IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

360 VIRTUAL DRONE SERVICES LLC et al., Plaintiffs, 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.	)	Case No.: 5:21-cv-0137-FL

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (ECF 31)

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NATURE OF THE CASE

This is a case about information. Like many entrepreneurs, Plaintiff 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 aerial orthomosaic maps. Using a drone, an operator can capture a series of aerial geotagged images 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 the like. (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." Pls.' MSJ App'x Ex. 25 (Schall Dep. 65:4-65:15) (ECF 38-25).

Michael Jones began offering these sorts of maps. But he'd hardly gotten 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, the Board ordered him to stop offering aerial orthomosaic maps. Unless his company "c[a]me into compliance," the Board threatened to pursue "an injunction" or even "criminal prosecution." Pls.' MSJ App'x Ex. 8 at 1 (ECF 38-8).

Not surprisingly, Jones complied and shut down his budding efforts to develop an 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). At base, what Jones wants to do is create and disseminate information. The Board says he can't do that *because of* the information's content. By its terms, for instance, the agency's cease-and-desist letter to Jones targeted "information" and "data"—speech. In defending this case, moreover, the agency has resorted to

increasingly content-based distinctions to justify its power to pursue small businesses like Jones's. 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."

The Board has now moved for summary judgment, and its motion is an easy candidate for denial. To start, the Board contends that Jones and his company lack standing because they did not successfully sell maps or models (illegally) in the past—that is, before the Board shut them down. But "[a] plaintiff is never required to violate the law to obtain standing to challenge a statute." *NC RSOL v. Boone*, 402 F. Supp. 3d 240, 252 (M.D.N.C. 2019). Jones wants to sell aerial maps and 3D models in the future. Under the Board's surveying law, he can't. That dispute is one the Court has the power to resolve—a point the Board's brief all but concedes. Defs.' MSJ Mem. 17 (ECF 34) ("A plaintiff has standing to bring a 'pre-enforcement challenge' to a statute when the plaintiff 'faces a credible threat of prosecution' under that law.").

The Board's merits arguments are equally flawed. The Board devotes much of its brief to arguing that intermediate First Amendment scrutiny—not strict—is the proper standard. Doctrinally, that is incorrect. But either way, the Board is not entitled to summary judgment. Both strict scrutiny and intermediate place on the government "the burden of proving that the law is 'narrowly tailored to serve a significant governmental interest.'" *Id.* 26. Yet the Board's summary-judgment record contains no evidence of tailoring. Not one of its proposed undisputed facts bears on tailoring. Beyond reciting (part of) the relevant standard, nothing in its brief addresses tailoring. Instead, its submission begins and ends with comments about the significance of its law in the abstract. *Id.* 27-31. But as the Fourth Circuit has made clear—in an intermediate-scrutiny case, no less—the "constitutionality of a law that restricts protected speech does not turn solely on the significance of the governmental interest involved." *Billups v. City of*

Charleston, 961 F.3d 673, 686 (4th Cir. 2020). The courts also must decide "whether the speech-restricting law at issue . . . is narrowly tailored." *Id.* On this question, "[t]he government's burden . . . is satisfied only when it presents 'actual evidence supporting its assertion[s].'" *Id.* at 688. And the record contains no such evidence here. Worse, the Board ignores—entirely—a separate intermediate-scrutiny requirement: that its law "leave[] open ample alternative channels of communication." *Id.* at 685, 690 n.11. At base, the Board has not carried its burden under any level of First Amendment scrutiny—intermediate or strict. Its motion should be denied.

STATEMENT OF FACTS

A. Commercial drone use

A drone is an unmanned aircraft that can fly either autonomously or with a remote pilot on the ground. Recent years have seen the rise of a thriving commercial-drone industry nationwide. Using cameras, drones can take photographs of—and collect data about—buildings, land, construction sites, and other property. The images and data can be used for many different purposes. Abatie Decl. ¶¶ 20-30, 54-69 (ECF 38-1). Two are at the heart of this case: creating aerial orthomosaic maps and creating 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 them into a single photograph (often called "orthomosaic" or "measurable" maps). *Id.* ¶¶ 58-61.

Because each individual image is geo-referenced, the map can also convey useful information about the land—for example, about distances, elevations, and the like. *Id.* ¶¶ 50-53, 58-61. It can be used to measure the distance from Point *A* to Point *B*. *Id.* ¶ 59. Or to estimate the area of a piece of land. *Id.* Or to identify the elevation of a particular point. *Id.* Some of this information can be conveyed using traditional means—for example, a scale bar on the map.

Alternatively, commercially available mapping platforms let users annotate maps and use other electronic tools to derive information about distances, areas, elevations, and volumes. *Id.*

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 generally* Google Earth Help, *Measure distances and areas in Google Earth*, https://tinyurl.com/y5jjtcjx. One of the benefits of aerial maps, though, is currentness. While the images and data on sites like Google Earth may be months or years out of date, a custom aerial map can document up-to-date conditions. Abatie Decl. ¶ 60. That currentness can provide useful information in many different contexts. A farmer may want to estimate the amount of crop loss in a field after a storm. *Id.* A real-estate developer may want to estimate the size of a piece of land. *Id.* And so on.

3D Digital Models. Drones can also be used to capture images for photorealistic 3D models of land and structures. *Id.* ¶¶ 62-63. Much like a two-dimensional aerial map, a 3D model can be created by combining geotagged photos to create a three-dimensional representation of a piece of property. *Id.* 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). *Id.* ¶¶ 84-85. They can be used as a form of cultural preservation—for example, by capturing a three-dimensional representation of a historical site. *Id.* ¶ 82. They can be used to recreate crime-scenes. *Id.* ¶ 86. In short, they are a source of useful information.

B. Michael Jones founds 360 Virtual Drone Services LLC and begins offering drone-related photography services.

1. Michael Jones has provided photography and videography services in North Carolina since around 2016. Jones Decl. ¶ 4 (ECF 38-3). What started off as a hobby soon grew into a small business, with Jones offering photography services for pay. *Id.* ¶ 5.

