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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (ECF 35)

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The Board's opposition brief streamlines the summary-judgment analysis substantially. On the merits, the Board all but concedes that it cannot meet its burden under even intermediate First Amendment scrutiny. Defs.' MSJ Opp. 16 (ECF 42). It also presents no evidence—none—that banning Plaintiffs' maps and models is sufficiently tailored to any governmental interest. As for jurisdiction, the Board concedes that Michael Jones and his company "want to create and sell orthomosaic maps" and that the maps and models would "fall[] under the definition of land surveying," meaning there is a live dispute between the parties. *Id.* 3. The Board's brief thus reinforces two key points: the agency cannot meet any level of First Amendment scrutiny, and the Court has the power to decide this case.

I. North Carolina's restriction on creating maps and 3D digital models violates Plaintiffs' First Amendment rights.

Laws that burden protected speech are subject to heightened First Amendment scrutiny—either strict (if the law regulates speech based on its content) or intermediate (if content-neutral). Strict scrutiny is the right standard to apply here, but under either standard, the burden of proving a sufficient means-end fit lies with the government. Whichever level of First Amendment scrutiny applies, the Board's brief confirms that the agency cannot carry its burden.

A. The surveying law restricts Plaintiffs' speech based on its content.

As detailed in our opening brief, Michael Jones wants to use his drone to take photos of land. He wants to process the photos into maps and 3D models. He wants to offer and sell those maps and models to clients. But doing so would be illegal. His maps and models would convey "measurable information"—for example, data about the distance from *A* to *B*. And North Carolina's surveying law forbids him from giving that content to his customers. In this way, the law burdens his speech based on its content. The Board's contrary arguments lack merit.

1. The Board first contends that Plaintiffs' maps and models do not implicate the First Amendment because they are created "using pre-programmed software," meaning Plaintiffs are not "speaker[s] in the traditional sense." Defs.' MSJ Opp. 4. The Board cites no authority for this view, and for good reason: it breaks with precedent at a bedrock level. "Applying the Constitution's protections to new technological contexts is far from a novel exercise." *Nat'l Press Photographers Ass'n v. McCraw*, No. 19-cv-946, 2022 WL 939517, at *9 (W.D. Tex. Mar. 28, 2022) (rejecting similar defense of a law restricting drone photography), *appeal docketed*. And that Jones's creations would be processed using software does not make them any less speech. Ordinary First Amendment principles apply. *Cf. ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) ("[T]here is no fixed First Amendment line between the act of creating speech and the speech itself.").

Sorrell v. IMS Health Inc. illustrates the point. 564 U.S. 552 (2011). The Board recounts *Sorrell*'s facts at length, but more instructive are the parallels between Vermont's arguments in *Sorrell* and the Board's here. In *Sorrell*, Vermont sought to portray medical data "as a mere 'commodity' with no greater entitlement to First Amendment protection than 'beef jerky.'" 564 U.S. at 570. That sleight of hand did not work there, *see id.* at 570-71, and the Board's similar maneuver is no more persuasive here. Like the state in *Sorrell*, the Board tries to cast Jones's "data" and "information" as something other than speech. Defs.' MSJ Opp. 5 ("It is nothing more than data in a map that constitutes the practice of land surveying" (footnote omitted)); *id.* ("Plaintiffs are left to argue that the 'information' embedded in the proposed sale of a commercial map is somehow protected speech . . . ."). As in *Sorrell*, that theory is wrong. 564 U.S. at 568 ("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.").

2. The Board also suggests that the First Amendment does not apply because Plaintiffs' maps and models "do[] not involve speech in a public forum, such as a sidewalk or public right-of-way." Defs.' MSJ Opp. 4-5. The implication is that because Jones's speech would not take place in the town square, the Board has a free hand to ban it. Here, too, the Board is mistaken. The Supreme Court's "'forum based' approach" applies narrowly to the state'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). (Briefly, the government has more power to limit speech in its "non-public" forums than in its public ones.) To state the obvious, however, this case has nothing to do with speech on government-owned property. It involves speech in the private sector. So the Board's distinctions between public and non-public forums are beside the point. *See Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980) ("[T]he Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property."). Rather, ordinary First Amendment rules apply: a content-based speech restraint triggers strict scrutiny. *See id.*; *cf. Holder v. Humanitarian L. Project*, 561 U.S. 1, 28 (2010) (applying strict scrutiny to a ban on sharing "specialized knowledge" with terrorist groups); *Brokamp v. District of Columbia*, No. 20-cv-3574, 2022 WL 681205, at *1 (D.D.C. Mar. 7, 2022) (holding that strict scrutiny applies to licensing requirement for professional counselors).

