No. 23-1472

In the United States Court of Appeals for the Fourth Circuit

360 VIRTUAL DRONE SERVICES LLC et al., Plaintiffs-Appellants,

v.

ANDREW L. RITTER, in his official capacity as Executive Director of the North Carolina Board of Examiners for Engineers and Surveyors, et al., Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina, Case No. 5:21-cv-00137-FL
(Hon. Louise W. Flanagan)

CORRECTED BRIEF OF APPELLANTS 360 VIRTUAL DRONES SERVICES LLC AND MICHAEL JONES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1472 Caption: 360 Virtual Drone Services LLC, et al. v. Ritter, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

360 Virtual Drone Services LLC
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Samuel B. Gedge Date: 6/28/2023

Counsel for: Appellants

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Signature: /s/ Samuel B. Gedge Date: 6/28/2023

Counsel for: Appellants

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343 because this action arises under the following laws of the United States: Title 42 U.S.C. § 1983 and the First Amendment to the U.S. Constitution.

This Court's jurisdiction is based on 28 U.S.C. § 1291. The district court entered final judgment disposing of all parties' claims on March 31, 2023. J.A. 983-984. That final judgment followed entry of an order granting appellees' motion for summary judgment and denying appellants' motion for summary judgment. J.A. 959-982.

Appellants 360 Virtual Drone Services LLC and Michael Jones filed their notice of appeal on April 25, 2023. J.A. 985-987.

STATEMENT OF THE ISSUE

The North Carolina Engineering and Land Surveying Act, N.C. Gen. Stat. §§ 89C-1 *et seq.*, provides that only licensed land surveyors can legally create and share aerial maps that contain measurable information. Whether an image triggers the Act depends on the type of information (even the metadata) the image contains. The Act places a similar restriction on photorealistic 3D digital models.

The issue on appeal is whether the Act violates Michael Jones and his company's rights under the First Amendment by barring them from providing customers with aerial maps and photorealistic 3D digital models.

INTRODUCTION

This is a case about information. Like many entrepreneurs, Michael Jones became fascinated by drones—small, unmanned aircraft. In 2017 and 2018, he paired his love for drones with another of his interests: photography. With his one-man business, 360 Virtual Drone Services, he began offering a range of aerial photography services, including what are called "orthomosaic" maps. Using a drone, an operator can capture a series of aerial images over a tract of land. And with commercially available software, he or she can process those images into a composite map. These maps can be useful as visual aids. They also can contain various types of location information; with the software, for example, users can measure distances, elevations, areas, and more. (Think Google Earth, but with up-to-date images.) Simply, the maps convey what the government's expert in this case would later call "useful information."

Michael Jones began offering these sorts of maps. But he had hardly begun to get that part of his business off the ground before the North Carolina Board of Examiners for Engineers and Surveyors intervened. After a six-month investigation in 2019, the Board ordered him to stop offering orthomosaic maps. Because Jones and his company do not have a land-surveyor license, the Board warned, it was illegal for them to give customers aerial maps

containing "location and dimension data" or to "produc[e] orthomosaic maps, quantities, and topographic information." The right to convey basic location information about land, the Board maintained, is reserved for licensed surveyors only. Unless Jones's company "c[a]me into compliance," the Board threatened civil and even criminal penalties.

Jones complied and shut down his budding aerial-mapping business. But under the First Amendment, he shouldn't have had to. "[T]he creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011). And at base, what Jones wants to do is create and disseminate information. The Board says he can't—because of that information's content. According to the Board's expert, for example, the presence of a scale bar (or even a north arrow) is enough to transform a lawful image of land into an illegal, unlicensed "survey." More broadly, the Board insists that only by scrubbing information and metadata from his images can Jones avoid enforcement in the future.

A law that applies in this way violates the First Amendment. North Carolina's surveying law burdens protected speech; Jones can't sell his maps (or 3D digital models, a related product he'd like to develop) because of the information they communicate. As applied to Jones and his company, in other

words, the law "singles out one particular topic of speech . . . for regulatory attention." *Wash. Post* v. *McManus*, 944 F.3d 506, 513 (4th Cir. 2019). That makes the law content-based and subject to strict scrutiny—a standard the Board has never tried to meet.

The district court upheld the law even so. At every turn, however, the court misapplied Circuit and Supreme Court precedent. Most notably, the court reasoned that the surveying law restricts "conduct" and affects Jones's speech only "incidentally." Yet the only "conduct" of Jones's that would trigger the law is the act of sharing his maps and models—speech. And where it is the speech that triggers the law, the law cannot be said to restrict the speech only incidentally. This Court has so held, as has the Supreme Court.

Based on that error (and others), the district court opted for intermediate scrutiny, not strict. But here, too, the court broke with precedent. A "nonnegotiable requirement" of intermediate scrutiny, for instance, is that the government supply "'actual evidence' in the legislative record that lesser restrictions will not do." *PETA* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 831 (4th Cir. 2023), *pets. for cert. docketed*, Nos. 22-1148, 22-1150 (U.S.). Yet the district court held the opposite: that the Board had no obligation to "demonstrate consideration of alternatives." The court thus excused the

Board's failure to offer any response to a slate of alternatives far less restrictive than its flat ban on unlicensed mapping—examples ranging from Mississippi to Missouri to Wisconsin to Virginia. Only by applying an unrecognizable (and unprecedented) brand of intermediate scrutiny could the district court reach that result. Under either intermediate scrutiny or strict, the judgment below should be reversed.

STATEMENT OF THE CASE

A. Drones and drone-captured images

Recent years have seen the rise of a thriving commercial-drone industry nationwide. A drone is an unmanned aircraft that can fly either autonomously or with a remote pilot on the ground. J.A. 41. Using cameras, drones can take photographs of—and collect data about—buildings, land, construction sites, and other property. J.A. 41, J.A. 77-78. These images and data can be used for many different purposes, two of which are at the center of this case: aerial orthomosaic maps and photorealistic 3D digital models.

Aerial Maps. Drones have revolutionized the mapping industry. Using drones, operators can create detailed two-dimensional maps of property by flying a drone over the area, capturing images, and stitching those images together using computer software that combines the images into a single, high-

resolution photograph. J.A. 41-42, J.A. 74-78. These composite photos often are called "orthomosaic" or "measurable" maps. J.A. 41. (A short tutorial video is available at https://tinyurl.com/2s3zw4dj.)

Because each individual photo is geo-referenced (simplified, its metadata contains geographic coordinates), the composite image can also convey useful information about the land—for example, about distances, elevations, and the like. J.A. 41-42, J.A. 75-78. It can be used to measure the distance from Point *A* to Point *B*. J.A. 41-42, J.A. 75-78. Or to estimate the area of a piece of land. J.A. 41-42, J.A. 75-78. Or to identify the elevation of a particular point. J.A. 41-42, J.A. 75-78. Some of this information can be conveyed using traditional means—for example, a scale bar at the bottom of the map. J.A. 41-42, J.A. 75-78. Alternatively, commercially available mapping platforms (well-known examples include Pix4D and DroneDeploy) let users annotate maps and use other tools to derive information from the maps, including distances, areas, elevations, and volumes. J.A. 41-42, J.A. 75-76.

Similar information is available through any number of public-record sources; using Google Earth, for example, you can measure the distance between two points, or calculate area, or (for some places) pinpoint an elevation. *See* Google Earth Help, *Measure distances and areas in Google Earth*,

https://tinyurl.com/y5jjtcjx. One of the benefits of custom aerial maps, though, is currentness. While the images on sites like Google Earth may be out of date, a custom aerial map can document up-to-date conditions. J.A. 42, J.A. 77-78. That currentness can provide useful information in many contexts. A farmer may want to estimate the amount of crop loss in a field after a storm. J.A. 42, J.A. 78. A real-estate developer may want to estimate the size of a piece of land. J.A. 42, J.A. 78. Project managers, and other stakeholders may want up-to-date progress reports on construction projects. J.A. 42, J.A. 78. And so on.

3D Digital Models. Drones can also be used to capture images for photorealistic 3D models of land and structures. J.A. 42, J.A. 78-79. Much like a two-dimensional aerial map, a 3D model can be created by combining georeferenced photos to make a three-dimensional representation of a piece of property. J.A. 42, J.A. 78-79. And again as with two-dimensional maps, these models can offer information in various settings. They can be used to inspect hard-to-reach areas (cell towers, for instance). J.A. 42, J.A. 83-85. They can be used as a form of cultural preservation—for example, by capturing three-dimensional representations of historic sites. J.A. 42, J.A. 83. They can recreate crime scenes. J.A. 42, J.A. 85-86. In short—and much like their two-dimensional counterparts—3D models are a source of useful information.

B. Michael Jones and his company

1. Michael Jones has provided photography and videography services in North Carolina since 2016. What started off as a hobby soon grew into a small business, with Jones offering his services for pay. J.A. 43, J.A. 88.

Jones soon recognized the extraordinary potential of drones, and he branched out into drone-based photography as well. J.A. 43, J.A. 88. He got certified by the FAA to fly drones commercially. J.A. 43, J.A. 89. And in 2017, he founded a single-member company—360 Virtual Drone Services LLC—and began offering drone-photography services to clients. J.A. 43, J.A. 89.

