No. 25-948

In the Supreme Court of the United States

UPSOLVE, INC., ET AL.,
Petitioners,

v.

LETITIA JAMES,
Respondent.

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

BRIEF OF THE MANHATTAN INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a law whose application is triggered by communicating about a particular topic nonetheless content-neutral so long as it can be described as aimed at the "purpose, focus, and circumstance" of the speech rather than at its content?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

This case interests *amicus* because the First Amendment is of paramount importance to MI. How a particular regulation if speech is categorized is often outcome-determinative, as it was in this case. Getting those categories correct is thus important to maintaining the protections of the First Amendment.

SUMMARY OF ARGUMENT

This case likely turns on the same issue now before the Court in *Chiles v. Salazar* (No. 24-539): whether a law that regulates conversations based on the purpose of the exchange may be treated as content-neutral under the First Amendment. The decision below rests on that understanding. The Second Circuit held that New York's prohibition on nonlawyers giving legal advice regulates speech according to the "purpose, focus, and circumstances" of the communication rather than the substance of what is said. *Upsolve, Inc. v. James*, 155 F.4th 133, 143 (2d Cir. 2025). That reasoning raises the same question courts have confronted in applying this Court's decisions in *Reed v. Town of Gilbert*, 576 U.S. 155 (2015), and *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61 (2022), to speech occurring in advisory or professional settings. Because the judgment below rests on the same premise

[1] Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

presented in *Chiles*, the Court may wish to hold this petition pending the resolution of that case.

If *Chiles* does not resolve the relevant issue(s), this case independently warrants review. The decision below illustrates two recurring problems in the Second Circuit's First Amendment jurisprudence. *First*, the circuit has read *Reed* and *City of Austin* to regard as content-neutral regulations targeting the purpose of a conversation. *Second*, the circuit's intermediate scrutiny cases do not follow a consistent approach. This Court has explained that intermediate scrutiny requires the government to demonstrate that a speech restriction is (1) narrowly tailored to serve an important governmental interest and (2) does not burden substantially more speech than is necessary to further that interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 799 (1989); *McCullen v. Coakley*, 573 U.S. 464, 486–90 (2014). Yet some Second Circuit decisions have sustained speech regulations early in litigation based largely on generalized governmental interests. *See*, *e.g.*, *Brokamp v. James*, 66 F.4th 374 (2d Cir. 2023); *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018). Other cases require the government to make the more developed evidentiary showing this Court's precedents contemplate. *See Cornelio v. Connecticut*, 32 F.4th 160 (2d Cir. 2022).

This confusing state of affairs matters because the initial characterization of a speech regulation often determines how searching the judicial review will be. If a regulation is labeled content-neutral, courts may resolve the case without the factual inquiry that intermediate scrutiny typically demands. Courts confronting similar issues have begun to recognize this tension. For example, the Fourth Circuit recently explained

that its own precedents reflect more than one version of intermediate scrutiny depending on the nature of the regulation at issue. *See 360 Virtual Drone Servs. v. Ritter*, 102 F.4th 263 (4th Cir. 2024). If *Chiles* does not clarify the governing framework, this case would provide a suitable vehicle for explaining how laws that regulate conversations based on their purpose should be classified and how intermediate scrutiny should operate once that classification is made.

ARGUMENT

I. THIS CASE IS LIKELY TO BE CONTROLLED BY *CHILES V. SALAZAR*

In *Chiles*, this Court is looking at whether a law that regulates conversations based on the *purpose* of the communication is properly treated as content-neutral under the First Amendment. The court below concluded that New York's prohibition on nonlawyers providing legal advice is content-neutral because it regulates speech according to the "purpose, focus, and circumstance" of the communication rather than the content of the advice conveyed. *Upsolve*, 155 F.4th at 143. That reasoning turns on the same doctrinal tension that emerged in lower courts' applying the Court's decisions in *Reed* and *City of Austin* to laws regulating speech in professional or advisory contexts. At bottom, both this case and *Chiles* ask whether restrictions triggered by the communicative purpose of speech are content-based under the rule articulated in *Reed*.

The Second Circuit's analysis reflects a broader approach to content-neutrality that has appeared in several of its recent decisions. For example, in *Brokamp*, that court treated restrictions on professional advice as content-neutral, reasoning that the statute

regulated the provision of therapy rather than what therapists said as such. *Brokamp*, 66 F.4th at 383–84, 393–97. Taken together, these decisions reflect a doctrinal premise that regulations targeting speech because of its communicative purpose regulate the *function* of speech rather than its *content*. Whether that premise is consistent with this Court's First Amendment doctrine is the question now presented in *Chiles*.

