23-15138

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**RYAN CROWNHOLM, et al.,**

Plaintiffs-Appellants,

**v.**

**RICHARD B. MOORE, et al.,**

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California

No. 2:22-cv-01720-DAD-CKD
Dale A. Drozd, Judge

# ANSWERING BRIEF

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General
SHARON L. O'GRADY
Deputy Attorney General
State Bar No. 102356
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3834
Fax: (415) 703-1234
Email: Sharon.OGrady@doj.ca.gov
*Attorneys for Defendants-Appellees*

# TABLE OF CONTENTS

**Page**

**TABLE OF CONTENTS**
**(continued)**

**Page**

**TABLE OF CONTENTS**
**(continued)**

**Page**

# TABLE OF AUTHORITIES

**Page**

**CASES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**



**STATUTES**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

# TABLE OF AUTHORITIES
## (continued)

**Page**

**TABLE OF AUTHORITIES**
**(continued)**

**Page**

## INTRODUCTION

Plaintiffs create and sell detailed site plans showing precise dimensions between fixed works (such as buildings) and property lines for submission to local planning and building agencies. Under long-standing California law, this activity requires a license issued by the Professional Land Surveyors' Board. Plaintiffs are not licensed, however, and make no claim to be competent to engage in land surveying. Indeed, they disclaim the accuracy of their site plans and disavow any liability arising out of their use. And, when state regulators fined them $1,000 and ordered them to "cease and desist" from engaging in unlicensed practice, Plaintiffs accepted the terms of the citation and waived their right to appeal it through the state courts. Instead, claiming that drawing site plans based on publicly available data is "pure speech," and that the First Amendment immunizes them from state regulation, they filed a federal court action aimed at tearing down the State's licensing requirement for professional land surveyors, which dates to 1891. In addition to arguing that the law violates their First Amendment rights, they contend it is unconstitutionally overbroad and vague on its face, and that it violates Equal Protection and substantive due process, even under rational basis review.

As the district court correctly held, all of Plaintiffs' claims fail as a matter of law and cannot be saved by amendment. California's licensing scheme for professional land surveyors regulates conduct and has, at most, an incidental impact on speech. It is a rational and appropriate exercise of the State's police powers, serving to ensure accuracy in the depiction of property lines, which directly affects property rights in California. Even if the licensing requirement did implicate the First Amendment, it is content neutral and satisfies intermediate scrutiny as a matter of law. Further, the law is neither overbroad nor vague, and poses no equal protection or substantive due process problem. Finally, the district court's judgment can be upheld on the alternative grounds that abstention is warranted under *Younger v. Harris*, 401 U.S. 37 (1971). The district court's order denying Plaintiffs' motion for a preliminary injunction and its subsequent judgment of dismissal on the pleadings should be affirmed.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly hold that the Complaint did not state a claim that the California Professional Land Surveyors' Act, which requires licensure for persons who engage in the practice of land surveying, violates Plaintiffs' free speech rights under the First Amendment?

2. Did the district court correctly hold that the Act is not unconstitutionally overbroad?

3. Did the district court correctly hold that the Act's definition of the practice of land surveying is not unconstitutionally vague?

4. Did the district court correctly hold that the Complaint failed to state a claim for violation of substantive due process under the Fourteenth Amendment?

5. Did the district court correctly hold that the Complaint failed to state a claim for violation of the Equal Protection Clause?

6. Was the denial of Plaintiffs' motion for preliminary injunction an appropriate exercise of the district court's discretion?

7. Did the district court err in holding that *Younger* abstention was not appropriate?

## STATEMENT REGARDING ADDENDUM

In accordance with Circuit Rule 28-2.7, the Addendum to this brief includes relevant statutes and regulations not included in the addendum to the Opening Brief.

## STATEMENT OF THE CASE

### I. THE CALIFORNIA PROFESSIONAL LAND SURVEYORS' ACT

California has required that land surveyors be licensed since 1891. SER-040-42. Every U.S. jurisdiction similarly requires a license to perform land surveying work, and all state licensing boards are members of the National Council of Examiners for Engineering and Surveying (NCEES). *See* NCEES: A Century 1920-2020 4 (2020), https://ncees.org/wp-content/uploads/2022/09/2020_history_web_version.pdf. In California, licensees must satisfy education and/or training requirements, and pass national and California-specific exams. *See* ER-110. The Act has been amended over time to reflect, among other things, technological advances. SER-044-113. But the fundamental definition of land surveying is little changed since 1941. The current version of California Business and Professions Code section 8726[1] states, in relevant part:

> (a) A person, . . . practices land surveying within the meaning of this chapter who, either in a public or private capacity, does or offers to do any one or more of the following:
>
> (1) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed

[1] All statutory references are to the California Business and Professions Code unless otherwise noted.

> works embraced within the practice of civil engineering, as described in Section 6731.
>
> ***
>
> (3) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries.
>
> ***
>
> (7) Determines the information shown or to be shown on any map or document prepared or furnished in connection with any one or more of the functions described in paragraphs (1) to (6), inclusive.
>
> ***
>
> (9) Procures or offers to procure land surveying work for themselves or others.

Section 8792 states, in relevant part:

> A person who does any of the following is guilty of a misdemeanor:
>
> (a) Unless the person is exempt from licensure under this chapter, practices, or offers to practice, land surveying in this state without legal authorization.
>
> ***
>
> (i) Unless appropriately licensed, manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced, except as authorized pursuant to Section 6731.2 and subdivision (e) of Section 8792.

Licensure requires that an applicant have a four-year college degree and two years' experience; a two-year degree and four years' experience; or six years post-secondary school experience. § 8742; 16 Cal. Code Regs. § 425. Applicants also must pass a California-specific examination as well as a national examination sponsored by the NCEES. *Id*.

## II. PLAINTIFFS' BUSINESS

Plaintiffs are Ryan Crownholm, a self-described "serial entrepreneur," and Crown Capital Adventures, Inc., doing business as MySitePlan.Com (collectively, "MySitePlan"). MySitePlan is in the business of creating and selling site plans over the internet. Its plans are based on publicly available Geographic Information System ("GIS") mapping data "and other publicly available imagery." ER-094, ER-101. MySitePlan's products purport to show precise dimensions between fixed works, such as buildings, and property lines—to one one-hundredth of a foot (0.12 inches), one-tenth of a foot, or one inch. *See* SER-130, SER-282; ER-085. MySitePlan also markets its site plans as being appropriate for submission to local building authorities. In fact, its website invites reliance on its site plans with statements such as:

"Guaranteed Acceptance"

> "Widely accepted by building departments and HOA's for residential permitting purposes"
>
> "OUR SITE PLANS ARE GREAT FOR [¶] Demolition permits. . . . [¶] Conditional Use Permits. . . . [¶] Construction Permits. . . . [¶] Sign Permits. . . ."
>
> "SAVE TIME AND MONEY [¶] If your building department DOES NOT REQUIRE a Surveyor, Engineer, or Architect Stamp our plans are just what you need. We have created plans in almost every jurisdiction in the U.S. and our plans meet or exceed requirements.

SER-301, SER-122, SER-131, SER-137 (emphasis in original).

Despite these assurances, MySitePlan attempts to disclaim any responsibility for the accuracy of its site plans. Buried in the lengthy "terms of service" section of its website, MySitePlan states: "Because we use third party sources to create our plans, *we cannot verify the accuracy of these sources, therefore MySitePlan.com makes no representations regarding the accuracy of site plans.*" SER-268 (emphasis added). It also disclaims all liability for any use of its products. SER-272. The GIS mapping data used by MySitePlan contain similar disclaimers about their accuracy. SER-306, SER-309, SER-316-17. While MySitePlan's *website* contains disclaimers, *its actual site plans do not*. *See, e.g.,* ER-103; SER-278.

## III. THE BOARD'S ENFORCEMENT OF THE PROFESSIONAL LAND SURVEYORS' ACT AGAINST MYSITEPLAN

Defendants in this action are the members of the Board for Professional Engineers, Land Surveyors, and Geologists (the "Board") and its Executive Officer, all in their official capacities. The Board is charged with enforcing the Professional Land Surveyors' Act (the "Act"). § 8790. In response to a complaint against MySitePlan, the Board opened an investigation and subsequently issued a citation order. SER-115-41. The order directed MySitePlan to cease and desist from violating section 8792(a) and (i) and, by incorporation by reference, former section 8726(a), (g) and (i) (now section 8726(a)(1), (3) and (9)) of the Act ("Citation Order"). SER-140. It also required MySitePlan to pay a $1,000 fine. *Id*. The Citation Order was based on MySitePlan's website, which clearly shows that MySitePlan prepares and markets site plans showing "the location of property lines, fixed works and the geographical relationship thereto." SER 141. The Citation Order did not extend to any other products sold by MySitePlan.

Pursuant to regulations, MySitePlan was advised that it could appeal the Citation Order by requesting either an informal conference, a hearing before an administrative law judge, or both. 16 Cal. Code Regs. § 472; SER-144. MySitePlan appealed and requested a hearing. SER-146. Five

days before the scheduled hearing, however, MySitePlan dropped its appeal and "accept[ed] the terms of [the Citation Order]." SER-149.

## IV. PROCEEDINGS BEFORE THE DISTRICT COURT

Seven days after withdrawing its appeal of the Citation Order and accepting its terms, MySitePlan filed suit in federal court seeking a declaration that the Act is unconstitutional along with an injunction barring the Board from enforcing the Act, in particular the provisions MySitePlan had agreed to "cease and desist" from violating. SER-140, SER-149. MySitePlan alleged that the Act's licensing requirement violates its First Amendment rights, that the Act is facially overbroad and vague, and that the Act is "so irrational as to violate [MySitePlan's] substantive due process and equal protection rights." Opening Br. at 17.

### A. The Denial of MySitePlan's Motion for Preliminary Injunction

On December 27, 2022, the district court denied MySitePlan's motion for preliminary injunction. The court rejected the Board's argument that the Court should abstain under *Younger v. Harris*, 401 U.S. 37 (1971). ER-44-45. But the court held that MySitePlan had not carried its burden of showing a likelihood of success on the merits of its claims. ER-47-61. The district court further held that MySitePlan had not shown that it was "likely to face

irreparable injury absent a preliminary injunction." ER-062. However, California would suffer irreparable harm if it were enjoined from "conducting meaningful oversight of unlicensed land surveying" ER-063.

