No. 23-463

IN THE

Supreme Court of the United States

ELIZABETH BROKAMP,

Petitioner,

v.

LETITIA JAMES,
Attorney General of New York, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether New York's statutory licensure requirement for mental health counselors violates the First Amendment right to free speech of petitioner, a mental health counselor licensed in another State who has not attempted to avail herself of New York's streamlined process for licensing out-of-state practitioners.

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STATEMENT OF THE CASE

Petitioner Elizabeth Brokamp challenges as unconstitutional New York's statute requiring that practitioners of mental health counseling in New York hold a license from the New York State Education Department. *See* N.Y. Educ. Law §§ 8400-8402, 8406-8412 (the licensure statute). Petitioner argues that, because she provides therapy to her patients by means of conversations with them, she engages in speech protected by the First Amendment, which cannot be burdened by the requirement of a license. The U.S. District Court for the Northern District of New York dismissed petitioner's complaint, and the U.S. Court of Appeals for the Second Circuit affirmed.

There is no reason for this Court to review the Second Circuit's recognition of the unexceptional proposition that States may require a license for the practice of mental health counseling, a form of therapy. Indeed, all 50 States as well as the District of Columbia and Puerto Rico have such requirements.

This case presents a poor vehicle for reviewing that question because petitioner, a mental health counselor licensed in Virginia, has standing to challenge only New York's streamlined procedure for licensing out-of-state practitioners. Yet petitioner did not preserve a challenge to the streamlined procedure, and lacks standing to challenge the licensure statute's other provisions, which do not apply to him. Moreover, although petitioner argues that this case warrants review to decide whether "talk therapy" is speech or conduct (Pet. 31-32), the Second Circuit did not decide whether mental health counseling is speech or conduct; rather, the court assumed for argument's sake that mental health counseling is pure speech and held that

any restriction imposed by the licensure statute satisfied constitutional requirements.

Even aside from thee threshold flaws, this case does not warrant review. Although petitioner purports to identify circuit conflicts over (a) when a restriction on speech is content based, and (b) whether bringing an intermediate-scrutiny challenge entitles the pleader to discovery, there are no genuine conflicts on these issues. In both instances, the tests consider the particular facts and circumstances of each case, with differing facts and circumstances yielding different results.

A. Statutory and Regulatory Background

Prior to 2002, New York's mental health care delivery system relied primarily on four licensed or certified mental health professions (psychiatry, psychology, social work, and psychiatric nursing), along with four unlicensed mental health professions (mental health counseling, psychoanalysis, creative arts therapy, and family therapy). *See* Bill Jacket for Ch. 76 (2002) at 36.[1]

In 2002, the New York Legislature joined 46 other States and the District of Columbia, *see* Bill Jacket, *supra*, at 37, in extending its licensure framework to the profession of mental health counseling along with the other three previously unlicensed mental health professions. *See* Ch. 676, 2002 N.Y. Laws 3629. The Legislature concluded that the practice of those professions within the State "affects the public safety and welfare of its citizens" and that it was "in the public interest to regulate and control" such practice. *Id.* § 7, 2002 N.Y. Laws at 3630. The law took effect January 1, 2005. *Id.*

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[1] See https://digitalcollections.archives.nysed.gov/index.php/Detail/objects/30886#.

§ 19(2), 2002 N.Y. Laws at 3640. The bill received strong support from professional organizations, including the American Mental Health Counselors Association, the National Board for Certified Counselors, Inc., the American Counseling Association, the New York Mental Health Counselors Association, the National Association for the Advancement of Psychoanalysis, and the New York Coalition of Creative Arts Therapies. Bill Jacket, *supra*, at 22-23, 27, 29, 35-38.

Among other things, the licensure statute prohibits the unlicensed practice of "mental health counseling." N.Y. Educ. Law § 8402(2). That practice 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.

Id. § 8402(1). To obtain a license, a candidate must, among other things, have a master's degree or higher in counseling from a qualified program; complete a minimum of 3,000 hours of post-master's supervised experience; and pass an examination. *Id.* § 8402(3).

Practitioners who are licensed in another jurisdiction may obtain New York licensure by "endorsement"

upon presentation of the out-of-state license and evidence that they meet certain other requirements. N.Y. Comp. Codes R. & Regs. tit. 8 ("8 N.Y.C.R.R."), § 79-9.7, promulgated under the authority of N.Y. Educ. Law § 6506(6).

