

No. 23-463

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IN THE  
**Supreme Court of the United States**

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ELIZABETH BROKAMP,

*Petitioner,*

v.

LETITIA JAMES, ATTORNEY GENERAL OF NEW YORK ET AL.,

*Respondents.*

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

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**BRIEF OF *AMICUS CURIAE*  
PROFESSOR MORRIS M. KLEINER  
IN SUPPORT OF PETITIONER**

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JOSEPH S. DIEDRICH  
JULIA B. BANEGAS  
HUSCH BLACKWELL LLP  
1801 Pennsylvania Ave NW  
Suite 1000  
Washington, DC 20006

MADLINE TOWNSLEY  
HUSCH BLACKWELL LLP  
8001 Forsyth Blvd, Suite 1500  
St. Louis, MO 63105

REBECCA C. FURDEK  
*Counsel of Record*  
HUSCH BLACKWELL LLP  
511 N. Broadway, Suite 1100  
Milwaukee, WI 53703  
(414) 273-2100  
rebecca.furdek  
@huschblackwell.com

*Counsel for Amicus Curiae*

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Dr. Morris M. Kleiner is a distinguished and widely cited scholar in the field of occupational licensing. Dr. Kleiner is Professor and AFL-CIO Chair in Labor Policy at the Humphrey School of Public Affairs at the University of Minnesota, a visiting scholar at the Federal Bank of Minneapolis and the Upjohn Institute for Employment Research, and a research associate with the National Bureau of Economic Research in Cambridge, Massachusetts. He has published numerous books and articles spanning over two decades of research, with a particular focus on occupational regulation and its impact on quality and costs. Dr. Kleiner received his Ph.D. in economics from the University of Illinois, Urbana-Champaign.

Given his substantial and ongoing academic contributions in this field, Dr. Kleiner has a professional interest in contributing to the sound interpretation of First Amendment law as applied to occupational licensing. In this brief, Dr. Kleiner presents an array of empirical research in support of granting the Petition. This evidence contextualizes the magnitude of occupational licensing as a labor market force, the variation in licensing laws across states and occupations, and the effect of leaving the current circuit splits intact on millions of professionals.

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<sup>1</sup> All parties were timely notified of the filing of this brief. Nobody other than counsel for *amicus* authored this brief in any part or funded its preparation or filing.

## SUMMARY OF ARGUMENT

Dr. Elizabeth Brokamp engages in speech as a core part of her profession. Occupational-licensing laws that regulate speech-based professions necessarily “defin[e] regulated speech by particular subject matter.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). These laws should be subject to strict scrutiny. *Id.*; see *City of Austin v. Reagan Nat’l Advertising of Austin*, 596 U.S. 61, 76 (2022). Nevertheless, the rulings of some (but not all) circuits have allowed some (but not all) states to evade this Court’s clear holdings and unconstitutionally regulate protected speech. Today’s case presents an ideal vehicle to build upon *Reed* and *City of Austin* and provide necessary clarity at the intersection of occupational licensing and the First Amendment.

The cross-country regulatory patchwork encountered by Dr. Brokamp is far from unique. Instead, her experience aptly illustrates how licensing laws and the existing circuit splits affect millions of everyday Americans. A vast body of empirical evidence—much of it resulting from decades of study by *amicus* and his peers—shows how occupational licensing has become one of the most significant aspects of the American labor market. Licensing’s regulatory coverage, in fact, now extends to millions of individuals in nearly 1100 vocations.

On top of that, occupational-licensing laws vary significantly, both from state to state and occupation to occupation. This significant variation acts as a barrier to workers and customers seeking to cross state lines for better opportunities. And this barrier to interstate mobility has become even more pronounced in the post-

pandemic era, as both telework and telemedicine expand their reach.

What’s left after the Second Circuit’s blunder below is an increasingly convoluted labyrinth of licensing laws subject to varying levels of First Amendment protection. As it stands, millions of Americans have different legal rights to pursue their chosen occupations—and to speak as part of those occupations—based solely on their zip codes or the zip codes of their clients. But the First Amendment should apply equally everywhere: in Virginia, in New York, and in every other state.

