NO. 23-15138

In The
United States Court of Appeals
For The Ninth Circuit

RYAN CROWNHOLM; and **CROWN CAPITAL ADVENTURES, INC., d/b/a MYSITEPLAN.COM**,

Plaintiffs-Appellants,

v.

RICHARD B. MOORE, in his official capacity as Executive Officer of the California Board for Professional Engineers, Land Surveyors, and Geologists, 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
HON. DALE A. DROZD

BRIEF OF APPELLANTS

Michael Greenberg
INSTITUTE FOR JUSTICE
901 N. Glebe Road,
Suite 900
Arlington, VA 22203
(703) 682-9320
mgreenberg@ij.org

Paul V. Avelar
INSTITUTE FOR JUSTICE
398 S. Mills Ave.,
Suite 301
Tempe, AZ 85281
(480) 557-8300
pavelar@ij.org

S. Michael Kernan
THE KERNAN LAW FIRM, APC
9663 Santa Monica Blvd.,
Suite 450
Beverly Hills, CA 90210
(310) 490-9777
mkernan@kernanlaw.net

Counsel for Plaintiffs-Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states: Plaintiff-Appellant Crown Capital Adventures, Inc., d/b/a MySitePlan.com, is a Delaware corporation with no parent corporation. No publicly held entity owns 10% or more of its stock.

Dated: May 10, 2023

/s/ Paul V. Avelar
Paul V. Avelar

Counsel for Plaintiffs-Appellants

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants respectfully submit that oral argument is warranted in this case in light of the importance of the free speech rights at issue, continuing uncertainty regarding the application of recent precedents from this Court and the Supreme Court, and the potential for similar controversies to arise from the application of the laws of other states within this Circuit.

STATEMENT OF JURISDICTION

Plaintiffs-Appellants filed this civil-rights action for declaratory and injunctive relief against Defendants-Appellees, the executive officer and members of the California Board for Professional Engineers, Land Surveyors, and Geologists, in their official capacities on September 29, 2022, in the United States District Court for the Eastern District of California. The district court had federal question jurisdiction under 28 U.S.C. § 1331 because Plaintiffs-Appellants' causes of action arise under the First and Fourteenth Amendments to the U.S. Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Excerpts of Record ("ER") 095.

The district court (Judge Dale A. Drozd) denied Plaintiffs' motion for a preliminary injunction, ER-041-064, then granted Defendants' motion to dismiss the complaint with prejudice under Rule 12(b)(6), ER-004-22. Final judgment disposing of all claims was entered January 24, 2023. ER-003. Plaintiffs noticed their appeal on January 30, 2023. ER-122-24.

This Court has jurisdiction over this appeal from a final judgment under 28 U.S.C. § 1291. Plaintiffs-Appellants' appeal is timely under Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Does the Board's restriction of Plaintiffs' ability to create and disseminate non-authoritative site plan drawings because they "depict the location of property lines, fixed works, and the geographical relationship thereto" violate Plaintiffs' right to free speech under the First Amendment?

Plaintiffs raised this issue in their motion for a preliminary injunction, D. Ct. ECF 12-1, 9-15, and opposition to the motion to dismiss, D. Ct. ECF 17, 9-16. The applicable standards of review are set forth below.

2. Are Cal. Bus. & Prof. Code § 8726(a)(1), (3), (7), and (9) unconstitutionally overbroad because they require a license to make even informal, non-authoritative depictions of property lines and fixed works?

Plaintiffs raised this issue in their motion for a preliminary injunction, D. Ct. ECF 12-1, 15-20, and opposition to the motion to dismiss, D. Ct. ECF 17, 16-19. The applicable standards of review are set forth below.

3. Are Cal. Bus. & Prof. Code § 8726(a)(1), (3), (7), and (9) void for vagueness because they do not provide fair warning of which depictions of property lines and fixed works require a license and which do not, thereby allowing arbitrary application of the licensing requirement?

Plaintiffs raised this issue in their motion for a preliminary injunction, D. Ct. ECF 12-1, 20-23, and opposition to the motion to dismiss, D. Ct. ECF 17, 19-22. The applicable standards of review are set forth below.

4. As applied to Plaintiffs, does California's land-surveying licensure requirement violate due process or equal protection given the thousands of other non-surveyors who also draw non-authoritative site plans which are accepted by California building departments?

Plaintiffs raised this issue in their opposition to the motion to dismiss, D. Ct. ECF 17, 21-25. The applicable standard of review is set forth below.

Appellants refer the Court to their concurrently filed addendum setting forth the pertinent statutes, regulations, and constitutional provisions cited in their Argument below. *See* Cir. R. 28-2.7.

STATEMENT OF CASE

I. Local California building departments teach Ryan—and thousands of people like him—how to draw site plans using publicly available information.

Plaintiff Ryan Crownholm was a licensed contractor in California whose projects often required a permit from a local government building department. ER-066-67, ER-096-97. These departments often required submission of a site plan drawing to apply for a permit. ER-067, ER-097. A site plan is required for a permit for all sorts of projects, even those of small scale. ER-067, ER-097.