Along with standard drone-photography jobs, Jones began offering aerial mapping services as well. J.A. 43, J.A. 89. He made a profile on a popular commercial-drone website, Droners.io, and selected "Surveying & Mapping" as one of his project categories. J.A. 89. (As he would later explain to the North Carolina surveying board, the site did not offer a standalone "Mapping" category. J.A. 89, J.A. 107.) On his own website, too, he began advertising "video, pictures and orthomosaic maps (Measurable Maps) of [construction] sites." J.A. 43, J.A. 96. "With this information," he wrote, "construction companies can monitor the elevation changes, volumetrics for gravel/dirt/rock, and watch the changes and progression of the site as it forms over time." J.A. 96.

Over the next year or so, Jones started making progress. A drone-data company hired him to fly his drone over a Walmart distribution center and capture the images needed to create a thermal map of the roof. J.A. 43, J.A. 90. He was hired to capture aerial images of a shopping-mall parking lot, which likewise could be used to create an aerial map. J.A. 43-44, J.A. 90. He also started making maps himself. J.A. 44, J.A. 90. One repeat client, for instance, had hired him to take periodic photos and videos of a real-estate development site. J.A. 44, J.A. 90. To expand his portfolio, Jones processed those images into an aerial map and pitched the client on incorporating maps into Jones's existing business. (The map he created is reproduced below.) That client chose not to make use of the maps. J.A. 44, J.A. 90. Undeterred, though, Jones continued to advertise mapping as one of his company's offerings. J.A. 44, J.A. 90.

J.A. 99.

2. At no point has Michael Jones been a licensed land surveyor. J.A. 44, J.A. 90. Nor has he ever deliberately marketed himself as a licensed surveyor. J.A. 44, J.A. 90. Nor has he ever purported to establish legal descriptions of property. J.A. 44, J.A. 90. Even so, in December 2018 he received a letter from the North Carolina Board of Examiners for Engineers and Surveyors. J.A. 44, J.A. 90. "Based upon a review of [360 Virtual Drone Services'] web site . . . and an advertisement on the Droners.io web site," the Board stated, "it is alleged that the firm may be practicing or offering to practice land surveying." J.A. 44-45, J.A. 101. "The services include, but are not limited to, 'Surveying & Mapping,' and providing orthomosaic maps of construction sites." J.A. 45, J.A. 101. The Board advised that "an investigation has been initiated" and gave Jones fifteen business days to provide "your written explanation of, or comments on, the charges along with any documents or papers[] which support your position in this matter." J.A. 45, J.A. 101.

C. The surveying board's cease-and-desist letter

1. People and businesses engaged in "the practice of land surveying" in North Carolina must have a surveyor license issued by the state's Board of Examiners for Engineers and Surveyors. Practicing land surveying without a

license exposes violators to both civil and criminal enforcement. N.C. Gen. Stat. §§ 89C-2, 89C-23, 89C-24; *see also id.* § 89C-10(c), (f).

To get a surveyor license, an applicant must meet a combination of educational, examination, and practice requirements. 21 N.C. Admin. Code 56.0601. For example, an applicant without a surveying-related B.S. or associate degree must have nine years of "progressive practical experience" under a practicing licensed land surveyor. N.C. Gen. Stat. § 89C-13(b)(1a)(d). All applicants also must pass three examinations. They must pay hundreds of dollars in fees. And present five references. *Id.* § 89C-13(b)(1a). And submit to a character-and-fitness inquiry. *Id.* And tender a sample plat complying with the state's standards for the practice of land surveying. *See* N.C. Bd. of Exam'rs for Eng'rs & Surveyors, *Individual Applicants: Professional Land Surveyor*, https://tinyurl.com/5xbstx69.

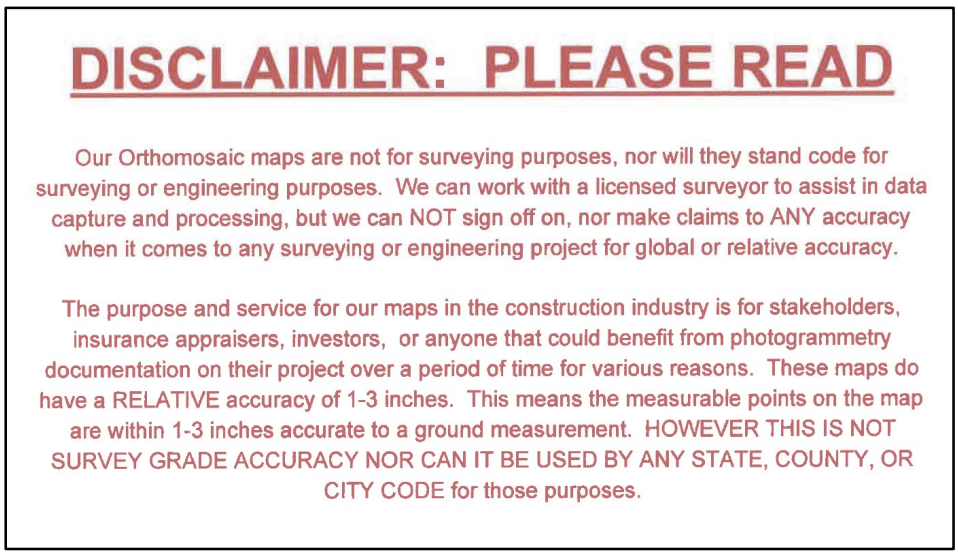
Over the years, North Carolina's definition of "practice of land surveying" has broadened. The definition naturally covers traditional surveying activities, like the placement of survey monuments and establishing "property line[s], easement[s], or boundar[ies] of any tract of land"—work that affects the property rights of landowners. N.C. Gen. Stat. § 89C-3(7)(a)(1), (3), (4). But in recent decades, the surveying board's mandate has expanded far beyond

projects that have legal implications for property rights, to include, for example, "mapping . . . relative to the location, size, shape, or physical features of the earth, improvements on the earth, the space above the earth, or any part of the earth." *Id.* § 89C-3(7)(a); *see also id.* § 89C-3(7)(a)(5)-(6); N.C. Laws S.L. 1998-118 (H.B. 794).

The Board has enforced its surveying law vigorously against drone operators, issuing at least a half-dozen cease-and-desist letters between 2016 and 2020. J.A. 45, J.A. 123-137. The agency has warned them against "aerial surveying and mapping services" and "any resulting map or drawing," "3D models" and "aerial photogrammetry," and "use of orthomosaic software, aerial orthomosaics and models with control point accuracy." J.A. 45, J.A. 124, J.A. 127. In a lengthy question-and-answer e-mail, the Board's counsel cautioned one drone operator against providing clients with even basic information about their land. Processing aerial images of a building into a 3D model? "No, this would be within the definition of land surveying." J.A. 46, J.A. 139. Processing aerial images into a map so a client can go online and perform rough measurements using a distance tool? Surveying. Processing the images into a map so a client "can go online and draw a polygon around [a] stock pile and use a software tool to tell him area and cubic yards contained in the stock pile"?

Surveying. Only "[i]f there is no meta data or other information about coordinates, distances, property boundaries or anything that falls within the definition of land surveying"—the Board's lawyer advised—can a drone operator legally give clients aerial images of their land. J.A. 46, J.A. 139.

2.a. Michael Jones learned all this the hard way. Having received the Board's investigation letter in December 2018, he responded quickly. J.A. 46, J.A. 90. By e-mail, he asked the Board for "help in making sure that my company is not overstepping any boundaries or [is] in violation of any codes." J.A. 106. He advised that he had removed the "Mapping and Surveying" category from his Droners.io profile. J.A. 107 ("This group title is only offered as a service[] 'together' as 'mapping and surveying.' You are not able to just select 'Mapping' per [se]."). He explained that he had added a long disclaimer for his mapping services (reproduced below). And he asked the Board to "[p]lease feel free to correct or offer any revisions that need to be made to this disclaimer." J.A. 106.



DISCLAIMER: PLEASE READ

Our Orthomosaic maps are not for surveying purposes, nor will they stand code for surveying or engineering purposes. We can work with a licensed surveyor to assist in data capture and processing, but we can NOT sign off on, nor make claims to ANY accuracy when it comes to any surveying or engineering project for global or relative accuracy.

The purpose and service for our maps in the construction industry is for stakeholders, insurance appraisers, investors, or anyone that could benefit from photogrammetry documentation on their project over a period of time for various reasons. These maps do have a RELATIVE accuracy of 1-3 inches. This means the measurable points on the map are within 1-3 inches accurate to a ground measurement. HOWEVER THIS IS NOT SURVEY GRADE ACCURACY NOR CAN IT BE USED BY ANY STATE, COUNTY, OR CITY CODE for those purposes.

J.A. 227; *see also* J.A. 106.

Jones also asked for guidance about what kinds of work he could lawfully perform without a surveyor license. He noted that he offered aerial maps for the construction industry and explained that the maps are "generally used" for purposes like:

- "[M]onitoring the site/property by flying it every week or bi-weekly";
- "Stockholders, insurance adjusters, investors can see the site as it constructs";
- "Quality Control";
- "Safety Control/Monitoring";
- "Annotations for marking spots on the site"; and
- "Equipment verification etc."

