety and against all defendants under Federal Rule of Civil Procedure ("Rule") 12(b)(1) and 12(b)(6). The motion having been fully briefed, the Court will now consider it on the basis of the parties' submissions without oral argument.

II. BACKGROUND

A. Brokamp and her Counseling Services

Brokamp is a Virginia-licensed professional counselor with over twenty years' experience. Dkt. 24 ("Am. Compl.") ¶ 1. Professional counselors like plaintiff "talk to their clients about their feelings, their relationships, and their lives." *Id.* ¶ 1. Her services consist entirely of conversations with her clients; plaintiff

does not prescribe any medication or conduct medical procedures. *Id.* ¶¶ 28-29.

Brokamp provides counseling out of her home in Virginia, but she has moved all her counseling online due to the COVID-19 pandemic. Am. Compl. ¶ 8. While her move online was initially driven by the pandemic, plaintiff has found that this arrangement is beneficial for clients because it allows them to seek out help without making a trip to her office. *Id.* ¶ 25. Consequently, plaintiff intends to continue providing online teletherapy for the indefinite future, including after the pandemic is over. *Id.* ¶ 23.

During the pandemic, one of Brokamp's clients relocated to New York. Am Compl. ¶ 36. As explained below, New York temporarily suspended its requirement that out-of-state counselors obtain New York counseling licenses before providing teletherapy to New York residents, so plaintiff was able to continue counseling her client for a time. *Id.*

Another of Brokamp's former clients who lives in New York also contacted her seeking to resume therapy. Am. Compl. ¶ 39. Concerned that she may have to terminate therapy with this client when New York's licensing exemption expired, plaintiff felt ethically obligated to turn this individual down. *Id.*

B. New York's Licensing Requirement and Enforcement

N.Y. Educ. Law § 6512(1) makes it a felony to practice certain professions without a license issued by the New York State Education Department (the "Education Department"). One such profession this statute covers is "mental health counseling."[1]

To obtain a mental health counseling license, one must satisfy several requirements, which include passing an exam, completing an internship and supervised experience, obtaining a master's degree or higher, and paying a fee. N.Y. Educ. Law § 8402(3). In addition, New York's licensing laws contain various exemptions, which allow certain professions to provide services falling within the definition of "mental health counseling" without obtaining a mental health counselor license. *See* N.Y. Educ. Law § 8410.[2]

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[1] N.Y. Educ. Law § 8402(1) defines "mental health counseling" as: (a) the evaluation, assessment, amelioration, treatment, modification, or adjustment to a disability, problem, or disorder of behavior, character, development, emotion, personality or relationships by the use of verbal or behavioral methods with individuals, couples, families or groups in private practice, group, or organized settings; and (b) the use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate mental health counseling services.

[2] For instance, "attorneys, rape crisis counselors, certified alcoholism counselors and certified substance abuse counselors" may "provid[e] mental health services within their respective

Early in the COVID-19 pandemic, New York issued an executive order temporarily suspending its requirement that out-of-state counselors obtain New York licenses before providing teletherapy to New York residents, so Brokamp was able to continue counseling her New York clients. *See* Am. Compl. ¶ 36 (citing N.Y. Exec. Ord. 202.15). On March 9, 2020, the Board of Mental Health Practitioners confirmed to plaintiff that, after N.Y. Exec. Ord. 202.15 expired, she would no longer be able to provide teletherapy to New York residents. *Id.* ¶ 38. On June 25, 2021, a subsequent executive order, N.Y. Exec. Ord. 210, confirmed that N.Y. Exec. Ord. 202.15 expired.

III. LEGAL STANDARD

1. Subject Matter Jurisdiction

"A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Id.* "In resolving a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court …

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established authorities." N.Y. Educ. Law § 8410(2). Similarly, "member[s] of the clergy or Christian Science practitioner[s]," may provide "pastoral counseling services" if such services are "within the context of his or her ministerial charge or obligation." *Id.* § 8410(4).

may refer to evidence outside the pleadings." *Id.* at 113. Subject matter jurisdiction is a threshold issue and, thus, when a party moves to dismiss under both Rules 12(b)(1) and 12(b)(6), the motion court must address the 12(b)(1) motion first." *Hartwick v. Annucci*, 2020 WL 6781562, at *4 (N.D.N.Y. Nov. 18, 2020).

2. Failure to State a Claim

"To survive a Rule 12(b)(6) motion to dismiss, the '[f]actual allegations must be enough to raise a right to relief above the speculative level.'" *Ginsburg v. City of Ithaca*, 839 F. Supp. 2d 537, 540 (N.D.N.Y. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "[T]he complaint must contain sufficient factual matter that it presents a claim to relief that is plausible on its face." *Hartwick*, 2020 WL 6781562, at *4 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

In assessing the plausibility of the plaintiff's complaint, "the complaint is to be construed liberally, and all reasonable inferences must be drawn in the plaintiff's favor." *Ginsburg*, 839 F. Supp. 2d at 540 (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). A plaintiff may support her complaint with "any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint." *L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (citing *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004)).

IV. DISCUSSION

Appendix B

In her Amended Complaint, Brokamp advances three causes of action: (i) an as-applied First Amendment challenge; (ii) a facial First Amendment challenge; and (iii) an as-applied First & Fourteenth Amendment vagueness challenge.[3]

In response, defendants raise the following objections: (1) plaintiff lacks standing; (2) plaintiff's claims must be dismissed for lack of subject matter jurisdiction because defendants have sovereign immunity; (3) the Attorney General is not a proper defendant in this action; and (4) plaintiff's claims must be dismissed for failure to state a claim upon which relief can be granted.

A. Standing[4]

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[3] Plaintiff does not specify whether her vagueness challenge is as-applied or facial, but "[t]he label is not what matters." *Libertarian Party of Erie Cty. v. Cuomo*, 300 F. Supp. 3d 424, 438 (W.D.N.Y. 2018), *aff'd in part, appeal dismissed in part*, 970 F.3d 106 (2d Cir. 2020). A claim is facial if it "challenges application of the law more broadly," but a "claim is as-applied if it is limited to a plaintiff's particular case." *Id.* While plaintiff's prayer for relief seeks, in part, a declaration that N.Y. Educ. Law §§ 8402-8405 is unconstitutional, in substance plaintiff's vagueness claim and proposed remedies are tied to enforcement of New York's licensing regime as to her and to her specific injuries, not those more broadly experienced by others. The Court therefore considers Count III an as-applied constitutional challenge.

[4] While defendants make their standing argument under Fed. R. Civ. P. 12(b)(6), "standing is at heart 'a jurisdictional prerequisite to a federal court's deliberations,' … and thus it is more appropriately analyzed under Rule 12(b)(1)." *See*

Defendants argue that Brokamp lacks standing over each of her claims. As to her as-applied claims, the Court agrees with defendants.