Site plan drawings only need to show the basic layout of a property—a depiction of the property's physical features and their location relative to property lines—and an explanation of the changes proposed to be made to the property. ER-067, ER-097. As Monterey County explains:

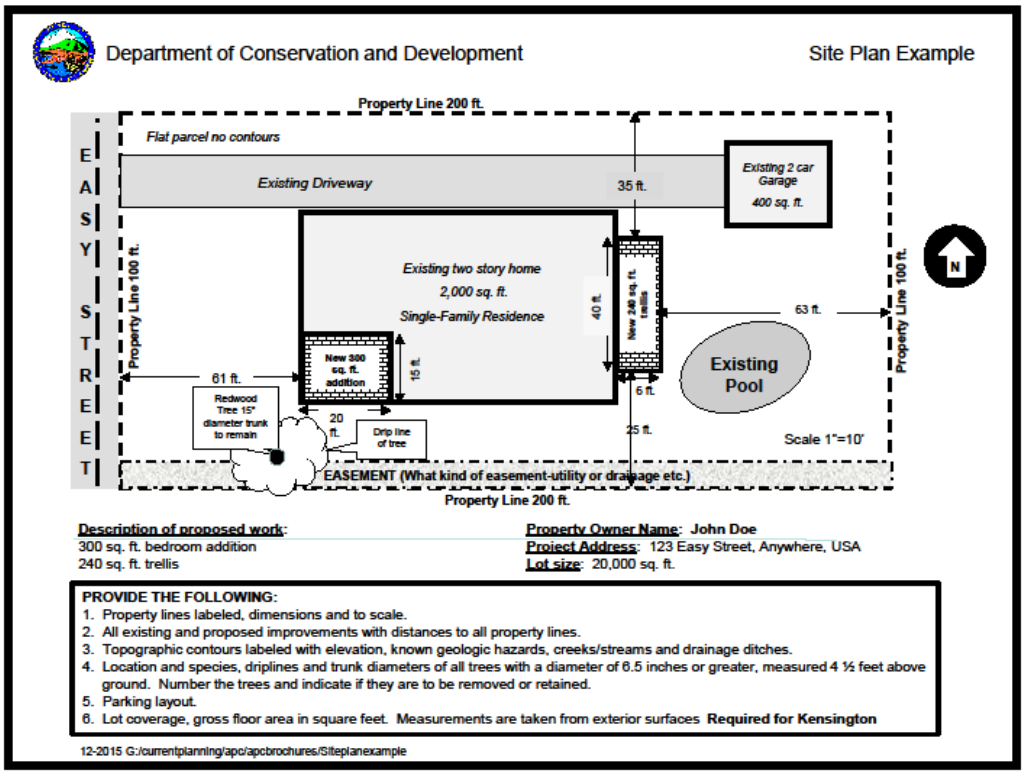
> **What is a Site Plan?**
>
> A Site Plan is a drawing depicting the site of a proposed or existing project. Some of the key elements of a Site Plan are property boundaries, land topography, vegetation, proposed and/or existing structures, easements, wells, and roadways.
>
> **Why is a Site Plan Needed?**
>
> A site plan is required for most permit applications, pre-application meetings, and submittals. It provides a visual image of your proposal and is used to assist in determining if your project conforms to land use policies and regulations. A Site Plan submitted as part of a permit application needs to show all of the items listed below. However, a simple sketch is fine for beginning discussion.

https://www.co.monterey.ca.us/government/departments-a-h/housing-community-development/development-services/building-services/preparing-a-site-plan (cited at ER-068). Or, as Napa County explains, site plan drawings are required so the planning office can "have a clear and concise view of the existing development on the property and the scope of your project." https://www.countyofnapa.org/DocumentCenter/View/7162/Sample-Site-Plan-PDF (cited at ER-068, ER-098).

For larger projects, departments may require plans to be submitted by a licensed professional—like a licensed surveyor. ER-067-68, ER-097-98. But for

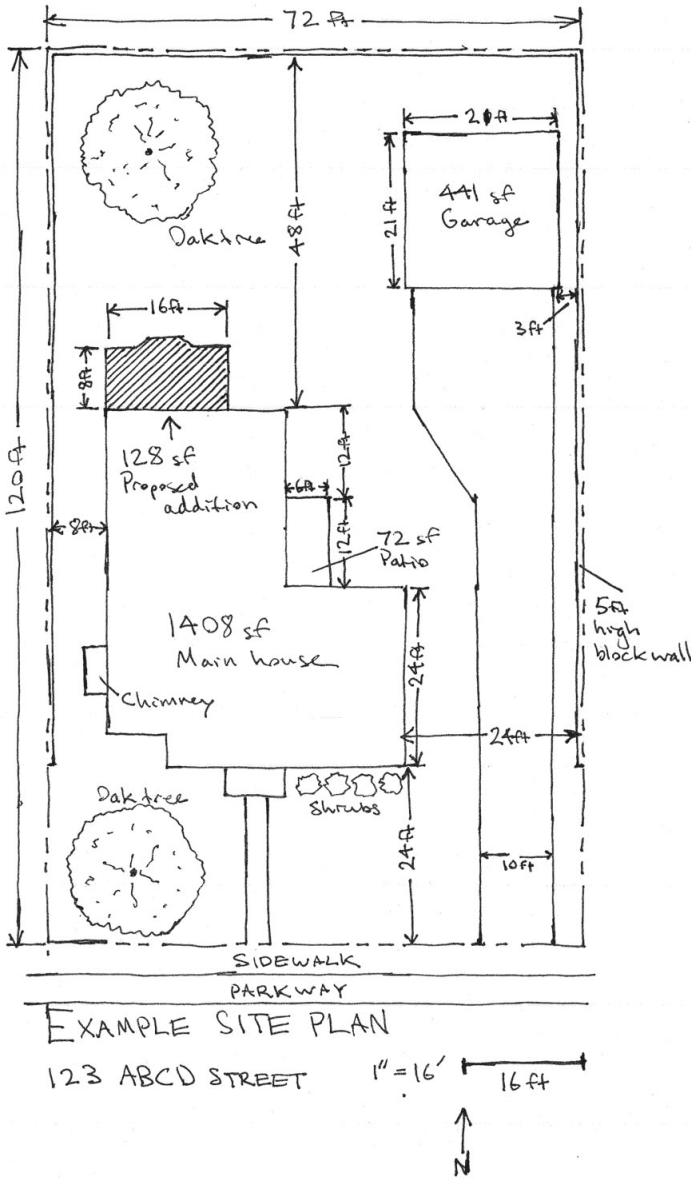
smaller projects, departments regularly accept site plans drawn by people who are not licensed surveyors, because in many instances, those local governments just need a general picture of the site. ER-069, ER-099.[1] Thousands of contractors and homeowners regularly make site plans and submit them to local jurisdictions. ER-100-01.

