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)

REPLY BRIEF OF APPELLANTS 360 VIRTUAL DRONE SERVICES LLC AND MICHAEL JONES

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ARGUMENT

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

Under North Carolina's surveying law, appellants Michael Jones and his company can create aerial maps, but those images cannot be shared—with "anyone"—unless they are scrubbed of all "location information, georeferenced data, or any information that a recipient could use to make measurements on the maps." Appellants' Br. 19 (citation omitted). Even a scale bar converts them into illegal, unlicensed land surveys. Presenting them in the form of a photorealistic 3D model? Forbidden.

The state's Board of Examiners for Engineers and Surveyors maintains that this regime comports with the First Amendment. At every turn, however, the Board's theories part ways with Circuit and Supreme Court precedent. The agency argues, first, that "generally applicable licensing regime[s]" are exempt from customary First Amendment principles. Having urged intermediate scrutiny over strict, the agency then advocates an unprecedented, uniquely lax brand of review, seemingly reserved for licensing laws alone. The Board's arguments lack merit. The surveying law violates appellants' First Amendment rights, and the judgment below should be reversed.

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

The Board's brief narrows the issues on appeal substantially. Like the district court, the Board does not deny that, as applied to Michael Jones and his company, its surveying law restricts speech. Nor does the Board deny that the law's application turns on the content of the images Jones wishes to communicate. That common ground makes the law an easy fit for strict scrutiny.

The Board urges intermediate scrutiny instead, based on three different theories: its law restricts appellants' speech only "incidentally"; its law merits special treatment as a "generally applicable licensing regime"; and its law is content-neutral. *See generally Pac. Coast Horseshoeing Sch., Inc.* v. *Kirchmeyer*, 961 F.3d 1062, 1072 n.7 (9th Cir. 2020) (noting that intermediate-scrutiny standard is the same for content-neutral laws and for laws that restrict speech only incidentally). Each of the Board's theories lacks merit. So, too, does the agency's suggestion that Jones's position, if accepted, will spell doom for licensing laws in general.

1. The surveying law restricts appellants' speech directly, not "incidentally."

In resisting strict scrutiny, the Board contends, foremost, that its surveying law targets Jones's non-speech "conduct" and restricts his speech only

"incidentally." Appellees' Br. 26-33. Like the district court, however, the Board has yet to put its finger on any non-speech conduct of Jones's that triggers its law. In the Board's words, the "conduct" is Jones's "preparing an image of property with locational data"—textbook protected expression. *Id.* 29.

Against this backdrop, the surveying law cannot be couched as simply an "incidental" restraint on Jones's speech. The rule is clear. A law may be said to restrict speech incidentally "when 'speech' and 'nonspeech' elements are combined in the same course of conduct" and a restriction on the "nonspeech element[]" yields "incidental limitations" on the speech. *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). But that principle does not apply when, as here, it is the speech itself that triggers the law. Quite the opposite: where "the conduct triggering coverage under the statute consists of communicating a message," the law does not restrict speech "only incidentally." *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 26, 28 (2010).

The Board offers no persuasive response. Like the district court, the agency ticks through a list of laws involving restrictions targeting conduct, not speech. Appellees' Br. 40-41 (ban on "race-based hiring" and "outdoor fires"); *id.* 34 (price caps, informed consent, etc.). But as detailed in the opening brief (at 35-36), the non-speech conduct triggering each of those laws is easy to

pinpoint. Discriminating against job applicants. Collecting money. Surgery. Fire. For each, the "noncommunicative conduct" is unmistakable. *O'Brien*, 391 U.S. at 382. Here, by contrast, the Board admits that it is Jones's speech—his sharing of "data" and "information"—that triggers the surveying law. Appellees' Br. 18. As applied to Jones, the law's "effect on First Amendment interests" thus is "far from incidental." *PETA* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 827 (4th Cir. 2023) (citation omitted), *pets. for cert. docketed*, Nos. 22-1148, 22-1150.[1]

The Board emphasizes that its statute refers to surveying using the word "practice." Appellees' Br. 26-27. From that word, the Board infers that the law necessarily regulates conduct, not speech. But "[s]tate labels cannot be dispositive of [the] degree of First Amendment protection." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2375 (2018) (*NIFLA*) (citation omitted). Whether or not the surveying law "may be described as directed at conduct," it calls for heightened scrutiny when "the conduct triggering coverage under the statute consists of communicating a message." *Holder*, 561

[1] The Board also cites *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978). Appellees' Br. 22-23. That decision concerned advertising ("commercial speech"), which is subject to lesser First Amendment protection and is not at issue here. *Edenfield* v. *Fane*, 507 U.S. 761, 774 (1993); Appellees' Br. 54 (seeming to agree that appellants' speech is not commercial speech).