The Court should hear this case.

## ARGUMENT

### **I. Occupational licensing has become one of the most significant forces influencing American labor markets.**

A. Occupational licensing—the “government licensing of jobs” that makes “working for pay in a licensed occupation [ ] illegal without first meeting government standards”—is one of the most significant influences affecting American labor markets today. *See* Morris M. Kleiner, *Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing* 1 (2015), <https://bit.ly/3qllBFJ>. In the 1950s, just five percent of workers needed a government permission slip to earn money for their labor. *See* Morris M. Kleiner, *Reforming Occupational Licensing Policies*, Brookings Inst. 5 (Mar. 2015), <https://brook.gs/3ojmYVz> [hereinafter Kleiner, *Reforming*]. In the decades since, however, the number of new licensing laws has grown into a “na-

tional patchwork of stealth regulation” that tightly restricts “labor markets, innovation, and worker mobility.” See Nat’l Conf. of State Legislatures, *The State of Occupational Licensing: Research, State Policies and Trends* 5 (2017), <https://bit.ly/47WgMGz> [hereinafter NCSL, *State of Occupational Licensing*]; see also Morris M. Kleiner, *Why License a Florist?*, N.Y. Times (May 29, 2014), <https://nyti.ms/3P2W6mw>.

Today, roughly one in four workers must obtain a government license to work in over a thousand occupations. See Kleiner, *Guild-Ridden Labor Markets*, *supra*, at 1; NCSL, *State of Occupational Licensing*, *supra*, at 2. In New York, 21% of all workers are licensed, making it the state with the 17th highest percentage of licensed workers in the United States. See Morris M. Kleiner & Evgeny S. Vorotnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, Inst. for Justice 40 (Nov. 2018), <https://bit.ly/3qvEbeh>.

Many occupational-licensing laws necessarily regulate speech “uttered by professionals.” *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (*NIFLA*); see Bradley Copeland, *Occupational Licensing and the First Amendment*, 31 Geo. Mason U. Civ. Rts. L.J. 181, 182 (2021). “[M]illions of Americans,” after all, “earn their living in occupations that consist primarily, if not entirely, of speech.” Paul Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183, 183 (2005) <https://bit.ly/3TNjjN8>; see also Copeland, *supra*, at 182. When a professional “does no more than render advice to a client, the government’s interest in protecting the

public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional’s practice”—and, hence, First Amendment concerns arise. See Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 *Sea. U.L. Rev.* 885, 893 (2000). Talk therapy is speech subject to First Amendment protections. *Pet.App.32a*; see *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020) (holding that talk therapy is protected speech).

Additionally, “[w]hen the government restricts professionals from speaking to their clients . . . it’s restricting the speech precisely because of the message that the speech communicates, or because of the harms that may flow from this message.” Eugene Volokh, *Speech as Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 *Cornell L. Rev.* 1277, 1346 (2005). Thus, occupational licensing laws, which vary depending on the type of advice rendered to the client, necessarily “defin[e] regulated speech by particular subject matter” and, therefore, require strict scrutiny under the First Amendment. *Reed*, 576 U.S. at 163–64.

B. These First Amendment concerns are exacerbated because occupational-licensing laws often include “good moral character” requirements. These requirements, it is said, protect the public by ensuring professional integrity—or, put more colorfully, by “eliminating the diseased dogs before they inflict their first bite.” Bruce Robert Elder & Laurie Swinney, *The Good Moral Character Requirement for Occupational Licensing*, 43 *Mgmt. Res. Rev.* 717, 721 (2020) (quoting

Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident*, 40 Bar Examiner 17, 23 (1971)). Certainly not limited to mental health professionals in New York, character requirements (“good,” “moral,” or both) have been imposed on a wide range of occupations, including beauticians, geologists, piano tuners, guide-dog trainers, and even vendors of erotica, to name but a few. See Elder & Swinney, *supra*, at 721; Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 499 (1985). All 50 states require good moral character for at least some occupations, with an average of 49 such occupations per state. Elder & Swinney, *supra*, at 724; see also Nat’l Conference of State Legislatures, *The National Occupational Licensing Database*, <https://bit.ly/3F6Vp7M> (last visited Nov. 30, 2023).