J.A. 107-108. He explained that the mapping software could also let clients "get[] a quick but relatively accurate measurement of an area," which could, for example, let them estimate "how much cable they would need to get from this point X to point Z." J.A. 108. "If this is in ANY violation of any code," he wrote, "please let us know." J.A. 108. "Please keep in mind," he added, "this would be working WITH the disclaimer on our site and also with the project manager's [i.e., the client's] knowledge that we are not licensed surveyors." J.A. 108. "Please if we have missed anything or need rewording of any thing we have changed in our disclaimers or such," he reiterated, "I would please ask that you let us know, we want your help in making sure we are working within the legal means in North Carolina." J.A. 108.

b. The Board largely ignored Jones's plea for guidance; in early February, an investigator sent him a two-sentence e-mail asking to set up an interview. J.A. 47, J.A. 105-106. Days later, the two met in person. J.A. 91. Jones confirmed that he offered aerial maps. J.A. 255-257. He "acknowledged that at one time he advertised the ability to provide measurements but has since removed that from any marketing materials." J.A. 256. He also explained that, "he has the ability to add his clients as administrators in the [mapping]

application, which would allow them to use the measurement tools if they wanted to, but he has never done so." J.A. 256.

c. Four months passed. Mid-summer 2019, Jones received another letter from the Board. J.A. 110-111. "After a thorough consideration of the investigative materials," the Board advised, "the Board's Review Committee has determined that there is sufficient evidence to support the charge that 360 Virtual Drone Services, LLC is practicing, or offering to practice, surveying in North Carolina, as defined in G.S. 89C-3(6) [sic] without being licensed with this Board." J.A. 110. The Board stated that the company's unlawful activities "include, but are not limited to: mapping, surveying and photogrammetry; stating accuracy; providing location and dimension data; and producing orthomosaic maps, quantities and topographic information." J.A. 110-111. As for Jones's questions about disclaimers, the Board dismissed them with one sentence: "marketing disclaimer is not appropriate as the services still fall within the practice of land surveying." J.A. 111; *see also* J.A. 401-402. If Jones's company "fails to come into compliance," the Board warned, the agency could "apply to the court for an injunction" or "pursue criminal prosecution." J.A. 110.

3. Jones heeded the warning. He stopped trying to develop his mapping business. J.A. 49, J.A. 91. He stopped offering any kinds of aerial maps.

J.A. 49, J.A. 91. He even stopped taking jobs to capture images for *other* people to use for aerial maps. J.A. 49, J.A. 91. He refrained from branching out into other mapping-related work as well—for instance, using aerial images to create 3D digital models. J.A. 49, J.A. 91, J.A. 92-93.

D. Proceedings below

1. Jones and 360 Virtual Drone Services filed this lawsuit against the Board (or, more precisely, against its members and director in their official capacities). The complaint pleads a First Amendment claim, and it requests a judgment securing Jones and the company's right to create and sell aerial maps and 3D digital models. J.A. 29.[1]

For the aerial maps, the Board responded with a decidedly content-based view of its law. In the Board's telling, Jones can process his images into orthomosaic aerial maps—but before he shares those maps with anyone, he must strip out all "measurable information." Dist. Ct. Doc. 34, at 9. So, for example, Jones can print out a hard copy of an aerial map. J.A. 49-52. But he cannot include a scale bar on the page; the bar would allow for measuring things, which would make the image an unlicensed survey. J.A. 49-52, J.A. 343.

[1] The surveying law restricts unlicensed surveying by natural persons and entities alike, and the Board enforces the law against both. N.C. Gen Stat. §§ 89C-2, 89C-23, 89C-24; J.A. 49, J.A. 267-268.

For the same reason, it also would be illegal to include a north arrow. J.A. 49-50, J.A. 290. Or maybe the north arrow would be fine; the Board's witnesses offered conflicting views. *Compare* J.A. 290, *with* J.A. 387. Whatever might be said of north arrows, though, the Board was clear on one thing: Jones certainly cannot give his clients access to an unscrubbed electronic version of the map. J.A. 345-346, J.A. 401. *He* is allowed to see the location data that goes into his aerial maps. But letting his *customers* see that information is illegal. *Compare* J.A. 49 ("The Board's current position is that Plaintiffs can create aerial ortho-mosaic maps but cannot give the maps to anyone if the maps contain location information, georeferenced data, or any information that a recipient could use to make measurements on the maps."), *with* J.A. 929 ("Not disputed.").

As for the 3D models, the Board's position is categorical: unlicensed people cannot give them to customers. *Compare* J.A. 53 ("The Board's current position is that unlicensed persons and entities cannot provide clients with 3D digital models of land or structures."), *with* J.A. 929 ("Not disputed.").

2. The district court granted the Board's motion for summary judgment.

a. The court first rejected the Board's argument that Michael Jones and 360 Virtual Drone Services lacked standing. Jones and the company, the

court reasoned, "have demonstrated concrete and particular intention to create two-dimensional, orthomosaic maps and maps otherwise facilitating measurement, for instance by scale bar." J.A. 970. As for 3D digital models, Jones had likewise "proffered evidence that he intended to create three-dimensional maps for clients, and indeed had begun practicing their production, but his efforts were 'chilled' by the Act and the Board acting pursuant to it." J.A. 971. And as to both the maps and the models, the Board maintained that those products "fall[] under the definition of surveying." J.A. 970; *see also* J.A. 971. Thus, the court concluded, Jones and his company showed a credible threat of enforcement, supporting "injury in fact with respect to creation of two-dimensional and three-dimensional maps with geospatial data." J.A. 972. That injury traced directly to the Board's laws, meaning Article III's causation and redressability elements were satisfied also. J.A. 972.

b. On the merits, the court ruled for the Board. The court acknowledged that North Carolina's surveying law prohibits Jones and his company from providing "aerial orthomosaic maps," "three-dimensional digital models of land and structures," and "aerial images containing location, distance, volumetric, and elevation data." J.A. 972. The court concluded, too, that "the use of drones to capture images for the purpose of conveying 'orthomosaic' or

'measurable' information is protected expression and, by regulating this activity, the Act implicates the First Amendment." J.A. 975. The court also observed that, "[a]s a general matter," the key question in a First Amendment case is whether the challenged law is "content-based" (calling for strict scrutiny) or "content-neutral" (calling for intermediate). J.A. 975.

Having articulated that principle, the district court then departed from it. In the court's view, North Carolina's surveying law "regulate[s] conduct" and has only "an incidental impact on speech." J.A. 978. The court did not identify what "conduct" of Jones's (besides his speech) might trigger the law. Even so, the court maintained that the law amounted to a "conduct regulation[]" that only "incidentally impact[s]" Jones's speech. J.A. 979. On that basis, the court held that intermediate scrutiny, not strict, was the proper standard. J.A. 979.

The intermediate-scrutiny analysis that followed bore little likeness to that articulated by this Court. One "nonnegotiable requirement" of intermediate scrutiny, for example, is that the government present "'actual evidence' in the legislative record that lesser restrictions will not do." *PETA* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 831 (4th Cir. 2023), *pets. for cert. docketed*, Nos. 22-1148, 22-1150 (U.S.). The district court, however, declined to entertain a slate of "'less-speech-restrictive alternatives'" that call into question North

Carolina's restrictions on mapping and modeling. J.A. 981 (quoting *Billups* v. *City of Charleston*, 961 F.3d 673, 681 (4th Cir. 2020)). The court did not consider that other states regulate mapping and modeling far less restrictively than does North Carolina. Nor did the court consider that the Board had no evidence that life, health, or property are jeopardized to a greater degree in any of the states whose laws are less restrictive. Instead, the court applied a different form of intermediate scrutiny entirely, under which the Board did not have to "demonstrate consideration of alternatives" at all. J.A. 981. In the court's view, reciting that North Carolina's interests were "substantial" and its means-end fit "reasonable" (J.A. 981) sufficed to hold that the Board could validly bar Jones from selling his maps and models.

SUMMARY OF ARGUMENT

I. As applied to Michael Jones and 360 Virtual Drone Services, North Carolina's surveying law violates the First Amendment.

A. Strict scrutiny is the correct standard because, as applied to Jones (and his company), the surveying law restricts speech based on its content. The statute bars Jones from sharing aerial images that contain "measurable" information—from metadata with "location information" to "property images capable of measurement" to images with a scale bar to (according to the

Board's expert) ones with a simple north arrow. *See* J.A. 975, J.A. 981. The statute similarly bans Jones and the company from sharing 3D models—also due to the information in them. As the district court recognized, these images and models are "protected expression." J.A. 975. And Jones cannot legally share them with his customers *because of* the information—the content—they convey. A law that applies in this way is content-based and subject to strict scrutiny.

The district court held differently and purported to apply intermediate scrutiny instead. Its reasons for doing so followed from two main errors.

First, the court maintained that the surveying law restricts "conduct" and affects Jones's speech only "incidentally." J.A. 978-979. But the only "conduct" of Jones's that would trigger the law is the act of sharing his maps and models—speech. "[A]s applied to [the] plaintiffs," therefore, "the conduct triggering coverage under the statute consists of communicating a message." *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 28 (2010). So the ordinary First Amendment standard for content-based laws applies. *See id.*

Second, the district court reasoned that, however the surveying law might apply to Jones, it could not be classified as content-based because it is "part of a generally applicable licensing regime." J.A. 978. But even if the law

may apply to non-speech conduct of *other* people (for example, those who place survey monuments), it applies to Jones based on his speech. Supreme Court and Circuit precedent confirm that the First Amendment applies straightforwardly in circumstances like these.