The Board's focus on "public forums" pervades its brief (Defs.' MSJ Opp. 4-8, 16), and that error distorts its view of the controlling precedent as well. Take *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020). As discussed in our opening brief (ECF 36 at 15), the court in *Billups* applied the First Amendment to a law that in material respects is much like the one here: an ordinance "requir[ing] . . . tour guide[s] to obtain a license before leading visitors on a paid

tour through Charleston's historic districts." *Id.* at 682-83. Because the activity triggering the law "necessarily involve[d] speech or expressive conduct," the Fourth Circuit held that the law "burden[ed] protected speech and thus implicate[d] the First Amendment." *Id.* at 683, 684. That "rather straightforward conclusion" applies here. *Id.* at 683. And the Board's only response is no response at all: it again resorts to irrelevant distinctions between the sale of "traditional speech in a public forum" and "the sale of 'information.'" Defs.' MSJ Opp. 4, 7. Again, though, the First Amendment is not limited to whatever "public" speech an agency might think "traditional." *Id.* 7. The rule is simpler: a law that restricts speech triggers First Amendment scrutiny—full stop.

3. Changing tack, the Board contends that its law burdens Plaintiffs' speech only "incidentally." *Id.* 9-11. Yet as detailed in our earlier briefing, the Fourth Circuit rejected this precise line of argument in *Billups*. 961 F.3d at 683; *see also* Pls.' MSJ Opp. 22-23 (ECF 44). That reasoning applies here, and beyond its "public speaking on city sidewalks" conception of the First Amendment, the Board offers no argument to the contrary. Defs.' MSJ Opp. 7.

Nor does the authority the Board cites support its view. *Ohralik v. Ohio State Bar Ass'n*, for example, concerned advertising, which is subject to lesser First Amendment protection and is not at issue here. 436 U.S. 447, 455-56 (1978); *see also Edenfield v. Fane*, 507 U.S. 761, 774 (1993) ("*Ohralik*'s holding was narrow . . . ."). 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). Unlike North Carolina's surveying law, the law in *Casey* was keyed directly to non-communicative conduct: it conditioned abortions (conduct) on the physicians' getting informed consent beforehand (which necessarily involves giving information to patients). *Id.* at 884 (opinion of O'Connor, Kennedy, and Souter, JJ.). Put differently, *Casey*'s statute regulated conduct in a way the surveying law does not; unlike the law in *Casey*, the surveying law "is not

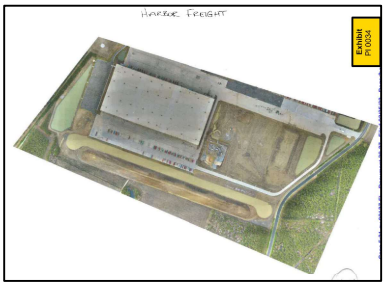
tied to a procedure at all"—or to any other type of conduct. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (*NIFLA*). It "regulates speech as speech" (*id*. at 2374) by barring Jones from sharing certain content with customers. That the Board's rebuttal persists in relying on the discredited "professional speech" doctrine only drives home the point.[1]

Capital Associated Industries v. Stein—on which the Board dwells at length—fits neatly within this framework. 922 F.3d 198 (4th Cir. 2019), *cited at* Defs.' MSJ Opp. 7-8. As in its earlier briefing, the Board seizes on the fact that the court 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. But more important 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.* Unlike Michael Jones, the company-plaintiff in *Capital Associated Industries* wished to perform both communicative and non-communicative aspects of lawyering; it wanted to answer law-related questions, for example, but also to prepare employment contracts—which have legal effect even if never read. *See id.* at 202. Given the contours of that as-applied challenge, the court thus held that the UPL statute was generally a restriction on conduct with only an incidental effect on speech. *Id.* at 208 ("[T]he practice of law has communicative and non-communicative aspects."); Defs.' MSJ Opp. 8 (quoting Institute for Justice-authored brief making this point during the *Billups* appeal). But the same can't be said here,

[1] *Compare* Defs.' MSJ Opp. 8-9 ("'If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.'" (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring))), *and Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) ("[A] state's regulation of a profession raises no First Amendment problem where it amounts to 'generally applicable licensing provisions' affecting those who practice the profession." (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring)), *with NIFLA*, 138 S. Ct. at 2371-72 (abrogating *Moore-King*).

where Plaintiffs seek to engage *only* in communicative activities and where the challenged law is triggered by those activities alone. As in *Billups*, the surveying law "cannot be classified as a restriction on economic activity that incidentally burdens speech." *Billups*, 961 F.3d at 683.

