No. 23-463

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

REPLY IN SUPPORT 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

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REPLY IN SUPPORT OF CERTIORARI

The petition for certiorari outlines two important splits of authority regarding: (1) the test for content-neutrality and (2) whether the government can carry its narrow tailoring burden on a motion to dismiss by merely pointing to extra-record legislative history.

The brief in opposition denies the existence of these splits by substituting different questions presented. But the first question is not whether *any* examination of the content of speech makes a law content-based; the question is whether a law that explicitly defines regulated speech by its subject matter and purpose can escape strict scrutiny. And the second question is not whether the amount of evidence the government will need in order to prevail under intermediate scrutiny can vary based on context. (Of course it can.) The question is whether the government has an evidentiary burden at all.

Respondents also posit some vehicle problems with this case, but these problems are nonexistent and do not merit serious consideration.

I. Whether "licensure by endorsement" applies to Petitioner is irrelevant to this Court's decision on certiorari.

Respondents correctly point out that New York's professional counseling law has a provision for "licensure by endorsement," whereby counselors licensed in other states can apply for a New York license, provided they meet New York's requirements. See N.Y. Educ. Law § 6506(6); N.Y. Comp. Codes R. & Regs tit. 8, § 79-9.7. But Respondents are quite wrong to

suggest that this alternative licensing path presents a vehicle problem in this case, or that Dr. Brokamp somehow failed to preserve a challenge to licensure by endorsement.

First, whether Dr. Brokamp qualifies for licensure by endorsement (a point on which New York refused to take a position below) is irrelevant to the First Amendment questions before this Court. Dr. Brokamp's complaint alleged that New York's licensing requirements were sufficiently burdensome that she stopped talking to a client who relocated to New York, rather than try to comply with New York's requirements. *E.g.,* Pet. App. 113a–114a. Endorsement may streamline the initial application process, but it does not relieve the licensee of most of the burdens of licensure. She must still meet all the prerequisites, fill out substantial paperwork, pay significant recurring fees, and obtain continuing education credits.[1] The continuing education requirements are particularly burdensome because New York requires 36 hours (more than Virginia's 20) and does not grant credit unless a course provider pays a fee to obtain advance approval from New York (which eliminates most out-of-state courses). N.Y. Comp. Codes R. & Regs tit. 8, § 79-9.8(e)(3), (c)(2)(ii)(a).

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[1] See License Requirements for Mental Health Counselors, https://perma.cc/K28C-R3YY; ACA Licensure Portability Model FAQs, https://perma.cc/V3BQ-Q2RK ("[The American Counseling Association] receives calls every week from licensed counselors – often with many years of experience – who move to another state and experience licensure reciprocity roadblocks. As a result, licensed counselors can feel that they are prisoners in their own state.")

While the minimal differences between regular licensure and licensure by endorsement may be relevant when it comes time to apply First Amendment scrutiny to Dr. Brokamp's claims, they are irrelevant to the antecedent questions presented in this case: What is the correct level of scrutiny, and can the government carry its evidentiary burden with mere legislative history?

Respondents are equally wrong to suggest that Petitioner somehow waived her challenge to licensure by endorsement by not specifically mentioning it in the complaint. Respondents did not raise this argument below, and the Second Circuit did not find waiver, but in any event, the Complaint clearly states a First Amendment claim based on the application of the licensing law to out-of-state counselors like Dr. Brokamp. "Rule 8's liberal pleading principles do not permit dismissal for failure in a complaint to cite a statute, or to cite the correct one. Factual allegations alone are what matters." *Wynder* v. *McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) (cleaned up).

II. Respondents ignore the actual split among the circuits on *City of Austin*'s effect on *Reed*.

As explained in the Petition, there is a split of authority among the federal circuits about the degree to which this Court's ruling in *City of Austin* v. *Reagan National Advertising*, 596 U.S. 61 (2022), modified this Court's ruling in *Reed* v. *Town of Gilbert*, 576 U.S. 155 (2015). Pet. 12–23. Specifically, that split concerns the purposes for which government

regulators may examine the content of regulated speech without triggering strict scrutiny.