The district court made no mention of that precedent. It instead misconstrued a 2019 decision of this Court (*Capital Associated Industries, Inc.* v. *Stein*) as signaling that "generally applicable licensing regime[s]" categorically fall within the "exception for professional regulations that regulate conduct with an incidental impact on speech." J.A. 978. *Capital Associated Industries*, however, stands for no such far-reaching proposition. Rather, the law at issue there (a UPL statute) merited something less than strict scrutiny because it regulated non-speech conduct *as applied to the plaintiff in that case*. Contrary to the district court's view, the decision announced no categorical rule for "generally applicable" licensing laws that (like the surveying law here) apply based on the content of a plaintiff's speech. Were the district court's reading correct, in fact, *Capital Associated Industries* would effectively reinstate the so-called professional-speech doctrine—abrogated by the Supreme Court in 2018—and would conflict with the precedent of at least one other court of appeals. *See Vizaline, L.L.C.* v. *Tracy*, 949 F.3d 927 (5th Cir. 2020).

The correct approach is the simpler one. As applied to Jones, the surveying law restricts his and his company's "protected expression" (the district court's phrase). It does so based on content, meaning strict scrutiny applies.

B. Because the Board never tried to satisfy strict scrutiny below, Jones and his company would be entitled to summary judgment were the Court to conclude that strict scrutiny is the proper standard. The same result would obtain even were the Court to apply lesser, intermediate scrutiny (the standard the Board urged below). A "nonnegotiable requirement" of intermediate scrutiny is that the government must present "'actual evidence' in the legislative record that lesser restrictions will not do." *PETA* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 831 (4th Cir. 2023), *pets. for cert. docketed*, Nos. 22-1148, 22-1150 (U.S.). The Board produced none—even when confronted with a raft of alternatives less restrictive than its flat ban on unlicensed mapping. For its part, the district court abandoned the intermediate-scrutiny standard altogether: contrary to Circuit and Supreme Court precedent, it held that the Board had no obligation to "demonstrate consideration of alternatives" at all. J.A. 981. That was error. Under either intermediate scrutiny (properly applied) or strict, the judgment below should be reversed.

II. The Board also contended that Jones and his company lacked standing. The district court rightly rejected that argument: each element of Article III standing is easily met.

STANDARD OF REVIEW

The district court's summary-judgment decision is reviewed de novo. *Franklin* v. *City of Charlotte*, 64 F.4th 519, 529 (4th Cir. 2023).

ARGUMENT

I. North Carolina's restriction on sharing maps and 3D digital models violates the First Amendment.

Michael Jones wants to use his drone to take photographs of land. He wants to process those photos into aerial maps and 3D models using commercially available mapping software. He wants to offer and sell those maps and models to willing clients. Legally, however, he can't. His maps and models would convey certain information—location data about distances, coordinates, volumes, elevations. And backed by civil and criminal penalties, North Carolina's surveying law forbids him from sharing that "useful information" (as the Board's expert put it) with his clients. J.A. 289.

A law that applies in this way violates the First Amendment at a bedrock level. North Carolina's surveying law burdens protected speech, and it does so based on content: Jones can't sell his mapping products because of the

information those products communicate. As a result, the law is subject to strict scrutiny—a standard the Board has never tried to meet. Even under lower, intermediate scrutiny, moreover, the record confirms that the Board's barring Jones from sharing his maps and models is unconstitutional.

A. North Carolina's surveying law is subject to strict scrutiny because it restricts appellants' speech based on its content.

North Carolina's law burdens appellants' speech, and because it does so based on the speech's content, strict scrutiny applies. The district court's contrary reasoning lacks merit.

1. The surveying law burdens speech based on its content.

a. North Carolina's surveying law burdens Jones and his company's speech. "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 568 (2011). North Carolina imposes just such a restraint here. By law, the state forbids Jones from providing aerial maps and models to clients because those products contain location information. Unless he scrubs his maps of all georeferenced data, he will have violated the surveying law. *See* pp. 18-19, *supra*. 3D digital models are off-limits altogether. *See* p. 19, *supra*. In this way, the surveying law forbids Jones and his company from conveying certain information

to his customers. (The cease-and-desist letter itself warned explicitly against sharing "information" and "data." J.A. 110-111.) That is a burden on protected speech. *See Sorrell*, 564 U.S. at 570.

A recent decision of this Court illustrates the point. Much like this case, *Billups* v. *City of Charleston* involved a First Amendment challenge to a licensing law—a tour-guide licensing ordinance. 961 F.3d 673, 676 (4th Cir. 2020). The City of Charleston "require[d] . . . tour guide[s] to obtain a license before leading visitors on a paid tour through Charleston's historic districts." *Id.* at 682-83. Put differently, it "prohibit[ed] unlicensed tour guides from leading paid tours—in other words, speaking to visitors—on certain public sidewalks and streets." *Id.* at 683. And because the activity triggering the law (that is, the tours) "necessarily involves speech or expressive conduct," the Court held that the ordinance "burdens protected speech and thus implicates the First Amendment." *Id.* at 683, 684.

These principles apply with equal force here. North Carolina requires people to obtain a surveyor license before conveying images with basic location data to customers. That information is protected speech under the First Amendment. As in *Billups*, North Carolina's surveying law "completely prohibits" unlicensed people from disseminating the information. *Id.* at 683. So

the Court's "rather straightforward conclusion" in *Billups* applies equally here: the law "undoubtedly burdens protected speech," making it "subject to First Amendment scrutiny." *Id.* at 683, 684.

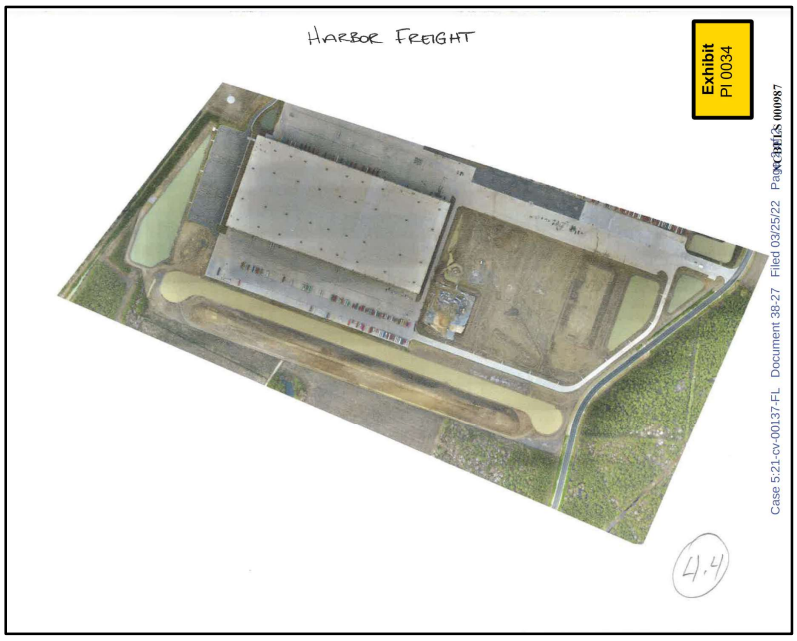
b. Not only does the surveying law restrict speech, it does so based on the speech's content, meaning strict scrutiny is the proper standard. *See Barr* v. *Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality opinion). A law is content-based if it "'target[s] speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022). That remains true even if a law is neutral as to viewpoint; "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 169 (2015). Where a law "singles out one particular topic of speech . . . for regulatory attention," in other words, it is "a content-based regulation on speech." *Wash. Post* v. *McManus*, 944 F.3d 506, 513 (4th Cir. 2019).

As applied to Jones's maps and models, North Carolina's surveying law is unmistakably content-based. The record is clear: Jones's aerial maps and 3D models would be unlawful *because of* their content—the information they

communicate. If Jones were to strip his maps of any "measurable information," for example, the Board would not punish him for giving those maps to customers. Dist. Ct. Doc. 34, at 9. (3D models can't be stripped of their data. J.A. 54, J.A. 356.) If Jones were to leave that information untouched, however, he would violate the law. "[T]he georeferencing information" in the images—as the Board's expert confirmed—"is what triggers the surveying definition." J.A. 346 ("A. That's correct. That's correct. . . . "). So if Jones were to print out an aerial map in hard copy or PDF, he could be in the clear. J.A. 290. But if the PDF were to contain certain, well, content—a scale bar, for instance, or, according to the Board's expert, even a north arrow—that content would trigger the surveying law. J.A. 290; *see also* J.A. 315-316 (deposition of Board's designee). Indeed, the one map Jones pitched to a client qualified as a survey because of a scale (a line, ticks, letters, and numbers) at the bottom of the page:

See J.A. 99; *see also* J.A. 343 ("Q. . . . [A]s I understand what we've been discussing this orthomosaic map [Exhibit 35] would qualify under the definition of survey; is that right? A. I see a scale bar on there which implies that the map is scaled correctly and measurable so I would have to say yes.").

An image lacking the scale bar, meanwhile, would not trigger the law—for example (as the Board's expert confirmed) this one:



J.A. 418; *see also* J.A. 342-343 (Board expert's deposition).