Standing limits the jurisdiction of federal courts to decide only actual "Cases" or "Controversies." *Smith v. Hochul*, 2021 WL 4972640, at *3 (N.D.N.Y. Oct. 26, 2021). To establish standing, a plaintiff must show: (1) an injury-in-fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury "will be redressed by a favorable decision." *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 383 (2d Cir. 2015). If any of these three elements is missing, a federal court lacks jurisdiction to entertain the claim. *Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106, 121 (2d Cir. 2020).

1. Plaintiff lacks standing to bring her as-applied First Amendment and Vagueness claims.

(i) Plaintiff has not submitted to the challenged licensure requirement.

"To establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the

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Disability Rights N.Y. v. N.Y., 2019 WL 2497907, at *4 n.2 (E.D.N.Y. Jun. 14, 2019) (citing *Thompson v. Cty. of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994)); *see also All. for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 88 n.6 (2d Cir. 2006) ("Although we have noted that standing challenges have sometimes been brought under Rule 12(b)(6), as well as Rule 12(b)(1), the proper procedural route is a motion under Rule 12(b)(1)").

challenged policy." *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997). However, a plaintiff may be excused from the threshold standing requirement that she submit to the challenged policy if she "makes a substantial showing that application for the benefit … would have been futile." *Id.*

Thus, when a plaintiff wishes to mount an as-applied First Amendment challenge to a licensing scheme in New York, she must either: (1) apply for a license under that scheme; or (2) make a "substantial showing" that submitting a licensing application "would have been futile." *See Prayze FM v. F.C.C.*, 214 F.3d 245, 251 (2d Cir. 2000) (citing *Jackson-Bey*, 115 F.3d at 1096).

Brokamp does not allege that she has applied for a license, nor does she allege that applying for a license would be futile. Indeed, plaintiff concedes that she has no intention of applying to become a licensed mental health counselor in New York. Am. Compl. ¶ 35. Because plaintiff's alleged injuries result from her own decision to not apply for a license in New York, and she does not allege that obtaining a license would have been futile, she has failed to satisfy a "threshold requirement for standing" on her as-applied claims. *See Jackson-Bey*, 115 F.3d at 1096; *Prayze FM*, 214 F.3d at 251-52.

(ii) Plaintiff has not alleged a credible threat of prosecution.

Brokamp also claims that because she faces the threat of prosecution if she engages in unlicensed

counseling services, she is not required to subject herself to the licensing requirement before she can challenge it.

Where a plaintiff "asserts injury based on the threat of prosecution, [she] need not expose [herself] to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *Adam v. Barr*, 792 F. App'x 20, 21 (2d Cir. 2019) (citing *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128 (2007)) (internal quotations omitted). Such preenforcement review is "available where the 'circumstances … render the threatened enforcement sufficiently imminent.'" *Id.* (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

"To sufficiently allege standing on [her] preenforcement claim, Plaintiff must … allege both a concrete intention to violate the law and the credible threat of prosecution if [she] were to do so." *Smith*, 2021 WL 4972640, at *8 (citing *Adam v. Barr*, 2019 WL 1426991, at *3 (S.D.N.Y. Mar. 29, 2019)); *see also Adam*, 792 F. App'x at 22 ("A sufficiently imminent injury can be established by plausible allegations that a plaintiff intends to engage in conduct proscribed by a statute, and 'there exists a credible threat of prosecution thereunder'"). "A credible threat is not established by 'imaginary or speculative' fears of prosecution." *Adam*, 792 F. App'x at 22. "Although courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund, the mere existence of a law

prohibiting intended conduct does not automatically confer Article III standing." *Id.* (cleaned up).

Brokamp fails to allege either a concrete intention to violate the law or a credible threat of prosecution. If anything, plaintiff seems to concede that she intends to *follow* the law, not violate it. *See, e.g.*, Am. Compl. ¶¶ 39, 68.

Even assuming *arguendo* that Brokamp had alleged a concrete intention to violate the law, she also fails to allege a credible threat of prosecution. Although plaintiff notes that the Attorney General has the power to enforce New York's professional licensing regime through prosecution, Am. Compl. ¶ 9, and that she faces a "threat of felony prosecution," *id.* ¶ 77, she has not alleged facts which particularize such enforcement as to her. Any alleged injury is, at best, "conjectural or hypothetical." *See Adam*, 792 F. App'x at 21, 23 (holding that, where plaintiff would simply be at risk of prosecution like any other person who might violate the law at issue, enforcement was not particularized as to him); *compare Knife Rts.*, 802 F.3d at 385–87 (holding that fear of prosecution was not conjectural or hypothetical "given that defendant [prosecutor] recently identified [plaintiff] as a [state criminal law] violator and pursued enforcement action against it").[5]

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[5] Moreover, plaintiff has not made any allegations concerning the past or present enforcement of N.Y. Educ. Law ¶ 6512(1) from which a credible threat of prosecution against her could be

In sum, alleging that she will be prosecuted for providing counseling services without a license because doing so is against N.Y. Educ. Law ¶ 6512(1), without more, fails to demonstrate a credible threat of prosecution. Any alleged injury based on threat of enforcement against plaintiff for counseling without a license is insufficiently imminent to confer standing. Accordingly, plaintiff lacks standing over her as-applied claims, and Counts I and III of her Amended Complaint will be dismissed.

2. Plaintiff has standing to bring her facial First Amendment claim.

"A speaker subject to licensure has standing to make a facial [First Amendment] challenge without the necessity of first applying for, and being denied, a license when the [licensing] scheme allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity." *Prayze FM*, 214 F.3d at 252 (citing *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988)) (cleaned up). Such a speaker can also bring a facial challenge to a regulation that "purport[s] to regulate the time, place, and manner of expressive or communicative conduct" on the ground that it is not

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inferred. *See Susan B. Anthony List*, 573 U.S. at 164 (considering history of past enforcement of a statute against the plaintiff, for the same conduct, as being good evidence that "the threat of enforcement is not 'chimerical'")

sufficiently narrowly tailored. *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

Brokamp alleges that "New York's mental health counseling licensing law is substantially overbroad, as it sweeps in significant amounts of speech that New York has no conceivable interest in regulating." Am. Compl. ¶ 94. This is akin to alleging that the statute is not sufficiently narrowly tailored, and is sufficient to give plaintiff standing over her facial First Amendment challenge. *See Prayze FM*, 214 F.3d at 252 (finding plaintiff had standing to raise facial challenge to licensing scheme where its "narrow tailoring challenge to the licensing scheme … [was] analogous to … a challenge to a time, place, or manner regulation").

B. Sovereign Immunity

Defendants argue that Brokamp's claims must be dismissed for lack of subject matter jurisdiction because they have sovereign immunity. With respect to the Board of Regents and Board of Mental Health Practitioners, the Court agrees.