U.S. at 28; *compare* Appellees' Br. 38 (ignoring *Holder*, except to note that it "did not involve licensing or the regulation of professional conduct that incidentally involves speech"), *with Billups* v. *City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (applying *Holder* in challenge to licensing law).

2. That the surveying law may be "generally applicable" does not insulate it from ordinary First Amendment principles.

a. With no conduct of Jones's on which to hang its statute, the Board falls back on an error of the district court's. Even if Jones's speech is restricted directly, the Board posits, the restriction still can be written off as incidental to (unspecified) non-speech conduct—so long as it comes in the form of a "generally applicable licensing regime." Appellees' Br. 27 (quoting J.A. 978).

That view was wrong in the district court, and it is wrong still. In developing the "line between speech and conduct," the Supreme Court has never carved out an enclave for generally applicable licensing regimes. *NIFLA*, 138 S. Ct. at 2373. To the contrary, the Court in 2018 admonished that whether a law restricts speech or conduct in no way "turn[s] on the fact that professionals [a]re speaking." *Id.* at 2372. Were the rule otherwise, the Court cautioned, states would enjoy "unfettered power to reduce . . . First Amendment rights by simply imposing a licensing requirement." *Id.* at 2375. The lesson is simple.

If a licensing law restricts non-speech conduct and burdens speech only incidentally, it—like any law fitting that bill—may face something less than strict scrutiny. But if "the conduct triggering coverage . . . consists of communicating a message," then "a more demanding standard" applies—licensing regime or no. *Holder*, 561 U.S. at 28 (citation omitted).

This Court's precedent reinforces the point. As discussed in the opening brief (at 34-35), this Court in *Billups* v. *City of Charleston* invalidated a licensing requirement for tour guides. That regime was no less "generally applicable" than North Carolina's surveying law. Yet the Court rejected Charleston's attempt to portray it as "a business regulation governing conduct" and "merely impos[ing] an incidental burden on speech." *Billups*, 961 F.3d at 682. The law was triggered by the plaintiffs' speech, just as North Carolina's law is triggered by Jones's. *Id.* at 683. So applying customary First Amendment principles, this Court held that the law "cannot be classified as a restriction on economic activity that incidentally burdens speech." *Id.* That holding translates readily here.

For its part, the Board purports to distinguish *Billups*'s logic on one ground alone: that tour guides in Charleston spoke in "traditional public fora" whereas Jones might share his maps in more private settings. Appellees' Br.

55 (quoting *Billups*, 961 F.3d at 683). Contrary to the Board's implication, however, states do not have a freer hand to regulate speech in private spaces than in public ones. It is certainly true that courts take a "'forum based' approach" in a subset of First Amendment cases: those involving the government's power to restrict speech "on property that it owns and controls." *Int'l Soc. for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). But this case has nothing to do with speech on state-owned property. Nor was the tour guides' presence on sidewalks a dispositive feature in *Billups*; had Charleston required licenses for guides inside the city's (many) privately owned historic mansions, the outcome would have been the same. *Cf. Consol. Edison Co. of N.Y.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 539-40 (1980). In short, the Board's First Amendment carve-out for "generally applicable licensing regime[s]" cannot be squared with either Circuit or Supreme Court precedent.

b. *Capital Associated Industries, Inc.* v. *Stein* is not to the contrary. 922 F.3d 198 (4th Cir.), *cert. denied*, 140 S. Ct. 666 (2019). Like the district court, the Board views *Capital Associated Industries* as holding that professional-licensing laws—as a category—necessarily have only an incidental effect on First Amendment rights. Appellees' Br. 23-25, 27. The decision stands for no such proposition. Appellants' Br. 42-47. The First Amendment claim in

that case, rather, "test[ed] the constitutionality of [North Carolina's UPL] statute [as] applied to the plaintiff based on the record." 922 F.3d at 204. The record showed that the plaintiff sought to launch a legal program that involved not just speech, but nonspeech conduct as well. *Compare*, *e.g.*, Appellees' Br. 24, 27-28 (acknowledging that Capital Associated Industries "sought to offer an array of legal services," among them "drafting legal documents" like "contract[s]"), *with* Appellants' Br. 43 ("[A] contract is an operative legal instrument whether anyone reads it or not."). As a result, the analysis was straightforward: where the plaintiff did not seek to engage in speech alone, the Court did not apply the level of scrutiny reserved for direct restrictions on speech.

From that logic, the Board infers a far broader rule: that even when licensing laws *are* triggered by speech alone, they still can be said to restrict the speech only "incidentally" if they are in some sense "generally applicable." Appellees' Br. 27, 55 (citation omitted). That re-envisioning of *Capital Associated Industries* would put it in conflict with basic First Amendment tenets. As this Court recently observed, "a State may not harness generally applicable laws to abridge speech without first ensuring the First Amendment would allow it." *PETA*, 60 F.4th at 827. Supreme Court precedent is in accord. *Holder*, 561 U.S. at 27 (rejecting argument that speech-triggered law should "receive

intermediate scrutiny because it *generally* functions as a regulation of conduct"). Courts have applied this principle even in the context of UPL laws like that of *Capital Associated Industries*. *E.g.*, *Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 113 (S.D.N.Y. 2022), *appeal docketed*, No. 22-1345 (2d Cir.).