Jones soon recognized the extraordinary potential of drones, and he branched out into drone-based aerial photography as well. *Id.* ¶ 6. He got certified by the FAA to fly drones commercially. *Id.* ¶ 7. And in 2017, he founded a single-member company—360 Virtual Drone Services LLC—and began offering drone-photography services to clients, including real-estate developers, property managers, realtors, entertainment companies, and individuals. *Id.* ¶¶ 8-9.

Along with standard photography jobs, he began offering aerial mapping services as well. *Id.* ¶¶ 10-11. He made a profile on a popular commercial-drone website, Droners.io, and selected "Surveying & Mapping" as one of his categories. *Id.* ¶¶ 12-13. (As he would later explain to the surveying board, Droners.io did not offer a standalone "Mapping" category. Pls.' MSJ App'x Ex. 7 at 5 (ECF 38-7).) On his own website, too, he began advertising "video, pictures and orthomosaic maps (Measurable Maps) of [construction] sites." Pls.' MSJ App'x Ex. 4 at 2 (ECF 38-4).

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. Jones Decl. ¶ 17. He was hired to capture aerial images of a shopping-mall parking lot, which likewise could be used to create an aerial map. *Id.* ¶ 18. He also started trying to make maps himself. *Id.* ¶ 19. One repeat client, for instance, had hired him to take periodic photos and videos of a real-estate development site. *Id.* ¶ 20. To try to expand his portfolio, Jones processed those images into an aerial map and pitched the client on incorporating maps into Jones's existing business. *Id.* ¶ 21. That client chose not to make use of maps. *Id.* ¶ 22. Undeterred, though, Jones continued to advertise mapping as one of his company's offerings. *Id.* ¶ 23.

2. At no point has Jones been a licensed surveyor. *Id.* ¶ 24. Nor has he ever deliberately marketed himself as a licensed surveyor. *Id.* ¶ 25. Nor, for that matter, has he ever

purported to establish legal descriptions of property lines. *Id.* ¶ 26. Even so, in December 2018 he received a letter from the North Carolina Board of Examiners for Engineers and Surveyors. *Id*. ¶ 27. "Based upon a review of [360 Virtual Drone Services's] website . . . 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." Pls.' MSJ App'x Ex. 6 at 1 (ECF 38-6). "The services include, but are not limited to, 'Surveying & Mapping,' and providing orthomosaic maps of construction sites." *Id*. The Board advised that "an investigation has been initiated" and gave Jones fifteen business days to respond to the agency's "charges." *Id.*

C. North Carolina's regulation of surveying

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; *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. An applicant without a surveying-related B.S. or associate degree, for example, 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. All applicants 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. *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 law naturally covers traditional surveying activities, like placing monuments and establishing "property line[s], easement[s], or boundar[ies] of any tract of land"—work that

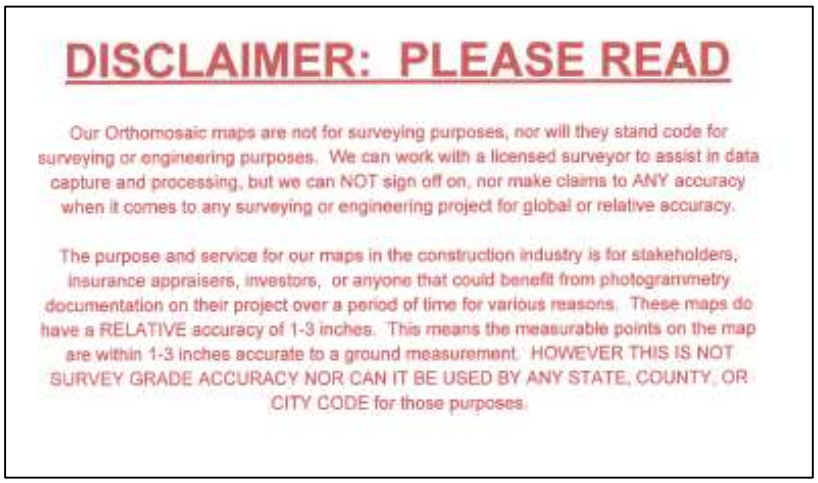
affects landowners' property rights. N.C. Gen. Stat. § 89C-3(7)(a)(1), (3). But in recent decades, the Board's mandate has expanded far beyond projects that have legal implications for property rights, to include, for example, "mapping . . . relative to the location, size, shape, or physical features 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).

In recent years, 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. Pls.' MSJ App'x Exs. 12-16 (ECF 38-12 to 38-16). The agency has warned them against "aerial surveying and mapping services" and "any resulting map or drawing," against "3D models" and "aerial photogrammetry," and against "use of orthomosaic software, aerial orthomosaics and models with control point accuracy." Pls.' MSJ App'x Ex. 13 at 1 (ECF 38-13); Pls.' MSJ App'x Ex. 12 at 2 (ECF 38-12). 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." Pls.' MSJ App'x Ex. 17 at 1 (ECF 38-17). Processing aerial images into a map so a client can go online and perform rough measurements using a distance tool? Surveying. *Id.* 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. *Id.* Only if "there is no meta data or other information about coordinates, distances, property boundaries or anything that falls within the definition of land surveying" can a drone operator give clients aerial images of their land. *Id.*

D. The North Carolina surveying board investigates 360 Virtual Drone Services.

1. Michael Jones learned all this the hard way. Having received the Board's investigation letter in late 2018, he responded quickly. Jones Decl. ¶ 28. 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." Pls.' MSJ App'x Ex. 7 at 4 (ECF 38-7). He advised that he had removed the "Mapping and Surveying" category from his Droners.io profile. *Id.* at 5. He explained that he had added a long disclaimer for his mapping services. And he asked the Board to "[p]lease feel free to correct or offer any revisions that need to be made to this disclaimer." *Id*. at 4.