The Eleventh Amendment to the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 95 (2d Cir. 2007) (citing U.S. Const. amend. XI). The Eleventh Amendment bars federal

courts from exercising subject matter jurisdiction over claims against states absent their consent to such a suit or an express statutory waiver of immunity. *See Brown v. New York*, 975 F. Supp. 2d 209, 221 (N.D.N.Y. 2013) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 92-100 (1984)). Although the plaintiff generally bears the burden of proving subject matter jurisdiction, the entity claiming Eleventh Amendment immunity bears the burden of proving such immunity. *Id.* at 221.

New York has not waived its sovereign immunity for 42 U.S.C. § 1983 claims. *See Jones v. N.Y. Div. of Military & Naval Affairs*, 166 F.3d 45, 49 (2d Cir. 1999). Moreover, it is well-settled that states and their officials acting in their official capacities are not "persons" under § 1983 and, therefore, Eleventh Amendment immunity is not abrogated by that statute. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Similarly, 28 U.S.C. § 1343, has no effect on sovereign immunity, and the bare fact that a case implicates a federal question under 28 U.S.C. § 1331 does not override state sovereign immunity. *See Sierotowicz v. State of New York Div. of Hous. & Cmty. Renewal*, 2005 WL 1397950, at *1 (E.D.N.Y. June 14, 2005).

1. Claims against the Board of Regents and Board of Mental Health Practitioners

Regardless of the type of relief Brokamp seeks, the Eleventh Amendment bars this Court from assuming jurisdiction over her claims asserted against the

Board of Regents and Board of Mental Health Practitioners, which are New York state agencies. New York has neither waived its sovereign immunity for § 1983 claims, *see Jones*, 166 F.3d at 49, nor has Congress overridden Eleventh Amendment immunity, *see Will*, 491 U.S. at 71. The other statutes plaintiff references in her Amended Complaint likewise fail to abrogate New York's sovereign immunity.

Accordingly, Brokamp's claims against the Board of Regents and Board of Mental Health Practitioners will be dismissed. *See Roberts v. New York*, 911 F. Supp. 2d 149, 159-60 (N.D.N.Y. 2012) (dismissing claims against state of New York and various state agencies for lack of subject matter jurisdiction based upon Eleventh Amendment); *see also Brown*, 975 F. Supp. 2d at 221 (same).

2. Claims against the Attorney General, the Education Commissioner, and the Mental Health Board Defendants in their official capacities

Brokamp also asserts claims against the Attorney General, the Education Commissioner, and the Mental Health Board defendants in their official capacities. Actions for damages against state officials in their official capacities are essentially actions against the state itself, and the Eleventh Amendment will bar these actions unless: (1) Congress has abrogated immunity; (2) the state has consented to suit; or (3) the *Ex parte Young* doctrine applies. *See Will*, 491 U.S. at 71. As noted, New York has not consented to suit and Congress has not abrogated Eleventh Amendment

immunity. However, defendants' motions to dismiss present issues involving the *Ex parte Young* doctrine.

Ex parte Young established an exception to state sovereign immunity in federal actions where an individual brings an action seeking injunctive relief against a state official for an ongoing violation of law or the Constitution. *See* 209 U.S. 123, 160 (1908). The *Ex parte Young* doctrine provides "a limited exception to the general principle of sovereign immunity [that] allows a suit for injunctive relief challenging the constitutionality of a state official's actions in enforcing state law under the theory that such a suit is not one against the State, and therefore not barred by the Eleventh Amendment." *Ford v. Reynolds*, 316 F.3d 351, 354-55 (2d Cir. 2003). Under the doctrine, a plaintiff may bring a claim against a state official in his or her official capacity, notwithstanding the Eleventh Amendment, when she: (1) alleges an ongoing violation of federal law; and (2) seeks relief properly characterized as prospective.[6] *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007).

First, the Court must consider whether Brokamp alleges an ongoing violation of federal law. "The

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[6] While retrospective relief is "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials," prospective relief "includes injunctive relief that bars a state actor from engaging in certain unconstitutional acts or abates ongoing constitutional violations as well as the payment of state funds 'as a necessary consequence of compliance in the future with a substantive federal-question determination.'" *Brown*, 975 F. Supp. 2d at 222-23 (citing *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)).

inquiry for determining whether an 'ongoing violation' exists is, 'does the enforcement of the law amount to a continuous violation of [plaintiff's] constitutional rights or a single act that continues to have negative consequences for [plaintiff].'" *Brown*, 975 F. Supp. 2d at 223 (citing *N.J. Educ. Ass'n v. N.J.*, 2012 WL 715284, at *4 (D.N.J. Mar. 5, 2012)). If the former is true, plaintiff will satisfy the first prong of *Ex parte Young*, *see id*; if the latter is true, the Eleventh Amendment will bar plaintiff's claim, *see N.J. Educ. Ass'n*, 2012 WL 715284, at *4.

Brokamp alleges that the Attorney General, Education Commissioner, and Board of Mental Health Practitioners (of which the Mental Health Board defendants are members) are statutorily responsible for either enforcing or administering New York's licensing requirements, *see* Am. Compl. ¶¶ 9, 10, 12, 13, and that these requirements are unconstitutional, *see generally id*. ¶¶ 78-112. These allegations are sufficient to satisfy the first prong of *Ex parte Young*. *See Brown*, 975 F. Supp. 2d at 223 ("[a]n allegation that state officials are enforcing a law in contravention of controlling federal law is sufficient to allege an ongoing violation for the purposes of *Ex parte Young*") (citing *Chester Bross Const. Co. v. Schneider*, 886 F. Supp. 2d 896, 905 (C.D. Ill. 2012)).

Second, the Court must determine whether Brokamp seeks prospective relief. As defendants acknowledge, *Ex parte Young* allows federal courts to entertain suits against state officials in their official capacity where a plaintiff seeks injunctive or

declaratory relief. *See* 209 U.S. at 161. While declaratory judgments form part of the injunctive relief that *Ex parte Young* allows for, such relief will not satisfy the second prong of the *Ex parte Young* analysis when it "would serve to declare only past actions in violation of federal law." *Brown*, 975 F. Supp. 2d at 225 (citing *Tigrett v. Cooper*, 855 F. Supp. 2d 733, 744 (W.D. Tenn. 2012)).

In this case, Brokamp seeks a permanent injunction prohibiting defendants from applying New York's licensing requirements and an order declaring New York's licensing law for mental health counselors unconstitutional. These requests are prospective and satisfy *Ex parte Young's* second prong. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636 (2002) ("[plaintiff's] prayer for injunctive relief—that state officials be restrained from enforcing an order in contravention of controlling federal law—clearly satisfies our 'straightforward inquiry' [for an *Ex parte Young* analysis]"); *see also Brown*, 975 F. Supp. 2d at 226 (holding that plaintiffs' request for an order declaring statute unconstitutional sought prospective relief).