The Board rejoins that licensing laws are a class apart. Appellees' Br. 38 ("*Holder* did not involve licensing . . . ."), 58 ("[H]ere the context concerns licensing and regulation of a professional practice . . . ."). Not only does that premise conflict with this Court's reasoning in *Billups*, but the Supreme Court has repudiated it: the speech of "professionals" is not in fact "a separate category of speech" but has the same status as other fully protected expression. *NIFLA*, 138 S. Ct. at 2371, 2372. The Board's response? That its carve-out would not abolish *all* First Amendment scrutiny for licensing laws (no "blanket immunity") but would instead assign them to a special, uniquely lenient zone—somewhere between the lower reaches of intermediate scrutiny and rational-basis review. Appellees' Br. 30; *see also* pp. 21-25, *infra*. That sleight of hand is no less a departure from Supreme Court precedent, which has long resisted "mark[ing] off new categories of speech" for "diminished constitutional protection." *NIFLA*, 138 S. Ct. at 2372 (citation omitted).

The Board's analysis also conflicts with the precedent of at least one other circuit. *Vizaline, L.L.C.* v. *Tracy*, 949 F.3d 927 (5th Cir. 2020). The Board denies that conflict (Appellees' Br. 31-32), but it is hard to miss. Like the district court, the Board proposes a special level of First Amendment scrutiny reserved for licensing laws alone. The Fifth Circuit, in contrast, holds that "occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections." 949 F.3d at 931. Thus, the court held that Mississippi's surveyor-licensing statute was subject to the "traditional" speech-conduct analysis applicable to other laws. *Id.* at 932. That decision cannot coexist with the Board's framework. In fact, the district-court opinion reversed by the Fifth Circuit could be a template for much of the Board's brief here. *Vizaline, L.L.C.* v. *Tracy*, No. 18-cv-531, 2018 WL 11397507, at *3 (S.D. Miss. Dec. 20, 2018).

c. The Board suggests that appellants' view, if adopted, would generate a circuit conflict of its own, with decisions of the Second, Ninth, and Eleventh Circuits. Appellees' Br. 33. That claim is overstated.

To start, the Second Circuit in *Brokamp* v. *James* declined to decide whether the law before it "only incidentally burden[ed] speech." 66 F.4th 374,

391-92 (2023). However this Court addresses the Board's views on "incidental" speech restrictions, its decision on those issues will not conflict with *Brokamp*.

As for the Ninth Circuit, the panel in *Tingley* v. *Ferguson* saw itself as "bound" by pre-*NIFLA* circuit precedent to hold that sexual-orientation "conversion therapy" is non-speech conduct and protected only by rational-basis review. 47 F.4th 1055, 1071, 1075 (2022), *pet. for cert. docketed*, No. 22-942; *see generally Tingley* v. *Ferguson*, 57 F.4th 1072 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of rehearing en banc). Outside of conversion therapy, however, the Ninth Circuit has rejected the sort of imprecise speech-incident-to-conduct theories advanced by the Board here. *Pac. Coast Horseshoeing Sch., Inc.*, 961 F.3d at 1069. Even the Board can bring itself to co-sign *Tingley* only in muted terms, given the opinion's evident tension with the agency's own view of First Amendment doctrine. Appellees' Br. 42 n.5.

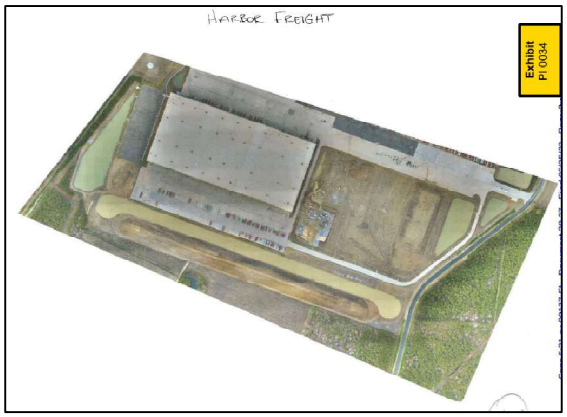
Last is *Del Castillo* v. *Secretary, Florida Department of Health*, 26 F.4th 1214 (11th Cir.), *cert. denied*, 143 S. Ct. 486 (2022). Much like the Ninth Circuit in *Tingley*, the Eleventh Circuit in *Del Castillo* considered itself "bound" by pre-*NIFLA* precedent and thus applied no First Amendment scrutiny to a licensing law restricting diet advice. *Id.* at 1226. In this way, the *Del Castillo* decision *already* conflicts with precedent of this Court. *See, e.g.*,