Id.; *see also* Pls.' MSJ App'x Ex. 19 at 58 (ECF 38-19).

Jones also asked 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." Pls.' MSJ App'x Ex. 7 at 5-6. 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." *Id.* at 6. "If this is in ANY violation of any code," he wrote, "please let us know." *Id*. "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." *Id.* "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." *Id.*

2. 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. *Id.* at 3-4. Days later, the two met in person. Jones Decl. ¶ 29. At the meeting, Jones recalls, the investigator told him that giving a client an aerial photograph that contains geospatial metadata would qualify as the unlicensed practice of surveying. *Id.* ¶ 30. The investigator also told him that stitching aerial photographs together to create an orthomosaic map would qualify as the unlicensed practice of surveying. *Id.* ¶ 31. Jones also recalls that the investigator told him that giving a client aerial images on which he had drawn lines (for example, to approximate property boundaries) would qualify as unlicensed surveying as well. *Id.* ¶ 32.

The investigator would later deny having offered Jones any guidance on what he could and could not legally do. Pls.' MSJ App'x Ex. 20 (Casey Dep. 44:15-45:3) (ECF 38-20). In accordance with the agency's practices, the investigator did not record his interview with Jones. *Id.* (Casey Dep. 19:14-19:16). And he shredded his contemporaneous notes of the interview. *Id.* (Casey Dep. 19:17-20:2). His later report of the interview, however, reflects that he and Jones spoke in detail about Jones's business. Pls.' MSJ App'x Ex. 21 at 2 (ECF 38-21). The report also recorded that Jones confirmed that he offered aerial maps. *Id.* at 2-3. It recorded that Jones "acknowledged that at one time he advertised the ability to provide measurements but has since removed that from any marketing materials." *Id.* at 3. It recorded that Jones said "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." *Id.* It also recorded that Jones "acknowledged that he has taken some real estate videos . . . that include what appears

to be property lines" but that "his intent with that was to give a general location and shape of the parcel" and that "he puts a disclaimer . . . in the notes of his YouTube videos stating, 'Property lines are for a visual guide only and are not accurate to county coordinates.'" *Id.* at 4.

E. The surveying board issues 360 Virtual Drone Services a cease-and-desist letter.

Five months passed. Mid-summer 2019, Michael Jones received another letter from the Board. Pls.' MSJ App'x Ex. 8 (ECF 38-8). "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) without being licensed with this Board." *Id.* at 1. 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." *Id.* at 1-2. As for Jones's questions about disclaimers, the Board dismissed them with one sentence: "[M]arketing disclaimer is not appropriate as the services still fall within the practice of land surveying." *Id.* at 2. 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." *Id.* at 1.

F. Michael Jones complies with the surveying board's instructions.

Not surprisingly, Jones heeded the Board's demand. He stopped trying to develop his mapping business. Jones Decl. ¶ 34. He stopped offering any kinds of aerial maps. *Id.* He even stopped taking jobs to capture images for *other* people to use for aerial maps. *Id.* He refrained from branching out into other mapping-related work as well—for instance, using aerial images to

create 3D models. *Id.* Given the investigator's warning, he also stopped adding lines on real-estate marketing images to indicate the rough position of property boundaries. *Id.*

G. Procedural background

Jones and 360 Virtual Drone Services LLC filed this lawsuit in March 2021. They seek a judgment that secures their right to create and sell aerial maps, 3D models, and real-estate photographs with lines approximating property boundaries. Compl. p. 22 (ECF 1).

For the aerial maps, the Board responded to this lawsuit with a murky—but inescapably content-based—position. 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." Defs.' MSJ Mem. 9 (ECF 34); *see also, e.g.*, Pls.' MSJ App'x Ex. 25 (Schall Dep. 34:4-34:13) (ECF 38-25). So, for example, he can print out a hard copy of an aerial map. *E.g.*, Pls.' MSJ App'x Ex. 25 (Schall Dep. 36:18-37:6). But he can't include a scale bar on the page; the bar would allow for measuring things, which would make the image an unlicensed survey. *Id.* (Schall Dep. 37:7-37:20). For the same reason, it also would be illegal to include a north arrow. *See* Pls.' MSJ App'x Ex. 23 at 15 (ECF 38-23) (Board's expert report). Or maybe the north arrow would be fine; the Board's witnesses offered conflicting views. *Compare id. with* Pls.' MSJ App'x Ex. 26 (Ritter Dep. 25:14-25:25) (ECF 38-26). Whatever might be said of north arrows, though, the Board has been clear on one thing: Jones certainly can't give his clients access to an unscrubbed electronic version of the map. *E.g.*, Pls.' MSJ App'x Ex. 25 (Schall Dep. 39:13-40:15); Pls.' MSJ App'x Ex. 26 (Ritter Dep. 52:2-52:5). *He* is allowed to see the location data that goes into his aerial maps. But letting his *customers* see that information is illegal.

As for the 3D models, the Board appears to be standing on its power to ban unlicensed persons from creating them. Pls.' MSJ App'x Ex. 23 at 16; Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 25:8-26:22) (ECF 38-24). For a time, the Board's in-house counsel suggested that

unlicensed persons might legally sell 3D models if they "somehow . . . strip[ped] all the metadata out of the 3D digital model." Pls.' MSJ App'x Ex. 18 (Tuttle Dep. 37:13-37:19) (ECF 38-18). But he admitted that he was "not qualified to answer" whether removing georeferenced data from a 3D model was even possible. *Id.* (Tuttle Dep. 37:20-37:25). And the Board's expert later confirmed that "[a] 3D digital model is all on its own completely georeferenced" and "there's no stripping that data." Pls.' MSJ App'x Ex. 25 (Schall Dep. 55:2-55:14).

