No. _____

In The
Supreme Court of the United States

ELIZABETH BROKAMP,

Petitioner,

v.

LETITIA JAMES, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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

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

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

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

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

PARTIES TO THE PROCEEDING

Petitioner Dr. Elizabeth Brokamp.

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

RELATED PROCEEDINGS

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PETITION FOR A WRIT OF CERTIORARI

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

OPINIONS BELOW

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

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

STATEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

be outcome determinative if answered in Petitioner's favor.

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

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

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

But as *Reed* recognized, that "skips the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face." *Ibid.* Cutting through this confusion, *Reed* confirmed that all laws that draw facial content distinctions are content based—and thus subject to strict scrutiny—"regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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