Indeed, building departments often provide detailed instructions and exemplars for lay people to use in preparing their own site plans. ER-068, ER-079-83. Contra Costa County instructs unlicensed people on how to draw site plans and what information to include by providing an exemplar:



[1] Similarly, architectural or other drawings may need to be prepared by a "design professional" but, in some cases, can be done by an "unlicensed person." ER-097.

ER-080, ER-098. The City of San Gabriel also advises homeowners how to prepare site plans and provides an exemplar:



ER-082. These site plans must include:

- Property lines and dimensions;
- Scale and scale bar;
- Dimensions and square footage of all buildings and structures including house, garage, porches, decks, patios and sheds;
- Dimensions of all parking areas and driveways;

- Fences and walls, with height and materials labeled;
- Roof overhangs, bay windows, and chimneys; and
- Trees and landscaping.

ER-082; *see also* ER-080. And the city specifically recommends using Los Angeles County Assessor Geographic Information Systems ("GIS") maps[2] to determine the "boundaries," "dimensions," and "size" of the property, and to then add the locations and measurements of "all structures and other physical features" on the site plan. ER-083, ER-099-100. Many other county and city building departments provide similar guidance and example plans for homeowners. *See* ER-068, ER-098-99.

Ryan learned how to draw site plans from these local governments. As a contractor, he spent hours drawing site plans to obtain permits. ER-069, ER-099. He started by hand-tracing data and images from GIS maps provided by local governments or even from Google Maps—exactly as local planning staffers taught him. ER-069, ER-099.

[2] GIS is "a computer system capable of assembling, storing, manipulating, and displaying geographically referenced information." *Env't Prot. Info. Ctr. v. U.S. Forest Serv.*, 432 F.3d 945, 946 (9th Cir. 2005). GIS is used in a variety of industries. ER-100. GIS maintained and made publicly available by county and municipal governments display parcel property boundaries, property ownership and tax records, parcel addresses, property building and other coverage, orthoimagery (aerial and/or satellite imagery geometrically corrected to a uniform scale), and other information. ER-100. Because GIS is at a uniform scale, they often allow measurements of distances, dimensions, and area to be calculated within the GIS based on polygon drawings. ER-100.

Later, Ryan learned to use this same GIS data to create electronic site plan drawings in a Computer-aided Design (CAD) program. ER-069, ER-101. He would take the preexisting maps and aerial or satellite photography he used to hand-trace, and instead copy the relevant elements into a CAD program to create a new drawing based on that information. ER-069, ER-101.