Lastly, for real-estate photos, the Board says its law does not cover those images. Defs.' MSJ Mem. 17. It also denies that its investigator told Jones differently. Answer ¶ 63 (ECF 21).

Given the Board's position that it can prohibit Jones and his company from performing mapping and modeling, this case has proceeded through discovery and to summary judgment.

ARGUMENT

I. The Court has the power to hear this case.

Michael Jones and his company have standing to sue. "To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014). Each element is met as to the core of the parties' dispute here (Section A, below). At the same time—and as noted in Plaintiffs' summary-judgment brief (at 24-25)—the Court may be able to conclude that the dispute has been narrowed as to a subset of maps and images (Section B).

A. Plaintiffs have Article III standing to challenge North Carolina's restriction on their selling measurable aerial maps and 3D digital models.

The core of the parties' dispute is whether Plaintiffs can create and sell measurable aerial maps and 3D models. Jones wants to provide these products. He contends that the First Amendment secures his right to do so. For its part, the Board says that its surveying law

prohibits Jones and his company from providing these products. And it maintains that the prohibition is valid under the First Amendment. The Court has the power to resolve this dispute.

1. Injury: Plaintiffs wish to sell measurable aerial maps and 3D digital models but face a credible threat of enforcement if they do so.

a. The first element of Article III standing—injury—is the focal point of the Board's summary-judgment brief, and it is easily satisfied here. "[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). That "leniency of First Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact." *Id.* In cases like this one, "the injury-in-fact element is commonly satisfied by a sufficient showing of 'self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression.'" *Id.* Which makes sense. "[W]here 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*, 573 U.S. at 158-59 (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 Plaintiffs' favor:

First, Michael 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. Jones Decl. ¶¶ 34-39. 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." Pls.' MSJ App'x Ex. 4 at 2; Defs.' MSJ Mem. 7 ("Jones told the Board that Virtual Drones offered orthomos[ai]c maps or measurable maps."). He captured aerial images for clients to process into orthomosaic maps. Jones Decl. ¶ 18. He "started practicing making 3D models." *Id.* ¶ 39; *cf. Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (McConnell, J.) (noting that "evidence of past activities obviously cannot be an indispensable element" of the standing analysis because "people have a right to speak for the first time," though "such evidence lends concreteness and specificity to the plaintiffs' claims"). Looking forward, he'd like to develop his business along similar lines in the future, by offering maps and models to clients. Jones Decl. ¶¶ 34-39.

Second, that "intended future conduct is 'arguably . . . proscribed by [the] statute' [Plaintiffs] wish to challenge." *Susan B. Anthony List*, 573 U.S. at 162. In fact, the proscription is undisputed. The Board firmly maintains that non-licensees like Jones and 360 Virtual Drone Services cannot legally offer aerial maps that contain measurable information. *E.g.*, Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 11:19-12:1). The Board says the same for 3D models. *E.g.*, *id.* So it is illegal for Jones and his company to offer these services in North Carolina. *See* Defs.' MSJ Opp. 3 (ECF 42) ("The commercial products Plaintiffs seek to offer to consumers falls under the definition of land surveying.").

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). 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 Jones "fail[ed] to come into compliance." Pls.' MSJ App'x Ex. 8 at 1.[1] And that the Board has issued similar warnings to other drone operators. *See* Pls.' MSJ App'x Exs. 12-16.[2] And that the Board has pointedly *not* foresworn making good on its threats if Jones shares illegal maps or models in the future. *See* Defs.' MSJ Mem. 17 (volunteering that "[t]he threat of prosecution is especially credible when defendants have not 'disavowed enforcement' if plaintiffs engage in similar conduct in the future" (citation omitted)). This record more than suffices to give Plaintiffs a cognizable stake in this case.

b. The Board's arguments to the contrary lack merit.

Foremost, the Board contends that because Jones and his company did not sell 3D models or measurable aerial maps in the past, they cannot sue to secure their right to sell them in the future. *Id.* 12-14. In the Board's view, plaintiffs can bring a pre-enforcement challenge only as to services they performed (illegally) at some point in the past. *Id.* 15 (asserting that Plaintiffs must "establish prior conduct on the services at issue").

That is wrong. Contrary to the Board's view, "[i]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Kenny*, 885 F.3d at 288 (citation omitted). "Establishing standing," in other words, "does not require that a litigant fly as a canary into a coal mine before she may enforce her rights." *Bryant v. Woodall*, 1 F.4th 280, 286 (4th Cir. 2021); *see also NC RSOL v. Boone*, 402 F. Supp. 3d 240, 252 (M.D.N.C. 2019). It is enough, rather, that the plaintiff have "an intention to engage in a course of conduct arguably affected

[1] *Cf. Susan B. Anthony List*, 573 U.S. at 166 ("The burdensome Commission proceedings here are backed by the additional threat of criminal prosecution. We conclude that the combination of those two threats suffices to create an Article III injury under the circumstances of this case.").

[2] *Cf. id.* at 164 ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not 'chimerical.'").

with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted). As detailed above (at 13-15) those elements are met here.

Separately, the Board posits that "Plaintiffs have no intent to offer clients any type of mapping other than a PDF copy of the orthomosaic map." Def.'s MSJ Mem. 9. That is wrong as well. Both at his personal deposition and at his company's, Michael Jones testified that he wishes to provide aerial maps containing measurable information—not just versions stripped of all such data.[3] The services his company offered before the Board issued its cease-and-desist letter reinforce that testimony. *See* pp. 13-14, above. His declaration is in accord. Jones Decl. ¶¶ 34-39. Distilled, Jones wants to develop his mapping business. He wants to offer aerial maps, including ones that contain measurable information. He wants to offer 3D models. The Board says he can't. That disagreement presents a live controversy that the Court is empowered to resolve.