Br. of Amici Curiae Rodney A. Smolla, Floyd Abrams, Erwin Chemerinsky et al. at 13, *Del Castillo* v. *Ladapo*, No. 22-135 (U.S. filed Sept. 14, 2022) ("The Eleventh Circuit's decision in *Del Castillo* also conflicts with the decision of the Fourth Circuit in *Billups* . . . ."). The Board's invitation to follow in the Eleventh Circuit's footsteps, even if tepid, underscores the agency's departure from this Court's precedent. 2 Smolla & Nimmer on Freedom of Speech § 20:37.40 (2023 update) ("The *Del Castillo* decision seems to at once reject the professional speech doctrine, while in the same breath endorsing it under another name.").

3. As applied to appellants, the surveying law is content-based.

a. As another basis for intermediate scrutiny, the Board contends that its surveying law is content-neutral, not content-based. Appellees' Br. 33-41. This theory, too, is wrong. The Board's law applies to Jones's maps and models based on the specific "information" and "data" they contain. If he communicates an electronic version of one of his aerial maps, for example, he will be committing a crime unless he scrubs it of all locational metadata. Appellants' Br. 19, 29-31. Under no circumstances can he present the images as three-dimensional models. *Id.* A hard copy or PDF of one of his maps is legal—

unless it bears a scale bar or (depending on which government witness you ask) even a north arrow. *Id.* Hence:



Lawful

Unlawful

Id. 30-31.

The Board disputes none of this (besides backpedaling on the north arrow). To the contrary, it doubles down on its law's content-based bona fides. On one side of the line, Jones and his company are "restricted only insofar as [they] seek to prepare for commercial distribution maps or models with location information or property images capable of measurement." Appellees' Br. 18. On the other, they "remain free to convey maps and models that do not contain [that] measurable data . . . ." *Id.* A law that applies this way is content-based. *Holder*, 561 U.S. at 27-28.[2]

[2] The Board's allusion to "commercial distribution" does not affect the analysis. The surveying law bars Jones's speech "regardless of whether money

b. The Board's contrary arguments lack merit.

i. The Board observes, first, that the concept of "content-based" laws has no purchase when a statute regulates nonspeech conduct and affects speech only incidentally. Appellees' Br. 33-34. That general proposition may be correct: a statute triggered only by "the independent noncommunicative impact of conduct" is (almost definitionally) not triggered by communicative content. *O'Brien*, 391 U.S. at 382. But as discussed, North Carolina's law is not such a statute. Indeed, the Board itself justifies the law's application in terms of communicative impact: the results of Jones's sharing his images, information, and data, the agency claims, could be "catastrophic." Appellees' Br. 51. Whether or not those concerns justify the law under the proper standard of scrutiny (they don't), they do confirm that the law is content-based. *See Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011); *cf. O'Brien*, 391 U.S. at 382 (noting that a law cannot be upheld as a conduct restriction when "the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful").

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changes hands." J.A. 811-812. In any event, "speech is 'protected even [when] it is carried in a form that is 'sold' for profit.'" *Billups*, 961 F.3d at 683.

ii. The Board also contends that, even applying ordinary First Amendment principles, its surveying law is content-neutral. Appellees' Br. 36-40. The agency asserts that the law merely restricts "who" can "practice" "activity" that falls within the definition of surveying. *Id.* 36. Yet that is simply an elegant way of avoiding the word *content*; as the Board elsewhere acknowledges, whether Jones's "activit[ies]" fall within the definition of "practice" depends on whether he communicates images containing proscribed information. *See* pp. 12-13, *supra*.

The Board protests that its law "serves purposes unrelated to the content of expression." Appellees' Br. 37 (citation omitted). That is hard to reconcile with the agency's broader theory: that its interest in banning Jones's maps turns on what it views as the harmful communicative impact of those materials. *See* p. 14, *supra*. In any event, the Board's claim of a content-neutral purpose is irrelevant, given the content-based lines built into the law itself. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 165 (2015).

The Board also errs in analogizing to the Second Circuit's decision in *Brokamp* v. *James*, 66 F.4th 374. Appellees' Br. 36-37. It is true that the court in *Brokamp* held a mental-health-counselor licensing law content-neutral. 66 F.4th at 392-97. The court did so, however, because it determined that the law

applied based not "on the content of what a person says," but on whether counselor-client speech has "a particular purpose." *Id.* at 393; *see also id.* at 394 & n.18. That reasoning is open to criticism. But applying it here would still mark North Carolina's surveying law as content-based. Unlike the law in *Brokamp*, North Carolina's is not triggered by Jones's "purpose"; whatever his purpose, he would be in violation were he to communicate his images (to "anyone") without first scrubbing them of location-related content. Appellants' Br. 19 (citation omitted); *accord Brokamp* v. *District of Columbia*, No. 20-cv-3574, 2022 WL 681205, at *1 (D.D.C. Mar. 7, 2022) (holding different therapist-licensing law content-based).