### B. The Dismissal of the Complaint

On January 24, 2023, the district court granted the Board's motion to dismiss the complaint without leave to amend. After again rejecting the Board's argument that *Younger* abstention applied, the court held, on the merits, that the Complaint failed to state a claim:

#### 1. Dismissal of MySitePlan's First Amendment free speech claim

The district court first rejected MySitePlan's as-applied First Amendment challenge. It described MySitePlan's activities in the State as "creat[ing] site plans using publicly available geographic information system mapping data, satellite imagery, and client-provided information, and then sell[ing] them to customers for planning, infrastructure management, general information, and submission to county and municipal building permit departments." ER-005. It then held that this activity is not "pure speech," but rather professional conduct subject to regulation by the State. ER-010. Thus, the Act is subject to, and satisfies, rational basis review, because "(1) it has a 'legitimate governmental purpose' and (2) there is a 'rational

relationship between' that purpose and the means chosen by the government to achieve that purpose." ER-011 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993)). ER-011. *See* § 145(a).

Citing *Hawker v. New York*, 170 U.S. 189, 195 (1898), the court noted that "[t]here is no question that states may enact licensing laws to protect the public from the consequences of ignorance or incapacity in the pursuit of professions. ER-011. The court further held that "[t]he Act's definition of land surveying and its licensing requirements are rationally related to California's interest in protecting the public from incompetent people and entities disseminating land surveying products," and that the "legislature's decision not to create a licensing exemption for what plaintiffs describe as 'non-authoritative' uses is rationally related to the state's goal of both protecting consumers and ensuring that building permits are not issued based on incorrect property lines. . . ." *Id*.

**2. Dismissal of the void-for-vagueness claim**

The district court also rejected MySitePlan's vagueness challenge to the Act's definition of land surveying. The court explained: "In the court's views, a person of ordinary intelligence would understand from the plain language of the statute that, absent a license, they cannot distribute or offer to distribute site plans to customers for building permits if those site plans

retrace or reestablish boundary lines from preexisting public geographic information system data, and also that inclusion of a disclaimer does not shield them from liability." ER-014. The district court observed that "§ 8726(a)(1) does not limit itself to the original surveyor who established a boundary line for the first time. . . . Moreover, nowhere does the statute provide that a disclaimer, such as 'this is not a legal survey,' would serve to exclude that activity from the definition of land surveying or the licensing requirement." *Id*. The court concluded: "the Act's text is sufficiently clear that plaintiffs should have known their conduct qualified as land surveying under California law and is prohibited because plaintiffs were not licensed or exempted. . . ." ER-015. Finally, the district court rejected MySitePlan's argument that the law was vague because MySitePlan and others have violated the law without being cited: "The Board is responsible for prosecuting violations of the Act 'coming to its notice.' Cal. Bus. & Prof. Code § 8790. The Board does not waive its enforcement authority merely because some unlicensed persons violating the provisions of the Act have not come to the Board's attention." *Id*.

**3. Dismissal of the overbreadth claim.**

The court also rejected MySitePlan's overbreadth claim, noting the high burden MySitePlan faced: "[P]articularly in cases like this one where

the challenged law regulates conduct and not merely speech, the asserted overbreadth must 'not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.' *Broadrick v. Oklahoma*, 413 U.S. 601, 615 [ ] (1973)." ER-015. The court recognized that "[b]ecause the purpose of the overbreadth doctrine is to prevent the chilling of protected speech, "'[r]arely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).'" *Id*. (quoting *Virginia v. Hicks*, 539 U.S. 113, 124 (2003)). Here, MySitePlan failed to allege "a realistic or actual danger that the statute will infringe upon recognized First Amendment protections." ER-016. Further, MySitePlan failed to identify, as it must, "a significant difference" between its claim that the Act is overbroad and its claim that the Act is unconstitutional as applied to its conduct. ER-17 (citing *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 802-03 (1984)).

**4. Dismissal of the substantive due process claim**

The district court also dismissed MySitePlan's substantive due process claim, applying rational basis review. MySitePlan did not allege "facts sufficient to show that California's actions are 'clearly arbitrary and unreasonable,'" and "California has rationally chosen not to include the

exemption to its land surveying definition that plaintiffs wish to have included in the Act." ER-018-19 (citing *Slidewaters LLC v. Wash. State Dep't of Lab. & Indus.*, 4 F.4th 747, 758 (9th Cir. 2021)).

**5. Dismissal of the equal protection claim**

Finally, the district court interpreted MySitePlan's equal protection challenge as asserting a "class of one" claim. Thus, "[t]o succeed, 'plaintiffs must demonstrate that they were treated differently than someone who is prima facie identical in all relevant respects.'" ER-020 (citation omitted). It failed to do that because

> the Board is only responsible for prosecuting violations of the Act "coming to its notice." Cal. Bus. & Prof. Code § 8790. Thus, even if, as plaintiffs allege, "hundreds, if not thousands, of non-surveyors in California routinely submit site plans based on copied GIS data or Google Maps to county and municipal building permit issuers" ([Complaint] ¶ 51), if those individuals were not reported to the Board, no intentional discrimination—and hence no denial of equal protection—plausibly occurred.

ER-020-21.

**6. Denial of leave to amend**

At the hearing, the district court repeatedly invited MySitePlan to seek leave to file an amended Complaint; MySitePlan declined to do so. ER-25-26, ER-029-33, ER-038-39. Based on MySitePlan's decision to stand on its

Complaint, the trial court concluded that "granting leave to amend would be futile." ER-021.

## STANDARD OF REVIEW

This Court reviews de novo a decision granting a motion to dismiss for failure to state a claim. *Davis v. HSBC Bank Nev. N.A.*, 691 F.3d 1152, 1159 (9th Cir. 2012). The Court also reviews de novo whether *Younger* abstention applies. *Baffert v. California Horse Racing Bd.*, 332 F.3d 613, 617 (9th Cir. 2003). Denial of a motion for preliminary injunction is reviewed "for an abuse of discretion, the underlying legal conclusions de novo, and factual findings for clear error." *Washington v. U.S. Dep't of State*, 996 F.3d 552, 560 (9th Cir. 2021) (citation omitted).

## SUMMARY OF THE ARGUMENT

The district court correctly held that MySitePlan failed to state a plausible constitutional challenge to the Act. As an initial matter, contrary to MySitePlan's contentions, the Act does not sweep in virtually all mapmaking and drawings. As the plain language makes clear, surveying encompasses site plans that "locate" or "establish" a property line, i.e., depict a property line in relation to buildings or other fixtures; a simple drawing of a structure, for example, would not be "land surveying," because it does not display the measured distance to the property line(s). Relatedly,

MySitePlan's arguments that its site plans are "non-authoritative," and therefore pose no danger to the public, fall flat. Its plans depict the location of property lines with precision and, as such, are marketed as suitable for submission to local building departments. They are presented as accurate and trustworthy, notwithstanding the fact that they do not contain an official land surveyor's stamp. But once they are on file, such plans can be improperly used, even years later, to support a permitting or planning decision, or to settle a property line dispute between neighbors. *See* SER-301.

Properly understood, the Act regulates conduct, not "pure speech," and easily satisfies rational basis review. As the district court held, the licensing requirement serves to protect the integrity of property boundaries and protect the public from the incompetent and the untrustworthy. Alternatively, if deemed to be a law regulating speech, the Act is content-neutral and satisfies intermediate scrutiny as a matter of law.

The district court also correctly held that the Act is not facially overbroad. MySitePlan failed to show that a substantial number of the Act's applications are unconstitutional, judged in relation to the law's plainly legitimate sweep.

MySitePlan also failed to state a claim that the Act is unconstitutionally vague. A facial challenge on vagueness grounds fails where, as here, the challenger engages in conduct that is clearly proscribed by the statute. *Marquez-Reye v. Garland*, 36 F.4th 1195, 1207 (9th Cir. 2022). The district court was correct in holding that "the Act's text is sufficiently clear" that MySitePlan should have known its conduct was prohibited.

MySitePlan's substantive due process claim also fails as a matter of law. California has a legitimate interest in requiring land surveyors to be licensed, and the licensing requirement easily satisfies rational basis scrutiny.

There is likewise no plausible equal protection claim here. The Act does not exempt property owners and contractors, as MySitePlan claims, and MySitePlan does not and cannot allege facts showing that it has been treated differently from others similarly situated.

The district court did not abuse its discretion in denying MySitePlan's motion for preliminary injunction. In addition to failing to show a likelihood of success on the merits, MySitePlan failed to show irreparable injury or that the balance of equities tipped in its favor.

Finally, as an alternative basis for affirming the judgment, the district court erred in holding that the requirements for abstention under *Younger v.*

*Harris*, 401 U.S. 37 (1971), were not met. In particular, the district court should not have accepted the argument that there were no ongoing state enforcement proceedings, merely because MySitePlan dropped its appeal of the Citation Order before it filed its federal court action. MySitePlan's strategic decision to short-circuit those proceedings and instead file a federal court action does not thwart *Younger* abstention.

## ARGUMENT

### I. MYSITEPLAN'S CLAIMS TURN ON A BASIC MISREADING OF THE ACT.

All of MySitePlan's arguments are colored by two flawed premises: First, that the Act makes virtually all mapmaking, and the creation of many informal sketches and drawings, illegal without a land surveyor's license. Second, that MySitePlan's own site plans are only informal, "non-authoritative" drawings that the State has no interest in regulating.

#### A. MySitePlan's Proposed Expansive Interpretation of the Act Should Be Rejected.

MySitePlan's contention that the Act sweeps in virtually all informal mapmaking and drawings is based on an inflated misreading of the Act's definition of "land surveying," and the district court correctly rejected it. Section 8726(a) describes the practice of land surveying, most pertinently, as one who "does or offers to do any one or more of the following: [¶]

(1) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Section 6731. . . . [¶] (3) Locates, relocates, establishes, reestablishes, or retraces any property line or boundary of any parcel of land, right-of-way, easement, or alignment of those lines or boundaries."

To "locate" or "establish" a property line, a site plan has to show where it lies in relation to a building or a natural object. As the Board's witnesses explained in opposing the motion for preliminary injunction, "[t]he critical distinction between drafting, which does not require a license, and land surveying, which does, is that land surveying deals with the relative positions of fixed works (such as buildings or fences) or natural objects (topographic features, contours, elevations, etc.) in relationship to property lines. Land surveyors are rendering a professional opinion as to the spatial relationship between fixed works or natural objects and the property line." SER-334; SER-298; SER-319. In accordance with this distinction, the Citation Order issued to MySitePlan states: "Preparing site plans which depict the location of property lines, fixed works, and the geographical relationship thereto, falls within the definition of land surveying. . . ." SER-141. Thus, contrary to MySitePlan's contentions, general mapmaking and

drawings that show houses and properties do not constitute the practice of land surveying. Detailed, measured drawings of structures also are not land surveys because they do not show measurements to property lines.