On one side of that split stands the Ninth Circuit, which held that the government may review the content of speech only in the service of enforcing "location-based rules" such as the on-/off-premises sign regulation at issue in *City of Austin*. *Project Veritas* v. *Schmidt*, 72 F.4th 1043, 1056 (9th Cir. 2023). In the Ninth Circuit's view, this narrow exception for location-based rules "does not affect [this] Court's longstanding holding that 'regulations that discriminate based on the topic discussed * * * are content based.'" *Ibid*. (quoting *City of Austin*, 596 U.S. at 73–74).

On the other side of that split stand the Second and Third Circuits, both of which read *City of Austin* expansively, allowing government regulators to examine the content of speech, without triggering strict scrutiny, whenever the government does so to enforce some "neutral" line. See *Mazo* v. *N.J. Sec'y of State*, 54 F.4th 124 (3d Cir. 2022), cert. denied, No. 22-1033 (Oct. 2, 2023); see also Pet. App. 39a–44a. Thus, in *Mazo*, the Third Circuit held that New Jersey's consent requirement for ballot slogans was content-neutral because regulators examined the content of ballot slogans only to determine if the slogan included subject matter—the names of individuals or New Jersey incorporated organizations—for which the speaker was required to get consent. 54 F.4th at 149. And the Second Circuit, in the ruling below, held that New York's licensure requirement for mental health counseling was content-neutral because it required regulators to examine speech only to determine whether it

"pertain[s] to a mental disorder or problem," Pet. App. 52a, and was thus subject to licensure.

Remarkably, although this split of authority lies at the heart of Petitioner's first Question Presented, Respondents' Brief in Opposition does not address it at all. Instead, Respondents—like the Second Circuit below—focus on an entirely different argument: Petitioner's argument below that a law is content based "whenever it is necessary to examine the content of speech in order to determine how the law applies." BIO 14 (quoting Pet. App. 40a).

Shortly after this Court handed down *City of Austin*, Petitioner conceded in a 28(j) letter that this interpretation of *Reed*—as holding that *any* examination of content triggers strict scrutiny—was no longer tenable. And it's no surprise that the Second, Third, and Ninth Circuits similarly reject that per se rule in light of *City of Austin*. But that is irrelevant to the issue on which those circuits disagree: Whether *City of Austin* modified *Reed*'s holding that facial subject-matter distinctions trigger strict scrutiny.[2]

Petitioner also invoked *Reed* to make that argument below.[3] And the split of authority on that

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[2] For the same reason, Respondents' citations (at BIO 17–18) to *StreetMediaGroup* v. *Stockinger*, 79 F.4th 1243 (10th Cir. 2023), and *Association of Club Executives of Dallas* v. *City of Dallas*, 83 F.4th 958 (5th Cir. 2023), are also irrelevant to the split of authority at issue here. Both cases, following *City of Austin*, reject the view that any examination of content renders a law content-based, but neither addresses the sort of subject-matter-based distinction at the heart of the first Question Presented.

[3] See Appellant Br. (Doc. 34) at 30 ("The restriction therefore simultaneously defines the type of speech that requires a license

argument was outcome determinative here. Petitioner has argued, and no one seriously disputes, that New York distinguishes between regulated and unregulated speech based on its subject matter: Speech is regulated only if it "pertain[s] to a mental disorder or problem." Pet. App. 52a. Under the Ninth Circuit's view of *Reed* and *City of Austin*, that is an "obvious" example of a content-based regulation of speech. *Project Veritas*, 72 F.4th at 1057. Under the Second and Third Circuit's view, it is not.

Notwithstanding this Court's explicit holding that *City of Austin* does 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, some lower courts are treating *Reed* as effectively overruled. This Court's review is warranted to restore uniformity and reiterate the limits of *City of Austin*.