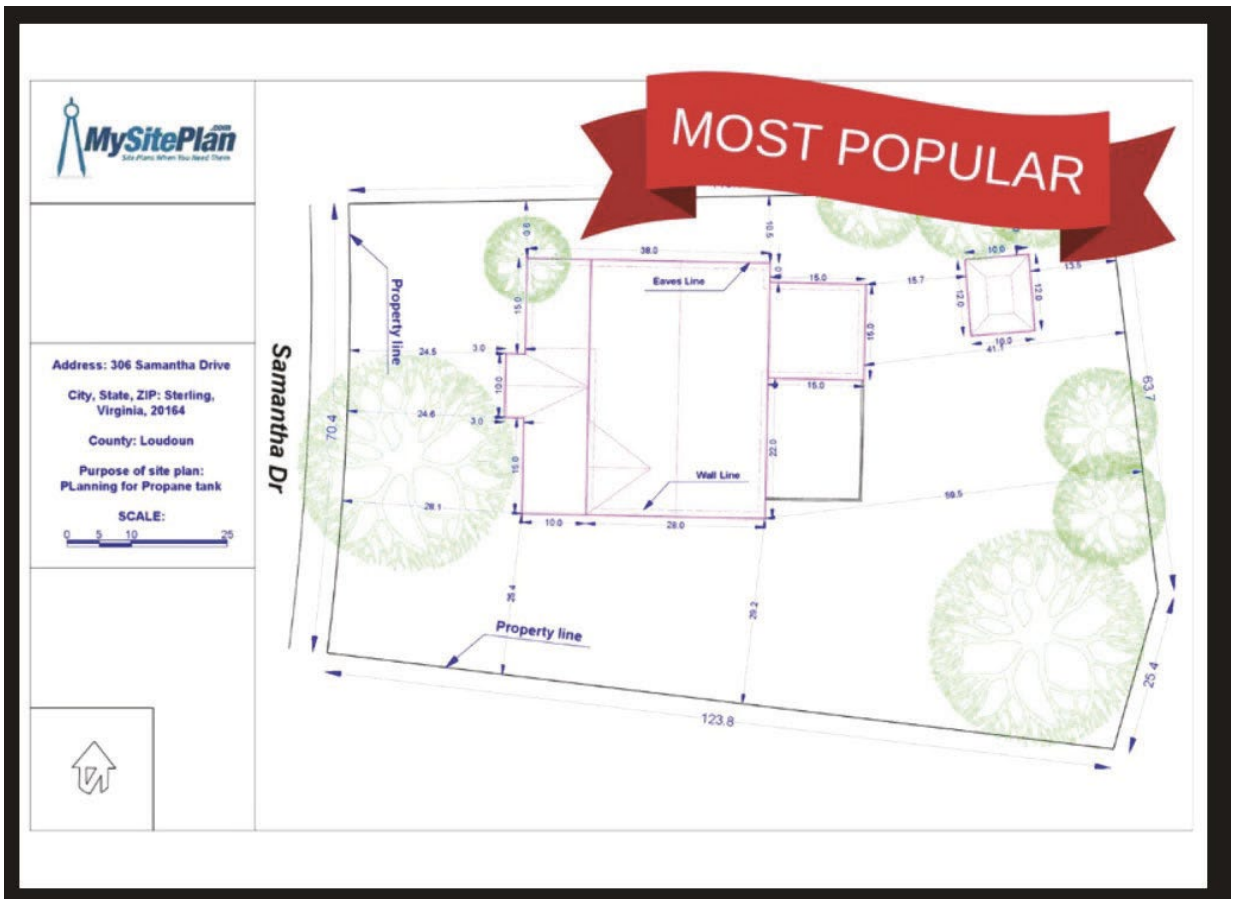
Local government building departments always accepted Ryan's site plan drawings. ER-070, ER-101. In fact, they appreciated Ryan's electronic drawings because they were easier to use and more informative than the typical hand-drawn plans submitted by homeowners and contractors. ER-070, ER-101. No one thought that Ryan—or anyone else—needed a surveyor license to re-draw existing information that local governments made publicly available. ER-070, ER-101. Soon, other contractors began asking Ryan to create site plan drawings for their projects. ER-070, ER-101.

II. Ryan creates MySitePlan.com.

This experience led to Ryan founding MySitePlan.com in 2013. ER-070, ER-101.[3] MySitePlan.com has created and sold tens of thousands of site plan drawings in jurisdictions with publicly available GIS data, including Canada, Australia, and nearly all U.S. states. ER-071, ER-104. It takes publicly available GIS data and

[3] MySitePlan.com is the d/b/a name of Plaintiff Crown Capital Adventures, Inc., which is wholly owned and operated by Ryan. ER-066, ER-095.

satellite imagery and copies that information into a CAD program to prepare a new site plan drawing, just as Ryan learned from California building departments. ER-071, ER-102. Just like the exemplars provided by local governments, MySitePlan.com's drawings include the location and dimensions of property lines, the location and dimensions of buildings and other improvements, a scale, and a description of the proposed work:



ER-085, ER-102-03.

Because MySitePlan.com was born of Ryan's experience as a contractor, ER-070, ER-101-02, many of MySitePlan.com's customers still use its site plan

drawings for submission to local government building departments when a surveyor is not required for the project, ER-072, ER-101. But customers also use MySitePlan.com's drawings for other general planning or informational uses. For example, wedding venues, farmers' markets, and other event holders use them in layout planning, and apartment complexes, hotels, and motels use them to show tenants and guests the location of—and give directions to—buildings, units, and rooms. ER-072-73, ER-103-04.

To prevent customers from believing MySitePlan.com's drawings are a survey made by a licensed surveyor, MySitePlan.com is headed by a disclaimer reading: "THIS IS NOT A LEGAL SURVEY, NOR IS IT INTENDED TO BE OR REPLACE ONE." ER-070, ER-101. It informs customers that it makes "no representation regarding the accuracy of [its] sources." ER-070, ER-102. Another disclaimer warns: "**Before ordering:** Please verify with your building department that they **DO NOT** require that the plan to be prepared by surveyor, architect or engineer [sic]. **This is not a Legal Survey, nor is it intended to be or replace a Legal Survey.** We are a Drafting Company and do not stamp, sign or seal plans. Our plans are noncertified."[4] ER-070, ER-101. Neither Ryan nor MySitePlan.com have ever claimed to be a surveyor or to do surveys. ER-072, ER-102.

[4] Licensed surveyors have a state-created "stamp or seal" that must be used to sign and stamp or seal their documents. Cal. Bus. & Prof. Code §§ 8750, 8761. A non-licensee may not stamp or seal documents. *Id.* As MySitePlan.com's website

III. California's licensing requirement for—and broad definition of—land surveying.

California regulates land surveying through its Professional Land Surveyors' Act (Cal. Bus. & Prof. Code §§ 8700 *et seq*.), rules and regulations promulgated pursuant to the Act, and policies of the Board for Professional Engineers, Land Surveyors, and Geologists (the "Board"). It is a misdemeanor to practice land surveying, offer to practice land surveying, or manage any place of business from which land surveying work is solicited, without a license from the Board. Cal. Bus. & Prof. Code § 8792(a), (i).

In relevant part, a person in California practices land surveying requiring a license when he does or offers to do any 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.[5]
>
> …
>
> (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.