This reading of the Act has been confirmed by two opinions issued by the California Attorney General, which are cited in the Opening Brief (at 37 note 9). They explain that the definition in what is now section 8726(a)(1) is "aimed at mapping as an integral step in designing and locating specific projects, not map making in the abstract," and that "[m]ap making is not ipso facto surveying." 23 Ops. Cal. Atty Gen. No. 54-26 (Feb. 11, 1954). *See* 19 Ops. Cal. Atty Gen. 51-124 (Jan. 21, 1952) (opining that mapmaking that does not include determining boundaries is not land surveying). MySitePlan's argument that the law has changed since these opinions were issued is simply wrong. Opening Br. at 37 note 9. The 1941 version of section 8726(a)—which was addressed in the Attorney General opinions and in *Hill v. Kirkwood*, 326 P.2d 599 (Cal. 1958)—uses the very same "[l]ocates, relocates, establishes, reestablishes, or retraces" language MySitePlan complains about here. SER-053. As the district court correctly held, although the statute has been amended several times since, that language has not changed. *See* SER-058; SER-062; SER-066; SER-069; SER-074; SER-078; SER-082; SER-087; SER-097; SER-110.

MySitePlan further relies on a partial dictionary definition of the word "locate" to argue that "Section 8726 criminalizes basically all mapmaking without a license." Opening Br. at 41-42 (arguing that the word "locate" can mean merely to "indicate" where something is). But this is too slim a reed to invalidate a state law that has stood virtually unchanged since 1941, and that has never been construed to sweep as broadly as MySitePlan claims. Indeed, the complete dictionary definition cited by MySitePlan includes an example: "to determine or indicate the place, site, or limits of [¶] *locate the lines of the property*." *Locate*, Merriam-Webster's Dictionary https://www.merriam-webster.com/dictionary/locate (last accessed June 15, 2023) (italics added). And other pertinent definitions of "locate" include:

> **1.** To discover the position or place of; find. . . . **4.** *U.S.* To survey and fix the site or boundaries of (property, a mining claim, etc.).

Funk & Wagnalls Standard College Dictionary 794 (1973).

> **1.** To determine or indicate the place of : define the site or limits or (as by a survey) *<locating the lines of the property>* . . . .

Webster's Third New International Dictionary (2003).

> [to] discover the exact place or position of: *"engineers were working to locate the fault."*

Google and Bing Dictionary, Data from Oxford Languages.

> To identify or discover the place or location of: *to locate the bullet wound.*

Random House Webster's Unabridged Dictionary 1128 (2d ed. 1998). None of these definitions suggests that all mapmaking and drawings, formal or informal, would be covered by the statute. And all are consistent with the Board's reading of the Act and the district court's orders.

MySitePlan's expansive interpretation of the Act, echoed by amici, should be rejected.

### B. MySitePlan's Products Are Land Surveys, Not Just Informal Drawings.

MySitePlan's related argument—that it is merely engaged in preparing informal drawings—is likewise meritless. Opening Br. at 36, 52; *see id. passim*. MySitePlan's website describes its site plans as "an aerial-view drawing of your property *showing features relative to the lot boundaries*." SER-124 (italics added). And the plans themselves plainly show specific measurements between lot boundaries and structures and natural objects. SER-125, SER-278-286. These activities fall squarely within section 8726(a)(1) and (3).

In response, MySitePlan argues that its plans are "non-authoritative," and therefore the State has no legitimate interest in regulating its business. *See, e.g.,* Opening Br. at 17, 20, 36. The argument fails because its site

plans are presented as precise and accurate to the measurements shown, *see* SER-285, SER-298, SER 320, and its marketing strongly suggests that its site plans match the quality and accuracy of those offered by licensed professionals. SER-120, SER-122, SER-128, SER-320; SER-301.

MySitePlan further contends that its plans would be deemed "non-authoritative" under NCEES Model Rule 201.25, but the opposite is true. NCEES Model Law section 110.20(N) defines "authoritative" as "being presented as trustworthy and competent." Indeed, the Director of NCEES testified that MySitePlan's plans are "authoritative" under the NCEES Model Rules. SER-295-96. They are marketed as accurate to the measurements shown and suitable for submission to planning and building departments for permitting purposes, *see e.g.*, SER-285, and the fact that they do not come with an official "land surveyor's stamp" does not make them "non-authoritative." But even if MySitePlan were right that its products are not "authoritative" within the meaning of the Model Rules, the fact remains that California has not adopted NCEES Model Rule 201.25 (and MySitePlan has identified no state that has), and its failure to do so does not render the Act unconstitutional; as the district court correctly held, "California is not required to follow the NCEES Models Rules" ER-016.

## II. THE LICENSING REQUIREMENT FOR LAND SURVEYORS SURVIVES MYSITEPLAN'S VARIOUS CONSTITUTIONAL CHALLENGES AS A MATTER OF LAW.

### A. The Complaint Does Not Allege a Plausible Free Speech Claim.

#### 1. The Act regulates conduct and imposes no more than an incidental burden on speech.

It is well-settled that states may impose licensing requirements on persons engaged in certain professions and activities, notwithstanding the First Amendment. *Smith v. California*, 336 F.2d 530, 533 (9th Cir. 1964). The State may "prohibit the practice of [engineering] professions by one . . . who does not choose to meet the law's requirements." *Id*. at 534.

Here, the district court correctly held that the Act regulates "professional *conduct* by requiring a license and that this requirement does not impose more than an incidental burden on speech." ER-010 (italics in original). As the district court observed: "There is no question that states may enact licensing laws to protect the public from the consequences of ignorance or incapacity in the pursuit of professions." ER-11 (citing *Hawker v. New York*, 170 U.S. at 195.

In *National Ass'n for Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000) ("*NAAP*"), this Court rejected a First Amendment challenge to the licensing requirements

for psychoanalysts, explaining: "The Supreme Court has held that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id*. at 1053 (citations omitted).

> While it is possible to find some kernel of expression in almost every activity a person undertakes, such a kernel is not sufficient to bring the activity within the protection of the First Amendment. The communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation.

*Id*. (cleaned up, citations omitted).

Here, as in *NAAP*, California has an interest in shielding the public from "the untrustworthy, the incompetent, or the irresponsible," *id*. at 1054, by requiring that persons engaged in the practice of land surveying have the requisite education, experience, and knowledge. *Cf. Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373-74 (2018) ("*NIFLA*") (holding that the law at issue in that case was not a regulation of professional conduct). [2]

[2] *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927 (5th Cir. 2020), cited by MySitePlan (Opening Br. at 28) and amicus (YIMBY Br. at 3, 5, 12), is not to the contrary. The court there simply held that the district court had erred

MySitePlan's assertion that it is engaged in "pure speech" that cannot be regulated by the State fails. In *Hackin v. State*, 417 P.2d 910, 912 (Ariz. 1967), the Arizona Supreme Court held that a layman did not have a free speech right under the First Amendment to represent a habeas petitioner in court. The United States Supreme Court summarily dismissed the appeal "for want of a substantial federal question." *Hackin v. Arizona*, 389 U.S. 143 (1967). In *Wright v. Lane County Dist. Court*, 647 F.2d 940, 941 (9th Cir. 1981), this Court affirmed the dismissal of a similar challenge, holding that the Supreme Court's dismissal in *Hackin* for lack of a substantial federal question was a decision on the merits binding on the lower courts "until subsequent decisions of the Supreme Court suggest otherwise." Speaking on someone's behalf in court is much closer to "pure speech" than is assembling site maps from publicly available information.

*Tingley v. Ferguson*, 47 F.4th 1005, 1072 (9th Cir. 2022), *pet'n for cert. docketed* Mar. 28, 2020 (No. 22-942), is in accord. In *Tingley*, this Court held that Washington's law prohibiting licensed therapists from

---

in holding that, because Mississippi's land surveying law regulated a profession, it was *categorically* exempt from First Amendment scrutiny; it remanded for the district court to consider whether the statute regulated only speech, regulated speech as an incident to the regulation of non-expressive professional conduct, or regulated only non-expressive conduct. 949 F.3d at 931.

performing "conversion therapy" on minors "regulated only treatment, and any effect on free speech interests is merely incidental." 47 F.4th at 1073 (cleaned up) (citing *Pickup v. Brown*, 740 F.3d 1208, 1232 (9th Cir. 2014)). As such, the law was subject to rational basis review, and the law was "rationally related to the legitimate government interest of protecting the well-being of minors." *Id*. (quoting *Pickup v. Brown*, 740 F.3d at 1232. This case presents an even clearer example of a law regulating conduct and not speech than *Tingley* or *NAAP*. First, the plaintiff in *Tingley* did not challenge the state's right to require that therapists be licensed. Second, the law at issue in *Tingley* prohibited licensed professionals from providing a specific therapy; the Act here does not prohibit licensed land surveyors from providing any specific services. Third, speech between therapist and patient is necessarily an integral part of the treatment. *See Tingley*, 47 F.3d at 1073. Indeed, psychoanalysis is known as "the talking cure." *NAAP*, 228 F.3d at 1054. Here, in sharp contrast, speech is not similarly integral to the business of producing site plans based on GIS mapping and other data.

*American Society of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, 957 (9th Cir. 2021), is also instructive; it held that a labor law that limited employers' ability to treat freelance writers and photographers as independent contractors did not regulate speech, but rather economic

activity. The Court rejected plaintiffs' argument that the law triggered heightened scrutiny under the First Amendment by, for example, treating journalists differently from graphic designers. *Id*. at 960-63. The law did not "impose content-based burdens on speech" because "its applicability does not turn on what workers say, but, rather, *on the service they provide* or the occupation in which they are engaged." *Id*. at 963 (emphasis added). So here.

Similarly, in *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928 (9th Cir. 2020), *cert. denied*, – S.Ct. –, No. 22-865, 2023 WL 4065632 (June 20, 2023), the Court rejected a challenge to a law that potentially could have required plaintiffs to classify as employees doorknockers and signature gatherers engaged in political campaigns. Even accepting plaintiffs' assertion that they might not be able to retain as many doorknockers and signature gatherers due to increased costs imposed by the law, "[s]uch an indirect impact on speech, however, does not violate the First Amendment." *Id*. at 937. As the district court correctly held, the law at issue here also regulates economic activity and poses, at most, an indirect impact on speech.