Simply, the Board prohibits Jones from sharing his maps and models because of the information those images convey; "[i]t singles out one particular topic of speech . . . for regulatory attention." *Wash. Post*, 944 F.3d at 513. If a map or model contains certain information—about distances, locations, elevations, volumes, areas—communicating that information triggers the surveying

law and all the licensing burdens that follow from it. As the Board conceded below, in fact, it has no quarrel with Jones's creating aerial maps—but only if he scrubs them of all "measurable information" before giving them to anyone. Dist. Ct. Doc. 34, at 9. *He* can see that information. But his *customers* can't. It is the information—the content—that triggers the law, so as applied to Jones and his company, the law is content-based.

2. The district court's contrary reasoning was unsound.

The district court's reasoning cast no doubts on the analysis above. The court agreed that Jones's creating "images for the purpose of conveying 'orthomosaic' or 'measurable' information is protected expression." J.A. 975. The court agreed that "by regulating this activity, the [surveying law] implicates the First Amendment." J.A. 975. The court agreed that "[c]ontent-based regulations are 'presumptively unconstitutional' and subject [to] heightened scrutiny." J.A. 975 (quoting *Reed*, 576 U.S. at 163). And the court nowhere denied the obvious: that North Carolina's law indeed singles out Jones's maps and models based on their content.

From those premises, strict scrutiny should have followed straightforwardly. The district court, however, selected a lower level of scrutiny instead, and its analysis suffered from two errors. The court mistakenly viewed the

surveying law as regulating "conduct" and burdening Jones's speech only "incidentally." And the court appears to have labored under the misimpression that the law could not be classified as content-based—even as applied to Jones's speech—because it is "part of a generally applicable licensing regime." Both those lines of reasoning conflict with precedent.

a. The court erred in holding that the surveying law burdened appellants' speech only "incidentally."

Governments may, without triggering strict scrutiny, regulate non-speech "conduct" even if that regulation has "an incidental impact on speech." J.A. 978. In the district court's view, North Carolina's surveying law fell within this First Amendment "exception"; the court maintained that the law restricts conduct and only "incidentally impact[s] [Jones's] speech." J.A. 978-979. The court thus applied, not strict scrutiny, but a (flawed) form of intermediate. J.A. 979; *see also* pp. 47-58, *infra* (addressing errors in the court's application of intermediate scrutiny).

In this, the court erred. It is of course true that intermediate scrutiny, not strict, applies to laws that regulate conduct and affect speech only incidentally. *See Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2372, 2375 (2018) (*NIFLA*). At risk of stating the obvious, however, that principle applies only when the law in fact regulates *conduct*. And as applied to

Jones and his company, North Carolina's law regulates not "conduct," but what the district court acknowledged is "protected expression." J.A. 975. A law that applies in this way does not have merely an "incidental impact" on speech. J.A. 978. It targets the speech. It is triggered by the speech. And when a law's trigger is the speech itself, it cannot be recast as regulating "conduct" and burdening that speech only "incidentally." *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 26-27 (2010) (rejecting much the same argument). As applied to Jones, "the conduct triggering coverage under [North Carolina's] statute consists of communicating a message." *Id.* at 28. Whether one of his aerial images triggers the statute "depends on what [it] say[s]." *Id.* at 27. So the statute is subject to the ordinary First Amendment principles that govern content-based laws. *See id.*

Other precedent drives home the point. Take *Billups*, the tour-guide licensing case. 961 F.3d 673. Much like the Board here, the City of Charleston portrayed its tour-guide licensing law as "a business regulation governing conduct that merely imposes an incidental burden on speech." *Id.* at 682. And this Court freely acknowledged that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 683 (quoting *Sorrell*, 564 U.S. at 567). Even so, the Court

held, that principle did not apply to a licensing law that directly restricts who can communicate on certain topics. Charleston's ordinance "completely prohibit[ed] unlicensed tour guides from leading visitors on paid tours—an activity which, by its very nature, depends upon speech or expressive conduct." *Id.* Hence, the Court reasoned, "the Ordinance . . . cannot be classified as a restriction on economic activity that incidentally burdens speech." *Id.*; *see also id.* at 684-85 (declining to decide whether to apply strict scrutiny or intermediate because the ordinance failed even intermediate). That reasoning applies equally here. As in *Billups*, the only "conduct" of Jones's that triggers the surveying law is the act of communicating images that contain certain types of information. *See* pp. 27-32, *supra*. As applied to him and his company, the law thus acts as a regulation of speech.[2]

The district court alluded to other laws that *do* in fact regulate conduct, but those examples only spotlight how far afield the court strayed. J.A. 977 (citing *Cap. Assoc. Indus., Inc.* v. *Stein*, 922 F.3d 198, 207-08 (4th Cir.), *cert.*

[2] *See also, e.g.*, *Pac. Coast Horseshoeing Sch., Inc.* v. *Kirchmeyer*, 961 F.3d 1062, 1070-71 (9th Cir. 2020) (rejecting government's similar argument as to ability-to-benefit requirement for certain licensed schools); *Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 113-14 (S.D.N.Y. 2022) (rejecting government's similar argument as to law prohibiting access-to-justice group's legal advice), *appeal docketed*, No. 22-1345 (2d Cir.).

denied, 140 S. Ct. 666 (2019)). A ban on racially discriminatory hiring, for example, restricts conduct (race discrimination) even if, incidentally, it may require an employer to remove a *White Applicants Only* sign (speech). J.A. 977; *see also Sorrell*, 564 U.S. at 567. A price cap regulates conduct (the amount a store can charge) even if it may prevent the seller from advertising a higher price (speech). J.A. 977; *see also Expressions Hair Design* v. *Schneiderman*, 581 U.S. 37, 47 (2017). Antitrust laws regulate conduct (anticompetitive activities) even though they may prohibit agreements in restraint of trade (speech). J.A. 977. Or consider a classic example detailed by the Supreme Court in *NIFLA*: a law conditioning abortions (conduct) on physicians' getting informed consent (involving speech). 138 S. Ct. at 2373-74.

In each of these examples, the relevant law is triggered by and regulates non-speech conduct. And in each, "the law's effect on speech would be only incidental to its primary effect on [that] conduct." *Expressions Hair Design*, 581 U.S. at 47. North Carolina's law is different. As applied to Jones, "it is not tied to a procedure at all" or to any other sort of non-speech conduct. *NIFLA*, 138 S. Ct. at 2373. It "regulates speech as speech," *id.* at 2374, and because it does so based on the speech's content, strict scrutiny is warranted.

b. The court wrongly gave weight to the fact that the surveying law is "generally applicable" to non-speech conduct that appellants do not want to perform.

i. The district court's second error is equally straightforward. However the surveying law might apply to Jones, the court posited, it could not be classified as content-based because "the challenged provisions . . . are part of a generally applicable licensing regime that restricts the practice of surveying to those licensed." J.A. 978.

That, too, is wrong; earlier this year, in fact, this Court roundly rejected the view that "[l]aws that implicate a variety of conduct . . . need not pass First Amendment scrutiny even when applied to speech." *PETA* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 825-26 (4th Cir. 2023), *pets. for cert. docketed*, Nos. 22-1148, 22-1150 (U.S.); *see also Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 113-14 (S.D.N.Y. 2022), *appeal docketed*, No. 22-1345 (2d Cir.). That principle translates easily here. As applied to some types of services, North Carolina's law may well "implicate a variety of conduct." *See PETA*, 60 F.4th at 825-26. Much bread-and-butter surveying work, for instance, involves placing survey monuments or creating and sealing documents that (whatever their communicative effect) have independent legal force. *See* p. 12, *supra*; *see also* N.C. Gen. Stat. § 47-30(d) (providing that plats can be recorded by the register

of deeds only under the seal of a licensed surveyor). Yet Jones doesn't want to engage in any of those non-speech activities; as applied to him, the statute would be triggered simply by creating and sharing images that contain certain information. "General or not, the First Amendment applies" in circumstances like these, where the law "is used to silence protected speech." *PETA*, 60 F.4th at 828. And where, as here, that speech is targeted based on the content of the information it conveys, strict scrutiny is the appropriate level of review.

The Supreme Court has been down this road as well, in *Holder* v. *Humanitarian Law Project*. That case involved a statute prohibiting the provision of "material support" to designated terrorist organizations. 561 U.S. at 8-9. The plaintiffs challenged it as applied to the specialized legal advice they wished to offer. *Id.* at 21-22. In the plaintiffs' view, the statute merited strict scrutiny as a content-based limit on their speech; it forbade them from "impart[ing] a 'specific skill' or communicat[ing] advice derived from 'specialized knowledge'" but not from "impart[ing] only general or unspecialized knowledge." *Id.* at 27. The government, in contrast, contended that the law "should nonetheless receive intermediate scrutiny because it *generally* functions as a regulation of conduct." *Id.*

The Court rejected the government's theory root and branch. Generally speaking, the Court acknowledged, the material-support statute "may be described as directed at conduct." *Id.* at 28. "[A]s applied to [the] plaintiffs," however, "the conduct triggering coverage under the statute consists of communicating a message." *Id.* Thus, regardless of how the law might function "generally," as applied to the plaintiffs it called for strict scrutiny. *Id.*; *see also PETA*, 60 F.4th at 826 (observing that *Holder* "deemed irrelevant that the law 'may be described as directed at conduct' where plaintiffs triggered the statute by 'communicating a message'"); *see generally Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 444 (2015) (confirming that *Holder* applied strict scrutiny).

