

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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ELIZABETH BROKAMP,

*Plaintiff,*

v.

LETITIA JAMES, in her official  
capacity as Attorney General of the  
State of New York, and the New York  
State Board of Mental Health  
Practitioners

*Defendants.*

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No. 1:21-CV-0389 (DNH/ATB)

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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1. This First Amendment lawsuit seeks to vindicate the right of Plaintiff Elizabeth Brokamp, a Virginia-licensed professional counselor with more than twenty years of experience, to speak with New York residents over internet video. Professional counselors like Elizabeth talk to their clients about their feelings, their relationships, and their lives; Elizabeth does not seek to prescribe medication or provide any service beyond talk therapy. All Elizabeth wants to do is talk.

2. Because of the COVID-19 pandemic, Elizabeth currently provides all her counseling services over the internet using teletherapy. One of Elizabeth's clients has relocated to New York. At present, Elizabeth is allowed to talk to her New York client because an executive order issued early in the pandemic temporarily allows licensed out-of-state counselors to talk to clients in New York. That order is

currently scheduled to expire on May 10, 2021. Though that order may be extended additional times before the Governor determines that the pandemic no longer merits such measures, Elizabeth has no way of knowing how long it will be extended, and the exemption could be taken away suddenly, without notice.

3. Elizabeth would like to continue talking to her New York client after the pandemic is over, as she believes it would be in the best interest of her client's mental health. She would also like to begin talking to a prospective client (with whom she once had a counseling relationship) in New York who has reached out to her, but Elizabeth is unwilling to re-initiate a counseling relationship if it is likely that she will have to stop talking to the client after only a few months. She believes that therapy would be in that prospective client's best interest to resume therapy with Elizabeth only if they could resume without the imminent threat of having to cut that relationship off.

4. New York's licensing laws restrict Elizabeth's ability to speak with New York residents about their professional, educational, personal, or spiritual development—topics one might discuss with a life coach, mentor, self-help guru, religious leader, or close friend. These laws have only been on the books since 2002. On their face, New York's laws are substantially overbroad. In application, they are also substantially underinclusive, as New York has carved out a long list of speakers who may discuss the same topics that Elizabeth wishes to discuss, without first obtaining a license. Those who are exempted from New York's licensing law are generally those who possess far less training and expertise, so paradoxically,

Elizabeth is subject to more onerous restrictions because she is more knowledgeable. If she were less qualified, she could offer services as a life-coach without obtaining a license.

5. All that Elizabeth wants to do is talk to New Yorkers about their lives and their problems. The First Amendment fully protects these conversations, and New York's licensing laws place an impermissible burden on Elizabeth's free speech rights.

### **Jurisdiction and Venue**

6. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983.

7. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

8. Plaintiff Elizabeth Brokamp is a United States citizen and a resident of Virginia. Elizabeth is a Virginia-licensed professional counselor with over twenty years of experience. During the COVID-19 pandemic, Elizabeth has moved all of her services online and currently provides counseling out of her home in Fairfax Station, Virginia.

9. Defendant Letitia James is the Attorney General of the State of New York, sued in her official capacity.

### **Factual Allegations**

#### ***Elizabeth Brokamp's Professional Counseling***

10. Plaintiff Elizabeth Brokamp is a Virginia-licensed professional counselor with over twenty years of experience.

11. In 1994, Elizabeth earned a Master's Degree in Counseling Psychology from Columbia University. She is currently pursuing a PhD in Counseling from the University of the Cumberlands.

12. Elizabeth also holds a number of voluntary certifications related to professional counseling, including a certification in tele-mental health from the Center for Credentialing and Education.

13. As a Virginia-licensed professional counselor, Elizabeth must renew her license annually and complete a minimum of 20 hours of continuing education requirements. *See* 18 VAC 115-20-105.

14. Elizabeth is also subject to oversight by the Virginia Board of Counseling, which establishes standards of practice applicable to all Virginia-licensed professional counselors. *See* 18 VAC 115-20-130. The Virginia Board of Counseling is empowered to discipline counselors who violate its standards of practice. *See* 18 VAC 115-20-140

15. In 2018, Elizabeth closed her Alexandria office in order to pursue her doctoral degree at the University of the Cumberlands. As part of her doctorate training, Elizabeth provided intake assessment and individual counseling for college students at the University of Mary Washington. In addition, starting in 2019, Elizabeth has served as a supervisor for individuals who have completed their Master's degrees and are seeking licensure.

16. In 2020, Elizabeth opened Nova Terra Therapy as an online practice. Elizabeth currently provides counseling exclusively through the internet.