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explains, a "certified site plan is a site plan that is prepared by and stamped by an architect, engineer, or surveyor and requires a high level of accuracy" but a "non-certified site plan is one that can be created by a homeowner, unlicensed individual, or a company like My Site Plan." ER-070-71, ER-102. Every drawing prepared by MySitePlan.com includes the company's name, but none carry a signature, seal, or certification. ER-071, ER-102.

[5] The fixed works described in section 6731 include all "buildings" and "municipal improvements," like roads, bridges, and railroads.

> …
>
> (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.

Cal. Bus. & Prof. Code § 8726(a). None of these terms are further defined—what it means, for example, to *locate* or *retrace* the alignment of a building or location of a property line—by statute or regulation. *Cf.* Cal. Code Regs. Tit. 16, § 404(w) (defining "land surveying" as "that practice defined in Section 8726 of the Code."). Nor is the definition of land surveying limited to attempts to establish location information with official, legally authoritative certainty. *Cf.* Cal. Bus. & Prof. Code § 8726(a)(12) (separately including "[d]etermin[ing] the information shown or to be shown within the description of any deed, trust deed, or other title document" as surveying). The plain text could include—and thus, require a surveying license for—a person offering their informal opinion about where fixed works or property lines are located, or simply retracing that information from an existing map for informational uses.

IV. Longstanding concerns that practice-of-surveying laws sweep too far.

There have long been concerns that, without such a limitation, the defined scope of "surveying" sweeps too far. Even twenty years ago, experts recognized that "literal[ly] interpret[ing]" many "practice of surveying" definitions would render much spatial and geographical information—including GIS—illegal in the hands of anyone other than licensed surveyors. ER-107. Accordingly, beginning in 2006, the National Council of Examiners for Engineering and Surveying (NCEES), which is made up of every engineering and surveying licensing board in the country, promulgated Model Rules to distinguish activities and uses of spatial data that should require a license from those that should not. ER-107. The distinction drawn by the NCEES Model Rules is that surveyor licensing requirements should extend only to activities purporting to establish "authoritative location," but not to non-authoritative uses of location data such as "reference[s] for planning, infrastructure management, and general information." ER-107-09 (setting forth NCEES Model Rule § 210.25 (Sept. 2021) in its entirety).

While some other states followed the NCEES's lead to limit the reach of their land-surveying laws,[6] California has not. ER-109. As described below, its

[6] *E.g.*, Miss. Bd. of Licensure for Prof'l Eng'rs & Land Surveyors, *Declaratory Opinion: The Practice of Surveying* (Feb. 6, 2019), *available at*: https://www.pepls.ms.gov/sites/pepls/files/PEPLS%202020/Board%20Opinions%2C%20communications%20etc/Opinion%20-%20Surveying%20-%20pg%201-3%20v2%20(6).pdf (last accessed May 9, 2023); *see also Se. Reprographics, Inc.*

enforcement against Plaintiffs makes clear that California law criminalizes a vast amount of mapmaking and conveying of information about property without a land-surveying license, no matter how informal or non-authoritative the use of the map or information. ER-109.

V. The Board cites Plaintiffs for violating California's surveyor-licensing law for drawing pictures of property.

No one—not Plaintiffs, nor their clients, nor local building departments—thought Plaintiffs' non-authoritative maps required a land-surveying license. ER-070-72, ER-101. But the Board does, and it cited Plaintiffs for engaging in "land surveying" without a license.[7] On December 28, 2021, the Executive Officer for the Board, who is a licensed land surveyor, issued Plaintiffs a citation. ER-074, ER-087-92, ER-104. The citation directed Plaintiffs to pay a $1,000 fine and to "cease and desist from violating Business & Professions Code section(s) 8792(a) and (i)," which make it a misdemeanor to practice land surveying without a license. ER-074, ER-087-92, ER-104-05.

The citation asserted that Plaintiffs' site plan drawings are illegal without a license because, under Cal. Bus. & Prof. Code § 8726(a)(1) and (7), "[p]reparing

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v. Bureau of Prof'l & Occupational Affairs, 139 A.3d 323, 332-33 (Pa. Commw. Ct. 2016) (company that created GIS database and map to geographically locate and identify a customer's physical assets did not violate practice act).

[7] Though not known until after this litigation began, the citation was based on a licensed surveyor's complaint. D. Ct. ECF 13-1 at 12-16.

site plans which depict the location of property lines, fixed works, and the geographical relationship thereto falls within the definition of land surveying." ER-074, ER-087-92, ER-104-05. Relatedly, the citation explained, under subsection (a)(9), "[o]ffering to prepare … site plans which show the location of property lines, fixed works, and the geographical relationship thereto, falls within the definition of land surveying." ER-074, ER-087-92, ER-104-05.

The Board has never asserted that Plaintiffs claim to be licensed surveyors. ER-075, ER-106. Neither does the Board claim that Plaintiffs' site plans authoritatively determine the location of property lines, fixed works, or the geographical relationship thereto, or purport to do the same. ER-075; *see* ER-109. Instead, the Board requires a license merely for drawing and disseminating the basic site plans that Plaintiffs have drawn and disseminated for more than a decade; that hundreds or thousands of lay people, including homeowners and contractors, routinely draw and submit to local building departments throughout California; that those local building departments routinely accept and teach lay people to draw; and that are used for a variety of general informational, non-authoritative purposes. ER-068-69, ER-071-73, ER-075, ER-111-12.

On September 21, 2022, Ryan signed a notice agreeing not to appeal the citation and paid a $1,000 fine. ER-075, ER-106.