That logic applies "seamlessly" here. *Upsolve*, 604 F. Supp. 3d at 114. As discussed above (at 37-38), North Carolina's surveying law of course "may be described as directed at conduct" in some of its applications. *Holder*, 561 U.S. at 28. But "as applied to" what Jones and his company want to do, "the conduct triggering coverage under the statute consists of communicating a message." *Id.* Whether they violate the statute "depends on what they say" to their customers. *Id.* at 27. If their images convey "measurable information," the statute applies; if the images are scrubbed of that information, it doesn't.

See pp. 29-31, *supra*. "That is about as content-based as it gets." *Barr*, 140 S. Ct. at 2346 (plurality opinion).

ii. The district court engaged with none of the precedent above. Not only did its analysis conflict with that precedent, moreover, but it bears a striking likeness to a doctrine the Supreme Court repudiated in 2018: the "professional speech" doctrine. Before 2018, several courts of appeals (including this one) had carved out so-called professional speech "as a separate category of speech that is subject to different rules." *NIFLA*, 138 S. Ct. at 2371. "These courts define[d] 'professionals' as individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.'" *Id.* (quoting and abrogating *Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013)). "Professional speech," in turn, was "defined as any speech by these individuals that is based on '[their] expert knowledge and judgment' or that is 'within the confines of [the] professional relationship.'" *Id.* (internal citation omitted). "So defined, these courts except[ed] professional speech from the rule that content-based regulations of speech are subject to strict scrutiny." *Id.*

That line of cases was abrogated by *NIFLA*. The Supreme Court made clear that it "has not recognized 'professional speech' as a separate category

of speech." *Id.* Nor, the Court added, could it identify any "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375; *see also id.* at 2372 ("[The Court] has been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions.'").

Below, the district court gave a nod to *NIFLA*'s holding. J.A. 975-976. Yet its analysis tracked the very rule *NIFLA* annulled. In the district court's telling, it suffices to avoid strict scrutiny that North Carolina's statute restricted Jones's speech via "a generally applicable licensing regime" (J.A. 978)—a near-verbatim remnant of the professional-speech doctrine *NIFLA* quoted and abrogated. 138 S. Ct. at 2371; *see also Vizaline, L.L.C.* v. *Tracy*, 949 F.3d 927, 932 (5th Cir. 2020) ("*NIFLA* rejected the proposition that First Amendment protection turns on whether the challenged regulation is part of an occupational-licensing scheme."). Based on that error, the district court considered it irrelevant that the surveying law was triggered by Jones's "protected expression." J.A. 975. The court considered it irrelevant that the law applied based on his speech's content. J.A. 981. All that mattered was that the speech restriction came in the form of a "generally applicable licensing regime." That conclusion breaks with *Holder*. It breaks with this Court's

decisions in *Billups* and in *PETA*. And it breaks with *NIFLA*—under which the state cannot "reduce . . . First Amendment rights by simply imposing a licensing requirement." 138 S. Ct. at 2375.

3. This Court's reasoning in Capital Associated Industries *is consistent with applying strict scrutiny in this case.*

The district court appears to have viewed its approach as having been blessed by this Court's decision in *Capital Associated Industries, Inc.* v. *Stein*, 922 F.3d 198, *cert. denied*, 140 S. Ct. 666 (2019); *see generally* J.A. 976-979, J.A. 981 (citing *Capital Associated Industries* at some length). That is incorrect also; contrary to the district court's view, *Capital Associated Industries* did not immunize all "generally applicable licensing regime[s]" from challenge as content-based. Fairly read, rather, the Court in *Capital Associated Industries* determined that the statute before it (an unlicensed-practice-of-law statute) burdened speech only incidentally because the plaintiff before it did not dispute that much of the plaintiff's covered work would indeed be "non-communicative"—i.e., conduct.

a. *Capital Associated Industries* involved a trade association's challenge to a North Carolina statute prohibiting corporations from practicing law. 922 F.3d at 202. One of the (six) grounds raised on appeal was a free-speech claim. This Court rejected that claim. It held that, as applied to the

association's activities, the UPL statute "regulate[s] conduct" and had a "merely incidental" effect on the association's speech. *Id.* at 208. On that basis, the court applied intermediate scrutiny, not strict. *Id.* at 209. Critically, however, the plaintiff in that case sought to pursue both "communicative and non-communicative aspects" of legal practice. *See id.* at 208 ("As CAI recognizes, the practice of law has communicative and non-communicative aspects."). And nowhere did its as-applied challenge clearly distinguish between the two. For example, the association wanted to "answer questions about employment and labor law"—speech. *Id.* at 202. But it also wanted to "draft legal documents," such as "contracts." *Id.* And while drafting a contract of course involves writing words on paper, it does not necessarily involve "communicating a message" to the client. *See Holder*, 561 U.S. at 28. Much like a doctor's prescription (or a sealed land plat) a contract is an operative legal instrument whether anyone reads it or not. *Davis* v. *Davis*, 124 S.E.2d 130, 133 (N.C. 1962); *see also* Appellant's Br. 8, *Cap. Assoc. Indus.*, No. 17-2218 (4th Cir. Dec. 11, 2017) (noting that the association also wanted to "manag[e] responses to subpoenas" and undertake "representation[s] before the EEOC").

Against this backdrop—where the plaintiff's activities were shot through with "non-communicative aspects"—the Court in *Capital Associated*

Industries did not parse which of the trade association's work would be speech and which conduct. Nor, for that matter, did the association itself trouble to "distinguish between its speech and conduct." John G. Wrench & Arif Panju, *A Counter-Majoritarian Bulwark: The First Amendment and Professional Speech in the Wake of* NIFLA v. Becerra, 24 Tex. Rev. L. & Pol. 453, 479 (2020). Because much of the association's planned work was decidedly conduct, this Court thus took the association at its word: it concluded that "[t]he UPL statutes don't target the communicative aspects of practicing law, such as the advice lawyers may give to clients." *Cap. Assoc. Indus.*, 922 F.3d at 208; *see also id.* ("Having determined that the UPL statutes regulate conduct, we turn to the appropriate standard of review."). It then applied intermediate scrutiny, not strict.

b. This case is different. As discussed, Jones and his company do not wish to engage in any aspect of land surveying that might fairly be characterized as "conduct." They do not, for example, want to create plats or land surveys that have legal import for property rights. J.A. 227 ("THIS IS NOT SURVEY GRADE ACCURACY NOR CAN IT BE USED BY ANY STATE, COUNTY, OR CITY CODE for those purposes."). They do not want to give their maps or models the legal imprimatur of a surveyor's seal. They do not

want to hold themselves out as having a surveyor license. They do not want to record their images with registers of deeds. All they want to do is take photos that contain "useful information" and provide that information to willing, informed customers. *See* J.A. 289. In this way—and as applied to Jones—North Carolina's surveying law regulates speech alone; it "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers." *Sorrell*, 564 U.S. at 567. "[O]rdinary First Amendment principles" apply, *NIFLA*, 138 S. Ct. at 2375, and nothing in *Capital Associated Industries* counsels differently.

c. The district court read *Capital Associated Industries* far more broadly—as a signal that "generally applicable licensing regime[s]" categorically fall within the "exception for professional regulations that regulate conduct with an incidental impact on speech." J.A. 978. As discussed, however, that reading of *Capital Associated Industries* would reinstate (almost word-for-word) the precise professional-speech doctrine the Supreme Court abrogated five years ago. *See* pp. 40-42, *supra*. It would depart from the "traditional conduct-versus-speech dichotomy" of *NIFLA* and *Holder*. *Vizaline, L.L.C.*, 949 F.3d at 932; *see also* pp. 37-40, *supra*. It would conflict with this Court's *Billups* decision, which held that a licensing regime (there, for tour

guides) could not in fact "be classified as a restriction on economic activity that incidentally burdens speech." 961 F.3d at 683. And it would overlook a key aspect of *Capital Associated Industries* itself—that strict scrutiny was unwarranted not simply because the UPL statute regulated non-speech conduct in general, but because it regulated non-speech conduct as applied to the plaintiff trade association's activities specifically.

Equally important, the district court's reading of *Capital Associated Industries* would, if accepted, put that decision in conflict with the precedent of at least one other court of appeals. In 2020, the Fifth Circuit reversed a district court for holding "categorically" that a state's surveying laws "only 'incidentally infringed upon' [a mapping company's] speech because they merely 'determin[e] *who* may engage in certain speech.'" *Vizaline, L.L.C.*, 949 F.3d at 931-32. The Supreme Court's *NIFLA* decision, the Fifth Circuit admonished, "reoriented courts toward the traditional taxonomy that 'draw[s] the line between speech and conduct.'" *Id.* at 933. Under that precedent, the question was not whether Mississippi's surveyor-licensing law was "generally applicable" to professional conduct in the abstract. *See id.* at 931-32 (quoting *Moore-King*, 708 F.3d at 569). The "relevant question," rather, "is whether, *as applied to [the plaintiff's] practice*, Mississippi's licensing requirements

regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct." *Id.* at 931 (emphasis added); *see also id.* at 934 (remanding for district court to determine whether the plaintiff's maps "constitute[] speech or conduct" under the standard "conduct-speech analysis"). *But cf. Del Castillo* v. *Fla. Dep't of Health*, 26 F.4th 1214 (11th Cir.) (relying on pre-*NIFLA* circuit precedent to apply rational-basis review to dietetics law that restricted speech of non-licensees), *cert. denied*, 143 S. Ct. 486 (2022). *Vizaline*'s as-applied mode of speech-conduct analysis tracks the Supreme Court's decision in *Holder*. It tracks this Court's precedent in *Billups*. And it cannot be squared with a reading of *Capital Associated Industries* that would (as the district court suggested) part ways with those precedents and exempt "generally applicable" licensing laws from standard First Amendment principles.