N.Y. Educ. Law § 8402 requires an applicant to show “good moral character”—but no New York law defines that term. New York’s definition-less requirement finds good company: states frequently fail to define what “good moral character” means. See Elder & Swinney, *supra*, at 730. This Court has long recognized that “good moral character” may be “defined in an almost unlimited number of ways[,] for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.” *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262–63 (1957). Hardly any mental effort is required to grasp how the “unusually ambiguous” concept of “good moral character” “can be a dangerous instrument for arbitrary and discriminatory

denial” of the right to earn a living. *Konigsberg*, 353 U.S. at 262–63.

The ubiquity of occupational licensing has impacted millions of workers in life-altering ways. Dr. Brokamp is, unfortunately, just one example of how occupational licensing prevents professionals from continuing to serve clients—or reaching new, hopeful clients—due to varying licensing requirements across different jurisdictions.

## **II. Occupational licensing imposes significant costs and harms on the very people it purportedly protects.**

Not surprisingly, occupational licensing has come under scrutiny. Scholars and commentators of varying disciplines—*amicus* chief among them<sup>2</sup>—have raised wide-ranging critiques.<sup>3</sup> Empirical scholarship shows

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<sup>2</sup> See, e.g., Morris M. Kleiner & Maria Koumenta, *Grease or Grit? International Case Studies of Occupational Licensing and its Effects on Efficiency and Quality* (2022); Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in U.S. States*, 90 Rev. Econ. Studies 2481 (2023); Jonathan Hall et al., *Occupational Licensing of Uber Drivers*, Stanford Inst. for Theoretical Econ. (2019); Kleiner, *Guild-Ridden Labor Markets*, *supra*; Morris M. Kleiner, *Stages of Occupational Regulation: Analysis of Case Studies* (2013); Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006); Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & Econ. 547 (2000).

<sup>3</sup> See also, e.g., Daniel Greenberg, *Regulating Glamour: A Quantitative Analysis of the Health and Safety Training of Appearance Professionals*, 54 UIC J. Marshall L. Rev. 123 (2021); Chiara Farronato et al., *Consumer Protection in an Online World: An Analysis of Occupational Licensing* (Nat'l (footnote continued)



that while providing little or no public benefit, occupational licensing imposes significant costs and harms on individuals and the public. These costs and harms manifest in three primary ways—by (A) decreasing quality; (B) decreasing the availability of services; and (C) increasing prices.

A. Empirical research into many different licensed occupations has consistently found that imposing any occupational-licensing requirements, let alone onerous ones like N.Y. Educ. Law § 8402's, generally does *not* improve safety or quality.

For example, a 2015 study examined the quality of optician service in non-licensed states versus states requiring licensure, finding no significant link between optician licensure and improved service quality. See Edward J. Timmons & Anna Mills, *Bringing the Effects of Occupational Licensing into Focus: Optician Licensing in the United States*, 15, 18 (Mercatus Ctr. at George Mason Univ. Working Paper (2015)), <https://bit.ly/3TDS1Io>.<sup>4</sup> That study reaffirms decades of

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Bureau of Econ. Research, Working Paper No. 26601, 2020), <https://bit.ly/2Y5y9X6>; Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, Brookings Inst. (Mar. 2018), <https://brook.gs/3FcvMmq>; Edward J. Timmons, *The Effects of Expanded Nurse Practitioner and Physician Assistant Scope of Practice on the Cost of Medicaid Patient Care*, 121 *Health Policy* 189 (2017); Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, *Monthly Labor Rev.*, May 2015, <https://bit.ly/3umpHyy>; Edward J. Timmons & Robert J. Thornton, *The Effects of Licensing on the Wages of Radiologic Technologists*, 29 *J. Labor Res.* 333 (2008).