17. The number of clients that Elizabeth serves varies week-to-week, but, in a typical week, Elizabeth currently provides teletherapy to between ten and twenty clients.

18. Elizabeth advertises her teletherapy services online, including through websites that provide counseling referral services.

19. Even when the pandemic is over, Elizabeth intends to continue providing online teletherapy for the indefinite future. Likewise, even when the pandemic is over, Elizabeth intends to continue advertising her teletherapy services over the internet, including through websites that provide counseling referral services.

20. Elizabeth would like to use these websites to advertise her availability to potential clients located in New York.

21. Elizabeth intends to continue providing teletherapy because she believes that it provides significant benefits for clients, as it allows clients to seek out help without having to make a trip to a counselor's office. Teletherapy can be beneficial for new mothers, as the demands of a newborn child can make it particularly difficult to schedule in-person counseling. Teletherapy benefits clients who need to be seen imminently, and who may not be able to wait for an in-person visit. Teletherapy allows clients to access therapists in different geographic regions, which allows for more opportunity to find a therapist that meets a client's specific needs. Teletherapy also benefits clients in areas that are underserved, where there may be few options and limited availability, or where prices may be prohibitive.

22. Elizabeth advises her clients on a variety of topics, including anxiety, relationships, and mindfulness. She also has a particular specialty assisting women who are facing issues relating to infertility and postpartum depression.

23. Clients seek out Elizabeth for a variety of reasons, including need for services from a counselor with Elizabeth's particular areas of specialization and referrals from existing clients who have been satisfied with Elizabeth's services.

24. When Elizabeth provides counseling services, she does not prescribe medication or conduct any medical procedures.

25. Elizabeth's counseling services consist entirely of conversations between her and her clients.

26. Elizabeth speaks with her clients about a variety of topics, including, but not limited to, their emotions, their relationships, and their lives. Through these conversations, Elizabeth seeks to improve her clients' well-being.

27. For clients who pay for her services, Elizabeth accepts both insurance and cash. She also charges on a sliding scale for those who cannot otherwise afford the full price of her services.

### ***Elizabeth's New York Practice***

28. New York's licensing law strictly limits the practice of "mental health counseling" by out of state professional counselors. N.Y. Educ. Law § 8402(2). Only New York-licensed professional counselors may provide mental health counseling, including via teletherapy, to people located in New York.

29. Elizabeth's teletherapy conversations with her clients constitute "mental health counseling" under New York law because they include the "assessment" and "amelioration" of "problem[s] or disorder[s] or behavior, character, development, emotion, personality or relationships by the use of verbal ... methods." N.Y. Educ. Law § 8402(1)(a).

30. Elizabeth's teletherapy conversations with her clients are just that: conversations, consisting of nothing other than speech.

31. Elizabeth is not licensed as a professional counselor in New York, and she has no intention of applying to become licensed.

32. Elizabeth is currently located in Virginia and providing teletherapy counseling to one client who relocated to New York during the pandemic. She is currently allowed to do so, but only because New York has temporarily allowed out-of-state, licensed counselors to serve New York clients during the pandemic. *See* EO 202.15 That exemption is scheduled to expire on May 10, 2021, though it will presumably be extended during the state of emergency.

33. Elizabeth strongly desires to continue counseling her New York client after the pandemic is over. She believes it is her patient's best interest to maintain their existing relationship, rather than having to find a new counselor and start over after the pandemic.

34. New York's regulatory authority, the State Board for Mental Health Practitioners, has confirmed in an email dated March 9, 2020, that she will be

unable provide teletherapy to New York residents after the Governor's order expires.

35. Elizabeth has also been contacted by another New York resident and former client who would like to take advantage of her counseling services. She has turned that individual away because she does not believe that it would be ethical or in the potential client's best interest to initiate a relationship if she would have to end it in only a few months.

36. Counseling is most effective when counselors and their clients can have a sustained relationship over an extended period of time.

37. If Elizabeth were allowed to treat New York clients without a license after the pandemic, she would reach out to the individual who contacted her and offer her teletherapy counseling services.

38. If Elizabeth were allowed to treat New York clients without a license after the pandemic, she would also advertise her teletherapy counseling services to New York residents, using web-based referral platforms.

39. When EO 220.15 expires, Elizabeth will not be allowed to offer teletherapy counseling individuals located in New York, though she could do so if they came to her office in Virginia.

***New York's Overbroad Definition of Psychotherapy***

40. New York prohibits the unlicensed practice of "mental health counseling," which it defines 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).