The Board's reliance on *City of Austin* v. *Reagan National Advertising of Austin, LLC* is similarly unsound. 142 S. Ct. 1464 (2022), *cited at* Appellees' Br. 38-40. As the Board notes, the Court in *City of Austin* held that an off-premises sign ordinance was content-neutral even though regulators had to read the signs to determine whether they were located "on-premises" or "off." But contrary to the Board's view, the Court's analysis highlights the surveying law's content-based attributes here. Under Austin's ordinance, the Court reasoned, a sign's content "matter[ed] only to the extent that it informs the sign's relative location," making the ordinance "similar to ordinary time, place, or

manner restrictions." 142 S. Ct. at 1473. The Board, by contrast, insists that its law is *not* a "time, place, and manner" restriction. Appellees' Br. 56 n.7. Nor is the law "agnostic as to [the] content" of Jones's speech. *City of Austin*, 142 S. Ct. at 1471. Rather, it is precisely because the Board views the impact of his speech as potentially "catastrophic" that it threatened him with civil and criminal penalties. Where Austin's law was "location-based and content-agnostic," North Carolina's targets Jones's speech "based on its communicative content." *Id.* at 1471, 1475 (citation omitted).

4. The surveying board's claims of havoc, revolution, and doom are overstated.

More broadly, the Board voices concern that appellants' view of the First Amendment would disrupt licensing laws writ large. *E.g.*, Appellees' Br. 40 ("Plaintiffs' logic would wreak havoc in the law . . . ."), 35 ("Plaintiffs' theory would spark a revolution."), 61 ("Adopting that logic would doom untold professional licensing laws . . . ."); *cf. Vizaline, L.L.C.*, 2018 WL 11397507, at *3 (similar rhetorical devices), *rev'd and remanded*, 949 F.3d 927.

The Board's concerns are unfounded. Far from "lack[ing] an adequate limiting principle" (Appellees' Br. 61), appellants' submission tracks the line "long familiar to the bar" between speech and conduct. *NIFLA*, 138 S. Ct. at 2373 (citation omitted). Applying that line, many licensing regimes do not

implicate the First Amendment. Rather, they are triggered by easy-to-identify conduct, not by speech. *See* Institute for Justice, License to Work: A National Study of Burdens from Occupational Licensing (3d ed. 2022) (cataloguing licensure laws, many having nothing to do with speech).

That is true, too, of aspects of surveying itself. North Carolina is free, for example, to say that only licensed surveyors can give documents the legal imprimatur of a state-issued seal. In fact, the state already so provides. N.C. Gen. Stat. § 89C-23. North Carolina is free to say that plats can be recorded only under the seal of a licensed surveyor; much like a contract or a medical prescription, recorded plats are "legally efficacious acts, and so can be regulated as conduct." *Tingley*, 57 F.4th at 1081 (O'Scannlain, J., dissenting from denial of rehearing en banc); *cf. O'Brien*, 391 U.S. at 382. Again, North Carolina already so provides. Appellants' Br. 37-38. North Carolina is free, as well, to say that buildings can be constructed or modified—conduct—only upon the submission of papers sealed by a licensed surveyor. Here, too, North Carolina cities already so provide.[3] And where the Board insists that surveying laws

[3] *E.g.*, City of Raleigh, *Commercial Permits: New Buildings, Additions, and Change of Use* (requiring that "recorded map" or "copy of a current signed and sealed survey" be submitted before permit will issue for the construction of a commercial building), https://tinyurl.com/4f3fs9cb; City of Greensboro,

simply "cannot be severed" from broad speech restrictions (Appellees' Br. 29), the experience of other states indicates differently. *E.g.*, Appellants' Br. 50-51 (giving examples).

The Board's reliance on "history and tradition" (Appellees' Br. 30-31 & n.4) adds little more; that licensing laws may fall within the states' police power does not affect the First Amendment analysis. *Cf. Reed*, 576 U.S. 155. Whatever might be said of other regimes, moreover, North Carolina's law hardly dates to "time immemorial." Appellees' Br. 30-31 (citation omitted). Maps and models like Jones's were not regulated until the late '90s. J.A. 334-335; Appellants' Br. 13-14. As recently as 1959, in fact, anyone could perform *any* surveying in North Carolina, "provided he d[id] not represent himself to be a registered land surveyor." 1921 N.C. Sess. Laws ch. 1, § 15; 1951 N.C. Sess. Laws ch. 1084, § 1; *accord Billups*, 961 F.3d at 677 (invalidating law dating to 1983).