<sup>4</sup> See also, e.g., Morris M. Kleiner, *Regulating Access to Work in the Gig Labor Market: The Case of Uber*, Emp't Research (July (footnote continued))

scholarship. See John Phelan, Fed. Trade Comm'n, *Regulation of the Television Repair Industry in Louisiana and California: A Case Study* (1974), <https://bit.ly/39Tn8uB>; Sidney L. Carroll & Robert J. Gaston, *Occupational Restrictions and the Quality of Service Received: Some Evidence*, 47 S. Econ. J. 959 (1981), <https://bit.ly/3CUCcG1> [hereinafter Carroll & Gaston, *Occupational Restrictions*].

In fact, some empirical studies find a *negative* correlation between licensure and quality. See, e.g., Kyle Sweetland & Dick M. Carpenter II, *Raising Barriers, Not Quality: Occupational Licensing Fails to Improve Services*, Inst. for Just. 3, 11 (Sept. 2022), <https://bit.ly/3LAYGA0>. Research spanning a range of professions—from optometrists, to real estate brokers, to veterinarians—has found that *less restrictive* occupational regulation correlates with *higher* quality, presumably due to increased competition. See Sidney L. Carroll & Robert J. Gaston, *State Occupational Licensing Provisions and Quality of Services: The Real Estate Business*, 1 Res. L. & Econ. 1, 10 (1979), <https://bit.ly/3TLKHua>; Stanley J. Gross, *Professional Licensure and Quality: The Evidence*, Cato Inst. Pol'y Analysis No. 79, 5 (1986), <https://bit.ly/3CWsCTi>.

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2017), <https://bit.ly/3D6Dekq>, at 5–6; Kleiner, *Stages, supra*, at 39–40, 167; The White House, *Occupational Licensing: A Framework for Policymakers* 58 (July 2015), <https://bit.ly/2ZNaqvH>; Edward Timmons & Robert Thornton, *Licensing One of the World's Oldest Professions: Massage*, 56 J.L. & Econ. 371 (2013), <https://bit.ly/3F66qsI>.

B. All licensing regimes exclude at least some individuals from working in the field, thereby reducing supply. *See, e.g.*, Morris M. Kleiner et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service*, 59 *J. Law & Econ.* 261, 261–62 (2016), <https://bit.ly/3z3rxYA> [hereinafter Kleiner, *Relaxing*].<sup>5</sup> Such reduced supply is often expressly intended; governments commonly adopt licensing requirements at the behest of existing practitioners of an occupation who have every incentive to limit competition. Morris M. Kleiner & Evgeny Vorotnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, *Inst. for Justice* 8 (Nov. 2018), <https://bit.ly/3gq2c4F>; *see also N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494, 505 (2015). In fact, a 2022 study shows that within five years of establishing a professional association, a state is 15% more likely to license that profession. *See* Nicholas A. Carollo et al., *The Origins and Evolution of Occupational Licensing in the United States* 15 (2022), <https://bitly.ws/33V4T>.

The effects of this industry insider-driven phenomenon are especially acute in the behavioral health field, as public demand for therapy is on the rise. The American Psychological Association surveyed its members and found a surge in demand and new

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<sup>5</sup> *See also* Smith, *supra*, at 82; The White House, *supra*, at 3; Amy Fontinelle et al., *Unnatural Rights in The Natural State: Occupational Licensing in Arkansas* 9–10 (2016), <https://bit.ly/3ThppVG>; Jeffrey Pfeffer, *Administrative Regulation and Licensing: Social Problem or Solution?*, 21 *Social Problems* 468 (2014), <https://bit.ly/3CXV0EL>.

referrals. Lenny Bernstein, *This Is Why It's So Hard to Find Mental Health Counseling Right Now*, The Washington Post (Mar. 6, 2022), <https://bit.ly/3sQ5yoh>. In particular, clients needed care for anxiety, depressive, and trauma-related disorders. *Id.* “Yet 65 percent of the more than 1,100 psychologists who responded said they had no capacity for new patients and 68 percent said their wait lists were longer than they were in 2020.” *Id.* (“The federal government’s mental health and substance abuse referral line fielded 833,598 calls in 2020, 27 percent more than in 2019, before the pandemic began. In 2021, the number rose again, to 1.02 million.”).