Accordingly, jurisdiction remains over Brokamp's facial First Amendment claim against the Attorney General, the Education Commissioner, and the

Mental Health Board defendants in their official capacities.[7]

C. Failure to State a Claim

As noted *supra*, Brokamp lacks standing to bring her as-applied First Amendment and First and Fourteenth Amendment vagueness challenges. This leaves the Court to consider whether plaintiff's facial First Amendment challenge states a claim upon which relief can be granted against the remaining defendants.

Brokamp alleges that "New York's mental health counseling licensing law is substantially overbroad, as it sweeps in significant amounts of speech that New York has no conceivable interest in regulating." Am. Compl. ¶ 94. In other words, plaintiff's facial First Amendment challenge is an overbreadth claim, which presents a steep hurdle: "[i]nvalidation for

[7] The Attorney General also asserts that she is not a proper defendant in this action because she has no enforcement powers under the statutes at issue. However, as plaintiff correctly points out, the statute at issue in this case mandates that the "attorney general shall prosecute such alleged [violations of N.Y. Educ. Law §§ 6512-6513] in the name of the state." N.Y. Educ. Law § 6514(2). N.Y. Educ. Law § 6512(1) makes it a felony to practice mental health counseling without a license issued by the Department of Education. *Id.* § 6512(1). Thus, the Attorney General has a connection to the enforcement of the licensing laws at issue, not simply a general duty to execute them, and is a proper defendant. *See In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372-73 (2d Cir. 2005) ("Under *Ex parte Young*, the state officer against whom a suit is brought 'must have some connection with the enforcement of the act' that is in continued violation of federal law").

overbreadth is a 'strong medicine' that is not to be 'casually employed.'" *United States v. Williams*, 553 U.S. 285, 293 (2008).[8]

"In order to prevail on an overbreadth challenge, 'the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'" *Farrell v. Burke*, 449 F.3d 470, 499 (2d Cir. 2006) (citing *Broadrick*, 413 U.S. at 615). "An overbreadth challenger 'must demonstrate from the text of [the law] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.'" *Sibley v. Watches*, 501 F. Supp. 3d 210, 223 (W.D.N.Y. 2020) (citing *United States v. Thompson*, 896 F.3d 155, 163 (2d Cir. 2018)). This substantiality standard is "'vigorously enforced,' and because the overbreadth doctrine's purpose is to prevent the chilling of protected speech, '[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).'" *Id.* (citing *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)) (internal citations omitted).

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[8] In the same claim, plaintiff also alleges that New York's licensing laws are "significantly underinclusive." *See, e.g.*, Am. Compl. ¶ 99. While a law's "underinclusivity" may raise a "red flag," the Court notes that "the First Amendment imposes no freestanding underinclusiveness limitation," and a state "need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449 (2015).

Appendix B

Brokamp's allegations do not support an overbreadth challenge. First, plaintiff fails to adequately allege New York's licensing scheme will chill protected speech. While certain of plaintiff's allegations may suggest New York's licensing requirements could have a chilling effect on *her own* future conduct, *see, e.g.,* Am. Compl. ¶¶ 39, 68, 72-73, she does not allege that these requirements will chill conduct more broadly.

Thus, Brokamp has not shown New York's licensing laws "will have a *substantial* chilling effect on protected conduct." *Farrell*, 449 F.3d at 497 (emphasis added); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984) ("the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge…there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court"); *Sibley*, 501 F. Supp. 3d at 224 (finding allegation that challenged statute would chill plaintiff's *own* future protected conduct was insufficient to state a facial overbreadth challenge).

Second, even assuming Brokamp's allegations were sufficient to establish a chilling effect, she also fails to show that any effect would be substantial as c compared to New York's plainly legitimate interest in protecting the public through regulation of mental health counselor licensing. This would have been enough to warrant dismissal on its own. *See Bobbit v.*

Marzan, 2017 U.S. Dist. LEXIS 161478, *63 (S.D.N.Y. Sep. 28, 2017) (dismissing overbreadth challenge because any alleged burden on First Amendment rights was "outweighed by the law's legitimate purpose"); *United States v. Hashmi*, 2009 WL 4042841, *10 (S.D.N.Y. Nov. 18, 2009) ("Even if it were shown that the law affects some activity that otherwise receives First Amendment protection, [plaintiff] does not show that these potential interferences are substantial in view of the law's legitimate purpose").

Brokamp has failed to demonstrate that New York's licensing scheme is overbroad, let alone substantially so in relation to New York's legitimate interest in establishing standards for professional licensure. Plaintiff's facial First Amendment claim will be dismissed for failure to state a claim.

V. CONCLUSION

Therefore, it is

ORDERED that

1. Defendants' motions to dismiss are GRANTED; and

2. Plaintiff's Amended Complaint is DISMISSED.

The Clerk is directed to enter judgment accordingly and close the file.

IT IS SO ORDERED

Appendix B

/s/ David N. Hurd
David N. Hurd
U.S. District Judge

Dated: November 22, 2021
Utica, New York

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States courthouse, 40 Foley Square, in the City of New York, on the 1st day of June, two thousand twenty-three.

Elizabeth Brokamp

Plaintiff-Appellant,

v.

Letitia James, in her official capacity as Attorney General of the State of New York, et al.,

Defendants-Appellees.

ORDER
Docket No: 21-3050

Appellant, Elizabeth Brokamp, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

Appendix C

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

Appendix D

NY CLS Educ § 8402 Mental health counseling

1. Definition of the practice of mental health counseling. The practice of the profession of mental health counseling is defined as:

> **(a)** the evaluation, assessment, amelioration, treatment, modification, or adjustment to a disability, problem, or disorder of behavior, character, development, emotion, personality or relationships by the use of verbal or behavioral methods with individuals, couples, families or groups in private practice, group, or organized settings; and
>
> **(b)** the use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate mental health counseling services.

2. Practice of mental health counseling and use of the titles "mental health counselor" and "licensed mental health counselor". Only a person licensed or exempt under this article shall practice mental health counseling or use the title "mental health counselor". Only a person licensed under this article shall use the title "licensed mental health counselor" or any other designation tending to imply that the person is licensed to practice mental health counseling.