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

The other two elements of the standing inquiry are met as well. "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; *see* pp. 6-10, above (detailing Board's enforcement role and its history of cease-and-desist letters). And "[a] favorable decision on [Plaintiffs'] behalf would mean the State Board would be enjoined from enforcing the [surveying law] and/or the

[3] *E.g.*, 360 Virtual Drone Services Dep. 57:12-58:4 (ECF 39-2) ("I would like to have the option to give these clients access to DroneDeploy's dashboard to use the tools they have to measure and do volume metrics like construction sites. . . . I'm not claiming it's surveying, but I don't understand why I can't give the client these tools. They are made for that and they are being offered nationwide. It's just North Carolina is telling me you can't do it. And I have trouble understanding why. And I want to be able to do that."); 360 Virtual Drone Services Dep. 61:8-61:12 (similar); Jones Dep. 182:8-182:24, 185:25-187:18, 188:2-188:10 (ECF 39-3) (similar); *see generally* Defs.' MSJ Opp. 3 (ECF 42) ("Plaintiffs want to create and sell orthomosaic maps (measurable maps that allow users to measure distances, elevations and area).").

[law] would be deemed unconstitutional." *Cooksey*, 721 F.3d at 238. That judgment would redress Plaintiffs' injury by freeing them to pursue their work "without fear of penalty." *Id.*

B. The Court may be able to conclude that the parties' dispute has been narrowed as to certain real-estate marketing images and certain aerial maps.

As detailed above, the core dispute between the parties involves whether the Board can ban Michael Jones and his company from sharing measurable aerial maps and 3D models. In this way, the dispute is narrower than presented in Plaintiffs' complaint. Originally, for example, the Board investigator told Jones that he couldn't create real-estate marketing photos containing approximate boundary lines. *See* p. 9, above. The Board denies that the investigator offered that view. But in any event, the Board now "disavow[s] any intention to initiate a future action to enforce the Act on the issue of marketing images of land that includes the approximate position of property boundaries." Defs.' MSJ Mem. 4-5. Given that disavowal, the Court may wish to hold that the case no longer presents a controversy as to those real-estate marketing images.

The Board offers up another disavowal as well, as to certain aerial maps. On this front, however, the Board's position is far less clear. The Board says that it "disavows any intent to initiate enforcement proceedings against Plaintiffs based on the act of producing a PDF image of a map *that does not contain measurable information*." *Id.* 8 (emphasis added). Yet what the Board means by "measurable information" is anyone's guess. The Board's expert, for instance, testified that the aerial-map PDF Jones pitched to one of his clients is "measurable" because it bore a scale bar. Pls.' MSJ App'x Ex. 25 (Schall Dep. 37:7-37:20) ("Q. . . . [T]his orthomosaic map 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."). That testimony tracks the expert's earlier report. Pls.' MSJ App'x Ex. 23 at 15. Which the Board's 30(b)(6) designee ratified at deposition. Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 26:2-

26:13). More recently, however, that same designee appears to have reversed course: without explanation, his summary-judgment declaration now avers that the same "PDF map did *not* have any measurable information." Ritter Decl. ¶ 14 (ECF 39-1) (emphasis added).

This inconsistency makes the Board's disavowal all but worthless—at least as to maps displaying information that could even arguably be called "measurable." To rebut standing, an agency's disavowal must be "unequivocal" and not "subject to the changing whims of individual government officials." *Bryant v. Woodall*, 363 F. Supp. 3d 611, 624 (M.D.N.C. 2019), *aff'd*, 1 F.4th 280. Yet even within this case, the Board's witnesses have veered wildly on what is and is not "measurable information" that the agency can restrict. At base, then, the Board's disavowal reduces to a promise not to enforce the law against Jones unless it thinks he's violated the law. So couched, that disavowal only reinforces Plaintiffs' right to seek a federal-court judgment. *Cf. United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

II. The Board has failed to show that it is entitled to summary judgment on the merits.

Laws that burden protected speech are subject to heightened First Amendment scrutiny—either strict scrutiny (if the law regulates speech based on its content) or intermediate (if the law is content-neutral). Strict scrutiny is the correct standard to apply here (Section A, below). Under either standard, however, the burden of proving a sufficient means-end fit lies with the government. And whatever level of First Amendment scrutiny applies, the Board cannot carry its burden (Section B). Nor do the agency's residual arguments alter the analysis (Section C).

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

North Carolina's surveying law burdens Plaintiffs' speech. Because it does so based on the speech's content, strict scrutiny applies.

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

a. To start, North Carolina's surveying law burdens 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). And 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 "measurable information." Unless he scrubs his maps of all georeferenced data, he will have violated the surveying law. *See* Pls.' MSJ App'x Ex. 23 at 15; Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 25:8-26:13); Pls.' MSJ App'x Ex. 25 (Schall Dep. 39:13-40:15). 3D digital models are off-limits altogether. Pls.' MSJ App'x Ex. 23 at 16; Pls.' MSJ Ex. 24 (Board 30(b)(6) Dep. 11:19-12:1, 25:8-26:22). Simply, the law forbids Jones and his company from conveying certain information to his customers. (Not for nothing, his cease-and-desist letter spoke in terms of "information" and "data." Pls.' MSJ App'x Ex. 8 at 1-2.) That is a burden on speech. *Sorrell*, 564 U.S. at 570 ("[T]he creation and dissemination of information are speech within the meaning of the First Amendment.").

A recent Fourth Circuit decision 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, the law "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 Fourth Circuit held that the law "burdens protected speech and thus implicates the First Amendment." *Id.* at 683, 684.