Additionally, even after clients find a therapist, they are at risk of losing that therapist if they move. “[Seventy] percent of therapists had to stop working with a client because they moved, even if they were solely seeing the client virtually.” Alma, *Expanding Care with Teletherapy: 89% of Therapists Want Their License to Allow for Nationwide Care*, <https://bit.ly/3MWCrXa>. Clients and practitioners alike are frustrated by this geographic barrier. In a survey of 200 therapists, “nearly nine in 10 of its therapists want to be able to provide care across the country if their license enabled them to provide care nationwide.” *Id.*

In this post-pandemic era, occupational-licensing laws like N.Y. Educ. Law § 8402 serve as a significant barrier to workers seeking to provide in-demand services to their current or hopeful clients. While talk therapy services are increasingly in demand, and as both therapists and would-be patients are increasingly mobile, licensing schemes like N.Y. Educ. Law § 8402

only exacerbate the therapist shortage and diminish public access to mental health services, while offering no discernible public benefit in return.

C. As licensing restricts entry and reduces the availability of services, it inevitably leads to price increases for consumers. Basic economic logic dictates that decreased supply and steady demand mean higher prices. And what logic dictates, empirical research time and again proves: “The introduction of occupational licensing . . . increases the prices of products and services that are produced by licensed workers.” Jing Cai and Morris M. Kleiner, *The Labor Market Consequences of Regulating Similar Occupations: the Licensing of Occupational and Physical Therapists*, 41 *J. of Labor Research* 352 (2020), <https://bit.ly/3sqy2RS>; accord Pfeffer, *supra*. Depending on location and industry, licensing can cause prices to rise anywhere from five percent to 33%. See Kleiner, *Reforming*, *supra*, at 15. In the aggregate, licensing may cost consumers \$203 billion annually. *Id.* at 6.

This observation applies, unsurprisingly, to healthcare professions. A study of dentists found that in states with more difficult dental license exams, patients pay higher prices for basic dental services without attaining any statistically better dental outcomes. *Id.* Another study showed that broadening the scope of practice for physician assistants correlated with an 11.8 to 14.4% reduction in patient costs—without negative effects on access to care. See Edward J. Timmons, *Healthcare License Turf Wars: The Effects of Expanded Nurse Practitioner and Physician Assistant Scope of Practice on Medicaid Patient Access* 17–

18, Mercatus Ctr. at George Mason Univ., Working Paper (2016), <https://bit.ly/3cajrVw>; see Kleiner, *Relaxing*, at 286 (similar).

Limited supply and higher prices can undermine the very safety and quality goals licensing laws profess to advance. The Federal Trade Commission, for instance, has warned that licensing requirements for opticians could cause increased optical health problems, as increased costs may tempt individuals to wear their contact lenses too long. Maureen K. Ohlhausen et al., Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* 19 (Mar. 2004), <https://bit.ly/3m5EN7U>; see also Carroll & Gaston, *Occupational Restrictions*, *supra*, at 961, 963–65.

What's worse, occupational licensing's harmful costs fall disproportionately on minorities and lower-income individuals. See Daniel H. Klein et al., *Was Occupational Licensing Good for Minorities? A Critique of Marc Law and Mindy Marks*, 9 *Econ. J. Watch* 210, 228–29 (2012), <https://bit.ly/3TvUVz5>; Stuart Dorsey, *Occupational Licensing and Minorities*, 7 *L. & Human Behavior* (1983), <https://bit.ly/3VZK81R>; Nat'l Conference of State Legislatures, *Barriers*, *supra*. Higher prices regressively impact those on the bottom rungs of the economic ladder. See Kleiner, *Licensing Occupations*, *supra*, at 8; Daniel J. Smith, *Occupational Licensing in Alabama*, 27 *Labour & Industry* 77, 82 (2017); Carl Shapiro, *Investment, Moral Hazard, and Occupational Licensing*, 53 *Rev. Econ. Studies* 843 (1986), <https://bit.ly/3N2Zuyl>. In the aggregate, this leads to *lower* quality and *decreased* consumer welfare

and public health—directly contrary to the licensing regime’s purported purpose.