If *Chiles* clarifies that laws triggered by the communicative purpose of speech remain content-based under *Reed*, the Second Circuit's reasoning would warrant reconsideration. The Second Circuit treated New York's prohibition on nonlawyers' providing legal advice as content-neutral precisely because it regulates speech based on communicative purpose. *Upsolve*, 155 F.4th at 143. If that premise proves incorrect, the judgment below would rest on a doctrinal understanding the Second Circuit would likely revisit. More broadly, holding this petition pending the *Chiles* ruling would thus lower courts to reconsider the issues presented here in light of the guidance that decision provides.

II. IF *CHILES* DOES NOT CONTROL, THE COURT SHOULD GRANT REVIEW TO CLARIFY THE FIRST AMENDMENT'S APPLICATION TO REGULATIONS ON ADVISORY AND PROFESSIONAL SPEECH

The decision below illustrates two recurring doctrinal problems in the Second Circuit's First Amendment jurisprudence. *First*, the Second Circuit has interpreted this Court's decisions in *Reed* and *City of Austin* in a manner that treats speech restrictions triggered by the purpose of communication as categorically content-neutral. *Second*, the Second Circuit's intermediate scrutiny cases appear increasingly difficult to

reconcile. In that court, that threshold classification often determines how intermediate scrutiny operates in practice. In some cases, speech restrictions survive intermediate scrutiny with little evidentiary development, while in others the court applies the more rigorous inquiry described in this Court's precedents. Clarifying how *Reed* and *City of Austin* apply to speech restrictions triggered by the purpose of communication would therefore provide important guidance to lower courts confronting these issues.

A. *Reed* and *City of Austin* Do Not Permit Speech Restrictions Triggered by the Purpose of Communication to be Treated as Content-Neutral.

Under this Court's precedents, speech regulations are content-based if they apply "because of the topic discussed or the idea or message expression." *Reed*, 576 U.S. at 163. That rule applies not only to obvious subject-matter distinctions, but also to more subtle forms of content discrimination. *Id.* at 163–64. Laws that single out speech based on its communicative function or purpose can thus remain content-based if the regulation turns on the substance of what the speaker communicates. *Id.* The Court reiterated that principle in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018), rejecting the suggestion that speech in professional or advisory settings receives diminished protection. *Id.* at 767–68.

The Court's decision in *City of Austin* further clarified how these principles apply when laws regulate speech by reference to its function or purpose. 596 U.S. 61, 61 (2022). The Court explained that not every regulation that requires reading a sign or listening to speech is content-based, but it reaffirmed that laws

triggered by the subject matter or communicative content of speech remain subject to strict scrutiny. *Id.* at 69–71. The relevant inquiry remains whether the law draws distinctions based on the message conveyed. When a regulation singles out speech because of what the speaker communicates, it regulates speech based on content even if the law is framed in terms of the function or purpose of the communication. *Id.* at 71. These principles are particularly important in cases involving advice, counseling, or other forms of professional speech, where the purpose of the exchange often reflects the same substance as the speech itself.

The Second Circuit has interpreted these decisions to permit restrictions based on the purpose of conversations to be treated as content-neutral. In *Brokamp*, the court upheld New York's bar on unlicensed mental health counseling by concluding that the statute regulates speech based on the purpose of providing therapy rather than on what the therapist said. *Brokamp,* 66 F.4th at 383–84. The court below relied on similar reasoning, concluding that New York's restriction on nonlawyers' providing legal advice regulates speech according to its "purpose, focus, and circumstance," thus operating as a content-neutral regulation of professional conduct. *Upsolve*, 155 F.4th at 143. The question of whether speech restrictions triggered by the communicative purpose can be treated as content-neutral presents the same doctrinal tension that has divided courts applying *Reed* and *City of Austin*.

B. The Second Circuit's Intermediate Scrutiny Jurisprudence Is Increasingly Inconsistent and Unclear.

The importance of the question presented is reinforced by the Second Circuit's intermediate-scrutiny

jurisprudence, which appears difficult to reconcile across cases. This Court has explained that intermediate scrutiny requires the government to demonstrate that a speech restriction is narrowly tailored to serve an important governmental interest and does not burden substantially more speech than is necessary to further that interest. *Ward*, 491 U.S. at 791, 799; *Coakley*, 573 U.S. at 486–90. In several Second Circuit decisions, however, speech regulations have survived intermediate scrutiny at the pleading stage with little evidentiary development. *See*, *e.g.*, *Brokamp*, 66 F.4th at 397; *Schneiderman*, 882 F.3d at 380–85. In those cases, the Second Circuit resolved First Amendment challenges early in the litigation by accepting generalized governmental interests without requiring the kind of evidentiary showing typically associated with intermediate scrutiny.