3. Requirements for a professional license. To qualify for a license as a "licensed mental health counselor", an applicant shall fulfill the following requirements:

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(a) Application: File an application with the department;

(b) Education: Have received an education, including a master's or higher degree in counseling from a program registered by the department or determined by the department to be the substantial equivalent thereof, in accordance with the commissioner's regulations. The graduate coursework shall include, but not be limited to, the following areas:

(i) human growth and development;

(ii) social and cultural foundations of counseling;

(iii) counseling theory and practice and psychopathology;

(iv) group dynamics;

(v) lifestyle and career development;

(vi) assessment and appraisal of individuals, couples and families and groups;

(vii) research and program evaluation;

(viii) professional orientation and ethics;

(ix) foundations of mental health counseling and consultation;

(x) clinical instruction; and

(xi) completion of a minimum one-year supervised internship or practicum in mental health counseling;

(c) Experience: An applicant shall complete a minimum of three thousand hours of post-master's supervised experience relevant to the practice of mental health counseling satisfactory to the board and in accordance with the commissioner's regulations. Satisfactory experience obtained in an entity operating under a waiver issued by the department pursuant to section sixty-five hundred three-a of this title may be accepted by the department, notwithstanding that such experience may have been obtained prior to the effective date of such section sixty-five hundred three-a and/or prior to the entity having obtained a waiver. The department may, for good cause shown, accept satisfactory experience that was obtained in a setting that would have been eligible for a waiver but which has not obtained a waiver from the department or experience that was obtained in good faith by the applicant under the belief that appropriate authorization had been obtained for the experience, provided that such experience meets all other requirements for acceptable experience;

(d) Examination: Pass an examination satisfactory to the board and in accordance with the commissioner's regulations;

(e) Age: Be at least twenty-one years of age;

Appendix D

(f) Character: Be of good moral character as determined by the department; and

(g) Fees: Pay a fee of one hundred seventy-five dollars for an initial license and a fee of one hundred seventy dollars for each triennial registration period.

Appendix E

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ELIZABETH BROKAMP, *Plaintiff,* v. LETITIA JAMES, in her official capacity as Attorney General of the State of New York; BETTY ROSA, in her official capacity as the New York State Commissioner of Education; the NEW YORK STATE EDUCATION DEPARTMENT BOARD OF REGENTS; the NEW YORK STATE BOARD OF MENTAL HEALTH PRACTITIONERS; and THOMAS BIGLIN, HELENA BOERSMA, SARGAM JAIN, RENE JONES, SUSAN L. BOXER KAPPEL, SARA LIN FRIEDMAN MCMULLIAN, RODNEY MEANS, TIMOTHY MOONEY, ANGELA MUSOLINO, MICHELE LANDERS MEYER, NATALIE Z. RICCIO, HOLLY VOLLINKLENT, JILL R. WELDUM,	No. 1:21-cv-00389-DNH-ATB

and SUSAN WHEELER WEEKS, in their official capacity as members of the New York State Board of Mental Health Practitioners,

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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1. This First Amendment lawsuit seeks to vindicate the right of Plaintiff Elizabeth Brokamp, a Virginia-licensed professional counselor with more than twenty years of experience, to speak with New York residents over internet video. Professional counselors like Elizabeth talk to their clients about their feelings, their relationships, and their lives; Elizabeth does not seek to prescribe medication or provide any service beyond talk therapy. All Elizabeth wants to do is talk.

2. Because of the COVID-19 pandemic, Elizabeth currently provides all her counseling services over the internet using teletherapy. One of Elizabeth's clients has relocated to New York. At present, Elizabeth is allowed to talk to her New York client because an executive order issued early in the pandemic temporarily allows licensed out-of-state counselors to talk to clients in New York. That order is currently scheduled

to expire on July 5, 2021. Though that order may be extended additional times before the Governor determines that the pandemic no longer merits such measures, Elizabeth has no way of knowing how long it will be extended, and the exemption could be taken away suddenly, without notice.

3. Elizabeth would like to continue talking to her New York client after the pandemic is over, as she believes it would be in the best interest of her client's mental health. She would also like to begin talking to a prospective client (with whom she once had a counseling relationship) in New York who has reached out to her, but Elizabeth is unwilling to re-initiate a counseling relationship if it is likely that she will have to stop talking to the client after only a few months. She believes that therapy would be in that prospective client's best interest to resume therapy with Elizabeth only if they could resume without the imminent threat of having to cut that relationship off.

4. New York's licensing laws restrict Elizabeth's ability to speak with New York residents about their professional, educational, personal, or spiritual development—topics one might discuss with a life coach, mentor, self-help guru, religious leader, or close friend. These laws have only been on the books since 2002. On their face, New York's laws are substantially overbroad. In application, they are also substantially underinclusive, as New York has carved out a long list of speakers who may discuss the same topics that Elizabeth wishes to discuss, without first obtaining a license. Those who are exempted from New

York's licensing law are generally those who possess far less training and expertise, so paradoxically, Elizabeth is subject to more onerous restrictions because she is more knowledgeable. If she were less qualified, she could offer services as a life-coach without obtaining a license.

5. All that Elizabeth wants to do is talk to New Yorkers about their lives and their problems. The First Amendment fully protects these conversations, and New York's licensing laws place an impermissible burden on Elizabeth's free speech rights.

Jurisdiction and Venue

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202; 42 U.S.C. § 1983; and *Ex Parte Young*, 209 U.S. 123 (1908).

7. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

Parties

8. Plaintiff Elizabeth Brokamp is a United States citizen and a resident of Virginia. Elizabeth is a Virginia-licensed professional counselor with over twenty years of experience. During the COVID-19 pandemic, Elizabeth has moved all of her services online and currently provides counseling out of her home in Fairfax Station, Virginia.

9. Defendant Letitia James is the Attorney General of the State of New York. She is subject to an explicit statutory mandate to enforce New York's professional licensing regime through criminal prosecution. N.Y. Educ. Law § 6514(2) ("The attorney general shall prosecute such alleged offenses in the name of the state[.]"). Attorney General James is sued in her official capacity.

10. Defendant Betty Rosa is the New York State Commissioner of Education. She is statutorily responsible for "administer[ing] the admission to and the practice of the professions," including mental health counseling. N.Y. Educ. Law § 6507. Commissioner Rosa is sued in her official capacity.

11. Defendant New York State Education Department Board of Regents is statutorily responsible for "supervis[ing] the admission to and the practice of the professions," including the profession of mental health therapy. N.Y. Educ. Law § 6506. The Board of Regents is sued in its official capacity.

12. Defendant New York State Board of Mental Health Practitioners is statutorily responsible for "assisting the board of regents and the department on matters of licensing and registration." N.Y. Educ. Law § 8406. The Board of Mental Health Practitioners is sued in its official capacity.

13. Defendants Thomas Biglin, Helena Boersma, Sargam Jain, Rene Jones, Susan L. Boxer Kappel, Sara Lin Friedman McMullian, Rodney Means, Timothy Mooney, Angela Musolino, Michele Landers

Meyer, Natalie Z. Riccio, Holly Vollink- Lent, Jill R. Weldum, and Susan Wheeler Weeks are the members of the New York State Board of Mental Health Practitioners, as identified by the official website for the New York State Education Department, and they are sued in their official capacity.