D. Despite the many critiques from both scholars and policymakers, occupational licensing’s tentacular influence shows little sign of receding. It generally remains “rare for an occupation to become deregulated by a government agency.” Kleiner, *Licensing Occupations, supra*, at 12–13. A 2015 study found only eight examples of occupational *de*-licensing over 40 years. See Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, *Monthly Labor Rev.*, May 2015, <https://bit.ly/3TWZByE>.

The enduring nature of such laws should surprise no one. To *de*-license an occupation, a state legislature generally must either strip a licensing board of its authority, or the board itself must voluntarily request relinquishment of its authority. *Id.* at 2 (citing Kleiner, *Licensing Occupations, supra*, at 13). Such proposals typically receive “stiff resistance,” especially from the already-licensed workers who benefit from limited competition. *Id.* at 13. Furthermore, already-licensed workers often comprise the very boards empowered to enforce licensing laws. A 2022 study of nearly 500 “sunrise reviews,” in which state legislatures evaluate the need for imposing new or maintaining current licensing schemes, found that industry insiders are behind 83% of occupational licensing proposals, with consumers only behind *four* percent. See Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, Inst. for Justice 49, 56 (3d ed. 2022), <https://bitly.ws/33pFq> (citing Kathy Sanchez et al., *Too Many Licenses?* 2,

Inst. For Justice (2022), <https://bit.ly/47YYeFY>). This reality “may blend with private anticompetitive motives in a way difficult even for market participants to discern.” *N.C. State Bd.*, 574 U.S. at 505.

As the Federal Trade Commission aptly summed it up in 2018, “[u]nnecessary licensing restrictions erect significant barriers and impose costs that cause real harm to American workers, employers, and consumers, and our economy as a whole, with no measurable benefits to consumers or society.” Karen A. Goldman, Fed. Trade Comm’n, *Policy Perspectives: Options to Enhance Occupational License Portability* 4 (2018), <https://bit.ly/2YfJVhR>. Indeed, the evidence is clear: occupational licensing is a net negative. *See* Kleiner & Soltas, *supra*.

### **III. Licensing laws vary widely from state to state and occupation to occupation, thereby impeding economic mobility.**

Occupational-licensing laws—including those that regulate therapists like Dr. Brokamp here—vary widely. These variations include (1) state-by-state variations in whether a license is required at all for a particular occupation; (2) state-by-state variations in requirements to become licensed for a particular occupation; and (3) within a state, occupation-by-occupation variations in requirements to become licensed. Separately and together, these variations impede economic mobility by restricting interstate and occupational mobility—especially as the pandemic precipitated more remote work arrangements, including the use of telemedicine among health professionals.



A. *First*, the majority of licensed occupations are licensed in some, but not all, states. Although nearly 1100 occupations are licensed in at least one state, fewer than 60 occupations (or about five percent) are licensed in all states. *See* The White House, *Occupational Licensing: A Framework for Policymakers* 7 (July 2015), <https://bit.ly/3wtrG6y>. A recent study of 102 lower-income occupations revealed the disparity in licensing rigor among states, finding that only 12% of these occupations are licensed universally, while nearly a quarter are licensed in fewer than 10 states. *See* Carpenter II et al., *supra*, at 5, 14. Some occupations are only licensed in one state, ranging from forest workers in Connecticut to florists in Louisiana. *Id.* at 181. States also vary widely in the number of occupations they subject to licensing laws; for example, Wyoming licenses only 26 of the 102 studied occupations, while Louisiana licenses 77. *See id.* at 14. And the share of the workforce that is licensed varies, too; Iowa leads the nation with 33.3% of its workforce licensed, while only 12.4% of South Carolina’s is licensed. *See* Kleiner, *Reforming*, *supra*, at 8–9.

*Second*, among states that *do* license a given occupation, their respective requirements often differ substantially. These differences can relate to educational attainment (degree or coursework); experience level (time spent practicing, apprenticing, observing); examination (required or not, and difficulty); and existence and amount of fees (for application, for license, for renewal); among other requirements (such as demonstrating “good moral character”). *See* Suzanne Hultin, *The National Occupational Licensing Data-*

*base*, Nat'l Conf. of State Legislatures (Mar. 1, 2022), <https://bit.ly/3AMj2mi>. For example, while Nevada requires 896 days of education and experience to become a licensed barber, New York requires only about 68 days. Carpenter II et al., *supra*, at 166. Fifty-one of the 102 lower-income occupations analyzed in one recent study reveal differences between the most and least stringent education and experience requirements of more than 1000 days—or nearly *three years*. *Id.* at 42.