Those principles apply here. North Carolina requires people to get a surveyor license before conveying images with basic location data to customers. That information is protected speech under the First Amendment. As in *Billups*, the surveying law "completely prohibits" unlicensed people from disseminating the information. *Id.* at 683. So the Fourth Circuit'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. Michael Jones's aerial maps, for example, would be unlawful *because of* the information they contained. If he were to strip his maps of any "measurable information," the Board (today, at least) suggests it would not punish him for giving those maps to customers. Defs.' MSJ Mem. 9. If he were to leave the metadata untouched, however, he would violate the law. *E.g.*, Pls.' MSJ App'x Ex. 25 (Schall Dep. 40:7-40:10) ("Q. Okay. That makes sense. So really the georeferencing information is what triggers the surveying definition, is that what you're saying? A. That's correct. That's correct. . . . .").[4] If he were to print out an aerial map in PDF, the Board (today) says he'd be in the clear. Pls.' MSJ App'x Ex. 23 at 15; Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 25:8-26:13). But if that PDF were to contain a scale in the corner—or, according to the Board's expert, even a north arrow—it would become an illegal survey.[5] Indeed, the one map Jones pitched to a client qualifies as a survey because of a scale—a line, ticks, letters, and numbers—at the bottom of the page:

[4] *See also* Pls.' MSJ App'x Ex. 23 at 15, 16 (ECF 38-23); Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 25:8-26:22) (ECF 38-24) (Board's designee endorsing expert's view).

[5] Pls.' MSJ App'x Ex. 23 at 15 ("[Section A] . . . If the document was printed, also called 'hard-copy', and didn't include a reference grid, scale bar, north arrow, title block, etc., basically just a printed picture, this would not be regulated."); *see also* Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 26:10-26:13) ("Q. . . . It sounds like you looked over Letter a. The board doesn't disagree with [Mr.] Schall's opinion there? A. Correct.").

See Pls.' MSJ App'x Ex. 5 at 1 (ECF 38-5); *see also* Pls.' MSJ App'x Ex. 25 (Schall Dep. 37:7-37:20) ("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."); Ritter Decl. ¶ 14 (ECF 39-1) (pivoting to different view without explanation).

Simply, the Board regulates aerial maps and 3D models because of the information they convey. If a map or model contains information that might let a viewer make measurements—of distances, locations, elevations, volumes, areas—that information triggers North Carolina's surveying law and all the licensing burdens that follow from it. As the Board concedes, in fact, it (now) has no quarrel with Jones's creating aerial maps—but only if he scrubs them of all "measurable information" before giving them to anyone. *See* Defs.' MSJ Mem. 9. In other words, it is the information—the content—in his speech that triggers the surveying law.

2. The Board's contrary arguments conflict with Supreme Court and Fourth Circuit precedent.

The Board presents a series of arguments to either reduce the level of First Amendment scrutiny or exempt the surveying law from First Amendment review entirely. Each lacks merit.

a. The Board contends, first, that its surveying law "regulates professional conduct, not speech," meaning "the First Amendment is not implicated" at all. Defs.' MSJ Mem. 18-19. Because North Carolina classifies the activities Jones wishes to pursue as "land surveying" (so the argument goes), the law necessarily "regulates the conduct of land surveying, not speech." *Id.* 18. To state the obvious, however, "[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) (citation omitted); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) ("[T]he First Amendment deprives the states of 'unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.'"). And whether or not North Carolina's surveying law "*generally* functions as a regulation of conduct," "as applied to [Plaintiffs] the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27, 28 (2010); *Billups*, 961 F.3d at 683. Jones does not, for example, seek to establish legal property lines or place survey monuments. He wants to make maps and models. They would trigger North Carolina's surveying law *only* because of the "measurable information" they communicate. *See* pp. 18-21, above. The law is thus a content-based restriction on Plaintiffs' speech.

b. The Board's second line of defense is likewise without merit: "At most," the Board asserts, its law visits "only incidental burdens on speech," which means it triggers intermediate scrutiny, not strict. Defs.' MSJ Mem. 19. Yet the Fourth Circuit rejected this precise line of argument in *Billups*. Much like the Board, the City of Charleston portrayed its tour-guide-licensing law as "a business regulation governing conduct that merely imposes an incidental burden on speech." *Billups*, 961 F.3d at 682. And for its part, the Fourth Circuit acknowledged that "the First Amendment does not prevent restrictions directed at commerce or conduct from

imposing incidental burdens on speech." *Id.* at 683 (citation omitted); Defs.' MSJ Mem. 21 (invoking same rule). Even so, the court held, this 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." *Billups*, 961 F.3d at 683. Hence, the court reasoned, "the Ordinance . . . cannot be classified as a restriction on economic activity that incidentally burdens speech." *Id.* As discussed (at 19-20), that reasoning applies equally here.

Nor does the authority the Board cites counsel a different result. *Ohralik v. Ohio State Bar Ass'n*, for example, concerned "commercial speech" (advertising), which is subject to lesser First Amendment protection and is not at issue in this case. 436 U.S. 447, 455-56 (1978), *cited at* Defs.' MSJ Mem. 20-21. Then there's *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which, if anything, offers a useful contrast to the law here. 505 U.S. 833 (1992), *cited at* Defs.' MSJ Mem. 21. Unlike North Carolina's surveying law, the statute in *Casey* was keyed directly to non-communicative conduct: it conditioned abortions (conduct) on the physicians' getting informed consent beforehand (which necessarily involved giving information to patients). *Id.* at 884 (opinion of O'Connor, Kennedy, and Souter, JJ.). Put differently, *Casey*'s statute regulated conduct (the physical act of performing an abortion) in a way the surveying law does not. Unlike the law in *Casey*, the surveying law "is not tied to a procedure at all"—or to any other type of conduct. *Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2373. Rather, it "regulates speech as speech." *Id*. at 2374. It bars Jones and his company from sharing certain information with customers. It does so because of the information's content. And however often the Board writes the word *conduct*, the fact remains that "as applied to [Plaintiffs] the conduct triggering coverage under the statute consists of communicating a message." *Holder*, 561 U.S. at 28.