B. The surveying board has never tried to meet strict scrutiny, and its law fails intermediate scrutiny as well.

For the reasons above, strict scrutiny is the proper standard for this as-applied challenge. At no point below did the Board try to satisfy that standard. *See, e.g.*, Dist. Ct. Doc. 44, at 25 (Pls.' Opp. to Defs.' Mot. for Summ. J.). Were the Court to agree, the Board's failure even to try to meet strict scrutiny would entitle appellants to summary judgment—no further analysis needed.

"Content-based regulations are presumptively invalid." *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000) (citation omitted). "[T]he Government bears the burden to rebut that presumption." *Id.* And for strict scrutiny, the Board made no effort to do so.

Reversal would be warranted, too, were the Court to apply intermediate scrutiny instead—the standard the Board urged below and that the district court purported to apply. J.A. 979. This Court (like the Supreme Court) has at times declined to pick between strict and intermediate scrutiny when the statute before it cannot survive even the lower, intermediate level. *See, e.g.*, *Billups*, 961 F.3d at 684-85; *see also NIFLA*, 138 S. Ct. at 2375. That approach would counsel reversal here as well: only by misconstruing this Court's intermediate-scrutiny standard could the district court uphold North Carolina's surveying law. Whether viewed through strict scrutiny or intermediate, the law violated Jones and his company's First Amendment rights.

1. The surveying law fails intermediate scrutiny.

If less demanding than strict scrutiny, intermediate scrutiny, too, requires "a close fit between ends and means." *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014). Like strict scrutiny, intermediate scrutiny puts the burden on the Board. *Billups*, 961 F.3d at 685. To justify restricting Jones's speech, the

agency thus had to show that its law is "narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information." *Id.* (citation omitted). The Board came nowhere close. Even if its claimed interests—"safeguard[ing] life, health, and property" and "promot[ing] the public welfare"—are in the abstract significant, its law is not tailored to serve them. N.C. Gen. Stat. § 89C-2.

a. To satisfy intermediate scrutiny, the Board was obliged, foremost, to "present evidence showing that—before enacting the speech-restricting law—[North Carolina] 'seriously undertook to address the problem with less intrusive tools readily available to it.'" *See Billups*, 961 F.3d at 688 (quoting *McCullen*, 573 U.S. at 494). It had to "demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Id.* And its "burden in this regard" could be met only by "actual evidence supporting its assertion[s]." *Id.* (quoting *Reynolds* v. *Middleton*, 779 F.3d 222, 229 (4th Cir. 2015)).

The Board missed this "nonnegotiable" mark by a mile. *PETA*, 60 F.4th at 831. Faced with a slate of less restrictive alternatives, it offered no evidence—none—that any of the alternatives would be inadequate to serve the state's claimed interests. Whereas North Carolina imposes a monolithic

regime on would-be mappers like Jones, other jurisdictions achieve their public-safety goals with far less restrictive surveying laws. Some limit their laws to projects that define legal property lines. Missouri, for instance, regulates as "surveying" only projects "that affect real property rights." Mo. Rev. Stat. § 327.272(1). Wisconsin is similar. Wis. Stat. § 443.134. Other states carve out exemptions that let unlicensed people perform mapping and modeling in a range of circumstances. In Virginia, for example, unlicensed people can "utiliz[e] photogrammetric methods or similar remote sensing technology" to "determine topography or contours, or to depict physical improvements" so long as their maps are "not . . . used for the design, modification, or construction of improvements to real property or for flood plain determination." Va. Code § 54.1-402(C); *id.* (requiring that materials bear a disclaimer). In Kentucky, all surveying projects are exempt from the survey-licensing requirement so long as they bear a disclaimer. J.A. 122. Likewise in Mississippi. J.A. 118.

Below, the Board nowhere denied that the above laws are less restrictive than North Carolina's flat ban on unlicensed mapping and modeling. Nor did the Board offer *any* evidence (or even argument) that North Carolina has "tried or considered" those "less-speech-restrictive alternatives." *Billups*, 961 F.3d at 688. Nor did it offer evidence (or argument) that those alternatives

"were inadequate to serve [North Carolina's] interest[s]." *Id.* It offered no evidence that unlicensed mapping and modeling jeopardize life, health, and property to a greater degree in any of the states that regulate as "surveying" only those activities that directly affect property rights. Or in states, like Virginia, that restrict mapping only in specified contexts. Or in states, like Kentucky and Mississippi, that require unlicensed maps and models simply to bear a disclaimer. At deposition, the Board's designee confirmed that the agency has no such evidence. J.A. 306-310. And the Board's expert testified to similar effect. Having volunteered that "approximately 17" states do not regulate "3D modeling and topographic mapping" at all (as of 2015), the expert confirmed that he had no evidence that mapping and modeling cause greater harm in any of those places. J.A. 359-364.

That is a dispositive strike against the Board. Far from satisfying intermediate scrutiny, the Board's defense boiled down to generalities about the importance of its claimed interests. *E.g.*, Dist. Ct. Doc. 42, at 14 ("[T]he Act works to protect the public from negligence, incompetence, and professional misconduct in the profession of land surveying by holding the licensee accountable."). As the Court stressed in *Billups*, however, "the constitutionality of a law that restricts protected speech does not turn solely on the significance of

the governmental interest involved." 961 F.3d at 686. Rather, the courts "must also ensure that the government's chosen method for protecting its significant interests is not too broad." *Id.* And nowhere did the Board try to meet the standard of *Billups* and *Reynolds* and *PETA*. The Board warned, for example, of the need to "protect[] the public from misrepresentations as to professional status or expertise." Dist. Ct. Doc. 34, at 29. But on that front, a disclaimer—like Virginia's or Kentucky's or Mississippi's—is an obviously less restrictive alternative. *See also* p. 15, *supra* (Jones's very red disclaimer). Having urged intermediate scrutiny, in short, the Board defaulted on its most basic burden under that standard. With no evidence that its interests are impaired more in states that use "less intrusive tools," it cannot show that its more speech-restrictive law is sufficiently tailored to those interests. *Billups*, 961 F.3d at 690 (citation omitted).

b. The Board also failed to acknowledge (much less satisfy) the second part of the intermediate-scrutiny analysis: showing that its law "leaves open ample alternative channels of communication." *Id.* at 690 n.11. At a minimum, the government must show alternatives that are "adequate." *Reynolds*, 779 F.3d at 232 n.5. The Board showed no such alternatives here. Nor do any exist. After all, the surveying law does not mark out a particular "time, place,

or manner" as being off-limits to Jones and his company. *McCullen*, 573 U.S. at 477 (citation omitted). Rather, it makes entire categories of *content* off-limits. In North Carolina, there are thus no "ample alternative channels of communication" for Jones. *Billups*, 961 F.3d at 690 n.11. The Board nowhere argued otherwise. On this ground also, it did not carry its burden under even intermediate scrutiny.

c. The Board's evidentiary defaults aside, the record also betrays a more basic point: as applied to Jones, North Carolina's surveying law is a solution in search of a problem. Jones's maps and models, of course, are speech. But because he lacks a surveyor license, he is barred from providing these products to customers. To do so legally, he would need to devote the better part of a decade to working under a licensed surveyor, take several examinations, submit five references to the Board, pay hundreds in fees, prepare a sample plat, and receive the Board's approval of his character and fitness. *See* p. 12, *supra*. For Jones, these are prohibitive barriers. Yet not only does the Board have no evidence of ill-effects in the states with less restrictive laws, but the Board's own drone-related investigations appear *never* to have been prompted by an injured consumer. (Complaints tend to be filed by the Board itself or, more often, by Board-licensed surveyors or engineers. J.A. 407-408;

see also, e.g., J.A. 429, J.A. 439, J.A. 456, J.A. 470.) Nor do the Board's investigators bother to interview customers—to determine, for example, whether any were misled or harmed. J.A. 408-409. And for complex projects, the Board's expert testified that "higher level" clients "typically" ask for licenses or private certifications as part of the bidding process, regardless of what the surveying law requires. J.A. 333-334; *cf. Billups*, 961 F.3d at 689 (citing "voluntary certification program" as a less restrictive way to maintain standards "without infringing Plaintiffs' free speech rights").

Then there's the internet. Anyone can go on any number of websites and use mapping tools to calculate distances, areas, elevations, and more. Google Earth lets you measure distances down to the hundredth of a foot. J.A. 372-373. There's even a scale bar. And as the Board's expert acknowledged, people can use these online maps to make all sorts of day-to-day decisions about their land—none of which, in his view, appear to implicate the concerns that undergird the surveying law. J.A. 374 ("If they're just using it to get approximate numbers for how much fence to buy how much harm can that do?"). Nor would the Board have any qualms if Jones himself performed unlicensed mapping and modeling—if he were the full-time employee of a particular client, rather than an outside service provider. N.C. Gen. Stat. § 89C-25(7a); *see also* J.A.