Residential Building Permit Plan Submittal Requirements ("Site Plans for new residences shall be signed and sealed by an NC licensed land surveyor or design professional."), https://tinyurl.com/nhfvs3f4; City of Durham, *Plan Review Requirements* (requiring "[s]caled plot plan sealed by a NC registered surveyor if there is addition to or change of footprint on parcel. (residential)"), https://tinyurl.com/muzkzp7t; City of Charlotte, *Electronic Plan Review* (requiring that commercial-building plans include "professional seal & signature" conforming to Board's regulations), https://tinyurl.com/mrydddy9.

At base, the Board has given no cause to think that licensing laws would be uniquely disrupted by application of the First Amendment principles that govern all other legislative acts. The Board's alternative, in contrast, raises serious unanswered questions. In the Board's view (and the district court's), licensing laws appear to enjoy distinctively lax treatment under the First Amendment. Yet even the Board labors to define which laws should enjoy that most-favored-statute privilege. Surveying laws? Yes. Tour-guide laws? No. Appellees' Br. 55. On its own terms, the Board's brief thus trips over one of the chief concerns with devising special rules in this area: the speech to be regulated is "a difficult category to define with precision." *NIFLA*, 138 S. Ct. at 2375.

The Board's carve-out also ignores that licensing regimes, no less than other laws, can pose a real threat to free-speech rights. Of late, they have been at fault for a raft of First Amendment violations.[4] If anything, then, the

[4] *E.g.*, Matthew Gault, *State Charges 77-Year-Old for 'Practicing Engineering Without a License'*, Vice (June 25, 2021), https://tinyurl.com/5dzrxb65; Patricia Cohen, *Yellow-Light Crusader Fined for Doing Math Without a License*, N.Y. Times (Apr. 30, 2017), https://tinyurl.com/2p9my5mr ; Jacob Gershman, *Judge Scolds Kentucky for Trying to Censor Parenting Columnist*, Wall St. J. (Oct. 2, 2015), https://tinyurl.com/ye2yupr2; Adam Liptak, *Blogger Giving Advice Resists State's: Get a License*, N.Y. Times (Aug. 6, 2012), https://tinyurl.com/2p97pfvy.

Board's plea for special treatment gets things backwards. Contrary to the Board's suggestion, the right to speak without a state license is not the domain of only "special categories of speech." Appellees' Br. 58. It's the baseline. *Riley* v. *Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 802 (1988). Where, as here, a licensing law applies based on the content of speech, it thus demands the rigorous, consistent application of First Amendment precedent.

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

As discussed, the parties' briefs diverge on whether North Carolina's surveying law implicates strict scrutiny or intermediate. Under either standard, however, reversal is warranted. The Board has never tried to meet strict scrutiny. Appellants' Br. 47. As for intermediate, the Board puts its eggs in one basket: rather than try to meet this Court's customary intermediate-scrutiny standard, the agency insists—wrongly—that the standard does not apply at all. Whatever the level of scrutiny, the judgment below should be reversed.

1. The surveying board's view of the intermediate-scrutiny standard conflicts with Circuit and Supreme Court precedent.

As explained in the opening brief (at 48-49, 52-53), intermediate First Amendment scrutiny puts a meaningful evidentiary burden on the government. Along with a "significant governmental interest," *Billups*, 961 F.3d at

685 (citation omitted), the government must "demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve [its] interest." *Id.* at 688 (citing *McCullen* v. *Coakley*, 573 U.S. 464, 494 (2014); *Reynolds* v. *Middleton*, 779 F.3d 222, 231-32 (4th Cir. 2015)). The government also must show that its law "leaves open ample alternative channels of communication." *Id.* at 690 n.11.

As its core theory, the Board asserts that, for licensing laws specifically, the above standard does not apply. Like the district court, the agency maintains that licensing statutes—seemingly, alone among all laws—call for a special, more permissive brand of intermediate scrutiny. Appellees' Br. 52-59.

The Board is incorrect. The federal courts apply the customary intermediate-scrutiny standard, consistently, across a transsubstantive range of speech restrictions. The Supreme Court did so in *NIFLA*. And in *McCullen* v. *Coakley*. This Court did so in *Billups* (for a licensing law, no less). And in *Reynolds* v. *Middleton*. And, most recently, in *PETA* v. *North Carolina Farm Bureau Federation*.

The Board objects that those cases involved either "novel" laws or "different contexts" than this one. *Id.* 55, 57; *see also id.* 55-58 (recording several pages' worth of immaterial distinctions). But this Court has rejected the view

that the standard of "*Billups*, *Reynolds*, and *McCullen*" applies "only to novel speech regulations." *PETA*, 60 F.4th at 832. And the Board nowhere explains why laws that "concern[] licensing and regulation of a professional practice" merit a bespoke level of more lenient scrutiny. Appellees' Br. 58. Nor does the Board reconcile that view with Supreme Court precedent. *NIFLA*, 138 S. Ct. at 2372 ("This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'"). Nor does the Board harmonize it with this Court's decision in *Billups*—which, after all, applied the customary intermediate-scrutiny standard to a law that "concerns licensing." *See also* pp. 6-7, *supra* (rebutting the Board's forum-analysis theory).