Factual Allegations

Elizabeth Brokamp's Professional Counseling

14. Plaintiff Elizabeth Brokamp is a Virginia-licensed professional counselor with over twenty years of experience.

15. In 1994, Elizabeth earned a Master's Degree in Counseling Psychology from Columbia University. She is currently pursuing a PhD in Counseling from the University of the Cumberlands.

16. Elizabeth also holds a number of voluntary certifications related to professional counseling, including a certification in tele-mental health from the Center for Credentialing and Education.

17. As a Virginia-licensed professional counselor, Elizabeth must renew her license annually and complete a minimum of 20 hours of continuing education requirements. See 18 VAC 115-20-105.

18. Elizabeth is also subject to oversight by the Virginia Board of Counseling, which establishes standards of practice applicable to all Virginia-licensed professional counselors. See 18 VAC 115-20-130. The

Virginia Board of Counseling is empowered to discipline counselors who violate its standards of practice. See 18 VAC 115-20-140

19. In 2018, Elizabeth closed her Alexandria office in order to pursue her doctoral degree at the University of the Cumberlands. As part of her doctorate training, Elizabeth provided intake assessment and individual counseling for college students at the University of Mary Washington. In addition, starting in 2019, Elizabeth has served as a supervisor for individuals who have completed their Master's degrees and are seeking licensure.

20. In 2020, Elizabeth opened Nova Terra Therapy as an online practice. Elizabeth currently provides counseling exclusively through the internet.

21. The number of clients that Elizabeth serves varies week-to-week, but, in a typical week, Elizabeth currently provides teletherapy to between ten and twenty clients.

22. Elizabeth advertises her teletherapy services online, including through websites that provide counseling referral services.

23. Even when the pandemic is over, Elizabeth intends to continue providing online teletherapy for the indefinite future. Likewise, even when the pandemic is over, Elizabeth intends to continue advertising her teletherapy services over the internet, including through websites that provide counseling referral services.

24. Elizabeth would like to use these websites to advertise her availability to potential clients located in New York.

25. Elizabeth intends to continue providing teletherapy because she believes that it provides significant benefits for clients, as it allows clients to seek out help without having to make a trip to a counselor's office. Teletherapy can be beneficial for new mothers, as the demands of a newborn child can make it particularly difficult to schedule in-person counseling. Teletherapy benefits clients who need to be seen imminently, and who may not be able to wait for an in-person visit. Teletherapy allows clients to access therapists in different geographic regions, which allows for more opportunity to find a therapist that meets a client's specific needs. Teletherapy also benefits clients in areas that are underserved, where there may be few options and limited availability, or where prices may be prohibitive.

26. Elizabeth advises her clients on a variety of topics, including anxiety, relationships, and mindfulness. She also has a particular specialty assisting women who are facing issues relating to infertility and postpartum depression.

27. Clients seek out Elizabeth for a variety of reasons, including need for services from a counselor with Elizabeth's particular areas of specialization and referrals from existing clients who have been satisfied with Elizabeth's services.

28. When Elizabeth provides counseling services, she does not prescribe medication or conduct any medical procedures.

29. Elizabeth's counseling services consist entirely of conversations between her and her clients.

30. Elizabeth speaks with her clients about a variety of topics, including, but not limited to, their emotions, their relationships, and their lives. Through these conversations, Elizabeth seeks to improve her clients' well-being.

31. For clients who pay for her services, Elizabeth accepts both insurance and cash. She also charges on a sliding scale for those who cannot otherwise afford the full price of her services.

Elizabeth's New York Practice

32. New York's licensing law strictly limits the practice of "mental health counseling" by out of state professional counselors. N.Y. Educ. Law § 8402(2). Only New York-licensed professional counselors may provide mental health counseling, including via teletherapy, to people located in New York.

33. Elizabeth's teletherapy conversations with her clients constitute "mental health counseling" under New York law because they include the "assessment" and "amelioration" of "problem[s] or disorder[s] or behavior, character, development, emotion, personality or relationships by the use of verbal … methods." N.Y. Educ. Law § 8402(1)(a).

34. Elizabeth's teletherapy conversations with her clients are just that: conversations, consisting of nothing other than speech.

35. Elizabeth is not licensed as a professional counselor in New York, and she has no intention of applying to become licensed.

36. Elizabeth is currently located in Virginia and providing teletharapy counseling to one client who relocated to New York during the pandemic. She is currently allowed to do so, but only because New York has temporarily allowed out-of-state, licensed counselors to serve New York clients during the pandemic. *See* EO 202.15 That exemption is scheduled to expire on July 5, 2021, though it will presumably be extended during the state of emergency.

37. Elizabeth strongly desires to continue counseling her New York client after the pandemic is over. She believes it is her patient's best interest to maintain their existing relationship, rather than having to find a new counselor and start over after the pandemic.

38. New York's regulatory authority, the State Board for Mental Health Practitioners, has confirmed in an email dated March 9, 2020, that she will be unable provide teletherapy to New York residents after the Governor's order expires.

39. Elizabeth has also been contacted by another New York resident and former client who would like to take advantage of her counseling services. She has

turned that individual away because she does not believe that it would be ethical or in the potential client's best interest to initiate a relationship if she would have to end it in only a few months.

40. Counseling is most effective when counselors and their clients can have a sustained relationship over an extended period of time.

41. If Elizabeth were allowed to treat New York clients without a license after the pandemic, she would reach out to the individual who contacted her and offer her teletherapy counseling services.

42. If Elizabeth were allowed to treat New York clients without a license after the pandemic, she would also advertise her teletherapy counseling services to New York residents, using web-based referral platforms.

43. When EO 220.15 expires, Elizabeth will not be allowed to offer teletherapy counseling individuals located in New York, though she could do so if they came to her office in Virginia.

New York's Overbroad Definition of Psychotherapy

44. New York prohibits the unlicensed practice of "mental health counseling," which it defines as "(a) the evaluation, assessment, amelioration, treatment, modification, or adjustment to a disability, problem, or disorder of behavior, character, development, emotion, personality or relationships by the use of verbal

or behavioral methods with individuals, couples, families or groups in private practice, group, or organized settings; and (b) the use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate mental health counseling services." N.Y. Educ. Law § 8402(1).

45. Requirements for New York licensure include a Master's degree or higher, covering ten specified topics and including a one-year internship. N.Y. Educ. Law § 8402(3). Applicants must also have a minimum of 3000 hours of "supervised experience relevant to the practice of mental health counseling," pass an examination, be of "good moral character," and pay a $175 fee. *Id.*

46. Separate licenses with similar requirements are required for "marriage and family therapists," N.Y. Educ. Law § 8403, "creative arts therapists," N.Y. Educ. Law § 8404, and "psychoanalysists." The latter is defined as talk therapy focused on the "interpretation of dynamic unconscious mental processes that contribute to the formation of personality and behavior." N.Y. Educ. Law § 8405.