41. Requirements for New York licensure include a Master’s degree or higher, covering ten specified topics and including a one-year internship. N.Y. Educ. Law § 8402(3). Applicants must also have a minimum of 3000 hours of “supervised experience relevant to the practice of mental health counseling,” pass an examination, be of “good moral character,” and pay a \$175 fee. *Id.*

42. Separate licenses with similar requirements are required for “marriage and family therapists,” N.Y. Educ. Law § 8403, “creative arts therapists,” N.Y. Educ. Law § 8404, and “psychoanalysts.” The latter is defined as talk therapy focused on the “interpretation of dynamic unconscious mental processes that contribute to the formation of personality and behavior.” N.Y. Educ. Law § 8405.

43. A New York license does not authorize mental health counselors to prescribe drugs or use other invasive medical procedures. N.Y. Educ. Law § 8407.

44. New York’s licensing laws also contain numerous exemptions, which allow various categories of people to provide services falling within the definition of mental health counseling without obtaining a mental health counselor license. N.Y. Educ. Law § 8410.

45. For instance: “attorneys, rape crisis counselors, certified alcoholism counselors and certified substance abuse counselors” may “provid[e] mental health services within their respective established authorities.” The statute does not define the permissible bounds of such practice. N.Y. Educ. Law § 8410(2).

46. “[M]ember[s] of the clergy or Christian Science practitioner[s]” may provide “pastoral counseling services,” but only “within the context of [their] ministerial charge or obligation.” N.Y. Educ. Law § 8410(4). Spiritual counseling by non-clergy is apparently not exempt from the mental health counseling law.

47. An even broader exception allows “individuals, churches, schools, teachers, organizations, or not-for-profit businesses” to “provid[e] instruction, advice, support, encouragement, or information to individuals, families, and relational groups.” N.Y. Educ. Law § 8410(5). The distinction between such permitted conversations and “mental health counseling” is likewise not explained.

48. New York does not possess any evidence that less restrictive alternatives, such as titling acts that merely restrict who may call themselves a “licensed mental health counselor,” would be ineffective at protecting the mental health of New York residents.

### ***New York’s Underinclusive Enforcement Practices***

49. In practice, New York does not enforce its mental health counseling licensing laws against all the various individuals swept up by the overbroad definition.

50. New York has not adopted any written official policy that articulates when the law will or will not be enforced, and individuals have no way to know for sure whether their speech will or will not be prohibited.

51. At the same time, New York's general practice is to enforce its mental health counseling licensing laws against individuals with significant training and expertise relevant to the provision of counseling.

52. In practice, individuals who do not have significant training and expertise relevant to the provision of counseling can provide services falling within the definition of licensed mental health counseling so long as they refrain from calling themselves "licensed mental health counselors."

53. For instance, unlicensed and untrained individuals frequently call themselves "life coaches" and offer services that fall within the definition of mental health counseling under the label "life coaching." According to the Borough of Manhattan Community College, life coaching consists of: "[i]dentify[ing] and create[ing] a plan for what the client wants," "[m]odify[ing] and build[ing] strategies to achieve a client's goals," "[e]ncourag[ing] self-discovery, self-awareness and growth," and "[p]romot[ing] accountability and positive change."

54. Similarly, although self-help gurus, mentors, spiritual and religious guides (who do not meet the clergy exemption), Alcoholics Anonymous, Weight Watchers, and even friends and family members provide advice that falls within the scope of New York's mental health counseling laws, New York does not require those individuals to obtain a mental health counseling license.

55. The Board, however, has confirmed that Elizabeth cannot provide her services in New York, once EO 202.15 expires, without obtaining a New York license.

56. The Board's email made clear that, as applied to Elizabeth, New York's licensing law is not just a titling restriction. According to the Board, "Once the governor's executive order expires you will have to have a NY license in order to practice in New York either physically or by teletherapy within NY or from outside of NY."

57. In practice, therefore, Elizabeth is subject to greater burdens on her speech because she possesses greater qualifications to talk. Elizabeth is subject to New York's mental health counseling laws because of her education and experience, but New York does not enforce that requirement against other individuals who speak about the same topics.

58. New York does not have any evidence that counselors like Elizabeth, who are licensed in other jurisdictions but not in New York, are a threat to the mental health of New York residents.

59. New York does not have any evidence that unlicensed life coaches, self-help gurus, non-clergy religious guides, Alcoholics Anonymous, Weight Watchers, or friends and family who provide advice and guidance that falls under the definition of "mental health counseling" are a threat to the mental health of New York residents.

60. New York does not have any evidence that individuals who possess specialized training, like Elizabeth, require more regulation than those who possess less training.