The Board next objects that the normal intermediate-scrutiny standard is "super-stringent" and amounts to "a form of strict scrutiny" by smuggling in a "least restrictive means" requirement. Appellees' Br. 41, 44, 59. (The Board pans the standard as "Plaintiffs' approach" but nowhere denies that it is the Supreme Court's and this Court's as well. *Id.* 44.) The Board's characterization is inapt. Contrary to the agency's suggestion, both the Supreme Court and this Court have made clear that intermediate scrutiny does not demand that a law "be 'the least restrictive or least intrusive means of' serving the [government's] interests." *Billups*, 961 F.3d at 686 (quoting *Ward* v. *Rock*

Against Racism, 491 U.S. 781, 798-99 (1989)); *McCullen*, 573 U.S. at 486 (same). At the same time, intermediate scrutiny "demand[s] a close fit between ends and means." *McCullen*, 573 U.S. at 486. And to establish that fit, the Supreme Court and this Court developed the standard the Board has disavowed here. *Billups*, 961 F.3d at 687-88; *Reynolds*, 779 F.3d at 228.

Also without merit is the Board's return to *Capital Associated Industries*. Like the district court, the Board misreads that decision as establishing, sub silentio, a new standard of intermediate scrutiny—one good for licensing laws alone. Appellees' Br. 41-44, 58-59. But as discussed in the opening brief (at 56-58), that reading is hard to credit, not least because this Court in *Capital Associated Industries* looked to *NIFLA* for its articulation of the intermediate-scrutiny standard. 922 F.3d at 209; Appellees' Br. 55 (appearing to concede that *NIFLA* applied appellants' customary intermediate-scrutiny standard).

Equally unpersuasive is the Board's effort to divine what the Court in *Capital Associated Industries* "presumably" meant to signal. Appellees' Br. 43. For example, the Board cites this Court's comment that "[a]nother state legislature might balance the interests differently" than did the enactors of North Carolina's UPL statute. Appellees' Br. 43, 53. From that, the Board discerns a break with the standard of *McCullen* and *NIFLA* and *Reynolds*.

But the Court's turn of phrase can just as easily be read—in harmony with those decisions—as restating a point noted above: that intermediate scrutiny does not demand "'the least restrictive or least intrusive means of' serving the government's interests." *McCullen*, 573 U.S. at 486. That this Court has applied its customary intermediate-scrutiny standard twice more in the years since *Capital Associated Industries*—including in a case about licensing—further confirms that the Board's bid to reinterpret that decision lacks force.[5]

2. The surveying law fails intermediate scrutiny.

a. The Board has not carried its burden under the intermediate-scrutiny standard detailed above. It has not argued that North Carolina considered *any* less-speech-restrictive alternatives to its flat ban on unlicensed mapping and modeling. Appellants' Br. 49-52. Or that the menu of readily available alternatives were inadequate to serve its stated interests. *Id.* Or that its law leaves open ample alternative channels of communication. *Id.* 52-53. In short, it has defaulted on its "nonnegotiable" burden. *PETA*, 60 F.4th at 831. Where Charleston, in *Billups*, at least cobbled together "post-hoc justifications" and

[5] In similar vein, the Board parses the appellant's brief from *Capital Associated Industries* to buoy its view of an unspoken new intermediate-scrutiny standard. Appellees' Br. 43. But as discussed in our opening brief (at 57-58), the appellant in *Capital Associated Industries* nowhere meaningfully argued for intermediate scrutiny.

"uncorroborated assertions," 961 F.3d at 688-89, the Board here has opted out of the intermediate-scrutiny exercise altogether.

b. What arguments the Board offers do not alter the analysis.

The Board asserts that errors in land surveys can impair "property interests," leading to "chaos" and "catastrophic" results. Appellees' Br. 50-51 (citations omitted); *id.* (citing examples of buildings' encroaching on adjoining land). Nowhere, however, does the Board explain why a sprawling ban on *all* unlicensed mapping and modeling is tailored to that concern. Less intrusive alternatives are readily available (many of them embedded in the Board's string-cite of other states' laws). *Id.* 3 n.1. Some states restrict mapping only when it "affect[s] real property rights." Mo. Rev. Stat. § 327.272(1); *see also, e.g.*, Ala. Code § 34-11-1(14)(e); Wis. Stat. § 443.134. Others tailor their surveying laws to projects undertaken in specific contexts. Va. Code § 54.1-402(C); Idaho Code § 54-1202(12)(b)(i)-(ii). Others exempt certain basic locational information, like "metadata" and "scale ratios, scale bars, and north arrows." Ark. Code § 17-48-201(f)(1)-(2). North Carolina itself has laws that guard against boundary errors and encroachments. Licensed surveyors alone can sign off on recorded plats. *See* p. 18, *supra*; *cf.* 2 Edmund T. Urban et al., North Carolina Real Estate § 27:25 (3d ed.) (noting similar lender requirements).