VI. Proceedings before the district court.

Plaintiffs filed suit on September 29, 2022, alleging three counts. ER-093-121. First: Plaintiffs' creation and dissemination of location information in the form of site plan drawings is speech and the Board's requirement that Plaintiffs obtain a license to engage in that speech violates Plaintiffs' First Amendment rights. ER-112-15. Second: By criminalizing virtually all mapmaking or retracing of existing maps, no matter how informal, California's definition of land surveying is so overbroad that it is facially unconstitutional. Or, if the Board retreats from that plain reading of the statute, California's definition of land surveying is facially void for vagueness because there is no way to determine from the statute which maps are prohibited and which are not. ER-115-18. Third (and in the alternative): Even if Plaintiffs' drawings are not speech, the Board's requirement that Plaintiffs obtain a land-surveying license to create their non-authoritative site plan drawings is so irrational as to violate Plaintiffs' substantive due process and equal protection rights. ER-118-20.

The complaint sought declaratory and injunctive relief against enforcement of Cal. Bus. & Prof. Code §§ 8726(a)(1), (7), and (9), and 8792(a) and (i). ER-121. Plaintiffs also sought a preliminary injunction on their as-applied free speech claim and their facial overbreadth/vagueness claim. D. Ct. ECF 12. The Board opposed a

preliminary injunction, D. Ct. ECF 13, and, separately, sought to dismiss the complaint entirely under Rule 12(b)(6), D. Ct. ECF 15.

The district court denied the preliminary injunction, ER-041-64, then granted the motion to dismiss, ER-004-22. While it never squarely held whether Plaintiffs' drawings are speech, it rejected Plaintiffs' free speech and overbreadth claims because, in its view, California's land-surveying laws generally "regulate[] what activities fall within the ambit of land surveying requiring licensure, not what one can say." ER-051; *see* ER-010-12, ER-015-17. It rejected Plaintiffs' vagueness claim because "a person of ordinary intelligence would understand from the plain language of the statute" that a license is required to "retrace … boundary lines," even from "preexisting public [GIS] data." ER-014. And it rejected Plaintiffs' substantive due process and equal protection claims, finding it not even plausible that it is irrational to prohibit Plaintiffs' drawings, "even if the site plans do not purport to be authoritative" and thousands of other people do the same drawings. ER-017-21.

This appeal, incorporating both the district court's dismissal and denial of a preliminary injunction, followed. ER-122-24.

SUMMARY OF THE ARGUMENT

For more than a decade—first as a contractor, later as MySitePlan.com—Ryan has used preexisting, publicly available, GIS data to create site plan drawings

for submission to building departments and for many other purposes. Thousands of other non-surveyors do the same. No one—including local government building departments—thought Ryan was engaged in the practice of surveying when he made site plan drawings. Nevertheless, the Board, based on a licensee's complaint, cited Plaintiffs for unlicensed surveying because MySitePlan.com's drawings "depict the location of property lines, fixed works, and the geographical relationship thereto."

First, at the heart of both the district court's denial of the preliminary injunction and its granting of the motion to dismiss is its failure to recognize that this is a case about speech rights. The Supreme Court has repeatedly made clear that, in determining whether the government is infringing *speech* or *conduct*, courts should not look to the entire universe of activity a law might cover but rather at the precise activity the plaintiff engages in that triggers application of the law *in that case*. *E.g.*, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010). But the district court looked to what California's land-surveying laws regulate *generally*, not what those laws are being used to regulate *in this case*—exactly the framework *Holder* says courts should *not* use in as-applied challenges like this one. The court's error taints both its denial of a preliminary injunction for Plaintiffs' as-applied free speech claim and its dismissal of that claim.

Under the proper legal standard, California's Professional Land Surveyors' Act is regulating Plaintiffs' speech, not conduct, because, as applied in this case, it is regulating their use, creation, and dissemination of information. The Board is regulating based on the content of that speech: because Plaintiffs' drawings "depict the location of property lines, fixed works, and the geographical relationship thereto," regardless of the use of the drawings. And the Board cannot satisfy its burden under any form of First Amendment scrutiny. As both the Complaint and the preliminary-injunction record make clear, Plaintiffs' drawings are non-authoritative, are used for non-authoritative purposes, and building departments accept identical drawings from non-surveyors all the time. Indeed, building departments teach non-surveyors—including homeowners and contractors—how to draw the same site plans the same way that Plaintiffs do. Those facts preclude finding that, as applied, the restriction is narrowly tailored to achieving any purported interest. In short, if the proper legal standard is applied, not only have Plaintiffs stated a First Amendment claim, but they are also likely to succeed on the merits of that claim.

Second, this as-applied violation stems from the Act's facial overbreadth and vagueness. On its face and as applied here, the definition of "land surveying" criminalizes virtually all informal mapmaking by people without a license from the Board, regardless of the use of that drawing. But because the Board employs a

subjective, non-textual, haphazard interpretation to avoid that obvious overbreadth problem, the Board is free to engage in arbitrary and discriminatory enforcement—and Plaintiffs and others like them are without guidance as to which pictures they may draw and which they may not. Accordingly, not only have Plaintiffs stated a vagueness/overbreadth claim, but they are also likely to succeed on the merits.

Third, even if this case did not implicate First Amendment scrutiny, Plaintiffs have at least pled entitlement to relief under substantive due process and equal protection theories under the Fourteenth Amendment. Both protect the right to pursue one's chosen profession under the rational basis standard, and where plaintiffs plead facts plausibly demonstrating irrationality, they can proceed with their case. Here, Plaintiffs pled that their drawings do not implicate the interests supporting surveyor licensing and that thousands of other non-surveyors are free to make identical drawings, including for submission to local building agencies. These identical site plans by non-surveyors demonstrate both that the purported threat to public health and safety is not real and that there is no public health and safety distinction between Plaintiffs and their non-regulated counterparts.