The licensure requirement is subject to a variety of exemptions. For example, medical doctors, physician assistants, social workers, psychologists, and nurses—all of whom are licensed under separate statutes—may provide services that fall within the realm of mental health counseling, so long as they do not hold themselves out as licensed mental health counselors. N.Y. Educ. Law § 8410(1). Attorneys, rape crisis counselors, and certified alcoholism and substance-abuse counselors—all of whom are likewise credentialed under other licensing laws—may provide mental health services "within their respective established authorities." *Id.* § 8410(2). Pastoral counseling services and the general provision of "instruction, advice, support, encouragement, or information" are also exempted. *Id.* § 8410(4), (5).

Due to the COVID pandemic, beginning in March 2020, New York's Governor issued a series of executive orders to assist New Yorkers in obtaining needed services while restricting in-person gatherings that might spread COVID. One of those orders, Executive Order No. 202.15,[2] temporarily allowed licensed out-of-state mental health counselors to serve clients in New York. *Id.* at 2. That executive order was rescinded effective June 25, 2021.[3]

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[2] N.Y. Exec. Order No. 202.15 (Apr. 9, 2020), 9 N.Y.C.R.R. § 8.202.

[3] N.Y. Exec. Order No. 210 (June 24, 2021), 9 N.Y.C.R.R. § 8.210.

B. Petitioner's Practice as a Mental Health Counselor

Petitioner is a professional counselor. (Pet. App. 98a, 102a.[4]) She earned a master's degree in counseling psychology and a Ph.D. in counseling. (Pet. App. 7a, 102a.) Petitioner holds a professional counselor's license in the State of Virginia. (Pet. App. 100a, 102a.) She is subject to oversight by the Virginia Board of Counseling. (Pet. App. 102a-103a.)

As petitioner describes her practice, she provides "talk therapy" and "teletherapy" over the internet. (Pet. App. 98a, 103a.) Teletherapy "provides significant benefits for clients." (Pet. App. 104a.) The therapy that petitioner provides is "based on her extensive education in counseling, as well as her professional experience." (Pet. App. 114a-115a.) Petitioner's services assist "clients who need to be seen imminently, and who may not be able to wait for an in-person visit." (Pet. App. 104a.) She has developed "a particular specialty assisting women who are facing issues relating to infertility and postpartum depression." (Pet. App. 104a.)

Petitioner charges for her services. (Pet. App. 105a.) She accepts both cash and insurance payments. (Pet. App. 105a.) Under the authority of temporary emergency measures implemented during the COVID pandemic, petitioner treated one patient who relocated to New York during the pandemic. (Pet. App. 106a.)

Petitioner acknowledges that her services constitute "mental health counseling" under New York law because they include the "assessment" and "ameliora-

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[4] Facts taken from petitioner's complaint are assumed to be true for purposes of this proceeding.

tion" of "problem[s] or disorder[s]" of "behavior, character, development, emotion, personality or relationships" using "verbal" methods. (Pet App. 105a.) *See* N.Y. Educ. Law § 8402(1). However, petitioner is not licensed as a professional counselor in New York and "has no intention of applying" for such a license. (Pet. App. 106a.)

C. Proceedings Below

Petitioner sued New York's Attorney General in April 2021 and in June 2021 filed the amended complaint at issue. (*See* Pet. App. 97a-122a.) Among other things, petitioner alleged that New York's licensure requirement for mental health counselors violated her right to free speech, both facially (Pet. App. 116a-118a) and as applied (Pet. App. 114a-116a).

Petitioner contended that New York "has no interest, compelling or otherwise, in preventing [her] from speaking with clients over the internet." (Pet. App. 116a.) She sought a declaratory judgment that New York's licensure statute for mental health counselors is unconstitutional and a permanent injunction prohibiting defendants from applying New York's licensure requirements to prevent her from providing teletherapy services to New York residents. (Pet. App. 120a-121a.) Petitioner's amended complaint did not mention New York's streamlined procedure for licensure by endorsement, which is available to a person who, like petitioner, holds a license from another State.

Respondents moved to dismiss, arguing among other things that the amended complaint failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Pet. App. 17a, 69a.) Petitioner opposed the motion. The district court granted the motion and dismissed the

amended complaint. (*See* Pet. App. 67a-74a, 86a-90a.) The court concluded that petitioner had failed to show that any "chilling effect" on her conduct was "substantial as compared to New York's plainly legitimate interest in protecting the public through regulation of mental health counselor licensing." (Pet. App. 88a.)