*Third*, even within a given state, requirements for a license often vary significantly from one occupation to the next. In Missouri, for example, it takes 1460 days to become an athletic trainer, but only 26 days (1.78% of that amount of time) to become an emergency medical technician (EMT). *Id.* at 178. In Utah, a prospective transit bus driver must devote 365 days of experience to become licensed; a prospective taxi driver or chauffer, by contrast, needn't devote even one. *See id.* at 150, 209.

All told, many individuals in many lines of work must first obtain the government's permission to earn money for their chosen labor. But that general statement is often fogged with mind-boggling nuance. For any given individual, whether she needs a license—and what she needs to do to obtain and maintain it—depends entirely on her current physical location and the title of her occupation. Someone similarly skilled could be just a few miles away across a state line or practice a marginally different occupation, yet face a significantly higher or lower regulatory burden.

B. Occupational licensing’s proliferation and variation restrict economic mobility. In a well-functioning market, individuals can move to where their skills command higher pay. But licensing makes this difficult. The interstate migration rate for individuals in occupations requiring state licensing exams is 36% lower than for individuals in other occupations. See Janna E. Johnson & Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?* 15, Nat’l Bureau of Econ. Research, Working Paper No. 24107 (2017), <https://bit.ly/3RsaZRs>; accord Nat’l Conference of State Legislatures, *Barriers to Work: Low-Income, Unemployed and Dislocated Workers* (July 17, 2018), <https://bit.ly/3olO5j2> [hereinafter NCSL, *Barriers*] (finding that migration rates of workers within the most licensed occupations are significantly lower than in the least licensed occupations). At its worst, the state-by-state variation “may even lead licensees to abandon an occupation when moving to another state.” Goldman, *supra*, at 1. As President Biden concluded, “overly restrictive occupational licensing requirements can impede workers’ ability to find jobs and to move between States.” Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

Relatedly, licensing reduces cross-occupation mobility by lessening the incentives that workers may have to leave occupations where opportunities are declining. One recent study found that licensed professionals are 24% less likely than their non-licensed counterparts to switch occupations in a given year. See Morris M. Kleiner & Ming Xu, *Occupational Licensing and Labor Market Fluidity* 4, 37, Nat’l Bureau of Econ. Research

Working Paper No. 7568 (2020), <https://bit.ly/2YfypDc>. Perhaps unsurprisingly, the variation in licensing laws “disproportionately affect[s] low-income workers for whom the costs—e.g., for educational, training and licensing fees—represent a larger share of their income than they do for higher-income workers.” Nat’l Conf. of State Legislatures, *The Evolving State of Occupational Licensing* (2d ed. Nov. 2019) [hereinafter NCSL, *Evolving State*].

The challenges licensing presents to economic mobility have become even more pronounced with the rise of remote work post-pandemic. Remote work across all professions is on the rise, as is the disconnect between an employee’s place of employment and where they physically reside. See Jeffrey M. Jones, *Remote Work Stable at Higher Rate Post-Pandemic* (Sept. 15, 2023), <https://bit.ly/3QTUkqP>. Still, licensing regimes restrict individuals from taking on remote opportunities within their profession, or from switching to a different profession with more remote opportunities, because of where they are physically located.

Telemedicine healthcare, or telehealth, magnifies the challenges posed by licensing schemes on remote work. Telehealth, especially for behavioral and mental health services, has grown significantly in the United States during the COVID-19 pandemic and its aftermath. See Julia Shaver, *The State of Telehealth Before and After the COVID-19 Pandemic* (Apr. 25, 2022), <https://bit.ly/3GifVo8>; Julia Harris et al., *What Eliminating Barriers to Interstate Telehealth Taught Us During the Pandemic* 6, Bipartisan Policy Center (Nov. 2021). A recent study found that telehealth-delivered

behavioral services spiked *45-fold* since the start of the pandemic, rising from 1% of all behavioral health services in 2019 to 33% in 2022. Sanjula Jain, *Trends Shaping the Health Economy: Behavioral Health* 15, Trilliant Health (Mar. 2023), <https://bit.ly/3uCbXO2>. Despite the rise in telehealth, however, the tangle of occupational-licensing laws not only prevents providers from practicing in other states, but also from taking on clients that reside in other states or continuing to treat their existing clients as they move.