**2. MySitePlan's free speech arguments are meritless.**

The Opening Brief ignores both the district court's discussion, ER-010-11, and the line of cases applying rational basis review to uphold state

professional licensure requirements, like the Act. Instead, MySitePlan strings together snippets from inapposite cases to argue that the Act regulates MySitePlan's "fully protected speech," and that MySitePlan is "engaged *only* in speech, precluding application of the 'incidental burden' doctrine." Opening Br. at 23, 25 (italics in original). This theory is irreconcilable with *American Society of Journalists & Authors, Inc. v. Bonta*, 15 F.4th 954, and *Mobilize the Message, LLC v. Bonta*, 50 F.4th 928. How can MySitePlan be "engaged *only* in speech," while journalists, graphic designers, signature gathers, and door knockers are not? Similarly, if the State can require a license to practice psychoanalysis, also known as the "talking cure," *NAAP*, 228 F.3d at 1054, it can require a license to practice land surveying without triggering heightened scrutiny under the First Amendment.

*Conant v. Walters*, 309 F.3d 629 (9th Cr. 2002), discussed in the Opening Br. at 31, is not to the contrary; in fact, it is fully consistent with the district court's decision. There, the Court distinguished between physicians' recommending marijuana—protected by the First Amendment—and physicians' prescribing marijuana—not protected. *Id*. at 634-35. Here, MySitePlan is free to advocate whatever they wish—including for a change in the law—but it may not practice land surveying without a license.

The Act is also utterly unlike the laws challenged in *Sorrell v. IMC Health, Inc*., 564 U.S. 552 (2011), and *IMDb.com v. Becerra*, 962 F.3d 111 (9th Cir. 2020), which prohibited disclosure of specific information by specific categories of speakers, not because they did not have the requisite training or competence, but because the state disapproved of the messaging. *Western Watersheds Project v.* Michael, 869 F.3d 1189 (10th Cir. 2017), is also irrelevant; the challenged law effectively penalized the collection of resource data from public land for use in influencing public policy. Nothing in the Act restricts MySitePlan's access to data.

Nor is there any merit to MySitePlan's contentions that the district court "applied the wrong test" by looking at the law generally, instead of MySitePlan's "precise activities," and that MySitePlan "does not engage in *any* relevant conduct." Opening Br. at 25-26, 32 (italics in original). The trial court considered MySitePlan's precise activities as alleged in the Complaint: "In California, plaintiffs create site plans using publicly available geographic information system mapping data, satellite imagery, and client-provided information, and then sell them to customers for planning, infrastructure management, general information, and submission to county and municipal building permit departments." ER-005, ER-42. Unlike *NIFLA*, 138 S. Ct. at 2372-74, where the Court held that the

challenged state-mandated disclosures were not tied to the pregnancy center's activities, the Act is directly tied to MySitePlan's specific activities—the creation and sale of its site plans.

Moreover, the implicit premise of MySitePlan's argument—that site plans prepared by licensed land surveyors are conduct that can be regulated, while its own supposedly "non-authoritative" site plans are speech that cannot be regulated—is meritless. Neither *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2020), nor *Cohen v. California*, 403 U.S. 1 (1971), suggest that whether an activity is conduct or speech depends on who is engaged in the activity. If MySitePlan's theory were accepted, there would be nothing left of state regulation of professions.

In sum, the Act regulates conduct, and not protected speech, and as such it is subject to deferential rational basis review, which it easily passes, as discussed below.

### 3. The district court correctly held that the Act satisfies rational basis review.

Rational basis review simply requires that a law "(1) . . . has a 'legitimate governmental purpose' and (2) there is a 'rational relationship between' that purpose and the means chosen by the government to achieve that purpose." ER-011 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 319

(1993)). ER-011. A law satisfies rational basis review if "there is any reasonably conceivable state of facts that could provide a rational basis for the challenged law." *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008) (citation omitted).

As the district court held, "[t]he Act's definition of land surveying and its licensing requirement are rationally related to California's interest in protecting the public from incompetent people and entities disseminating land surveying products. California's legislature's decision not to create a licensing exception for what plaintiffs describe as 'non-authoritative' uses is rationally related to the state's goals of both protecting consumers and ensuring that building permits are not issued based on incorrect property lines." ER-011. *See Hawker v. New York*, 170 U.S. at 195.

The court was also correct in concluding that MySitePlan's allegations that some permitting authorities accepted unauthorized land surveys, and that MySitePlan had received no client or permitting-agency complaints about its plans, were "insufficient to show that California's definition of land surveying is irrational or fails to serve the state's legitimate interests." ER-012. Rational basis review neither allows judicial second-guessing nor requires that a law address every aspect of a problem. *See Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1048 (9th Cir. 2017). So the fact that some local

permitting agencies may accept illegally-prepared site plans does not mean that the Legislature cannot ban the creation and sale of those site plans by unlicensed persons.

Rational basis review also does not require a showing that a plaintiff's conduct has caused harm. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for example, plaintiff argued that his conduct did not cause any of the evils that restrictions on solicitations by attorneys were intended to address. *Id*. at 462-63. The Supreme Court held that this "argument misconceives the nature of the State's interest"—that the rules "are prophylactic measures whose objective is the prevention of harm before it occurs." *Id*. at 465.

California's decision not to adopt NCEES Model Rule 210.25, which allows the preparation and sale of "non-authoritative" site plans without a license, is also irrelevant to rational basis review. *See* Opening Br. at 14; ER-094, ER-107-09. As this Court observed in *NAAP*, "[i]t simply is not the function of the courts to tell California how to craft its legislation." 228 F.3d at 1053. Regardless, as discussed in Section I.B. above, MySitePlan's conduct is *not* permitted under Model Rule 210.25.

Similarly, amicus Bruce Joffe's suggestion that the Act fails rational basis review because a *court* or the *Legislature* would not rely on

MySitePlan's site plans is meritless. Joffe Br. at 8.[3] By the time a property owner is in litigation over a property line dispute, damage has been done.

Although the government need not present evidence to sustain a statute under rational basis review, in response to MySitePlan's motion for preliminary injunction, the Board provided evidence explaining why the knowledge and expertise of land surveyors is necessary for the protection of the public, and the danger of relying on site plans by unlicensed providers. SER-298-302, SER-319-20, 331-32, SER-336.

> Correct determination of the property line and its relationship to improvements - existing or planned - is important for the protection of the public. Incorrectly done, the activities may result in incorrect locations of property lines, gaps in the location of property ownership rights, or the construction of fixed improvements that encroach on required setbacks, or even on the property line itself, potentially injuring the value of the client's land, creating disputes with neighbors whose property lines are affected, and even resulting in litigation.

SER-334; SER-298; SER-319.

[3] Amicus Joffe attaches to his brief a list of thirteen "additional signatories," none of whom appear in the caption or in the Interest of Amicus section or otherwise satisfy the requirements of Federal Rule of Appellate Procedure 29(a)(4)(D), and most of whom do not even identify their affiliation.

This evidence, as well as the Complaint itself, demonstrated the potential for harm inherent in MySitePlan's business model: MySitePlan disclaims the accuracy of its site plans, and its plans are based on public sources that in turn disavow the accuracy of *their* products. SER-268, SER-298-300; SER-306, SER-309, SER 316-17. Yet MySitePlan's site plans on their face implicitly represent they are precise and accurate to the measurements shown. *See* SER-298-99, SER 320. And statements on the MySitePlan website incorrectly imply that its site plans match the quality and accuracy of those offered by licensed professionals. SER-320; SER-301.

The Act easily satisfies rational basis review, and even heightened scrutiny.

#### 4. The long tradition of state regulation of land surveying provides an alternative basis to uphold the Act.

The long history of state regulation of land surveying further supports the dismissal of MySitePlan's First Amendment claim. In its order denying MySitePlan's motion for preliminary injunction, the district court found "persuasive" the Board's alternative argument that the Act would likely be upheld because of the "long history of regulating land surveying," observing that "California has regulated land surveyors since 1891," and the definition

of land surveying "has remained relatively unchanged since 1941." ER-054. (citing *Tingley*, 47 F.4th at 1079).

Courts engaging in a First Amendment analysis properly consider whether the challenged law is an "outlier" statute—i.e., a law that "lack[s] traditional counterparts" or has "few parallels in contemporary practice," which might trigger concern that "the government has overlooked less burdensome 'options that could serve its interests just as well'." *Drummond v. Robinson Twp.*, 9 F.4th 217, 222 (3rd Cir. 2021) (citation omitted). *See City of Austin v. Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1474 (2022) (rejecting argument that an ordinance was content-based, noting an "unbroken tradition" spanning over "50-plus years," of distinguishing between on-site and off-site signs); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000) (rejecting a First Amendment challenge, and noting that the law replaced and updated an 1866 ordinance).

MySitePlan does not attack this principle, but instead argues "there is no 'long history' of regulating non-authoritative drawings or property." Opening Br. at 37 note 9. The argument is meritless for two reasons. First, it is based on the false premise that MySitePlan' site plans are "non-authoritative," merely because its website states in that its products are not

surveys.[4] *See* Section I.B. above. Second, the argument incorrectly assumes that the relevant definition of the practice of land surveying has changed since the authorities cited by MySitePlan were issued in the 1950's. Those authorities (discussed in Section I.A above) address, in relevant part, the *same language* MySitePlan challenges here.

**5. Even if the Act could be deemed to implicate protected speech, it does not offend the First Amendment.**

Even those courts that have considered professional licensing requirements to implicate free speech have upheld them as a matter of law under an intermediate standard of review. *See Brokamp v. James*, 66 F.4th 374, 381 (2d Cir. 2023) (holding that New York's law requiring licensure of out-of-state mental health counselors was content-neutral and satisfied intermediate scrutiny). And in *NAAP*, this Court alternatively held that to the extent the licensing scheme for psychoanalysts regulated protected speech, the law was content- and viewpoint-neutral and did not violate the First Amendment as a matter of law. *Id.* at 1055-56 (holding that "speech is

[4] Selling site plans with a false seal or with a representation that it is a "Legal Survey" would be a separate violation of the Act, under section 8726(a)(8) (including in the definition of the practice of land surveying one who "[i]ndicates, in any capacity or in any manner, by the use of the title 'land surveyor' or by any other title or by any other representation that they practice or offer to practice land surveying in any of its branches.")

not suppressed based on its message" or "disagreement with psychoanalytical theories," but rather for the "important purpose of protecting public health, safety, and welfare.") Here, too, the Act does not suppress speech based on message, but simply requires that the alleged "speaker" has met certain training and licensing requirements.[5] Thus, this case is unlike *Pacific Coast Horseshoeing School v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020), where this Court held that the particular law at issue "*favors* particular kinds of speech and particular speakers through an extensive set of exemptions," and for that reason was content-based. 961 F.3d at 1072 (italics in original). Here, the Act applies broadly to all persons practicing land surveying.