The U.S. Court of Appeals for the Second Circuit affirmed in a unanimous opinion. (*See* Pet. App. 1a-66a.) The court observed that, as a Virginia-licensed mental health counselor in good standing, petitioner did not need to satisfy New York's requirements for an initial license, but instead needed to satisfy only the streamlined requirements for licensure by endorsement. (Pet. App. 25a-27a, 55a.) Consequently, petitioner had standing to challenge only the provision for licensure by endorsement and no other portion of the licensure statute. (Pet. App. 25a-28a.)

Addressing petitioner's First Amendment claim, the Second Circuit "assume[d], without deciding" that petitioner's counseling services "consist only of speech without any non-verbal conduct." (Pet. App. 32a.) The court then determined that New York's licensure-by-endorsement requirement was content neutral. (Pet App. 32a-44a.) The court recognized that licensure by endorsement in this context does not "turn on the content of what a person says" (Pet. App. 34a), but rather applies narrowly to speech having the "particular purpose, focus, and circumstances" that define mental health counseling (Pet. App. 35a). Licensure by endorsement places "no limits or conditions on what a licensed counselor may hear or say in providing mental health counseling" (Pet. App. 37a).

The Second Circuit distinguished *Reed v. Town of Gilbert,* 576 U.S. 155 (2015), in which this Court struck

down an ordinance that treated outdoor signs differently depending on their content. (Pet. App. 39a.) As here, petitioner relied on *Reed* in the Second Circuit to support her argument that a law is content based "whenever it is necessary to examine the content of speech in order to determine how the law applies." (Pet. App. 40a (quoting Appellant Br. at 29).) The Second Circuit pointed out, however, that this Court "specifically disavowed that construction" of *Reed* in *City of Austin v. Reagan National Advertising of Austin LLC,* 596 U.S. 61 (2022). (Pet. App. 40a.) The Second Circuit observed that in *City of Austin,* this Court rejected as "too extreme" an interpretation of *Reed* similar to that advanced by petitioner here. (Pet. App. 41a (quoting *City of Austin,* 596 U.S. at 69).) This Court in *City of Austin* instead clarified that "restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." (Pet. App. 41a-42a (quoting *City of Austin,* 596 U.S. at 72).)

Having determined that New York's licensure-by-endorsement requirements were content neutral, the Second Circuit applied intermediate scrutiny and found that the statute survived such scrutiny. (Pet. App. 44a-57a.)

First, the court held, New York's licensure statute advances an important state interest in public health. (Pet. App. 45a-46a.) Indeed, the court noted, petitioner did not seriously dispute that interest at oral argument. (Pet. App. 45a.) The court cited the extensive legislative history documenting the need to protect the public from the "unprofessional, improper, unauthorized and unqualified practice of [mental health] counseling and psychotherapy" as well as other benefits of licensure. (Pet. App. 45a-46a.) And the court observed that the use of licensure as a means of regulation is consistent with

this Court's recognition that licensure "directly and materially . . . alleviate[s] concerns about ignorant, incompetent, and/or deceptive health care providers." (Pet. App. 49a; *see also* Pet. App. 47a-48a (citing *Dent v. West Virginia,* 129 U.S. 114, 122 (1889) (upholding licensure for physicians); *Semler v. Oregon State Bd. of Dental Exam'rs,* 294 U.S. 608, 611 (1935) (similar for dentistry).)

Second, the court explained that New York's definition of mental health counseling, combined with the statutory exemptions, narrowly tailors the licensure requirement by ensuring that it does not burden substantially more speech than is necessary to protect residents against incompetent and deceptive practitioners. (Pet. App. 53a-55a.) The definition of mental health counseling narrows the licensure statute's reach by addressing only speech that is (1) 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. (Pet. App. 53a.) And the exemptions properly address circumstances in which the risk of incompetent or deceptive counseling is reduced—for example, counseling undertaken by psychologists and other persons already licensed in related fields. (Pet. App. 50a-51a.)

Petitioner sought panel rehearing or rehearing en banc (CA2 ECF #119),[5] which the Second Circuit denied (CA2 ECF #122).

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[5] Documents from the proceedings below are cited by reference to the document number in the Second Circuit's electronic case filing system as reflected on PACER (CA2 ECF #).

REASONS FOR DENYING THE PETITION

I. THIS CASE IS A POOR VEHICLE FOR EXAMINING THE CONSTITUTIONALITY OF MENTAL HEALTH COUNSELING LICENSURE.

This case is a poor vehicle for examining the constitutionality of mental health counseling licensure, for two reasons. First, petitioner has standing to challenge only New York's streamlined procedure for licensure by endorsement of persons licensed in another State. By omitting from her complaint any mention of licensure by endorsement, however, petitioner failed to preserve such a challenge. Second, the Court of Appeals assumed for the purpose of argument that mental health counseling was pure speech, without analyzing or deciding the question.