4. The Board likewise errs in arguing that its law is content-neutral under ordinary First Amendment principles. Defs.' MSJ Opp. 11-13. The agency suggests that the law "does not 'target speech based on its communicative content.'" *Id.* 11. Yet as applied to Plaintiffs' projects, the law has *everything* to do with communicative content. Because it has a scale, for instance, the map on the left is an illegal survey; because it lacks a scale, the one on the right isn't.



Pls.' MSJ App'x Exs. 5, 27 (ECF 38-5, -27); Pls.' MSJ App'x Ex. 25 (Schall Dep. 36:16-37:20) (ECF 38-25). If that distinction sounds content-based, that's because it is: the Board regulates maps and models because of the content they communicate. It is the information—the content—that triggers the law; Jones can create his maps only if he takes care to strip them of "useful information." Pls.' SUF 56 (ECF 37). The law is thus an easy candidate for strict scrutiny.

B. The Board's evidence-free record confirms that the surveying law fails under any level of First Amendment scrutiny.

As discussed, strict scrutiny is warranted because North Carolina's surveying law is content-based. Because the law fails even intermediate scrutiny, however, the Court can enter judgment for Plaintiffs without deciding whether strict scrutiny is called for. 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). Under it, the Board must show that its law is

"narrowly tailored to serve a significant governmental interest, and that [it] leave[s] open ample alternative channels for communication of the information." *Billups*, 961 F.3d at 685 (citation omitted); *see also id.* ("The City bears the burden of proving that the Ordinance survives intermediate scrutiny."). The record establishes that the Board cannot carry this burden.

1. Plaintiffs' summary-judgment record shows that restricting their mapping and modeling fails even intermediate scrutiny. (Plaintiffs, of course, bear no affirmative evidentiary burden in this regard.) Plaintiffs point to the experience of other states to highlight that North Carolina's law "burdens substantially more speech than necessary." Pls.' MSJ Mem. 19. Plaintiffs cite less restrictive alternatives—laws that require disclaimers (rather than imposing bans) or laws that restrict mapping only in certain contexts. *Id.* 20-21. Plaintiffs stress that those alternatives are in place elsewhere. *Id.* Plaintiffs show that "[t]he Board has no evidence that these alternatives are inadequate to secure the government's public-welfare goals." *Id.* 21. And that "North Carolina appears not even to have entertained these alternatives." *Id.* 22. And that "the Board's drone-related investigations appear never to have been prompted by an injured consumer." *Id.* 23.

The Board contests none of this. It does not dispute that the alternatives Plaintiffs cite are less restrictive than North Carolina's. It does not argue (much less produce evidence) that North Carolina "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; *id.* ("The government's burden in this regard is satisfied only when it presents 'actual evidence supporting its assertion[s].'" (quoting *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015))). It offers no evidence that life, health, and property are jeopardized to a greater degree in any of the states

whose laws are less restrictive than North Carolina's. Pls.' MSJ Mem. 22; Pls.' SUF 62-64.[2] It does not show that its law "leave[s] open ample alternative channels for communication of [Plaintiffs'] information." *Billups*, 961 F.3d at 685 (citation omitted). It offers no evidence of tailoring. Bluntly, it ignores virtually every aspect of its burden even under intermediate scrutiny.

2. What arguments the Board opts to make do not rehabilitate its evidentiary default.

First, the Board recites its state interests at an impossibly high level of generality. It says that its law "works to establish a minimum level of competence" and protects against "misrepresentations" and "works to protect [] 'property' rights." Defs.' MSJ Opp. 14, 18-19. But as the Fourth Circuit made clear in *Billups*, "the constitutionality of a law that restricts protected speech does not turn solely on the significance of the governmental interest involved." 961 F.3d at 686. The courts also "must . . . ensure that the government's chosen method for protecting its significant interests is not too broad." *Id.* Put differently, the court must "examine whether the speech-restricting law" is sufficiently tailored. *Id.* And as discussed, the Board has not even tried to carry that burden here. Its tailoring analysis simply reprises its generalized interests. Defs.' MSJ Opp. 18-19. It talks of "prophylactic measure[s]." *Id.* 17 (quoting *Ohralik*, 436 U.S. at 464). *But see Edenfield*, 507 U.S. at 777 ("Broad prophylactic rules in the area of free expression are