MySitePlan's claim that the Act is content-based because its drawings depict property lines, Opening Br. at 32, is likewise meritless. Determining whether the Act applies may require someone to glance at MySitePlan's drawings to see if they show dimensions between fixed works or natural objects and a property line, but that does not make the law "content-based." In *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct.

[5] The plaintiffs in *NAAP* and *Brokamp* were trained in the profession, but failed to satisfy certain state-specific requirements. *NAAP*, 228 F.3d at 1048; *Brokamp*, 66 F.4th at 381. MySitePlan does not allege any education or training in land surveying.

at 1471, the Supreme Court held that a sign regulation was not content-based simply because the law would require a reader to ask, "who is the speaker and what is the speaker saying." "This Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id*. at 1473.

The same considerations that support the district court's holding that the Act satisfies rational basis review support a holding that the law satisfies intermediate scrutiny. Here, nothing in the Act dictates what land surveyors may say or prevents MySitePlan from expressing its views on any topic, including its opinions about the wisdom of the Act. It simply cannot engage in the unlicensed practice of land surveying.

### B. The District Court Correctly Held That the Act Is Not Overbroad.

To prevail on a facial overbreadth challenge, a plaintiff must show that "a substantial number of [a law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Knox v. Brovich*, 907 F.3d 1167, 1180 (9th Cir. 2018) (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)). "To justify facial invalidation, a law's unconstitutional applications must be realistic, not fanciful, and their number must be

substantially disproportionate to the statute's lawful sweep. In the absence of a lopsided ratio, courts must handle unconstitutional applications as they usually do—case-by-case." *United States v. Hansen*, —S. Ct.—, No. 22-179, 2023 WL 4138994, at *5 (June 23, 2023) (citations omitted).

The district court correctly held that the Complaint failed to demonstrate a "realistic or actual danger that the statute will infringe upon recognized First Amendment protections," and "has not alleged that the Act has been enforced against someone engaged in protected speech . . . let alone that such application constitutes a 'substantial' number of enforcement actions." ER-016. That failure is telling, because the definition of the "practice of land surveying" challenged here has not changed substantially since 1941. *See* SER-058; SER-062; SER-066; SER-069; SER-074; SER-078; SER-082; SER-087; SER-097; SER-110. The district court's holding is fully consistent with *United States v. Hansen*, in which the Supreme Court rejected an overbreadth challenge where the plaintiff "fail[ed] to identify a single prosecution for ostensibly protected expression in the 70 years since" the provision was enacted and instead "offer[ed] a string of hypotheticals, all premised on" a proposed expansive interpretation on the statute. 2023 WL 4138994, at *12.

### 1. MySitePlan's proposed interpretation of section 8726(a) should be rejected.

To advance its argument that the Act is overbroad, MySitePlan argues that the Act's definition of land surveying sweeps in a vast amount of mapmaking and drawings. As discussed in Section I.A. above, that is wrong. The practice of land surveying requires that there be a determination of the spatial relationship between property lines and fixed objects or works.

MySitePlan's retracing argument and its argument that "subsection (a)(7) criminalizes the mere process of deciding what to include on a map without a surveying license" (Opening Br. at 42), as well as similar arguments by amici (Joffe Br. at 8-12; YIMBY Br., *passim*), are based on the same misimpression that the law necessarily regulates all map making.[6] Indeed, Joffe seems to argue that California may not regulate unlicensed persons at all, because their products are, by definition, not "legally authoritative." Joffe Br. at 12.

"When words have several plausible definitions, context differentiates among them." *Hansen*, 2023 WL 41398994, at 7. Here, in context, the Act

[6] YIMBY does not claim that it has been subject to Board enforcement proceedings, and the illustration it includes at page 8 of its brief does not include measurements, and therefore would not be a land survey under the Act.

does not purport to cover general mapmaking or unmeasured drawings. Moreover, where the government's interpretation "is at least 'fairly possible,' . . . the canon of constitutional avoidance would still counsel [the Court] to adopt it." *Id*. at *11 (quoting *Jennings v. Rodriguez*, 138 S.Ct. 830, 842 (2018))." MySitePlan's proposed statutory construction should be rejected.

**2. MySitePlan failed to allege facts showing that any unconstitutional applications of the Act are substantially disproportionate to the Act's legitimate sweep.**

MySitePlan concedes that the Act has a plainly legitimate sweep—maintaining the integrity of property lines. Opening Br. at 43-44. Indeed, in opposition to MySitePlan's motion for preliminary injunction, the Board provided unrebutted declarations explaining the importance of the statute, in particular the dangers of unlicensed persons engaging in land surveying. *See* SER-298-SER-377. Nonetheless, MySitePlan again argues that, because California has not adopted NCEES Model Rule 201.25, the Act is overbroad, a problem that "[m]apping professionals have long recognized." Opening Br. at 43. That argument fails. A law is not unconstitutionally overbroad simply because it could have been narrower, or because it has

been subject to criticism.[7] And, as explained in Section I.B. above, MySitePlan has misinterpreted the NCEES Model Rules.

The fact that the Complaint alleges (in conclusory language, devoid of specific facts) that "hundreds or thousands" of persons violate the law, Opening Br. at 44, also does not mean that those persons are engaged in protected speech. *Cf. Porter v. Martinez*, 68 F.4th 429, 437 (2023) (holding that California law prohibiting use of vehicle horns for purely "expressive honking" did not violate the First Amendment, notwithstanding that the law in practice is rarely enforced). Indeed, MySitePlan does not allege a single

[7] MySitePlan's suggestion that the Act is overbroad because it has been the subject of longstanding concerns is unsupported by allegations of fact. MySitePlan cites only its own Complaint (ER-107), which in turn cites only a single three-page article by amicus Joffe, which refers generally to the land surveying laws in "[a]ll 50 states." Bruce A. Joffe, *Surveyors and GIS Professionals Reach Accord*, https://pubs.usgs.gov/of/2002/of02-370/dmt_02.pdf (last accessed June 30, 2023). And that article recognizes "that GIS/LID tools are potentially being used by unlicensed practitioners in activities that clearly fall within the long-established responsibility of the licensed surveyor." *Id*.

MySitePlan's further assertion that "some other states followed NCEES's lead to limit the reach of their land-surveying laws" (Opening Br. at 14 and note 6) is based on inapposite authorities, and does not make California's statute overbroad in any event. *See, e.g., Southeastern Reprographics, Inc. v. Bureau of Professional & Occupational Affairs*, 139 A.3d. 323, 330 (Penn. 2016) (addressing a large scale mapping project that "did not relate to nor involve the location or establishment of a property or boundary line").

instance in which the law has been enforced against protected speech (aside from its own case).

MySitePlan's cited overbreadth cases (*see* Opening Br. at 39-40, 44) also do not support its claim.[8] *City of Houston v. Hill*, 482 U.S. 451 (1987), *Sec'y of State of Md. v. Joseph Munston*, 467 U.S. 947 (1984), and *Hernandez v. City of Phoenix*, 43 F.4th 966 (9th Cir. 2022), involved speech relating to personal opinions or political or charitable activities, not ordinary commercial activities like MySitePlan's. "[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 463 (citation omitted). Similarly, *United States v. Stevens*, 559 U.S. 460, 469, 473 (2010), addressed a law that was a content-based regulation of speech, and the government in that case did not dispute that the statute's language would broadly ban "common depictions of ordinary and lawful activities."

*Virginia v. Hicks*, 539 U.S. 113 (2003), rejected an overbreadth claim and works against, rather than in favor, of MySitePlan. Noting that an "overbreadth claimant bears the burden of demonstrating from the text of the

[8] *United States v. Hansen*, 25 F.4th 1103, 1105-06 (9th Cir. 2022) (*see* Opening Br. at 39-40), was reversed by the Supreme Court in *Hansen*, 2023 WL 4138994, at *12.

law and from actual fact that substantial overbreadth exists," *id*. at 122, the court held that plaintiff had failed to demonstrate that a local housing policy would ever be enforced against "anyone engaged in constitutionally protected speech," or that the "policy as a whole prohibits a 'substantial amount' of protected speech," *id*. at 122-24. *Hicks* is consistent with the Supreme Court's recent decision in *Hansen*, which rejected an overbreadth challenge where the plaintiff did not identify any use of the statute to prosecute protected expression, but simply "offer[ed] a string of hypotheticals, all premised on" a proposed expansive interpretation on the statute. 2023 WL 4138994, at *11. Similarly, MySitePlan failed to demonstrate that the Board would ever enforce the law against protected speech; its "string of hypotheticals" (and those of amici Joffe and YIMBY) are based on an expansive and unwarranted interpretation of the statute, and as such fail to state an overbreadth claim as a matter of law.

### C. The Act Is Not Unconstitutionally Vague.

The district court correctly held that MySitePlan's claim that the Act is unconstitutionally vague failed as a matter of law. "A law is unconstitutionally vague if it does not provide a reasonable opportunity to know what is constitutionally prohibited, or is so indefinite as to allow

arbitrary and discriminatory enforcement." *First Resort, Inc. v. Herrera*, 860 F.3d 1262, 1274 (9th Cir. 2017). MySitePlan failed to meet its burden.

As a threshold matter, absent exceptional circumstances not present here, a facial challenge on vagueness grounds fails where an individual challenging a statute engages in conduct that is clearly proscribed by that statute. *Marquez-Reye v. Garland*, 36 F.4th 1195, 1207 (9th Cir. 2022); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010). Here, MySitePlan admitted to violating the Act and accepted the Order of Abatement in the Citation Order. *See Marquez-Reye v. Garland*, 36 F.4th at 1207 (rejecting petitioner's vagueness claim where he conceded that his actions fell within the scope of the challenged statute).

Beyond that admission, as discussed in Section I.B above, MySitePlan plainly is engaged in the practice of surveying within the meaning of the Act. MySitePlan's own website also implicitly concedes that the statute applies to its activities, by advertising its products as equivalent to a land survey in every way except that they lack a land surveyor's seal:

> If your building department DOES NOT REQUIRE a Surveyor, Engineer, or Architect Stamp our plans are just what you need. We have created plans in almost every jurisdiction in the U.S. and our plans meet or exceed requirements.

SER-275.

The district court correctly held that "a person of ordinary intelligence would understand from the plain language of the statute that, absent a license, they cannot distribute or offer to distribute site plans to customers for building permits if those site plans retrace or reestablish boundary lines from preexisting public geographic information system data, and also that inclusion of a disclaimer does not shield them from liability." ER-014. My SitePlan offers no reason to doubt that conclusion.