47. A New York license does not authorize mental health counselors to prescribe drugs or use other invasive medical procedures. N.Y. Educ. Law § 8407.

48. New York's licensing laws also contain numerous exemptions, which allow various categories of people to provide services falling within the definition

of mental health counseling without obtaining a mental health counselor license. N.Y. Educ. Law § 8410.

49. For instance: "attorneys, rape crisis counselors, certified alcoholism counselors and certified substance abuse counselors" may "provid[e] mental health services within their respective established authorities." The statute does not define the permissible bounds of such practice. N.Y. Educ. Law § 8410(2).

50. "[M]ember[s] of the clergy or Christian Science practitioner[s]" may provide "pastoral counseling services," but only "within the context of [their] ministerial charge or obligation." N.Y. Educ. Law § 8410(4). Spiritual counseling by non-clergy is apparently not exempt from the mental health counseling law.

51. An even broader exception allows "individuals, churches, schools, teachers, organizations, or not-for-profit businesses" to "provid[e] instruction, advice, support, encouragement, or information to individuals, families, and relational groups." N.Y. Educ. Law § 8410(5). The distinction between such permitted conversations and "mental health counseling" is likewise not explained.

52. New York does not possess any evidence that less restrictive alternatives, such as titling acts that merely restrict who may call themselves a "licensed mental health counselor," would be ineffective at protecting the mental health of New York residents.

Appendix E

New York's Underinclusive enforcement Practices

53. In practice, New York does not enforce its mental health counseling licensing laws against all the various individuals swept up by the overbroad definition.

54. New York has not adopted any written official policy that articulates when the law will or will not be enforced, and individuals have no way to know for sure whether their speech will or will not be prohibited.

55. At the same time, New York's general practice is to enforce its mental health counseling licensing laws against individuals with significant training and expertise relevant to the provision of counseling.

56. In practice, individuals who do not have significant training and expertise relevant to the provision of counseling can provide services falling within the definition of licensed mental health counseling so long as they refrain from calling themselves "licensed mental health counselors."

57. For instance, unlicensed and untrained individuals frequently call themselves "life coaches" and offer services that fall within the definition of mental health counseling under the label "life coaching." According to the Borough of Manhattan Community College, life coaching consists of: "[i]dentify[ing] and create[ing] a plan for what the client wants," "[m]odify[ing] and build[ing] strategies to achieve a

client's goals," "[e]ncourag[ing] self-discovery, self-awareness and growth," and "[p]romot[ing] accountability and positive change."

58. Similarly, although self-help gurus, mentors, spiritual and religious guides (who do not meet the clergy exemption), Alcoholics Anonymous, Weight Watchers, and even friends and family members provide advice that falls within the scope of New York's mental health counseling laws, New York does not require those individuals to obtain a mental health counseling license.

59. The Board, however, has confirmed that Elizabeth cannot provide her services in New York, once EO 202.15 expires, without obtaining a New York license.

60. The Board's email made clear that, as applied to Elizabeth, New York's licensing law is not just a titling restriction. According to the Board, "Once the governor's executive order expires you will have to have a NY license in order to practice in New York either physically or by teletherapy within NY or from outside of NY."

61. In practice, therefore, Elizabeth is subject to greater burdens on her speech because she possesses greater qualifications to talk. Elizabeth is subject to New York's mental health counseling laws because of her education and experience, but New York does not enforce that requirement against other individuals who speak about the same topics.

62. New York does not have any evidence that counselors like Elizabeth, who are licensed in other jurisdictions but not in New York, are a threat to the mental health of New York residents.

63. New York does not have any evidence that unlicensed life coaches, self-help gurus, non-clergy religious guides, Alcoholics Anonymous, Weight Watchers, or friends and family who provide advice and guidance that falls under the definition of "mental health counseling" are a threat to the mental health of New York residents.

64. New York does not have any evidence that individuals who possess specialized training, like Elizabeth, require more regulation than those who possess less training.

65. Elizabeth is injured by New York's licensing requirements for mental health counselors because, without a license from New York, she is significantly limited in her ability to share her advice and counseling expertise with New York residents.

66. Elizabeth is facing the immediately impending injury of being compelled to stop talking to her New York client once the pandemic is over. The Board has confirmed that this injury will occur once EO 202.15 expires. It is reasonable to expect that this client would continue talking to Elizabeth if New York allowed it.

67. Under EO 202.15, Elizabeth is injured because she cannot ethically take on new clients if she will be

required to terminate the relationship in only a few months. She has been forced to turn away a potential client who lives in New York.

68. Under EO 202.15, Elizabeth is injured because she cannot use her website or referral websites to advertise to New York residents, when it is certain that she would be unable to continue talking to them after just a few months of counseling.

69. This has resulted in a loss of income to Elizabeth, and, just as important, it has meant that Elizabeth has not been able to help individuals in New York.

70. If she were allowed to do so, Elizabeth would talk to New York residents about their lives, relationships, and problems, using video conferencing software, for the foreseeable future.

71. New York's licensing regime is triggered only if Elizabeth speaks to New York residents without a license about certain subjects.

72. New York's licensing requirements impose special burdens on Elizabeth because of the content of her speech.

73. In order to speak to New York residents about bettering their lives, Elizabeth would be forced to comply with burdensome licensing requirements.

74. In order to obtain a New York mental health counseling license, Elizabeth would have to devote a

significant amount of time to comply with the application procedures. That time could be spent talking to New Yorkers about their problems. Additionally, she would need to pay a $175 fee and recurring $170 fees.

75. These requirements are burdens placed on Elizabeth solely because of the content of her speech.

76. These requirements restrict Elizabeth from offering teletherapy services to New York residents without first obtaining a license.

77. If Elizabeth talks to New Yorkers about their problems without a New York license, she faces a threat of felony prosecution. N.Y. Educ. Law § 6512(1)

Constitutional Violations

Count I: As-Applied First Amendment Violation

78. All preceding allegations are incorporated here as if set forth in full.

79. New York's licensing restriction for mental health counselors violates the First Amendment as applied to Elizabeth's provision of teletherapy to New York residents.

80. The only thing Elizabeth wants to do in New York is talk to clients over the internet. Elizabeth's teletherapy services consist of ideas, opinions, and guidance that she communicates based on her

extensive education in counseling, as well as her professional experience.

81. When EO 202.15 expires, Elizabeth will be prohibited from having these conversations no matter what truthful disclosures she makes regarding her training and licensure.

82. Elizabeth's individualized advice is a form of speech fully protected by the First Amendment; she does not prescribe medicine or conduct medical procedures.

83. By prohibiting Elizabeth from giving New York residents individualized advice through teletherapy, New York prevents her from talking depending on what she says.

84. Elizabeth can talk to clients about a range of topics, but if she talks about topics that fall within the definition of "mental health counseling," she is required to have a New York license.