[2] The Board purports to dispute Plaintiffs' statement that "[t]he Board has no evidence that unlicensed mapping and modeling jeopardizes life, health, and property to a greater degree in any of the states whose laws are less restrictive than North Carolina's." *Compare* Pls.' SUF 62, *with* Defs.' Resp. Pls.' SUF 62 (ECF 43). But the Board's basis for designating Statement 62 "disputed" is wholly nonresponsive: the agency cites no evidence that unlicensed mapping and modeling jeopardizes life, health, and property to a greater degree in any of the states whose laws are less restrictive than North Carolina's. Its witnesses also testified that the agency has no such evidence. Pls.' MSJ App'x Ex. 24 (Board 30(b)(6) Dep. 16:8-20:24) (ECF 38-24); Pls.' MSJ App'x Ex. 25 (Schall Dep. 58:1-63:20) (ECF 38-25). The Board's response to Statement 62 is thus "insufficient under Rule 56 and Local Rule 56.1" to create a fact dispute. *United States v. $31,448.00*, No. 5:16-cv-177-D, 2020 WL 7050555, at *2 (E.D.N.C. Nov. 30, 2020).

suspect." (citation omitted)). And it all but concedes that if opinions like *McCullen* and *Billups* and *Reynolds* define intermediate scrutiny, it cannot carry its burden. Defs.' MSJ Opp. 16.

Second, the Board reverses course from earlier briefing and argues that cases like *McCullen* and *Reynolds* do not prescribe the appropriate level of intermediate First Amendment scrutiny. *Compare* Defs.' MSJ Mem. 26 (ECF 34) ("Under intermediate scrutiny, the State bears the burden of proving that the law is 'narrowly tailored to serve a significant governmental interest.'" (quoting *McCullen*, 573 U.S. at 486)), *with* Defs.' MSJ Opp. 16 ("Upon closer inspection, this is not the appropriate standard to apply . . . ."). But on this front, the Board had it right the first time. At a minimum, its law is subject to intermediate scrutiny. Cases like *McCullen* and *Billups* and *Reynolds* make clear what the state must show to meet that standard. Because the Board has not even tried to meet that standard here, it cannot justify restricting Plaintiffs' speech.

The Board nonetheless theorizes that the Supreme Court in *NIFLA* introduced a hitherto unknown level of First Amendment review—seemingly, one under which states can restrict speech with no evidence of tailoring. Defs.' MSJ Opp. 16 ("the true standard"). But as it did in *McCullen*, the Court in *NIFLA* explicitly applied "intermediate scrutiny." 138 S. Ct. at 2375. It then held that California's law likely failed that standard because the state "identified no evidence" that less restrictive approaches would be inadequate. *Id.* at 2376. In other words, the Court applied the same evidence-based standard that it applied in *McCullen*, that the Fourth Circuit applied in *Reynolds* (and later in *Billups*), and that the Board cannot meet here.

In a similar vein, the Board suggests that the Fourth Circuit in *Capital Associated Industries* endorsed something less than intermediate scrutiny. Defs.' MSJ Opp. 15, 17. But the court could not have been clearer. Like the Supreme Court in *NIFLA*, the Fourth Circuit said that "intermediate scrutiny" applied. 922 F.3d at 208, 209. It cited *NIFLA* and other decisions that

have placed a meaningful evidentiary burden on the government. *E.g.*, *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (holding that the government failed to satisfy intermediate Second Amendment scrutiny because "it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [the challenged law] and an important government goal"), *cited at* 922 F.3d at 209-10. And both before *Capital Associated Industries* and since, the Fourth Circuit has applied intermediate scrutiny to place that same meaningful burden on government defendants. In short, intermediate scrutiny is intermediate scrutiny. The Board hasn't even tried to meet it here, meaning Jones has the right to make his maps and models without punishment.

II. The Board's opposition brief confirms that Plaintiffs have Article III standing.

The Board devotes a (precedent-free) half-page of its brief to renewing its challenge to Plaintiffs' standing. Defs.' MSJ Opp. 2; *see also* Defs.' MSJ Mem. 10-18. Yet the agency's own words confirm that Article III's standing requirements are met. The Board first concedes that "Plaintiffs want to create and sell orthomosaic maps (measurable maps that allow users to measure distances, elevations and area)." Defs.' MSJ Opp. 3. That means Plaintiffs have "an intention to engage in a course of conduct arguably affected with a constitutional interest." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014) (citation omitted). The Board then confirms that Plaintiffs' maps and models would "fall[] under the definition of land surveying." Defs.' MSJ Opp. 3; Pls.' SUF 39, 46. That concession puts to rest the other two elements of Article III injury: Plaintiffs' course of conduct is "proscribed by [the] statute" and "there exists a credible threat of prosecution." *Susan B. Anthony List*, 573 U.S. at 159 (citation omitted); Pls.' MSJ Opp. 13-16. Summed up, Michael Jones says he has a First Amendment right to develop his mapping business. The Board says he doesn't. The Court has the power to resolve this dispute.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted.

Dated: May 12, 2022.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 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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Consistent with the Court's order of April 29, 2022, a courtesy copy of this document will be placed in the mail not later than May 13, 2022, for delivery to the Court.

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