For this reason, too, the Board's reliance on *Capital Associated Industries, Inc. v. Stein* is misplaced. 922 F.3d 198 (4th Cir. 2019), *cited at* Defs.' MSJ Mem. 24-25. The Board seizes on the fact that the Fourth Circuit in *Stein* held that an unlicensed-practice-of-law statute amounted to a "restriction[] on conduct that incidentally burden[ed] speech." 922 F.3d at 208. More important, though, is the court's reason for doing so: its view that the challenged UPL laws "don't target the communicative aspects of practicing law, such as the advice lawyers may give to clients." *Id.*; *see also id.* ("[T]he practice of law has communicative and non-communicative aspects."). The same can't be said of the law here, which (like the law in *Billups*) "completely prohibits" Plaintiffs from sharing certain content and thus "cannot be classified as a restriction on economic activity that incidentally burdens speech." *Billups*, 961 F.3d at 683*; see also PETA, Inc. v. Stein*, 466 F. Supp. 3d 547, 567 (M.D.N.C. 2020) (citing both *Billups* and *Capital Associated Industries* for the proposition that "even a generally applicable law can be subject to First Amendment scrutiny as applied to speech that falls within its terms"), *appeal docketed*.

c. The Board also asserts that its law is content-neutral under ordinary First Amendment principles because "the Act's regulation of land surveying has nothing to do with any message or speech." Defs.' MSJ Mem. 23. Yet the surveying law has *everything* to do with Plaintiffs' speech. If Jones's mapping products contain data that the Board perceives as "measurable information," he will be punished. If they don't, he won't. A law that applies in this way is content-based, and nothing in the Board's analysis suggests otherwise. The Board, for instance, resorts to generalities about content-neutrality. *Id.* 22 (citing precedent but not applying it). It recites the surveying law's legislative purpose. *Id.* 22-23. It even cites a 1988 case involving the "professional speech" doctrine—which (as the Board elsewhere concedes) the

Supreme Court repudiated in 2018.[6] In short, the simplest approach is the right one. The surveying law restricts Plaintiffs' speech. It does so based on the speech's content. And a law that restricts speech based on content is subject to strict scrutiny.[7]

B. The Board's summary-judgment record does not justify the surveying law under any level of First Amendment scrutiny.

The Board's motion does not argue—much less prove—that the surveying law satisfies strict scrutiny. If the Court agrees with Plaintiffs that strict scrutiny is the correct standard, therefore, the motion is an obvious candidate for denial. Moreover, the same result would obtain if—as the Board contends—intermediate scrutiny, not strict, were the right framework. As the Board admits, intermediate scrutiny puts the burden on the government to justify its law. Defs.' MSJ Mem. 26. And 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). To justify restricting Plaintiffs' speech, the Board would need to prove 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." *Billups*, 961 F.3d at 685 (citation omitted). It also would need to support that claim with "actual evidence." *Id.* at 688 (citation omitted).

The Board's summary-judgment record misses that mark by a mile. Even if the government's claimed interests—"safeguard[ing] life, health, and property" and "promot[ing]

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[6] *Compare Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988), *cited at* Defs.' MSJ Mem. 23, *and Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (applying *Bowman* as "professional speech" precedent), *with Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2371 (abrogating *Moore-King*), *and* Defs.' MSJ Mem. 19-20 ("Admittedly, courts no longer recognize a 'professional speech' exception to the First Amendment.").

[7] The Board separately notes that the surveying law's "justification or purpose" when adopted was not content-based. Defs.' MSJ Mem. 23. Whatever the truth of that claim, "[a] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015).

the public welfare"—are in the abstract significant, the Board has not shown that the surveying law is tailored to serve them. Defs.' MSJ Mem. 27.

1. To begin, the surveying law burdens far more speech than necessary. 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. 6, above. As applied to Plaintiffs, these one-size-fits-all burdens are not tailored to the state's claimed interests.

Other states illustrate the point. Whereas North Carolina imposes a monolithic regime on would-be mappers like Jones, other jurisdictions achieve their public-safety goals with far narrower surveying laws. Some, for example, limit their laws to projects that define legal property lines. Take Missouri, which regulates as "surveying" only projects "that affect real property rights." Mo. Rev. Stat. § 327.272(1). Wisconsin is similar. Wis. Stat. § 443.134. Meanwhile, others carve out exemptions that let unlicensed persons perform mapping and modeling in a range of circumstances. In Virginia, unlicensed people can "utiliz[e] photo-grammetric 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 specific disclaimer). In Kentucky, all surveying projects are exempt from the survey-licensing requirement so long as they bear a disclaimer. Pls.' MSJ App'x Ex. 11 at 3 (ECF 38-11). Likewise in Mississippi. Pls.' MSJ App'x Ex. 10 at 3 (ECF 38-10). Until the late 1990s, in fact, North Carolina itself did not

restrict mapping; early in his career, the Board's expert spent years performing what would today be unlawful, unlicensed surveying. Pls.' MSJ App'x Ex. 25 (Schall Dep. 11:21-12:6).

The Board's summary-judgment record offers no answer to any of this. For example, the Board's brief recites the statute's statement of purpose. Defs.' MSJ Mem. 27. It recycles that statutory language as an "undisputed fact." *Id.* It quotes its executive director "paraphrasing" statutory language. *Id.* 28. It quotes its expert's statement to the same effect. *Id.* 29. It advises that mapping and modeling are "very complicated." *Id*. Notably absent, however, is a single piece of evidence (or even argument) showing that North Carolina's law is tailored to its asserted interest. The Board's statement of undisputed facts lacks even one entry on tailoring. *See* Defs.' Statement of Undisputed Material Facts ¶¶ 49-51 (ECF 32). The agency offers no evidence that unlicensed mapping and modeling jeopardize life, health, and property to a greater degree in any of the states whose laws are far less restrictive than North Carolina's. The Board's designee confirmed that the agency has no such evidence. Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 16:8-20:24). 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), he confirmed that he had no evidence that mapping and modeling cause greater harm in any of those places. Pls.' MSJ App'x Ex. 25 (Schall Dep. 58:1-63:20).