### **Injury**

61. Elizabeth is injured by New York's licensing requirements for mental health counselors because, without a license from New York, she is significantly limited in her ability to share her advice and counseling expertise with New York residents.

62. Elizabeth is facing the immediately impending injury of being compelled to stop talking to her New York client once the pandemic is over. The Board has confirmed that this injury will occur once EO 202.15 expires. It is reasonable to expect that this client would continue talking to Elizabeth if New York allowed it.

63. Under EO 202.15, Elizabeth is injured because she cannot ethically take on new clients if she will be required to terminate the relationship in only a few months. She has been forced to turn away a potential client who lives in New York.

64. Under EO 202.15, Elizabeth is injured because she cannot use her website or referral websites to advertise to New York residents, when it is certain that she would be unable to continue talking to them after just a few months of counseling.

65. This has resulted in a loss of income to Elizabeth, and, just as important, it has meant that Elizabeth has not been able to help individuals in New York.

66. If she were allowed to do so, Elizabeth would talk to New York residents about their lives, relationships, and problems, using video conferencing software, for the foreseeable future.

67. New York's licensing regime is triggered only if Elizabeth speaks to New York residents without a license about certain subjects.

68. New York's licensing requirements impose special burdens on Elizabeth because of the content of her speech.

69. In order to speak to New York residents about bettering their lives, Elizabeth would be forced to comply with burdensome licensing requirements.

70. In order to obtain a New York mental health counseling license, Elizabeth would have to devote a significant amount of time to comply with the application procedures. That time could be spent talking to New Yorkers about their problems. Additionally, she would need to pay a \$175 fee and recurring \$170 fees.

71. These requirements are burdens placed on Elizabeth solely because of the content of her speech.

72. These requirements restrict Elizabeth from offering teletherapy services to New York residents without first obtaining a license.

73. If Elizabeth talks to New Yorkers about their problems without a New York license, she faces a threat of felony prosecution. N.Y. Educ. Law § 6512(1)

### **Constitutional Violations**

#### **Count I: As-Applied First Amendment Violation**

74. All preceding allegations are incorporated here as if set forth in full.

75. New York's licensing restriction for mental health counselors violates the First Amendment as applied to Elizabeth's provision of teletherapy to New York residents.

76. The only thing Elizabeth wants to do in New York is talk to clients over the internet. Elizabeth's teletherapy services consist of ideas, opinions, and guidance that she communicates based on her extensive education in counseling, as well as her professional experience.

77. When EO 202.15 expires, Elizabeth will be prohibited from having these conversations no matter what truthful disclosures she makes regarding her training and licensure.

78. Elizabeth's individualized advice is a form of speech fully protected by the First Amendment; she does not prescribe medicine or conduct medical procedures.

79. By prohibiting Elizabeth from giving New York residents individualized advice through teletherapy, New York prevents her from talking depending on what she says.

80. Elizabeth can talk to clients about a range of topics, but if she talks about topics that fall within the definition of "mental health counseling," she is required to have a New York license.

81. Elizabeth can give clients fashion advice, but she cannot provide advice that addresses problems with her clients' relationships or emotions.

82. Elizabeth can give clients interior decorating advice, but she cannot provide advice about managing stress caused by infertility or a newborn child.

83. Although Elizabeth is subject to New York's licensing laws because of her qualifications, New York does not enforce those laws against individuals with fewer

qualifications. New York cannot articulate any interest that would justify such an approach.

84. New York's temporary waiver, which allows for unlicensed mental health counseling by some counselors, further demonstrates the arbitrary and unnecessary nature of New York's licensing laws.

85. New York has no interest, compelling or otherwise, in preventing Elizabeth from speaking with clients over the internet.

86. Elizabeth has no adequate legal, administrative, or other remedy by which to prevent or minimize the existing and impending irreparable harm to her First Amendment rights.

87. Unless New York is enjoined from enforcing N.Y. Educ. Law § 8402 against her, Elizabeth will suffer ongoing and future impending irreparable harm to her First Amendment rights.

### **Count II: Facial First Amendment Violation**

88. The allegations of paragraphs 1 through 73 are incorporated here as if set forth in full.

89. On its face, New York's mental health counseling licensing law is a content-based regulation of speech, as it applies only to speech that meets the definition of "mental health counseling."

90. New York's mental health counseling licensing law is substantially overbroad, as it sweeps in significant amounts of speech that New York has no conceivable interest in regulating.



91. Under N.Y. Educ. Law § 8402, individuals who use words to help people with emotional, behavioral, or relationship problems fall within New York’s definition of “mental health counseling.”