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both in terms of its 'subject matter' and its 'function or purpose,' and *Reed* explains that both types of distinctions are content based. Either is sufficient to trigger strict scrutiny." (cleaned up)); Reply Br. (Doc. 52) at 13 ("Under *Reed*'s clear standard, there is no way to escape the conclusion that New York's licensing law is content-based: As the State concedes, Dr. Brokamp can talk to her clients about sports without a license, but she cannot talk to them about their emotions. That is a content-based restriction, regardless of whether the state is further targeting particular viewpoints within the targeted subject matter." (cleaned up)).

III. There is a real and growing split regarding whether the government needs evidence to prevail under intermediate scrutiny.

Respondents argue that there is no split on the second question presented because courts have adopted a "flexible standard," BIO 21, to intermediate scrutiny questions: Sometimes they decide them on a motion to dismiss, sometimes they don't. That argument ignores the actual holdings of these cases.

This Court, and the courts on the correct side of the split, have squarely held that the government has a burden under intermediate scrutiny that it cannot carry without introducing real evidence, specifically with regard to whether the regulation at issue addresses real harms and whether the regulation will "in fact alleviate them to a material degree."[4] These were not context specific holdings, where the courts said, "This is a particularly tough case where we need evidence." These cases articulated a general First Amendment principle under which the Second, Fourth, and Seventh Circuits are wrong. And, as New York pointed out in its Brief in Opposition, the First Circuit joined the wrong side of that split after the Petition was filed, which further underscores the need

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[4] *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 173, 188 (1999); *Bruni* v. *City of Pittsburgh*, 824 F.3d 353, 372 (3d Cir. 2016) ("[W]ithout such proof, the Plaintiffs' First Amendment claims cannot be dismissed." (emphasis added)); *Kiser* v. *Kamdar*, 831 F.3d 784, 789 (6th Cir. 2016) ("[T]he court may not simply rely on the government's 'own belief in the necessity for regulation,' but must actively scrutinize the evidence and question the government's assertions.")

for this Court's guidance. *Pitta* v. *Medeiros*, 90 F.4th 11, 13 (1st Cir. 2024).

Respondents try to escape this split by pointing out that "[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." BIO 21 (quoting *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000)); see also *Lorillard Tobacco Co.* v. *Reilly*, 533 U.S. 525, 555 (2001) ("We do not, however, require that empirical data come accompanied by a surfeit of background information." (cleaned up)). This is just a straw man. The question in this case is not *how much* evidence, but rather, whether the government needs *any at all*. Notably, both *Shrink Missouri* and *Lorillard* were decided at summary judgment on fully developed evidentiary records.

To be sure, a plaintiff cannot simply incant the words "First Amendment" to defeat a motion to dismiss. There are many ways in which the actual facts pleaded in the complaint might fail to state a claim, but that decision must be made by looking at the complaint itself. A plaintiff would not be able to survive a motion to dismiss, for instance, if a court held that the "expressive speech" described in his complaint was actually non-expressive conduct. There may even be cases where the facts in a complaint are sufficient to demonstrate narrow tailoring.[5] But it is something

[5] See *Bruni*, 824 F.3d at 372 n.20 ("[W]ere one to challenge [a] hypothetical *de minimis* * * * law * * * , that regulation would likely be viewed as narrowly tailored, even at the pleading stage. With such a slight burden on speech, any challengers would

else entirely—and contrary to this Court's repeated holdings—to find that a complaint fails to state a First Amendment claim because the defendant points to extra-record legislative history that supposedly proves narrow tailoring. *See Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 666 (1994) (plurality opinion) ("[W]e have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.'").

IV. This case is a good vehicle to address the constitutional status of talk therapy.

The specific issue in this case—the ability to conduct talk therapy across state lines—is itself a matter of compelling public importance. The relationship between a therapist and her clients can be exceedingly close and meaningful, and yet licensing laws make it difficult or in some cases effectively impossible to maintain that relationship across state lines. A student may have to give up his therapist after moving to a new state for school; others may have to give up their therapists after moving to a new state for work or family; and others may find themselves unable to speak with their therapists while temporarily out of state. Dr. Brokamp herself sued in New York because she was compelled to terminate her relationship with a patient who moved to the state.