Not only have Plaintiffs pled valid causes of action, they are likely to succeed on at least their free speech and overbreadth/vagueness claims. Because Plaintiffs will suffer—and are suffering—irreparable harm absent a preliminary injunction, and because the balance of equities and the public interest favor a preliminary

injunction, this Court should not only reverse and remand this case for further proceedings, it should order the entry of a preliminary injunction for the duration of those proceedings.

ARGUMENT

I. Standards of review.

This Court reviews "de novo the district court's grant of a motion to dismiss for failure to state a claim" as well as "[c]onstitutional questions implicating the First Amendment." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1067 n.3 (9th Cir. 2020) ("*PCHS*"). This Court accepts as true all factual allegations and determines for itself whether they are sufficient to state a claim for relief. *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 814 (9th Cir. 2016). A claim is sufficient if it is based on a cognizable legal theory and the facts alleged, accepted as true, make recovery on that claim "plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Yoshikawa v. Seguirant*, 41 F.4th 1109, 1114 (9th Cir. 2022).

Preliminary injunction denials are reviewed for an abuse of discretion, but the underlying legal conclusions are reviewed de novo. *Washington v. U.S. Dep't of State*, 996 F.3d 552, 560 (9th Cir. 2021). A district court's reliance on an "erroneous legal premise" is necessarily an abuse of discretion requiring reversal. *Fyock v. Sunnyvale*, 779 F.3d 991, 995 (9th Cir. 2015).

The "well established" standard for issuing a preliminary injunction contains four parts: (1) likelihood of success on the merits; (2) likelihood of irreparable harm absent preliminary relief; (3) whether the balance of equities favors the movant; and (4) whether the public interest favors relief. *Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014). This Court may also issue a preliminary injunction when a plaintiff raises "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff … so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "[T]he burdens at the preliminary injunction stage track the burdens at trial." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006). Thus, if plaintiffs make "a colorable claim that [their] First Amendment rights have been infringed, or are threatened with infringement," "the burden shifts to the government to justify the restriction." *Doe*, 772 F.3d at 570.

II. Plaintiffs have stated a free speech claim that is likely to succeed on the merits.

At the heart of the district court's error is its failure to apply the proper standard to determine if this is a speech case. Below, Plaintiffs establish that their site plans are speech (Section A); that the district court applied the wrong test to determine whether the Board is regulating Plaintiffs' speech or conduct (Section B); and that, because the Board is regulating Plaintiffs' fully protected speech and

cannot meet its narrow tailoring burden, Plaintiffs' claim is likely to succeed on its merits (Section C).

A. Plaintiffs' site plan drawings are speech.

Plaintiffs have pled facts showing their free speech rights are being violated. The use, "creation[,] and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). Therefore, "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id*. at 568. Accordingly, when a company wanted to "publi[sh] information submitted by members of the public"—specifically, the ages of film-industry professionals—this Court had no trouble applying *Sorrell* to determine that the company wanted to engage in speech. *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120-21 (9th Cir. 2020). Other circuits agree. *See, e.g.*, *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1195-96 (10th Cir. 2017) (collecting and recording "data relating to land or land use," including information about "air, water, [and] soil," constitutes "the protected creation of speech").

Under a straightforward application of that principle, Plaintiffs' site plan drawings are speech. Creating and disseminating information is speech under *Sorrell* and *IMDb*, and Plaintiffs "take existing data and information, including GIS data made available to the public by governments, and use it to create and

disseminate new information in the form of non-authoritative site plans." ER-113, ER-072; *see also* ER-069-72, ER-099-103 (describing process of making drawings). But Plaintiffs are prohibited from creating and disseminating those non-authoritative site plans because they "depict the location of property lines, fixed works, and the geographical relationship thereto [which] falls within the definition of land surveying." ER-074, ER-087-92, ER-104-05.

B. The district court applied the wrong test to determine if this case involves a regulation of Plaintiffs' speech or their conduct.

The district court did not squarely decide whether Plaintiffs' site plan drawings are speech. ER-010, ER-048-52. It only announced its view that California's land-surveying laws *generally* regulate conduct rather than speech, such that the law only incidentally regulates speech. ER-051-52. As explained below, the district court applied the wrong analysis as to both the speech-vs-conduct issue and the incidental regulation issue. Here, Plaintiffs' speech is being regulated, not their conduct, and that regulation is directly of their speech, not incidentally to their conduct. Indeed, Plaintiffs are engaged *only* in speech, precluding application of the "incidental burden" doctrine.

1. *Holder* and *PCHS* require examining what activity the Plaintiff engages in, not what the regulation does generally.

The district court's rejection of Plaintiffs' free speech claim is based on its failure to apply the proper standards. In the district court's view, Plaintiffs' free

speech challenge fails because California's land-surveying restrictions are *generally* aimed at restricting conduct, not speech. ER-050-51.