85. Elizabeth can give clients fashion advice, but she cannot provide advice that addresses problems with her clients' relationships or emotions.

86. Elizabeth can give clients interior decorating advice, but she cannot provide advice about managing stress caused by infertility or a newborn child.

87. Although Elizabeth is subject to New York's licensing laws because of her qualifications, New York does not enforce those laws against individuals with

fewer qualifications. New York cannot articulate any interest that would justify such an approach.

88. New York's temporary waiver, which allows for unlicensed mental health counseling by some counselors, further demonstrates the arbitrary and unnecessary nature of New York's licensing laws.

89. New York has no interest, compelling or otherwise, in preventing Elizabeth from speaking with clients over the internet.

90. Elizabeth has no adequate legal, administrative, or other remedy by which to prevent or minimize the existing and impending irreparable harm to her First Amendment rights.

91. Unless New York is enjoined from enforcing N.Y. Educ. Law § 8402 against her, Elizabeth will suffer ongoing and future impending irreparable harm to her First Amendment rights.

Count II: Facial First Amendment Violation

92. The allegations of paragraphs 1 through 77 are incorporated here as if set forth in full.

93. On its face, New York's mental health counseling licensing law is a content-based regulation of speech, as it applies only to speech that meets the definition of "mental health counseling."

94. New York's mental health counseling licensing law is substantially overbroad, as it sweeps in

significant amounts of speech that New York has no conceivable interest in regulating.

95. Under N.Y. Educ. Law § 8402, individuals who use words to help people with emotional, behavioral, or relationship problems fall within New York's definition of "mental health counseling."

96. On its face, New York's licensing requirement would apply to life coaches, self-help gurus, mentors, religious leaders, or even close friends, because each routinely offers advice that falls within the legal definition of "mental health counseling."

97. To the extent that New York considers such speakers to be exempt from its licensing laws because they are "individuals" who offer "instruction, advice, support, encouragement, or information to individuals," N.Y. Educ. Law § 8410(5), it is unclear how New York law draws distinctions between "mental health counseling" and "instruction, advice, support, encouragement, or information."

98. In practice, the only difference between "mental health counselors" and individuals who offer "advice" is that the former possess more qualifications to give advice.

99. New York's licensing laws are also significantly underinclusive in practice, as New York does not apply its laws to speakers who lack the training and qualifications associated with "mental health counselors."

100. For instance, New York does not enforce its licensing requirement against life coaches, mentors, and self-help gurus, each of whom routinely offers advice that falls within the definition of "mental health counseling."

101. New York cannot justify enforcing licensing requirements against people who are the most qualified to give advice, while exempting those without any qualifications.

102. By waiving its licensing requirement for some speakers, New York further demonstrates the arbitrary and underinclusive nature of its licensing law.

103. Elizabeth has no adequate legal, administrative, or other remedy by which to prevent or minimize the present and future irreparable harm to her First Amendment rights.

104. Unless New York is enjoined from enforcing N.Y. Educ. Law § 8402, Elizabeth will suffer continuing and imminent future irreparable harm.

Count III: First & Fourteenth Amendment Vagueness

105. The allegations of paragraphs 1 through 77 are incorporated here as if set forth in full.

106. New York's licensing requirement enacts an impermissibly vague and standardless restriction on speech.

107. While New York prohibits unlicensed individuals from using "verbal … methods" to "ameliorate … problem[s] … of behavior, character, development, emotion, personality or relationships," N.Y. Educ. Law § 8402(1)(a), New York permits unlicensed individuals to offer "instruction, advice, support, encouragement, or information." There is no discernible distinction between these types of speech.

108. In practice, it appears that New York deems people without extensive training, such as life coaches and self-help gurus, to be providers of "advice" that is exempt from New York's licensing laws. This distinction—between those with extensive training and those without—appears nowhere on the face of the statute, and if it did, it would be an irrational speaker-based distinction, contrary to the First Amendment.

109. New York likewise draws vague distinctions between types of licensed speech. For instance, Elizabeth is required to have one license to practice "mental health counseling," which includes helping people with relationship problems. But she is required to have a different license to conduct "marriage and family therapy," which is defined as "the use of mental health counseling…to treat mental, emotional and behavioral disorders and ailments within the context of marital…systems." N.Y. Educ. Law § 8403(c). She is required to have a different license if she talks to people about their unconscious minds. N.Y. Educ. Law § 8405(1)(a). Thus, even if Elizabeth were to obtain a license under § 8402, she would have to police

her own speech to ensure that her permissible "relationship" advice does not become prohibited "marital" advice. She would have to police her speech to ensure that when she talks to people about their problems, she does not talk about their unconscious minds. The vagueness of these categories of licensed speech places an impermissible burden on Elizabeth's First Amendment rights.

110. New York's failure to articulate any standard to guide its statutory definitions introduces impermissible discretion into the licensing process, as New York officials have broad and standardless discretion to decide whether speech should be subject to the licensing requirement, and, if so, which license is required.

111. Elizabeth has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing and future impending irreparable harm to her First Amendment rights.

112. Unless New York is enjoined from enforcing N.Y. Educ. Law § 8402, Elizabeth will suffer continuing and future impending irreparable harm.

Request for Relief

In light of the foregoing, Plaintiff Elizabeth Brokamp respectfully requests the following relief:

A. A declaratory judgment by the Court that, both as applied to Plaintiff and on its face, New York's licensing law for mental health

counselors, N.Y. Educ. Law §§ 8402-8405, violates the First and Fourteenth Amendments to the United States Constitution;

B. A permanent injunction prohibiting Defendants and their agents from applying New York's licensing requirements for mental health counselors to prevent Plaintiff from providing teletherapy services to New York residents; and

C. Any other legal and equitable remedies to which Plaintiff may show herself justly entitled.

DATED: June 21, 2021

Respectfully Submitted,

/s/ Jeffrey Redfern
Jeffrey Redfern
(DC Bar No. 1018046)*
Robert McNamara
(VA Bar No. 73208)*
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, VA 22203
P. (703) 682-9320
F. (703) 682-9321
E. jredfern@ij.org;
rmcnamara@ij.org

Robert Johnson
(D.C. Bar No. 1013390)*

Appendix E

INSTITUTE FOR JUSTICE
16781 Chagrin Blvd. #256
Shaker Heights, OH 44120
P. (703) 682-9320
F. (703) 682-9321
E. rjohnson@ij.org

Lead Counsel for Plaintiff

**Admitted Pro Hac Vice*

Alan Pierce,
NY Bar No. 102366
HANCOCK ESTABROOK, LLP
1800 AXA Tower I
100 Madison Street
Syracuse, NY 13202
Office: (315) 565-4546
Cell: (315) 427-0299
Email: apierce@hancock-law.com

Local Counsel for Plaintiff