In sum, the enduring variation among state licensing laws, despite the increase of remote work in recent years, “restricts worker mobility—which is costly not only for workers, but also for employers, consumers, and the economy at large.” NCSL, *Evolving State*, *supra*, at 9. In fact, one study found that occupational licensing may result in up to 2.85 million fewer jobs nationwide, costing American consumers \$203 billion annually. Kleiner, *Reforming*, *supra*, at 6; *see also* Johnson & Kleiner, *supra*, at 25 (finding that occupational licensing’s mobility-restricting effects result in hundreds of millions of dollars of lost earnings). As to mental health professionals, specifically, many state-based licensure laws were largely written in the 1870s “to protect Americans from the flood of post-Civil War quacks and charlatans.” Harry Ritter, *How Cross-State Licensure Reform Can Ease America’s Mental Health Crisis* (Mar. 8, 2023), <https://bit.ly/47r9Z80>. However, in today’s modern healthcare system, they instead largely function to prevent therapists like Dr. Brokamp from servicing new clients or existing clients as they move—hurting both therapists and patients.

**IV. The current circuit splits leave millions of Americans in licensed occupations with different protections for professional speech based solely on their location.**

As explained, occupational licensing is a major force influencing American labor markets. Both the proliferation of, and variation in, occupational-licensing laws impede interstate mobility and dampen economic opportunity. Indeed, as “occupational licensing [ ] expand[s] to more and more professions,” it “denie[s] [ ] occupational choice” especially to those already less fortunate, thereby serving to calcify existing inequalities. Smith, *supra*, at 81.

Licensing laws necessarily regulate speech “uttered by professionals.” *NIFLA*, 138 S. Ct. at 2372. And “millions of Americans” like Dr. Brokamp “earn their living in occupations that consist primarily, if not entirely, of speech.” Sherman, *supra*, at 183. However, the existing “patchwork of stealth regulation,” NCSL, *State of Occupational Licensing, supra*, at 5, exacerbated by the Second Circuit’s holding in this case, subjects the speech of “millions of Americans” to varying burdens depending on where they live and how they earn their living, Sherman, *supra*, at 183. Indeed, for a speech-dependent professional like Dr. Brokamp, a therapist, the requirements for licensure might be stricter in some states than in others (not to mention the cost of licensing fees in multiple jurisdictions). And, to top it off, one state’s law might be unconstitutional while another state’s might be just fine—not because those respective state’s laws are different, but because of deepening circuit splits.

Left intact, the decision below perpetuates uncertainty about whether a restriction is content-based and the standard for the government to prove that the restriction is narrowly tailored, giving millions of Americans different legal rights to pursue their chosen occupations based solely on their zip codes or the zip codes of their clients. But regardless of where a professional is located, these types of speech restrictions are necessarily content-based regulations and subject to strict scrutiny. *Reed*, 573 U.S. at 163–64. The Court should grant certiorari to once again enforce that precept—and to clarify that the First Amendment carries exactly the same meaning in Virginia, in New York, and in every other state throughout the country.

### CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Joseph S. Diedrich  
Julia B. Banegas  
HUSCH BLACKWELL LLP  
1801 Pennsylvania Ave NW  
Suite 1000  
Washington, DC 20006

Madeline Townsley  
HUSCH BLACKWELL LLP  
8001 Forsyth Blvd  
Suite 1500  
St. Louis, MO 63105

Rebecca C. Furdek  
*Counsel of Record*  
HUSCH BLACKWELL LLP  
511 N. Broadway  
Suite 1100  
Milwaukee, WI 53703  
(414) 273-2100  
rebecca.furdek  
@huschblackwell.com

*Counsel for Amicus Curiae*

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