A. Petitioner Has Standing to Challenge Only Licensure by Endorsement, Which She Does Not Address.

As a mental health counselor already licensed in Virginia, petitioner could have availed herself of New York's streamlined procedure enabling out-of-state practitioners to become licensed by endorsement. (Pet. App. 15a-16a, 55a.) The Second Circuit held that she consequently had standing to challenge only licensure by endorsement rather than the entirety of the licensure statute. (Pet. App. 3a, 6a, 25a-28a, 56a-57a.) And the petition does not contest that holding.

Indeed, the petition does not mention licensure by endorsement. Nor does the record provide a basis for challenging licensure by endorsement: petitioner's complaint likewise omitted mention of the streamlined procedure. And when respondents pointed out in their

brief to the Second Circuit that New York permits licensure by endorsement precisely to ease the burden on out-of-state practitioners, petitioner's only response was a footnote in the reply brief asserting, without analysis or citation to any allegation in the complaint, that her burden under licensure by endorsement is "far from de minimis." (CA2 ECF #52, at 22 n.8.)

To challenge a licensure requirement as an unconstitutional restriction on speech, allegations concerning the existence, weight, and effect of its purported burdens are essential. Under this Court's First Amendment precedents, a court must examine the nature and weight of the burden placed on speech. *See, e.g., Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. 721, 736-39 (2011) (applying strict scrutiny; analyzing weight of burden that matching funds provision imposed on political speech). Even under intermediate scrutiny, the nature and weight of the burden are relevant to assessing whether the regulation is narrowly tailored. *See Packingham v. North Carolina,* 582 U.S. 98, 105-06 (2017) (intermediate scrutiny demands that a law not "burden substantially more speech than is necessary to further the government's legitimate interests" (quotation marks omitted)).

Although the Second Circuit entertained petitioner's challenge "[i]nosofar as [she] *might* be understood to complain that even a license-by-endorsement requirement fails intermediate scrutiny" (Pet. App. 55a) (emphasis added), her complaint is devoid of any such allegation.

In short, although petitioner is limited to challenging licensure by endorsement, her complaint did not raise this challenge and her reply brief to the Second Circuit addressed the issue perfunctorily in a two-

sentence footnote. Because the record contains no pleading relating to the supposed burdens of licensure by endorsement, this case is a poor vehicle for this Court to probe the constitutionality of mental health counseling regulation.

B. The Second Circuit Did Not Decide Whether Mental Health Counseling Is Speech or Conduct.

Contrary to petitioner's argument (Pet. 31-33), this case is not an "ideal vehicle" for deciding whether "talk therapy" constitutes speech or conduct. The Second Circuit did not "recogniz[e] that talk therapy is speech" as petitioner asserts (Pet. 31). The court did not address whether talk therapy, let alone all mental health counseling, is speech or conduct. Instead, it assumed without deciding that mental health counseling was pure speech. (Pet. App. 32a.) The Second Circuit's opinion thus contains no analysis or holding on the issue petitioner seeks to advance.

Nor does this case provide an opportunity to rule on whether "conversion therapy"—therapy intended to change a patient's sexual orientation or gender identity—constitutes speech or conduct. *Compare Tingley v. Ferguson,* 47 F.4th 1055, 1064, 1080-83 (9th Cir. 2022) (conversion therapy is a medical treatment that States may regulate), *reh'g en banc denied,* 57 F.4th 1072 (9th Cir. 2023), *cert. denied,* 144 S. Ct. 33 (2023), *with Otto v. City of Boca Raton,* 981 F.3d 854, 861-64 (11th Cir. 2020) (ordinances banning conversion therapy were content-based regulation of speech), *reh'g en banc denied,* 41 F.4th 1271 (11th Cir. 2022). The record does not address conversion therapy at all. It does not indicate whether conversion therapy is a form of mental health counseling. The complaint contains no

allegation whatsoever concerning conversion therapy, including any allegation that petitioner uses conversion therapy or seeks to do so. Petitioner therefore lacks standing to pursue the issue.

Petitioner nonetheless argues (Pet. at 31-32) that a ruling on whether mental health counseling is speech or conduct would provide guidance in disputes over conversion therapy. But Article III's "strict prohibition on issuing advisory opinions" precludes the exercise of jurisdiction merely because "a decision might persuade actors who are not before the court." *Haaland v. Brackeen,* 599 U.S. 255, 294 (2023) (quotation marks omitted). Moreover, this record does not establish that conversion therapy is a form of mental health counseling in the first place. And in any event, as noted, the court below did not pass on the issue of whether mental health counseling is speech or conduct. Accordingly, even if petitioner had standing to raise the question she describes, this would not be a good case in which to answer it.