92. On its face, New York’s licensing requirement would apply to life coaches, self-help gurus, mentors, religious leaders, or even close friends, because each routinely offers advice that falls within the legal definition of “mental health counseling.”

93. To the extent that New York considers such speakers to be exempt from its licensing laws because they are “individuals” who offer “instruction, advice, support, encouragement, or information to individuals,” N.Y. Educ. Law § 8410(5), it is unclear how New York law draws distinctions between “mental health counseling” and “instruction, advice, support, encouragement, or information.”

94. In practice, the only difference between “mental health counselors” and individuals who offer “advice” is that the former possess more qualifications to give advice.

95. New York’s licensing laws are also significantly underinclusive in practice, as New York does not apply its laws to speakers who lack the training and qualifications associated with “mental health counselors.”

96. For instance, New York does not enforce its licensing requirement against life coaches, mentors, and self-help gurus, each of whom routinely offers advice that falls within the definition of “mental health counseling.”

97. New York cannot justify enforcing licensing requirements against people who are the most qualified to give advice, while exempting those without any qualifications.

98. By waiving its licensing requirement for some speakers, New York further demonstrates the arbitrary and underinclusive nature of its licensing law.

99. Elizabeth has no adequate legal, administrative, or other remedy by which to prevent or minimize the present and future irreparable harm to her First Amendment rights.

100. Unless New York is enjoined from enforcing N.Y. Educ. Law § 8402, Elizabeth will suffer continuing and imminent future irreparable harm.

**Count III: First & Fourteenth Amendment Vagueness**

101. The allegations of paragraphs 1 through 73 are incorporated here as if set forth in full.

102. New York's licensing requirement enacts an impermissibly vague and standardless restriction on speech.

103. While New York prohibits unlicensed individuals from using "verbal ... methods" to "ameliorate ... problem[s] ... of behavior, character, development, emotion, personality or relationships," N.Y. Educ. Law § 8402(1)(a), New York permits unlicensed individuals to offer "instruction, advice, support, encouragement, or information." There is no discernible distinction between these types of speech.

104. In practice, it appears that New York deems people without extensive training, such as life coaches and self-help gurus, to be providers of “advice” that is exempt from New York’s licensing laws. This distinction—between those with extensive training and those without—appears nowhere on the face of the statute, and if it did, it would be an irrational speaker-based distinction, contrary to the First Amendment.

105. New York likewise draws vague distinctions between types of licensed speech. For instance, Elizabeth is required to have one license to practice “mental health counseling,” which includes helping people with relationship problems. But she is required to have a different license to conduct “marriage and family therapy,” which is defined as “the use of mental health counseling...to treat mental, emotional and behavioral disorders and ailments within the context of marital...systems.” N.Y. Educ. Law § 8403(c). She is required to have a different license if she talks to people about their unconscious minds. N.Y. Educ. Law § 8405(1)(a). Thus, even if Elizabeth were to obtain a license under § 8402, she would have to police her own speech to ensure that her permissible “relationship” advice does not become prohibited “marital” advice. She would have to police her speech to ensure that when she talks to people about their problems, she does not talk about their unconscious minds. The vagueness of these categories of licensed speech places an impermissible burden on Elizabeth’s First Amendment rights.

106. New York’s failure to articulate any standard to guide its statutory definitions introduces impermissible discretion into the licensing process, as New

York officials have broad and standardless discretion to decide whether speech should be subject to the licensing requirement, and, if so, which license is required.

107. Elizabeth has no adequate legal, administrative, or other remedy by which to prevent or minimize the continuing and future impending irreparable harm to her First Amendment rights.

108. Unless New York is enjoined from enforcing N.Y. Educ. Law § 8402, Elizabeth will suffer continuing and future impending irreparable harm.

### **Request for Relief**

In light of the foregoing, Plaintiff Elizabeth Brokamp respectfully requests the following relief:

- A. A declaratory judgment by the Court that, both as applied to Plaintiff and on its face, New York's licensing law for mental health counselors, N.Y. Educ. Law §§ 8402-8405, violates the First and Fourteenth Amendments to the United States Constitution;
- B. A permanent injunction prohibiting Defendants and their agents from applying New York's licensing requirements for mental health counselors to prevent Plaintiff from providing teletherapy services to New York residents; and
- C. Any other legal and equitable remedies to which Plaintiff may show herself justly entitled.

DATED: April 5, 2021

Respectfully Submitted,

/s/ Alan Pierce

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*\*Motions for admission pro hac vice  
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