Its speculation about activities that might run afoul of the statute are not enough. Opening Br. at 42, 45, 49. "[H]ypothetical examples concerning what the [law] covers and who might be punished under its provisions do not render the [law] unconstitutionally vague. As the Supreme Court has explained, 'speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.'" *First Resort Inc. v. Herrera*, 860 F.3d at 1275 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)).

Its efforts to show that the Board has adopted a "subjective, shifting" interpretation of what constitutes land surveying also fail. As noted in Section I.A. above, in its opposition to MySitePlan's motion for preliminary injunction, the Board submitted declarations that, among other things,

explained the statutory requirements. SER-297-337. The Board's motion to dismiss focused only on the actual language of the statute. MySitePlan seizes on this to argue that the statute itself is vague. Opening Br. at 47.[9] But the Board could not have submitted declarations in support of a Rule 12(b)(6) motion. More fundamentally, there is no *substantive* difference between the statutory language, the Board's declarations, and the Citation Order. Each makes clear that the critical distinction between land surveys, which require a license, and drawings, which do not, are that the former show the geographic relationship—measurements—between property lines and fixed objects. A detailed, measured drawing of a structure alone is not land surveying; locating that structure within property lines is. The former does not impair the integrity of property lines or invite encroachment problems; the latter does.

The alleged fact that MySitePlan and other non-licensed persons have violated the statute without getting caught also does not render the law vague. Opening Br. at 44. The Board is responsible for prosecuting

[9] MySitePlan omitted from its Excerpts of Record numerous items necessary for review of the district court's ruling on the preliminary injunction, as well as items it actually cites in its brief, including the Board's opposition to the preliminary injunction and its motion to dismiss, which MySitePlan relies on for its "shifting interpretations" argument. The relevant pages are SER-289-92, SER-338-40.

violations of the law "coming to its notice." § 8790. That means that it must investigate complaints and take enforcement action when its investigation discloses a violation of the Act. The Board does not waive its ability to enforce the law merely because some unlicensed persons have not been brought to its attention. MySitePlan has not alleged any facts showing that the Board has ever failed to investigate a complaint filed with it or failed to enforce the law against other violators.[10] The conclusory allegation that the Board has chosen not to evenhandedly enforce California's definition of "land surveying," *see* ER-116, fails the plausibility test of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).

Nor is this a case in which the government has punitively enforced "the nebulous outer reaches" of a policy, as in *Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th. Cir. 1996). MySitePlan's conduct falls squarely within the four corners of the Act, and it is selling site plans with the knowledge and intent that they will be relied upon for land-use decisions, an area in which the state has a strong interest in protecting consumers.

[10] There is a presumption that official duties have been regularly performed. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1684 (2019) (Alito, J., concurring). Moreover, in opposition to MySitePlan's motion for preliminary injunction, the Board presented evidence that it investigates and enforces the law evenhandedly. *See* SER-332-35; SER-153-85.

Finally, MySitePlan quotes *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015), for the proposition that the need for specificity is greater where "a statute subjects violators to criminal penalties." Opening Br. at 47. This general principle does not render the particular statute at issue here vague—that case involved a law that employed subjective terms ("properly," "satisfactory") that exposed persons to a felony conviction and imprisonment based not on objective behavior but on the subjective viewpoint of others. 788 F.3d at 1022 n.6, 1031. The Act does not contain similar subjective terms, and its violation is a misdemeanor with a maximum fine of $5,000. § 8792; 16 Cal. Code Regs. § 472.1.

The vagueness claim fails as a matter of law.

### D. MySitePlan's Fourteenth Amendment Equal Protection and Substantive Due Process Claims Fail as a Matter of Law.

MySitePlan concedes that its Fourteenth Amendment claims are subject to rational basis review. Opening Br. at 51. Its overarching theory is that "facts are critical under the rational basis standard," and that it has alleged facts demonstrating the "irrationality" of the Act. But its own cited authorities make clear that, for laws "affecting ordinary commercial transactions," "the existence of facts supporting the legislative judgment is to be presumed." *United States v Carolene Prods., Co.*, 304 U.S. 144, 152

(1938). MySitePlan has not plausibly pled facts, as opposed to conclusions or arguments, negating every conceivable justification for the licensing requirement, and it declined to amend its Complaint to do so.

This Court has repeatedly rejected Fourteenth Amendment challenges to state professional licensing schemes. *Lupert v. Cal. State Bar*, 761 F.2d 1325, 1326-29 (9th Cir. 1985) (rejecting equal protection challenge to law requiring first-year law student to pass an exam before receiving credit for further study); *Chaney v. State Bar of Cal.*, 386 F.2d 962, 964-65 (9th Cir. 1967) (affirming dismissal of due process and equal protection challenge to state bar exam essay question requirements); *Smith v. State of Cal.*, 336 F.2d at 534 (holding that state licensing requirements for professional engineers "do not on their face violate any provision of the federal constitution").

As explained in Section II.A.3. above and in further detail below, the Act satisfies rational basis review.

**1. The Complaint does not allege a plausible substantive due process violation.**

It is well-settled that professional licensing statutes like the Act do not deprive non-licensees of their right to substantive due process, so long as they are "appropriate to the calling or profession, and attainable by reasonable study or application." *Dent v. State of West Virginia*, 129 U.S.

114, 121-22 (1889). "It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation." *Id*. And this Court recently held that a substantive due process challenge to a licensing requirement is properly dismissed where the plaintiff "fail[s] to plausibly allege" that the challenged law "completely prohibits them from exercising their 'right to engage in a calling.'" *Olson v. California*, 62 F.4th 1206, 1220 (9th Cir. 2023) (quoting *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999)).

MySitePlan does not and could not allege that it is completely prohibited from running its business. It argues that the barriers to licensure are "crushing," Opening Br. at 55, but it cites no facts to support that conclusion. California's requirement of examinations plus six years' experience (which may include an undergraduate degree) (§ 8742; 16 Cal. Code Regs. § 425), is not "crushing," but quite appropriate. As a comparison, the NCEES Model law's license requirement for land surveyors requires a four-year college degree plus four years' experience. SER-202. Hawaii, one of the few states, like California, that permit licensure without a college degree, requires eleven years' experience. Haw. Rev. Stat. § 5464.8(c)(1)(D).

California's licensure requirement for engineers includes an examination requirement and either a Bachelor of Science degree plus two years' qualifying work experience or a Master's or Ph.D. degree plus one year of qualifying work experience. §§ 6751(c), 6753; 16 Cal. Code Regs. § 424. Licensed contractors in California must have four years' experience or a combination of experience and education, and satisfy examination requirements. § 7065(a); 16 Cal. Code. Regs § 825. MySitePlan's argument that the Act's licensing requirements do not satisfy even rational basis review because they are "crushing" is far-fetched if not frivolous.

In dismissing the substantive due process claim, the district court rejected MySitePlan's contention that "because their 'non-authoritative' site plans should not be defined as legal surveys, there is no rational basis to subject plaintiffs to the same qualifications as land surveyors." ER-019. It correctly held that "California has rationally chosen not to include the exemption to its land surveying definition that plaintiffs wish to have included in the Act." *Id*. As the district court observed, "plaintiffs' argument that there is no rational basis to make the distribution of such land surveys unlawful (if done without a license) is undercut by plaintiffs' allegations that their customers use their site maps for planning and

infrastructure management and local government agencies routinely accept these site maps for purposes of issuing permits." *Id*.

MySitePlan's further argument that its drawings are used for activities other than building permitting is irrelevant. Opening Br. at 54. The Citation Order did not order the closure of MySitePlan's entire business, and as noted, many of MySitePlan's products, listed at page 54 of the Opening Brief, could be created without violating the statute.[11]

None of MySitePlan's cited cases support its due process claim. In *Merrifield v. Lockyer*, 547 F.3d at 986-88, this Court *rejected* plaintiff's claim that a licensing scheme imposing training and examination requirements for structural pest controllers violates due process. The Court held that California has a legitimate public interest in requiring all pest controllers to be licensed, and the licensure requirements satisfied rational basis scrutiny. As in *Merrifield*, in requiring licensure of land surveyors, "the state creates a framework to monitor them and keep them accountable." *Id.* at 989. To allow MySitePlan to operate its business without a license is

[11] MySitePlan's website advertises its site plans for permitting and land use purposes, not for use for drawings used for farmers' markets, events, or apartment building maps. SER-121-34. Nor does there appear to be any reason why plans designed for these and the other purposes MySitePlan describes would have to show precise measurements between market stalls or buildings and a property line.

antithetical to that interest, especially given that MySitePlan not only seeks to avoid accountability to the State, but also disavows accountability to its own customers. SER-268, SER-272. Further, California's interests here are significantly greater than any state interest in regulating, for example, hair braiding *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (1999), or even coffin sales. *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).[12]

Finally, MySitePlan's argument that "building departments—not the Board—are empowered to decide which site plans are acceptable and which are not," Opening Br. at 54-55, is both incorrect and irrelevant. It is incorrect because section 107.2.6 of the California Building Code (Title 24 of the California Code of Regulations) states that a site plan "shall be drawn in accordance with an accurate boundary line survey." And the fact that a building official "may waive or modify the requirement for a site plan" under certain conditions, such as where the permit application is for "alteration or repair," *id*., does not mean that the Building Code gives local authorities the right to allow the unlicensed practice of land surveying. In any event, section 107.6.4, which is a regulation and not a statute, must be

[12] In *Powers v. Harris*, 379 F.3d 1208, 1223 (10th Cir. 2004), the Tenth Circuit expressly disagreed with *Craigmiles* and held that a nearly identical statute did not violate either substantive due process or the Equal Protection Clause.

harmonized with the Act. *See Skidgel v. Cal. Unemployment Ins. Appeals Bd.*, 493 P.3d 196, 202 (Cal. 2021). And MySitePlan's contention about the Building Code is irrelevant because, at most, it would have provided MySitePlan with an argument that it did not violate the Act, an argument it abandoned when it dropped its administrative appeal.