II. THE DECISION BELOW CORRECTLY APPLIED WELL-ESTABLISHED LAW IN HOLDING THAT NEW YORK'S LICENSURE STATUTE DOES NOT IMPOSE A CONTENT-BASED RESTRICTION ON SPEECH.

Even if there were no threshold barriers to review, there still would be no reason for this Court to review the decision below because the Second Circuit correctly applied well-established legal principles to hold that New York's procedure for licensure by endorsement does not impose a content-based restriction on speech.

The regulation of mental health services has long been deemed to fall within a State's traditional police powers. 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. Board of Regents*, 347 U.S. 442, 449 (1954). In regulating mental health counseling, New York is hardly an outlier. Professional counselors are now required by law to obtain a license in all 50 States, the District of Columbia, and Puerto Rico. (*See* Pet. App. 10a-11a n.6.) Against that backdrop, no Circuit has ever held that licensure for mental health counselors violates the First Amendment.

The two decisions of this Court on which petitioner relies, *Reed v. Town of Gilbert,* 576 U.S. 155 (2015), and *City of Austin v. Reagan National Advertising of Austin, LLC,* 596 U.S. 61 (2022), do not upend that well-established regulatory framework by subjecting common health licensure requirements to strict scrutiny as content-based restrictions.

In *Reed,* the Court stated, unsurprisingly, that content-based restrictions on speech are "those that target speech based on its communicative content," that is, those that "appl[y] to particular speech because of the topic discussed or the idea or message expressed." 576 U.S. at 163. Applying that understanding to an ordinance that treated signs differently depending on whether they were "Political Signs," "Ideological Signs," or "Temporary Directional Signs," the Court found the ordinance to be facially content based; the restrictions that applied to any given sign "depend[ed] entirely on the communicative content of the sign." *Id.* at 164. Here, based on *Reed,* petitioner argued to the Second Circuit that "a law is content based whenever it is necessary to examine the content of speech in order to determine how the law applies." (CA2 ECF #34, at 29.)

But this Court rejected that interpretation of *Reed* as "too extreme" in *City of Austin,* decided after this case was briefed but before the Second Circuit heard oral argument. *See* 596 U.S. at 69. *City of Austin* involved a sign ordinance that treated signs that advertise "off-premises" goods or services, i.e., those not located in the same place as the sign, differently from "on-premises" signs. *Id.* at 64. Although enforcing the City of Austin's ordinance required officials to read a sign to determine where it directed readers, *id.* at 71, this Court sustained the measure against a First Amendment challenge. The Court clarified that "[t]his Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 72; *see also id.* at 73 (rejecting the view that "*any* examination of speech or expression inherently triggers heightened First Amendment concern"). Under the ordinance, evaluation of a sign was necessary to determine whether it advertised off-premises services, and thus how the sign would be regulated. But this regulation was content neutral because the sign's "substantive message" was "irrelevant." *Id.* at 71. The decision below is fully consistent with this holding, and review is not warranted to consider an interpretation of *Reed* that the Court has rejected.

Petitioner also argues (Pet. 16) that the Second Circuit misapplied *City of Austin* by concluding that the reliance on therapeutic purpose in the statutory definition of mental health counseling rendered it content neutral. But *City of Austin* did not hold that any consideration of the purpose of speech is necessarily content based; rather, this Court cautioned that "an obvious subject-matter distinction" cannot escape classi-

fication as facially content based by employing a "function or purpose" proxy to achieve the same result. 596 U.S. at 74. That rule has no application here because the statutory definition, which relies not only on the purpose of speech but also on its focus, methods, and circumstances (*see* Pet. App. 12a-14a), is not using those features as a proxy for a subject-matter distinction. The definition of "mental health counseling" places no limits on what topics, ideas, or substantive messages may be discussed in counseling, and does not otherwise single out speech according to its subject matter.