And cities regularly condition building permits on applicants' submitting a survey sealed by a licensed surveyor. *See* p. 18 & n.3, *supra*.

The Board nowhere denies that these alternatives are readily available. Nor has it offered evidence that "life, health, and property" are jeopardized more under these less intrusive regimes or that "negligence, incompetence, and professional misconduct" are more prevalent. Appellees' Br. 45; Appellants' Br. 49-52. Simply, the Board ignores what is obvious to regulators elsewhere: that in the twenty-first century, the data and information in aerial maps and 3D models can be used in ways that have little to do with traditional surveying—from crop analysis to inventory management to crime-scene recreation to historic preservation. J.A. 80-86; *see also* Sylvia Hui, *First full-size 3D scan of Titanic shows shipwreck in new light*, Assoc. Press (May 18, 2023), https://tinyurl.com/3taery86. In other states, these information sources are not the exclusive preserve of registered land surveyors. And the Board nowhere denies that those more tailored jurisdictions regulate surveying just as effectively as North Carolina. In intermediate-scrutiny terms, the agency has no evidence that North Carolina "attempted to use 'less intrusive tools readily available to it' . . . or that it ever seriously 'considered different methods that other jurisdictions have found effective.'" *Billups*, 961 F.3d at 690.

Similarly flawed is the Board's contention that, without its expansive surveying law, consumers will be misled by unlicensed mappers. Appellees' Br. 47-48; *see also id.* 61 ("*caveat emptor*"). That concern is readily answered: with a simple disclaimer requirement. Other states use this alternative. Appellants' Br. 50, 52. *Contra* Appellees' Br. 60 n.9 (misreading Kentucky's advisory opinion). And in response, the Board offers only bald assertions that such an alternative would be ineffective for North Carolina. Appellees' Br. 60. (For reasons unclear, the Board also shadowboxes with the sample disclaimer language Jones e-mailed the agency in 2019. *Id.*) Again, that "is not sufficient to satisfy the evidentiary standards established by *Reynolds* and *McCullen*." *Billups*, 961 F.3d at 688.

The Board asserts that "[i]t is difficult what to make of" the intermediate-scrutiny standard. Appellees' Br. 53. Contrary to the Board's suggestion, however, the standard does not require "proof that the General Assembly considered unconventional *deregulation*." *Id.* 53-54. Rather (simplifying slightly), it requires evidence that, before picking a speech-restrictive law, the government seriously considered less intrusive options and found them wanting. Despite every opportunity, the Board has not met that standard.

The Board also opines that Michael Jones is undereducated and unqualified. *Id.* 47 n.6 (commenting on Jones's GED and early career in welding), 52 ("Jones . . . does not have experience in 3D modeling because 'it's very hard and I didn't get far enough in the learning process.'"). But it is hardly surprising that Jones's mapping and modeling skills are incomplete; the Board shut him down almost immediately with threats of criminal prosecution. J.A. 93 ("[I]f I could do it without the Board coming after me, I would start building up my skills with 3D modeling . . . ."). For that matter, the agency itself appears to display only an imperfect understanding of the software used by mappers. *Compare* Appellees' Br. 48-49 (dwelling on "key points" and suggesting that commercially available software does not incorporate them), *with* J.A. 75-76 (explaining that the software can in fact make use of key points).

At bottom, the Board's defense reduces to the view that its law is important. But as the opening brief notes (at 51-52), "the constitutionality of a law that restricts protected speech does not turn solely on the significance of the governmental interest involved." *Billups*, 961 F.3d at 686. The courts also must "ensure that the government's chosen method for protecting its significant interests is not too broad." *Id.* On that front, the Board has not carried its burden. As applied to Jones, the Board's enforcement of its surveying law

trenches on one of "the most fundamental of American rights." *Id.* Yet the Board has not even begun to justify it. It has no response to the many states that regulate surveying without silencing people like Jones. It has no response to the fact that the internet makes available all manner of data that North Carolina seeks to reserve for licensed surveyors alone. Appellants' Br. 54. Or to the fact that its expert admitted that the data often can be used in ways that do not implicate the government's interests. *Id.* Or to the fact that Jones himself could share his maps and models—but only as the employee of a particular client, rather than as his own boss. *Id.* Distilled, the Board's defense of the judgment below depends entirely on this Court's forging a new, uniquely lax level of First Amendment scrutiny. Under the standards now in existence—strict and intermediate alike—the means-end mismatch in North Carolina's law simply is too great.

CONCLUSION

The judgment of the district court should be reversed.

Dated: August 30, 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 6,496 words (6,471 recorded through Microsoft Word's word-count tool combined with 25 words counted manually on the images at page 13 of the brief).

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Dated: August 30, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on August 30, 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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