These burdens are not limited to a single state. Rather, counselors like Dr. Brokamp must navigate a patchwork of laws across the country. *Cf. United*

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struggle to show that 'alternative measures [would] burden *substantially* less speech.'").

States v. *Locke*, 529 U.S. 89, 116 (2000) (noting the practical difficulty of complying with distinct regulatory regimes in each state). The result is that, as the American Counseling Association has recognized, "[t]ransferring a professional counseling license from one state or U.S. jurisdiction to another is often exceedingly difficult and has become a crisis."[6]

Beyond that specific issue, the Petition (at 31-33) also explained that this case provides a vehicle to address the constitutional status of talk therapy under the First Amendment. Courts have split at least three ways on that broader question, with courts disagreeing both as to whether therapy counts as speech at all and, if so, how restrictions on such speech should be analyzed.

In the context of that three-way split, the Petition raises important questions regarding the treatment of talk therapy: What is the standard to determine whether a restriction on talk therapy is content based? And can a First Amendment challenge to a restriction on talk therapy be resolved on the pleadings, based on conclusory assertions of regulatory benefits and dubious evidence drawn from legislative history? Both questions ultimately address the fact that the Second Circuit subjected restrictions on talk therapy to something akin to rational basis review; the Court can therefore use this petition to clarify whether talk

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[6] https://perma.cc/V3BQ-Q2RK. This crisis may in the future be eased somewhat by adoption of an interstate compact, the Counseling Compact, that provides for greater portability of counseling licenses. But even the Counseling Compact imposes meaningful burdens on speech. See *id*. And, regardless, as of the date of this Reply, New York is not a member of the Compact.

therapy deserves full protection under the First Amendment.

Respondents object that the Second Circuit assumed, without deciding, that Elizabeth's "counseling services consist only of speech." Pet. App. 32a. True enough; that is why both questions presented—like the Second Circuit—focus a step farther along in the First Amendment analysis. But that does not change the fact that the speech/conduct distinction would fall within the scope of the Court's review. The Court is not bound by the Second Circuit's assumption, see *Thigpen* v. *Roberts*, 468 U.S. 27, 30 (1984), and can reach any question "fairly subsumed" within the question presented, *Okla. Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991). That includes "antecedent" questions, *Arcadia* v. *Ohio Power Co.*, 498 U.S. 73, 77 (1991), such as whether talk therapy is speech at all. Ultimately, it seems unlikely that the Court would conclude that talk therapy is not speech; the more interesting questions are the ones actually addressed by the Second Circuit's analysis below. But if the Court wishes to decide this case on that basis, it would fall within the scope of the Court's review.

This Petition, moreover, is a good vehicle to address these questions precisely because it arises outside the culturally divisive context of some other talk therapy cases. Three Justices would have granted certiorari in *Tingley* v. *Ferguson*, concerning the First Amendment status of so-called "conversion therapy."[7]

[7] See *Tingley* v. *Ferguson*, 144 S. Ct. 33, 34 (2023) (Thomas, J., dissenting from denial of certiorari) (stating "if speaking to clients is not speech, the world is truly upside down" and "it is a

Like *Tingley*, this case affords an opportunity to address the constitutional status of talk therapy, but it would allow the Court to do so in a context that is less freighted with the baggage of the culture war. The Court should take that opportunity.

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

March 5, 2024

Counsel for Petitioner

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fundamental principle that governments have no power to restrict expression because of its * * * subject matter" (cleaned up)); *id.* at 35 (Alito, J., dissenting from denial of certiorari) (stating that it is "beyond dispute" that regulations of talk therapy "restrict speech, and all restrictions on speech merit careful scrutiny"); *id.* at 33 (Kavanaugh, J., supporting certiorari).