Moreover, contrary to petitioner's argument (Pet. 17-23), the circuits are not in disagreement over the "meaning" of *City of Austin.* In *Mazo v. New Jersey Secretary of State,* 54 F.4th 124 (3d Cir. 2022), *cert. denied,* 144 S. Ct. 76 (2023), which petitioner cites as evidence of a circuit split, the Third Circuit sustained a New Jersey law requiring that candidates for office obtain consent from individuals or incorporated associations before naming them in slogans on the election ballot.[6] In response to the candidates' argument that the consent law was content based because it required officials to examine the content of slogans, the Third Circuit observed, correctly, that *City of Austin* had rejected that argument. *Id.* at 148. The D.C. Circuit ruled likewise in *Green v. U.S. Dep't of Justice,* 54 F.4th 738 (D.C. Cir. 2022). In that case the court rejected a First Amendment challenge to the Digital Millennium

[6] Under the New Jersey law, for example, a candidate could not place the phrase "Regular Democratic Organization of Union County" next to his name on the ballot if the Regular Democratic Organization did not agree to allow its name to be used. *See Mazo,* 54 F.4th at 133. The provision thus prevented deception and voter confusion, while also protecting the associational rights of third parties who might be named in a slogan. *Id.* at 153-54.

Copyright Act, reasoning that although it was necessary to read computer code to determine whether the statute applied, the code's substantive message was irrelevant. *Id.* at 746.

Petitioner wrongly contends that *Project Veritas v. Schmidt,* 72 F.4th 1043 (9th Cir. 2023), represents the opposite side of a purported split with *Mazo*. In *Project Veritas* the Ninth Circuit struck down an Oregon statute that prohibited persons from recording conversations without first informing the participants. *Id.* at 1050. The rule was subject to exceptions, including for recordings made while a law enforcement officer was performing official duties or "during a felony that endangers human life." *Id.* at 1050-51 (quotation marks omitted). The Ninth Circuit concluded that the law was a content-based restriction on the expressive conduct of making a recording, *id.* at 1058, and applied strict scrutiny to hold it unconstitutional, *id.* at 1058-62, 1068.

The Ninth Circuit recognized that *City of Austin* had "rejected a per se rule that a regulation cannot be content neutral if it requires reading the speech at issue." *Project Veritas,* 72 F.4th at 1056 (quotation and alteration marks omitted). The Ninth Circuit accordingly did not apply the per se rule that petitioners urged below. Instead, the court analyzed Oregon's statute and, based on that analysis, concluded that its effect impermissibly "pivot[ed] on the content of the recording." *Project Veritas,* 72 F.4th at 1057 (quotation marks omitted). The Ninth Circuit did not cite or discuss the Third Circuit's opinion in *Mazo,* let alone disagree with it.

Other circuits have recognized that *Reed* and *City of Austin* may be applied together. For example, in *StreetMediaGroup, LLC v. Stockinger,* 79 F.4th 1243

(10th Cir. 2023), the Tenth Circuit found support in both *Reed* and *City of Austin* for its holding that an ordinance's different treatment of paid and unpaid billboards was content neutral. *Id.* at 1251-52. The court observed that *City of Austin* rejected the view that any examination of speech inherently triggers heightened First Amendment concern. *Id.* at 1250. With that understanding, the court concluded that "*Reed* and *City of Austin* resolve the First Amendment issue here." *Id.*; *see also, e.g., Association of Club Executives of Dallas, Inc. v. City of Dallas,* 83 F.4th 958, 964-65 (5th Cir. 2023) (explaining that *City of Austin* rejected an extreme reading of *Reed*).

In short, this Court two years ago rejected the extreme interpretation of *Reed* that petitioner advanced in the Second Circuit. There is no reason to revisit that determination now.

III. THE DECISION BELOW DOES NOT CONFLICT WITH THE LAW OF THIS COURT OR OTHER CIRCUITS REGARDING THE AVAILABILITY OF DISCOVERY IN INTERMEDIATE-SCRUTINY CASES.

Petitioner errs in suggesting that the decision below conflicts with the law of this Court or that of other circuits on the availability of discovery in intermediate scrutiny cases. Regardless of whether the First Amendment is implicated, dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper when a complaint fails 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) (quotation marks omitted). Dismissal for failure to state a claim here was consistent with precedent from this Court and the federal Courts of Appeals, and particularly appropriate under the circumstances.