That evidentiary default is a dispositive strike against the Board. With no evidence that its claimed interests are impaired more in states that use far "less intrusive tools," the Board cannot carry its burden of showing that its more speech-restrictive law is tailored to serve those interests. *Billups*, 961 F.3d at 690 (citation omitted); *cf. McCutcheon v. FEC*, 572 U.S. 185, 209 n.7 (2014) (plurality opinion) (casting doubt on law's tailoring because many states had no such law and the government "present[ed] no evidence" of greater harms in those states).

2. Other states also spotlight the less restrictive alternatives. To meet intermediate scrutiny (and, of course, strict), the Board "is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Billups*, 961 F.3d at 688. Here, at least two less restrictive alternatives lie directly north. As discussed, Virginia prohibits unlicensed people from creating maps and models in aid of certain projects—for example, flood-plain determinations—but otherwise largely leaves them alone. As with other states, Virginia also uses disclaimers to ensure that consumers know what they're getting. Still other states don't regulate mapping and modeling at all.

These alternatives are all less restrictive than North Carolina's flat ban, and the Board has no evidence that they are inadequate to serve the government's claimed interests. The Board, for example, claims that its law is needed to "protect[] the public from misrepresentations as to professional status or expertise." Defs.' MSJ Mem. 29. Yet a disclaimer—like Virginia's or Kentucky's or Mississippi's—is an obviously less restrictive alternative. Even laxer laws (like Wisconsin's or Missouri's) have yielded no increase in the sort of harms the Board appears to envision. Simply, less restrictive alternatives are common in other states. The Board has no evidence that those alternatives are inadequate to secure the state's public-welfare goals. *See* p. 27, above. Yet North Carolina appears not even to have entertained them.[8] On this ground also, the Board cannot meet its burden under any level of First Amendment scrutiny.

3. The Board's summary-judgment brief also fails to acknowledge (much less satisfy) the final part of the intermediate-scrutiny analysis: showing that its law "leaves open

[8] *See, e.g.*, Pls.' MSJ App'x Ex. 26 (Ritter Dep. 52:22-53:3) (ECF 38-26) ("Q. So can that non-licensee give that same orthomosaic map to a client if the non-licensee puts a disclaimer on the map? A. No. It's my understanding you cannot disclaim your way out of complying with the law. That's my understanding. You cannot disclaim your way out of that.").

ample alternative channels of communication." *Billups*, 961 F.3d at 690 n.11. At a minimum, the government must show alternatives that are "adequate." *Reynolds v. Middleton*, 779 F.3d 222, 232 n.5 (4th Cir. 2015). The Board hasn't done so here. Defs.' MSJ Mem. 25-30. And of course, there are none. After all, the surveying law does not mark out a particular "time, place, or manner" as being off-limits to Plaintiffs. *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 Plaintiffs. *Billups*, 961 F.3d at 690 n.11. The Board nowhere argues otherwise, and for this reason, too, it cannot carry its First Amendment burden.

C. The Board's residual arguments lack merit.

The Board's remaining arguments do not alter the analysis:

First, the Board parses facial versus as-applied relief. Defs.' MSJ Mem. 31-32. For purposes of the Board's summary-judgment motion, however, "[t]he label is not what matters." *Doe v. Reed*, 561 U.S. 186, 194 (2010). Plaintiffs seek a judgment that redresses their injury: that frees them to make and sell aerial maps and 3D models without fear of Board enforcement. North Carolina's ban on their creating those products restricts their speech. And the Board has presented no "actual evidence supporting its assertion[s]" that the ban is sufficiently tailored to a state interest. *Billups*, 961 F.3d at 688 (citation omitted). The agency thus has not carried its burden under the "relevant constitutional test"—either intermediate scrutiny or strict. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012).

Second, the Board faults Jones for not having sought a "declaratory ruling" from the Board about what services he can provide. Defs.' MSJ Mem. 2, 8, 31. But "plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court." *Felder v. Casey*, 487 U.S. 131, 147 (1988). Nor would a declaratory ruling have offered any benefit here. In his first e-mail to the Board, for instance, Jones repeatedly asked for guidance; in response, he

got a letter threatening civil and criminal penalties. In any event, the Board's response to this lawsuit leaves no doubt: measurable aerial maps and 3D models are off-limits.

The Board's response also makes clear that applying its law to people like Jones is a solution in search of a problem. The agency has no evidence of adverse consequences in any of the states that do not regulate mapping and modeling. It has no evidence of adverse consequences in ones that regulate via disclaimer rather than a flat ban. Its drone-related investigations appear never to have been prompted by an injured consumer. (Instead, complaints tend to be filed by Board-licensed surveyors or engineers Pls.' MSJ App'x Ex. 26 (Ritter Dep. 60:23-61:9); Pls.' MSJ App'x Exs. 23, 29-35 (ECF 38-21, 38-29 to 38-35) (investigative reports).) Nor do the Board's investigators trouble to interview customers—to determine, for example, whether any were misled or harmed. Pls.' MSJ App'x Ex. 26 (Ritter Dep. 64:14-65:1). And for complex projects, the Board's expert volunteered that clients often require a license or private certification regardless, as part of the bidding process. Pls.' MSJ App'x Ex. 25 (Schall Dep. 10:18-11:20).

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. *Id.* (Schall Dep. 71:3-72:20). And as the Board's expert acknowledged, people can use these measurable online maps to make all sorts of day-to-day decisions about their land. *Id.* (Schall Dep. 73:8-73:10) ("If they're just using it to get approximate numbers for how much fence to buy how much harm can that do? . . . ."). In short, the record makes two points clear. The surveying law burdens Plaintiffs' speech. And the Board's evidence-free submission does not carry its burden under any level of First Amendment scrutiny.

CONCLUSION

The Board's motion for summary judgment should be denied.

Dated: April 29, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing and, pursuant to Local Civil Rule 5.1(e), shall constitute service upon, the following:

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