Other decisions in the court below apply the more traditional, evidence-based form of intermediate scrutiny described in this Court's precedents. In *Cornelio v. Connecticut*, 32 F.4th 160 (2d Cir. 2022), for example, the court reversed the dismissal of a First Amendment challenge to Connecticut's sex-offender disclosure requirements, explaining that the government bears the burden of demonstrating that a speech restriction satisfies intermediate scrutiny. *Id.* at 173–76. The court emphasized that intermediate scrutiny requires a meaningful inquiry into whether the challenged regulation materially advances the government's asserted interests and whether less restrictive alternatives could adequately serve those interests. *Id.* at 174–75. That approach mirrors the framework this Court described in *Coakley*, which requires courts to determine whether a speech restriction is narrowly tailored and does not burden substantially more

speech than necessary to achieve the government's objectives. *Coakley*, 573 U.S. at 486–90.

These lines of cases are difficult to reconcile. In some decisions, speech restrictions survive intermediate scrutiny with little evidentiary development, while in others the court requires the government to justify its regulation with the kind of factual showing this Court's precedents contemplate. If the classification of a regulation as content-neutral determines whether courts apply a searching evidentiary inquiry or resolve a case at the pleading threshold, the question presented here becomes outcome-determinative. Clarifying how *Reed* and *City of Austin* apply to speech restrictions triggered by the purpose of communication would therefore provide important guidance to courts confronting these issues.

C. Similar Doctrinal Tensions Are Emerging in Other Circuits.

Absent further guidance, lower courts risk applying different forms of intermediate scrutiny depending on how a regulation is initially characterized. *Cf.*, *e.g.*, *Otto v. City of Boca Raton*, 981 F.3d 854, 863–71 (11th Cir. 2020) (treating restrictions on counseling conversations as content-based speech regulations subject to strict scrutiny); *Del Castillo v. Sec'y, Florida Dep't of Health*, 26 F.4th 1214, 1221–23 (11th Cir. 2022) (treating regulation of dietary advice as professional conduct that only incidentally burdens speech); *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207–08 (4th Cir. 2019) (characterizing restrictions on the corporate practice of law as regulation of professional conduct); *Pickup v. Brown*, 740 F.3d 1208, 1229–31 (9th Cir. 2014) (treating a conversion-therapy restriction as regulation of professional conduct even though the law

allowed counseling supportive of a client's sexual orientation while prohibiting counseling that sought to change it). Similar dynamics appear in other First Amendment cases in the Second Circuit, where threshold characterizations of government conduct have resolved constitutional claims at an early stage. *Nat'l Rifle Ass'n of Am. v. Vullo*, 49 F.4th 700 (2d Cir. 2022), vacated and remanded, 602 U.S. 175 (2024).

These tensions have become explicit in some circuits. For example, the Fourth Circuit recently acknowledged that intermediate scrutiny can operate in more than one form depending on the context in which a speech regulation arises. In *360 Virtual Drone Services LLC v. Ritter*, the court explained that its precedents reflect two distinct intermediate scrutiny frameworks, with some decisions requiring an evidence-based showing that a restriction does not burden substantially more speech than necessary, while others apply a more relaxed "reasonable fit" inquiry for regulations of professional conduct. 102 F.4th 262, 276–80 (4th Cir. 2024). The court therefore recognized that its precedent contains two distinct forms of intermediate scrutiny and described a nonexclusive set of factors to determine whether a regulation targets professional conduct or speech, a classification that determines which form of intermediate scrutiny applies. *Id.* at 274–80. That approach reflects an effort to make explicit a doctrinal tension that appears implicitly in other courts' First Amendment jurisprudence.

The Second Circuit's cases reflect a similar tension, though it has not described its doctrine in these terms. In some cases, the court treats intermediate scrutiny as a threshold inquiry that can be resolved without evidentiary development, while in others it requires the

government to demonstrate with evidence that a regulation advances a substantial interest and is appropriately tailored. *See*, *e.g.*, *Brokamp*, 66 F.4th at 397–401; *Schneiderman*, 882 F.3d at 380–85; cf. *Cornelio*, 32 F.4th at 173–76. Whether that divergence stems from differences in context or from the classification of the regulation at issue, the result is uncertainty about how the governing standard applies in practice. Clarifying whether restrictions triggered by the purpose of communication are content-based would help ensure that courts apply a consistent framework when evaluating such laws. Guidance from this Court would thus provide needed clarity for lower courts confronting similar questions.

CONCLUSION

For the foregoing reasons, the Court may want to hold this petition pending its decision in *Chiles v. Salazar* (No. 24-539). If that decision does not resolve the question presented, the petition for a writ of certiorari should be granted.

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