First, petitioner brought a facial challenge to the licensure provision. (*See* Pet. App. 116a-118a.) Whether a plaintiff has carried its burden on a facial challenge may be determined on a motion to dismiss. For example, in *Tinius v. Choi,* 77 F.4th 691 (D.C. Cir. 2023), *pet. for cert. docketed*, No. 23-646 (Dec. 14, 2023), the D.C. Circuit affirmed the dismissal of protestors' facial challenge to a temporary nighttime curfew imposed during the civil unrest that followed the George Floyd killing. Although the protestors argued that the complaint should not have been dismissed before discovery, they failed to explain "how discovery could have been relevant to their facial challenges." *Id.* at 702. *See also Anheuser-Busch, Inc. v. Schmoke,* 63 F.3d 1305, 1311-12 (4th Cir. 1995) (district court could decide motion to dismiss commercial speech claim based on challenged ordinance and its legislative history), *cert. granted and judgment vacated on other grounds,* 517 U.S. 1206 (1996), *op. adopted in part,* 101 F.3d 325 (4th Cir. 1996).

Although petitioner also purported to bring an as-applied challenge, she did not allege any circumstances peculiar to her that would render the licensure statute unconstitutional as applied in her case; rather, her theory was that the licensure statute chilled her exercise of protected speech. (*See* Pet. App. 22a-23a.) Petitioner's as-applied challenge was therefore a variant of her facial challenge and likewise did not entitle her to discovery. *See generally Doe v. Reed,* 561 U.S. 186, 194 (2010) (when analyzing facial versus as-applied challenges, "[t]he label is not what matters").

Second, contrary to petitioner's position (*see* Pet. 24, 36), there is no per se rule that pleading a claim subject to intermediate scrutiny entitles the plaintiff to discovery. Rather, under intermediate scrutiny, a burden on speech will be considered permissible "so long as the

neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.,* 547 U.S. 47, 67 (2006) (quotation marks omitted). The decision on which petitioner relies, *Greater New Orleans Broadcasting Association, Inc. v. United States,* 527 U.S. 173 (1999) (*see* Pet. 24), states that the government must "demonstrate" that the challenged measure will alleviate real harms. *Id.* at 188 (quotation marks omitted). Such a demonstration, however, may be "based solely on history, consensus, and simple common sense." *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555 (2001) (quotation marks omitted).

Whether a regulation promotes a government interest that would be achieved less effectively in its absence thus may be determined on a motion to dismiss. For example, in *Pitta v. Medeiros,* 90 F.4th 11 (1st Cir. 2024), the parent of a public-school student challenged the school district's prohibition against videotaping a meeting to discuss the student's individualized education program. Applying intermediate scrutiny, *see id.* at 24, the First Circuit affirmed a district court's grant of the school district's motion to dismiss under Rule 12(b)(6). The court observed that the policy promoted candor and protected sensitive conversations, which were content-neutral interests that would be achieved less effectively absent the regulation. *Id.* at 24-25. *See also, e.g., Alive Church of the Nazarene, Inc. v. Prince William Cnty.,* 59 F.4th 92, 110-12 (4th Cir. 2023) (applying intermediate scrutiny; affirming dismissal of church's challenge to zoning ordinance).

Third, the various results reached by circuit courts do not reflect a circuit split over the availability of discovery in cases subject to intermediate scrutiny, as petitioner argues (Pet. 26-31), but instead reflect only

the case-specific nature of the question. As this Court has explained, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Gov't PAC,* 528 U.S. 377, 391 (2000). Applying that flexible standard has yielded a variety of outcomes that depend on the facts and circumstances presented by each individual case.

Sometimes discovery and a trial will be necessary to resolve an intermediate scrutiny claim. For example, a trial was necessary in *McCullen v. Coakley,* 573 U.S. 464 (2014) (cited at Pet. 24-25), to make the fact-intensive determination of whether a 35-foot buffer zone around abortion clinics unduly restricted the free-speech rights of "sidewalk counselors" who sought to speak with patients at the clinics. *See id.* at 475; *McCullen v. Coakley,* 573 F. Supp. 2d 382, 386 (D. Mass. 2008), *aff'd,* 571 F.3d 167 (1st Cir. 2009); *see also, e.g., Kiser v. Kamdar,* 831 F.3d 784, 789 (6th Cir. 2016) (government body's "mere assertion that it has a substantial interest in distinguishing between specialists and general dentists" was not sufficient to meet its burden of supporting restriction on advertising); *Bruni v. City of Pittsburgh,* 824 F.3d 353, 366 (3d Cir. 2016) (in cases involving buffer zones around abortion clinics, application of intermediate scrutiny's narrow tailoring analysis "must depend on the particular facts at issue").