**2. The Complaint does not allege a plausible equal protection violation.**

MySitePlan argues that "the Board has no legitimate interest in banning" MySitePlan's drawings while not "banning the substantially identical drawings created by hundreds of homeowners and contractors." Opening Br. at 52. This argument is based on a faulty premise: the Act *does not exempt* either homeowners or contractors from the licensure requirements, but rather expressly applies to any "person, including any person employed by the state or by a city, county, or city and county within the state." § 8726(a). Thus, MySitePlan's argument that irrational exemptions to a statute may raise equal protection concerns fails for the simple reason that MySitePlan's claimed exemption does not exist.[13]

[13] MySitePlan's suggestion that the Board's counsel conceded at the hearing that homeowner-prepared site plans "similar" to MySitePlan's would not be subject to the Act, Opening Br. at 59, is patently untrue. Counsel was asked by the Court *if a sketch drawn by a homeowner on a*

Because MySitePlan is not a member of any identifiable protected class, any Equal Protection claim must rest on a "class-of-one" theory, which requires plausible allegations that MySitePlan has been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Enquist v. Or. Dep't of Agr.*, 553 U.S. 591, 601 (2008); *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The district court held that MySitePlan did not allege a plausible class-of-one Equal Protection claim. Yet MySitePlan does not argue that it can satisfy the "class-of-one" requirements. *See* Opening Br. at 57-61.

The allegation that local permitting agencies accept, or even encourage, site plans prepared by unlicensed persons also does not amount to a valid claim against the Board.[14] As the district court held, under section 8790,

---

*blank sheet of paper* is the same thing as MySitePlan's site plans "from the Board's perspective." ER-036-37. Counsel responded that "[t]he Board deals with complaints as they come in. And if they got a complaint about a homeowner, they would look at what the homeowner is doing." ER-037. MySitePlan's site plans are not rough sketches and are advertised as a substitute for land surveys. ER-036-376. It was in that context that Counsel stated, "there's no case I am aware of where someone providing what is truly a rough sketch has ever been prosecuted and found to be in violation of the land surveying act." ER-038.

[14] MySitePlan does not allege that its maps are actually allowed under local ordinances. Regardless, the Act preempts any conflicting local laws. *Verner, Hilby & Dunn v. City of Monte Sereno*, 245 Cal. App. 2d 29, 31 (1966) (holding local ordinance which attempted to regulate the profession of land surveying was preempted).

"the Board is only responsible for prosecuting violations of the Act "'coming to its notice'." ER-21. Thus, MySitePlan's allegation that "hundreds, if not thousands, of non-surveyors in California routinely submit site plans based on copied GIS data or Google Maps to county and municipal building permit issuers," ER-100-01 is insufficient to state an equal protection claim. "[I]f those individuals were not reported to the Board, no intentional discrimination—and hence no denial of equal protection—plausibly occurred." ER-021. MySitePlan has not alleged that the Board discriminates in handling complaints of violations it receives, and it could not truthfully do so. *See* SER-332, SER-336-37; *see* SER-152-84. Indeed, it acknowledged that it could bring other violators to the Board's attention by filing complaints with the Board. SER-025.

## III. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING MYSITEPLAN'S MOTION FOR A PRELIMINARY INJUNCTION.

Because MySitePlan's claims all fail as a matter of law, the district court did not abuse its discretion in denying the motion for preliminary injunction. But the district court also correctly held that MySitePlan had failed to show irreparable injury or that the balance of equities tipped in its favor. ER-061-063.

A party seeking a preliminary injunction must show 'that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). In this Circuit, an injunction may be appropriate when a party has demonstrated "that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (citation omitted). The party seeking the injunction bears the burden of proof as to each element. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter*, 555 U.S. at 22

For the same reasons discussed in Sections I-II. above, the district court correctly held that MySitePlan had failed to show a likelihood of success on the merits of its claims, which is the most important of the *Winter* factors.[15]

[15] In the district court, MySitePlan did not argue that it could show a likelihood of prevailing on the merits of its substantive due process and equal protection claims.

MySitePlan also failed to show irreparable harm. "[T]o show irreparable harm, Plaintiff must establish not only that it will lose revenues that cannot be recuperated because of the Eleventh Amendment, but also that the lost revenues will be 'considerable.'" *Ariz. Hosp. & Healthcare Ass'n v. Betlach*, 855 F. Supp. 2d 984 (D. Ariz. 2012) (citing *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 596 F.3d 1098 (9th Cir. 2010)), *vacated on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2014)).

Here, MySitePlan's evidence of irreparable harm was limited to bare assertions that 16 percent of MySitePlan's "existing total business" is in California and it is "threatened with permanently losing" that business. ER-076. Not only was the "16 percent" claim unsupported by any actual data,[16] but the Board submitted evidence that many of the products MySitePlan alleges it sells, such as restaurant layouts, hotel and motel room layout maps, maps for farmers markets and events, etc., *see* ER-9, do not require measuring the distance between property lines and improvements or fixed

[16] Similarly, MySitePlan's conclusory statement concerning repeat California customers (ER-076) is speculative, and does not constitute irreparable injury. *See Goldies' Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984).

objects, and thus could be prepared and sold without a license. SER-301, SER-336. In short, MySitePlan failed in its burden of showing substantial, irreparable financial harm.

But in any event, the district court correctly held that "California is likely to suffer irreparable harm if the court were to enjoin enforcement of the Act," citing the Board's submitted declarations, and holding that "enjoining the law would prevent the state from conducting meaningful oversight of unlicensed land surveying . . . ." ER-063. The Opening Brief makes no effort to address this conclusion by the district court. *See* SER-294-337.)

## IV. ALTERNATIVELY, THE DISTRICT COURT ERRED IN HOLDING THAT THE REQUIREMENTS FOR *YOUNGER* ABSTENTION ARE NOT MET.

The Board respectfully submits that, as an alternative basis for affirming the judgment of dismissal, the district court should have abstained under *Younger v. Harris*, 401 U.S. 37.

Under *Younger*, a complaint seeking declaratory or injunctive relief that would interfere with certain state enforcement proceedings is subject to dismissal. "[T]he driving principle behind *Younger* was that in matters of special concern to the states, federal courts should avoid depriving the state courts of the opportunity to adjudicate constitutional issues." *M&A Gabaee*

*v. Cmty. Redevelopment Agency*, 419 F.3d 1036, 1040 (9th Cir. 2005). A federal court "must abstain in deference to state civil enforcement proceedings that: (1) are ongoing, (2) are quasi-criminal enforcement actions . . . , (3) implicate an important state interest, and (4) allow litigants to raise federal challenges." *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 727-28 (9th Cir. 2017) (citation omitted). Abstention is appropriate where, as here, "the federal action would have the practical effect of enjoining the state proceedings." *Herrera v. City of Palmdale*, 918 F.3d 1037, 1044 (9th Cir. 2019). As set forth below, all of the requirements for *Younger* abstention are met.

**A. There Are "Ongoing" State Court Proceedings.**

MySitePlan remains subject to the Board's cease and desist order, which is a form of injunction enforceable by the Board in the event of further violations.[17] Thus, there are ongoing state proceedings, notwithstanding the fact that MySitePlan paid the fine and dropped the appeal of the citation.

[17] Black's Law Dictionary 277 (11th ed. 2019) defines "cease-and-desist order" as "[a] court's or agency's order prohibiting a person from continuing a particular course of conduct. See INJUNCTION; RESTRAINING ORDER."

The district court held this factor was not met, simply because MySitePlan Plaintiffs dropped its appeal of the Citation Order before it filed suit in federal court. ER-010 note 2; ER-044-45. Defendants respectfully submit that the majority view among the Circuits—and the better view—is that the "ongoing" proceedings requirement is satisfied so long as there were state administrative enforcement proceedings for which judicial review would have been available, even when the subject of the enforcement action did not pursue the state enforcement proceedings to conclusion. *See San Jose Silicon Valley Chamber of Com. Political Action Comm. v. City of San Jose*, 546 F.3d 1087, 1093-94 (9th Cir. 2008), *abrogation on other grounds recognized in ReadyLink Healthcare, Inc. v. State Compensation Ins. Fund*, 754 F.3d 754 (9th Cir. 2014) (describing circuit split); *Alleghany Corp. v. Pomeroy*, 898 F.2d 1314 (8th Cir. 1990); *Majors v. Engelbrecht*, 149 F.3d 709, 712-13 (7th Cir. 1998); *Maymó-Meléndez v. Álvarez-Ramírez*, 364 F.3d 27, 32-36 (1st Cir. 2001); *O'Neill v. City of Phila*, 32 F.3d 785, 790-91 (3d Cir. 1994). State administrative proceedings and state court trial and appellate review "are viewed as single ongoing proceedings" for *Younger* abstention purposes, and unless the federal plaintiff commences his federal court proceedings before the state commences its own, the requirement that there be an "ongoing 'judicial in nature'" state proceeding is met. *Majors*,

149 F.3d at 712-13; *accord O'Neill*, 32 F.3d at 790-91. A contrary rule would allow a duplicative and disruptive "federal alternative to state appellate process," and would "cast doubt on the ability of state appellate courts to oversee their trial courts." *Majors*, 149 F.3d at 713 (cleaned up).[18]

To hold otherwise would draw an arbitrary distinction between civil and administrative proceedings that is not borne out in the case law. The Supreme Court has repeatedly held that a plaintiff cannot avoid *Younger* abstention by failing to defend or appeal state civil enforcement actions. Although the issue has not been definitively settled (*see New Orleans Pub. Servs., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 369-70 & n.4 (1989)), the Supreme Court has also strongly suggested that *Younger* applies when a plaintiff fails to appeal an administrative enforcement action. In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432-36 (1983), the Supreme Court held that attorney disciplinary hearings constituted an ongoing state judicial proceeding, and that there was

[18] Although this Court has not decided the issue, its decision in *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004), is consistent with the majority view that administrative proceedings and subsequent state-court writ proceedings are to be considered a single "ongoing proceeding." In the course of explicating the bad faith exception to *Younger* abstention, this Court held that state judicial proceedings must be viewed as "an extension" of any administrative proceedings. *Id*. at 969.

no reason to believe plaintiff could not have raised his constitutional claims in the state proceedings. In so doing, the Supreme Court followed its earlier decision in *Huffman v. Pursue, Ltd*., 420 U.S. 592 (1975), in which the Court rejected plaintiff's argument that abstention was not appropriate because the state proceeding had ended by the time the district court action was filed. "[*R*]*egardless of when the Court of Common Pleas' judgment became final, we believe that a necessary concomitant of Younger is that a party in appellee's posture must exhaust his state appellate remedies before seeking relief in the District Court, unless he can bring himself within one of the exceptions specified in Younger*. *Id*. at 608 (emphasis added).[19]

[19] Similarly, in *Juidice v. Vail*, 430 U.S. 327, 329-30 (1977), plaintiff was held in contempt of court, fined, and jailed after he did not appear at the state court contempt hearing. He then joined a federal class action, after which the district court declared the contempt statute unconstitutional and permanently enjoined its operation. The Supreme Court reversed the decision and held that *Younger* abstention was required. The Court was unconcerned about the fact that plaintiff had never appeared in the state court proceedings, holding that "[a]ppellees need be accorded only an opportunity to fairly pursue their constitutional claims in the ongoing state proceedings." *Id*. at 337.