313-314. In short, the record makes two points clear. North Carolina's surveying law burdens speech. And as applied to Jones and his company, it fails not just strict scrutiny, but intermediate as well.

2. The district court's intermediate-scrutiny analysis conflicted with this Court's precedent.

Having recited the Board's claimed interests at the same high level of generality as did the Board, J.A. 980-981, the district court expressly declined to apply the intermediate-scrutiny standard detailed above. The court appears to have accepted that intermediate scrutiny ordinarily would require the Board to "demonstrate[] that 'less-speech-restrictive alternatives' actually were 'tried and considered' and deemed inadequate before enacting the [surveying law]." J.A. 981 (quoting *Billups*, 961 F.3d at 681). Yet the court posited that a different, more forgiving brand of intermediate scrutiny should govern here. J.A. 981. Under a hitherto-unknown level of intermediate scrutiny, the court held that the Board had no obligation to "demonstrate consideration of alternatives." J.A. 981. The court thus departed from the standard of *Billups* and *Reynolds* and *PETA* and *McCullen* and declined to evaluate the surveying law against any of the less restrictive alternatives before it.

This, too, was error. Intermediate scrutiny is intermediate scrutiny. And as this Court has held—and held again—a "nonnegotiable requirement in this

Circuit" is that the government can satisfy intermediate scrutiny only with "'actual evidence' in the legislative record that lesser restrictions will not do." *PETA*, 60 F.4th at 831. The district court nonetheless permitted itself to depart from the normal intermediate-scrutiny standard on the theory that the Supreme Court articulated a new, laxer standard in *NIFLA*. The Supreme Court did no such thing. As it did in *McCullen*, the Court in *NIFLA* explicitly applied "intermediate scrutiny." 138 S. Ct. at 2375. It then held that California's law likely failed that standard because the state "identified no evidence" that less restrictive "alternative[s]" would be inadequate. *Id.* at 2376. In other words, *NIFLA* applied the same intermediate-scrutiny standard that the Supreme Court applied in *McCullen*. And that this Court applied in *Reynolds*, and in *Billups*, and in *PETA*, and that the Board all but conceded below it cannot satisfy here. Dist. Ct. Doc. 42, at 16.

The district court also suggested that this Court in *Capital Associated Industries* introduced a version of intermediate scrutiny different from that of *McCullen* and *Reynolds* and *Billups*. J.A. 981-982. That is incorrect as well; far from marking out a new standard, *Capital Associated Industries* applied "intermediate scrutiny." 922 F.3d at 209. It cited *NIFLA* and other decisions that have placed a meaningful evidentiary burden on the government. And

both before *Capital Associated Industries* (in *Reynolds*) and after (in *Billups* and *PETA*), this Court has applied intermediate scrutiny to place that same meaningful burden on government defendants: to produce "'actual evidence' . . . that lesser restrictions will not do." *PETA*, 60 F.4th at 831; *see also id.* at 819 (recording that the authoring judge of *Capital Associated Industries* joined the majority opinion in *PETA*). Whatever conflict the district court perceived between *Capital Associated Industries* and the rest of this Court's intermediate-scrutiny precedent is unfounded. *Cf. United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("Although [the various forms of intermediate scrutiny] differ in precise terminology, they essentially share the same substantive requirements." (alteration in original; citation omitted)).

Likewise without merit was the district court's view that *Capital Associated Industries* silently abandoned the requirement under intermediate scrutiny "that defendants demonstrate consideration of alternatives." J.A. 981. The district court appears to have drawn this inference from the fact that the Court's opinion in *Capital Associated Industries* did not reflect the depth of analysis seen in decisions like *Billups* and *Reynolds* and *McCullen*. J.A. 981. Unlike the plaintiffs in those cases, however, the appellant in *Capital Associated Industries* did not meaningfully *argue* that the law at issue failed

intermediate scrutiny; it went all-in on strict. *See, e.g.*, Appellants' Br. 45 n.6, *Cap. Assoc. Indus.*, No. 17-2218 (4th Cir. Dec. 11, 2017) (burying intermediate-scrutiny argument in one sentence at the end of the penultimate footnote). Any brevity in the Court's opinion is thus best understood as a product of the issue's having gone unargued by the parties—not as a bid to covertly usher in a new level of First Amendment scrutiny. *Accord PETA*, 60 F.4th at 832 (rejecting government's effort to "distinguish[] *Billups*, *Reynolds*, and *McCullen*[] [by] arguing they involved 'unprecedented' laws").

In sum, the simplest approach is the correct one. Neither *NIFLA* nor *Capital Associated Industries* gave the district court license to jettison this Circuit's "nonnegotiable requirement[s]" for intermediate scrutiny. *PETA*, 60 F.4th at 831. The Board disclaimed any obligation to meet those requirements. *Compare* Dist. Ct. Doc. 34, at 25-26 (acknowledging that *Reynolds* articulated the correct standard), *with* Dist. Ct. Doc. 42, at 16 ("Upon closer inspection, this is not the appropriate standard . . . ."). Even under intermediate scrutiny, the judgment below should be reversed.

II. The district court correctly held that appellants have standing.

Below, the Board contended that Jones and his company lacked standing to bring this case. The district court rightly rejected that view, and this Court

can be confident of its subject-matter jurisdiction. *See Justice 360* v. *Stirling*, 42 F.4th 450, 458 (4th Cir. 2022) (noting appeals courts' duty to satisfy itself of lower courts' jurisdiction).

A. Injury: appellants wish to sell measurable aerial maps and 3D digital models but face a credible threat of enforcement.

On this record, Article III's injury element is readily met. "[W]hen a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements." *Cooksey* v. *Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (citation omitted). Thus, "where threatened action by government is concerned, [the courts] do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158-59 (2014) (emphasis and citation omitted). Rather, the harm is a forward-looking one: "a plaintiff satisfies the injury-in-fact requirement where he alleges '[1] an intention to engage in a course of conduct arguably affected with a constitutional interest, but [2] proscribed by a statute, and [3] there exists a credible threat of prosecution thereunder.'" *Id.* at 159.

Each of those considerations cuts decisively in appellants' favor:

First, Jones and his company have "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Id.* at 161 (citation

omitted). They want to create and sell aerial maps and 3D models—images that contain information. J.A. 91-93. That desire is reinforced by their past practices. Before the Board began investigating him, for example, Jones advertised "video, pictures and orthomosaic maps (Measurable Maps) of [construction] sites." J.A. 96. He captured aerial images for clients to process into orthomosaic maps. J.A. 90. He "started practicing making 3D models." J.A. 92-93. Looking forward, he'd like to develop his business along similar lines in the future, by offering maps and models to clients. J.A. 91-93. On this record, the district court was right to conclude that Jones and his company "have demonstrated concrete and particular intention to create two-dimensional, orthomosaic maps and maps otherwise facilitating measurement, for instance by scale bar." J.A. 970; *see also* J.A. 971 (similar, as to 3D digital models).

Second, the "intended future conduct is 'arguably . . . proscribed by [the] statute' [appellants] wish to challenge." *Susan B. Anthony List*, 573 U.S. at 162. The Board insists that non-licensees like Jones and 360 Virtual Drone Services cannot legally offer aerial maps that contain measurable information. J.A. 970 (district-court opinion); *see also* pp. 18-19, *supra*. The Board says the same for 3D models. J.A. 971; *see also* p. 19, *supra*. In brief, it is illegal for Jones and his company to offer these services in North Carolina.

Third, Jones and his company face "a credible threat of prosecution" if they violate North Carolina's surveying law in the future. *Cooksey*, 721 F.3d at 237; *see also Susan B. Anthony List*, 573 U.S. at 164. Everyone agrees that the law bars Jones and his company from creating measurable aerial maps and 3D models; that alone creates a "presumption" of a "credible threat." *Kenny* v. *Wilson*, 885 F.3d 280, 288 (4th Cir. 2018) (citation omitted). Then there's the fact that the Board has investigated Jones's company previously. And that the Board threatened "an injunction" and "criminal prosecution" if he "fail[ed] to come into compliance." J.A. 110. And that the Board has issued similar warnings to other drone operators. J.A. 123-137. This record more than suffices to give appellants a cognizable stake in this case.

B. Article III's causation and redressability elements are met.

The other two elements of the standing inquiry "easily are satisfied" as well. J.A. 972. "The injuries in this case—a chilling of speech and threat of prosecution—were caused directly by the actions of the State Board." *Cooksey*, 721 F.3d at 238. And a judgment for Jones and his company would redress that injury by freeing them to pursue their work "without fear of penalty." *Id.* This case presents a live controversy.

CONCLUSION

The judgment of the district court should be reversed.

STATEMENT REGARDING ORAL ARGUMENT

Appellants respectfully request oral argument in this appeal. Given the importance of the First Amendment question presented, appellants submit that oral argument would aid the Court in resolving this case.

Dated: June 28, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 12,992 words (12,765 recorded through Microsoft Word's word-count tool combined with 227 words counted manually on the images at pages 10, 15, 30, and 31 of the brief).

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expanded font.

Dated: June 28, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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