In other instances, however, the facts and circumstances will enable the government to demonstrate on the pleadings alone that it has a substantial interest which would be achieved less effectively absent the regulation. *See, e.g., StreetMediaGroup,* 79 F.4th at 1252 (applying intermediate scrutiny; affirming dismissal of challenge to ordinance that treated paid billboards

differently from unpaid ones); *Mai v. United States,* 952 F.3d 1106, 1115-1121 (9th Cir. 2020) (applying intermediate scrutiny; affirming dismissal of Second Amendment challenge to federal ban on possession of firearms by persons formerly committed to a mental institution), *cert. denied,* 141 S. Ct. 2566 (2021); *Proft v. Raoul,* 944 F.3d 686, 690-93 (7th Cir. 2019) (applying intermediate scrutiny; affirming dismissal of challenge to campaign contribution cap); *Dahlstrom v. Sun-Times Media, LLC,* 777 F.3d 937, 952-54 (7th Cir. 2015) (government interest and narrow tailoring of provision barring disclosure of personal information were shown based on "facts and circumstances of this case," including structure of statute and government interest in public safety).

The Second Circuit applied the traditional flexible approach to the particular facts of this case, which was apt for disposition on the pleadings. To begin with, the court cited petitioner's concession at oral argument that the licensure statute is a health measure. (Pet. App. 45a.) The court also considered the New York State Legislature's findings that mental health counseling "affects the public safety and welfare" and that regulation of the practice was in the public interest to "protect the public from unprofessional, improper, unauthorized and unqualified" practice of mental health counseling. (Pet. App. 45a-46a.) *See* Ch. 676, § 7, 2002 N.Y. Laws at 3630.

The Second Circuit further recognized the States' traditional "strong interest in protecting public health against the consequences of ignorance and incapacity, as well as of deception and fraud." (Pet. App. 47a (quotation marks omitted).) The court observed that every other State, Puerto Rico, and the District of Columbia

all require licensure of mental health counselors.[7] (Pet. App. 48a-49a.)

The Second Circuit pointed out that the licensure statute's legislative history—which was far from "sparse" as petitioner alleges (Pet. 10)—contained letters and memoranda from academicians, mental health counseling associations, and other mental health service providers contending that "patients can suffer significant, traumatic damage at the hands of mental health professionals who are unscrupulous, unethical, or untrained." (Pet App. 46a n.22 (quotation marks omitted).) *See* Bill Jacket, *supra*, at 29; *see also id.* at 36. The Second Circuit also cited the legislation's Sponsor Letter, a Budget Report, and a State Education Department Recommendation, which likewise underscored the need to protect against unqualified or unethical mental health counselors and indicated that passage of the bill

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[7] In the Brief of *Amicus Curiae* Professor Morris M. Kleiner in Support of Petitioner, the sole amicus, an economist, makes two arguments, both of which are more appropriately addressed to state legislatures than to courts. First, he contends that the "significant variation" in occupational licensing laws from State to State "acts as a barrier to workers and customers seeking to cross state lines for better opportunities." (Amicus Br. at 2-3, 7, 15-17.) That argument is in tension with the federal system, in which the States retain their police powers, *see* U.S. Const. amend. X, and serve as laboratories for devising solutions to legal problems, *see Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015). Second, amicus argues that licensure laws reduce the quality of professional services, reduce supply, and increase prices (Amicus Br. at 9-15), but the New York Legislature had ample basis to reject that argument and rely instead on the record supporting its conclusion that this licensure law would enhance professional services and protect consumers from dishonest or incompetent providers.

would raise the quality of mental health services available in the State. (Pet. App. 46a-47a n.22.) *See* Bill Jacket, *supra*, at 3, 6, 7, 11, 21, 32.)

As to tailoring, the Second Circuit observed that the statutory definition of mental health counseling in Education Law § 8402(1) includes restrictions on purpose, focus, and circumstances that "serve to tailor the license requirement" to address circumstances in which persons are most likely to present themselves as mental health counselors in order to gain trust. (Pet. App. 53a; *see also* Pet. App. 12a-14a (discussing restrictions).) In those instances, the state interest is greatest in "minimizing the risks [that] incompetence or deception pose to public health." (Pet. App. 53a.) And the statutory exemptions further tailored the licensure requirement so it would not burden substantially more speech than necessary to allow New York to protect residents against incompetent and deceptive mental health counselors. (Pet. App. 54a-55a.)

The Second Circuit concluded by observing that licensure by endorsement itself also tailored the licensure statute to avoid burdening counselors who, like petitioner, were already licensed in another State. (Pet. App. 55a.) Petitioner did not allege that the requirements of licensure by endorsement were unreasonable or unduly burdensome. (Pet. App. 56a.) In short, the court below applied intermediate scrutiny consistently with the precedents of this Court and the circuit courts, and the decision below does not implicate a circuit split.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 2024

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