Consistent with these principles, in *World Famous Drinking Emporium, Inc. v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir. 1987), plaintiff filed a constitutional challenge in federal court after a permanent injunction had issued against it, but before plaintiff appealed the state court judgment. In affirming the district court's dismissal of the action based on *Younger* abstention, this Court held that "[f]ailure to exhaust state appellate

Consistent with these Supreme Court decisions, a majority of appellate courts considering the issue have held that *Younger* applies—as in this case—when a plaintiff fails to appeal an adverse administrative decision. In *Alleghany Corp. v. Pomeroy*, 898 F.2d at 1316 n.5, the plaintiff filed the federal action after time had expired to seek state-court review of an adverse administrative ruling. The Eighth Circuit expressly held that the state proceedings were still "pending": "[I]t is well-settled that parties may not avoid the structures of *Younger* simply by allowing a state judgment to become final," and "[u]nless there is some reason to distinguish *Huffman [v. Pursue, Ltd*., 420 U.S. 592], this element of [the *Younger* test] is satisfied because Alleghany failed to present its constitutional claims to the state courts." *Id*. at 1317.

Similarly, in *Majors v. Engelbrecht*, 149 F.3d at 713, plaintiff argued that there were no ongoing proceedings when he filed his federal case because he filed his suit after the administrative hearing had ended and before he sought judicial review in state court; he also argued that "he could turn around and dismiss his state review tomorrow and file another § 1983

---

remedies satisfies the requirement that there be 'ongoing judicial proceedings' in order to justify federal abstention." *Id.*

suit," thereby avoiding the pending state proceeding problem. The Court disagreed.

> None of this matters, however, because unless a federal plaintiff beats the state to court—and gets past the preliminary stages, *Hicks v. Miranda*, 422 U.S. 332 [ ] (1975)—the time when the federal suit is filed is largely irrelevant. Since *Huffman v. Pursue, Ltd*., 420 U.S. 592 [ ] (1975), separate state trial and appellate review procedures are viewed as single ongoing proceedings. . . .
>
> ***
>
> Here, ignoring the fact that Majors filed for state court review, we have an analogous situation. The only distinction is that the proceedings here are administrative, not judicial—a distinction without a difference, if we read *Ohio State Civil Rights Commission v. Dayton Christian Schools, Inc*., 477 U.S. 619, 627[ ] (quoting *Gibson v. Berryhill*, 411 U.S. 564, 576–77[ ] (1973), "that 'administrative proceedings looking toward the revocation of a license to practice medicine may in proper circumstances command the respect due court proceedings' ") correctly.

*Id*.

The foregoing authorities strongly support dismissal under *Younger*. As explained, the Board's Citation Order contained an Order of Abatement directing MySitePlan to "cease and desist from" engaging in the unlicensed practice of surveying, and assessed a $1,000 fine. SER-140-42. MySitePlan appealed and requested a hearing. SER-146-47. Then, less than a week

before the scheduled hearing, MySitePlan withdrew the notice of appeal and expressly "accept[ed] the terms of [the] Citation," including the Order of Abatement. SER-149.

Because it dropped its appeal, MySitePlan remains subject to the Order of Abatement contained in the Citation Order, which prohibits it from violating section 8792(a) and (i)—that is, MySitePlan effectively is enjoined from practicing land surveying. *See Falhive v. City of Dana Point*, 72 Cal. App. 4th 241, 244-45 (1999) (comparing abatement order with injunction, the latter of which must be entered by a court). MySitePlan could have pursued its appeal before an administrative law judge, and if the Citation Order had been affirmed by the Board, sought review by writ of mandate in state court (Cal. Code Civ. Proc., § 1094.5), in which case it could have raised the same constitutional issues it raises here. Instead, MySitePlan effectively seeks to nullify the Order of Abatement by obtaining a federal court order enjoining the Board from enforcing it. *See* ER-120-21. For *Younger* abstention purposes, these state proceedings are "ongoing."

In sum, for *Younger* abstention purposes, state proceedings remain pending, even though MySitePlan withdrew its administrative appeal of the Citation Order.

### B. The State Proceeding Is Quasi-Criminal in Nature.

The Board proceeding is plainly a quasi-criminal enforcement action. The Citation Order charged plaintiffs with violation of section 8792(a) and (i), which makes the practice of land surveying without a license a misdemeanor. *See* ER-105; SER-140-42. These kinds of administrative enforcement proceedings satisfy the requirements for abstention under *Younger*. *See, e.g., Baffert v. California Horse Racing Bd.*, 332 F.3d at 618-620; *Kenneally v. Lungren*, 967 F.2d 329, 332-33 (9th Cir. 1992). Indeed, in *Gilbertson v. Albright*, 381 F.3d 965, 968-69 (9th Cir. 2004), this Court held that enforcement proceedings under Oregon's land surveyor licensing statute satisfied the requirements for *Younger* abstention.

### C. Regulation of Land Surveying in California Furthers Important State Interests.

In assessing the state's interests under *Younger*, courts look at the state proceedings in the most general sense, not merely the state's interest in the outcome of the particular case. *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. at 365. The Court considers whether the action concerns a central function of state government such that the "exercise of the federal judicial power would disregard the comity between

the States and the National Government." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 (1987).

Here, the Act implicates important state interests in maintaining the integrity of real property boundaries in the State, and protecting landowners and the public from incompetent and unreliable surveys. Indeed, in *Gilbertson v. Albright*, 381 F.3d 965, 983-84, a licensed land surveyor brought an action alleging that the state licensing board had violated his First Amendment rights in revoking and refusing to reinstate his license. *Id*. at 968. This Court held that "*Younger* principles apply here," *inter alia*, because the state proceeding "was in the nature of a judicial proceeding that implicates important state interests." *Id*. *Accord Credit One Bank, N.A. v. Hestrin*, 60 F.4th 1120, 1227 (9th Cir. 2023) (holding that, because the district attorney "sought to enforce state laws that protect consumers from predatory business practices, an important state interest was present" for *Younger* purposes).[20] *Accord Portrero Hills Landfill, Inc. v. Cnty. of Solano*, 657 F.3d 876, 883-84 (9th Cir. 2011).

[20] Other courts have reached similar conclusions. For example, in *Marohn v. Minnesota Board of Architecture, Engineering, Land Surveying, Landscape, Architecture, Geoscience, & Interior Design*, No. 21-1241 (JRT/LIB), 2021 WL 5868194 (D. Minn. Dec. 10, 2021), the court held that abstention was warranted in an engineer's First Amendment challenge to a

### D. There Was No Impediment to MySitePlan's Raising Its Constitutional Challenges in the Context of the State Proceedings.

California's administrative procedures allow litigants to raise federal challenges, including the federal challenges MySitePlan raises here. *Baffert v. California Horse Racing Bd.*, 332 F.3d at 618-620; *Kenneally v. Lungren*, 967 F.2d at 332-33 (9th Cir. 1992). "[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 629 (1986). Here, the Board's administrative decisions are subject to review by way of administrative mandamus under California Code of Civil Procedure section 1094.5, through which any federal constitutional claims could be resolved. *Kenneally v. Lungren*, 967 F.2d at 333.

### E. MySitePlan Is Attempting to Use This Action to Interfere With Ongoing State Enforcement Proceedings.

Finally, MySitePlan patently has filed this action to interfere with an ongoing state enforcement proceeding. As noted, the Citation Order includes a cease and desist order. SER-140. Although MySitePlan paid the $1,000 penalty, it remains subject to the Order of Abatement, and the Board

---

state licensing law, in light of a pending state administrative proceeding. The court held that the state had an interest in the disciplinary proceeding "in order to ensure the safe and well-regulated practice of engineering." *Id.*

has continuing jurisdiction to enforce it in the event of future violations. In a transparent attempt to frustrate the Board's jurisdiction, MySitePlan prays for an "injunction prohibiting Defendants from enforcing [the Act], and in particular Cal. Bus. & Prof. Code §§ 8726(a)(1), (7), and (9), and 8792(a) and (i) against Plaintiffs." ER-120-21. Indeed, MySitePlan sought a preliminary injunction seeking the same relief during the pendency of this action. Thus, MySitePlan brought this action to end-run and directly interfere with the Board's enforcement proceeding. *See Baffert v. Cal. Horse Racing Bd.*, 332 F.3d at 617 ("Plaintiff seeks to enjoin state administrative proceedings, so there is 'no doubt' that the federal injunctive relief would interfere directly with those proceedings.").

**F. No Exception to Abstention Is Present.**

An exception to *Younger* abstention may exist where an administrative prosecution is in bad faith, or extraordinary circumstances exist. *See Baffert v. Cal. Horse Racing Bd.*, 332 F.3d at 621. Here, the Complaint alleges neither bad faith nor extraordinary circumstances.

In sum, because all of the requirements are met and no exception applies, *Younger* abstention provides an alternative basis to affirm the judgment.

## CONCLUSION

The Court should affirm the judgment of the district court as well as its order denying Plaintiffs' motion for a preliminary injunction.

Dated: July 12, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General

*/s/ Sharon L. O'Grady*
SHARON L. O'GRADY
Deputy Attorney General
*Attorneys for Defendants*

SA2023300548

23-15138

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| |
|---|
| **CROWNHOLM, RYAN, et al.,**<br>Plaintiffs,<br>**v.**<br>**RICHARD B. MOORE, et al.,**<br>Decedents. |

## STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: July 12, 2023

Respectfully submitted,

ROB BONTA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General

*/s/ Sharon L. O'Grady*
SHARON L. O'GRADY
Deputy Attorney General
*Attorneys for Defendants*

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

## Form 8. Certificate of Compliance for Briefs

*Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf*

**9th Cir. Case Number(s)** 23-15138

I am the attorney or self-represented party.

**This brief contains** 15,369 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ◉ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ■ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** s/ Kazzi Figueroa-Lee **Date** 7/12/23
*(use "*s/[typed name]*" to sign electronically-filed documents)*

# CERTIFICATE OF SERVICE

Case Name: **Crownholm, Ryan, et al. v. Richard B. Moore, et al. [Appeal]** Case No. **23-15138**

I hereby certify that on July 12, 2023, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **ANSWERING BRIEF**
- **ADDENDUM TO ANSWERING BRIEF**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on July 12, 2023, at San Francisco, California.

K. Figueroa-Lee
Declarant

Signature

SA2023300548
43790376.docx