That analysis is directly contrary to the rule set forth in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). Under *Holder*, in as-applied cases like this one, courts are not to determine whether speech or conduct is being regulated by viewing the entire universe of activity a law might cover (as the district court did here). *Id*. at 27-28. Instead, courts must ask whether the precise activity the plaintiff engages in that triggers application of the law to them is speech or conduct. *Id*. In *Holder*, federal law prohibited providing designated terrorist groups with "material support or resources." *Id.* at 12. Because it is *primarily* aimed at prohibiting giving money to terrorist groups, the statute "generally functions as a regulation of conduct." *Id*. at 27. But the plaintiffs ran afoul of the statute by *teaching* designated terrorist groups "how to use humanitarian and international law to peacefully resolve disputes" and "how to petition … bodies such as the United Nations for relief." *Id*. at 21-22. Teaching is speech, so the Court held that, as applied to those plaintiffs, the statute regulated speech. *Id*. at 28. Accordingly, the as-applied challenge required the First Amendment's "more demanding standard." *Id*.

This rule is also established by *Cohen v. California*, 403 U.S. 15 (1971). There, Cohen violated a law barring disturbing the peace by "offensive conduct,"

which was a generally applicable regulation of conduct. *Id.* at 16. But it was enforced against Cohen because he was wearing a jacket bearing an epithet: "F**k the Draft." *Id.* The Court recognized that the generally applicable law was directed at him because of his speech—the content of the epithet. *Id.* at 18, 22. As applied to Cohen, then, the Court applied the usual rigorous First Amendment scrutiny to the statute. *Id.* at 19-26.

This Court has applied *Holder* in cases like this one. In *PCHS*, the law, as applied, prohibited a school from contracting to teach students without high-school education based on whether the class was vocational or recreational. 961 F.3d at 1069-70. The state maintained that this was part of a general regulation of conduct—specifically, of contractual relations between post-secondary schools and students. *Id.* at 1068-69. This Court, citing *Holder*, rejected that position because the law was *applied* to prohibit teaching based on the subject taught, and teaching is speech, so First Amendment scrutiny applied. *Id.* at 1069.

Other circuits apply *Holder* similarly. The Fourth Circuit has explained that under *Holder*, "it is well-established that a law *aimed* at regulating businesses can be subject to First Amendment scrutiny even though it does not directly regulate speech." *Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (emphasis added). Thus, in *Billups*, the court found that a tour-guide licensing law regulated the plaintiffs' speech, despite the government's claim that it was merely regulating

the "commercial transaction of selling tour guide services," because as applied it "prohibit[ed] unlicensed tour guides from leading visitors on paid tours," which was speech. *Id.* The Fifth Circuit's decision in *Vizaline, LLC v. Tracy*, 949 F.3d 927 (5th Cir. 2020) is also instructive. Like this case, *Vizaline* was an as-applied challenge to Mississippi's surveyor-licensing law by plaintiffs who used preexisting information to draw non-authoritative visualizations of property. *Id.* at 929. The district court found the licensing requirement "wholly exempt from First Amendment scrutiny simply because [it was] an occupational-licensing regime." *Id*. at 934. But the Fifth Circuit reversed and remanded, "reiterat[ing]" that "the relevant question" is instead whether the law regulates speech or conduct "as applied to Vizaline's practice." *Id*. at 931, 934.

The district court did not answer that question. Properly framed, the Board is regulating Plaintiffs' speech because, as explained above, Plaintiffs' drawings are speech. The First Amendment's "more demanding standard" is thus required. *Holder*, 561 U.S. at 28.

2. The Board is not regulating Plaintiffs' speech "incidentally" to regulating their conduct.

While the district court did not decide whether Plaintiffs were engaged in speech or conduct, it rejected Plaintiffs' as-applied claim in part because it believed the Act as a whole "regulates professional conduct with no more than an incidental burden on speech." ER-016. But that, too, answered the wrong question. Again, the

district court erred because it analyzed only what the statute did generally—not whether it was being applied to *these plaintiffs* because of their conduct or their speech.

Government may restrict a person's speech incidentally to restricting his conduct, but it may do so only if the person is engaged in related conduct. Where government regulates a person's speech but he is not engaged in related conduct, the government is regulating "speech as speech" which is not "incidental." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373-74 (2018) ("*NIFLA*"). In *NIFLA*, California mandated that pregnancy centers disclose specified information to their clients about different services offered by the state. *Id.* at 2368-69. The Court held this was not an "incidental" regulation of the centers' speech because it was "not tied" to performance of a medical procedure by the centers "at all." *Id.* at 2373-74. The Court contrasted *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where a mandated disclosure about a medical procedure was tied to the speaker's performance of that same procedure. 505 U.S. 833, 884 (1992).

Sorrell is similar. The government there prohibited selling, disclosing, or using "prescriber-identifying information" by pharmacies for marketing purposes. 564 U.S. at 557-59, 580. The government claimed this was "a mere commercial regulation," which therefore allowed "incidental burdens on speech." *Id*. at 566-67.

The Court rejected that argument because the only "conduct" identified by the government—the creation, use, and dissemination (sale) of information—was speech. *Id*. at 567, 570. The regulation therefore could not be incidental to any regulation of the speakers' conduct. *Id*. at 567-68. The Court distinguished prior valid applications of the "incidental" doctrine. For example, a ban on race-based hiring (conduct) can incidentally prohibit an employer's "White Applicants Only" sign (speech); a ban on outdoor fires (conduct) can incidentally prohibit flag burning (possibly speech); and the antitrust laws' prohibition on restraining trade (conduct) can incidentally prohibit agreements to restrict trade (speech). *Id*. at 568. The unifying theme: Speech can only be regulated "incidentally" to conduct if the restriction is triggered by the speaker's engagement in regulable conduct.

PCHS demonstrates this Court's application of the rule. There, the district court had held that California's restriction on enrolling paying students "regulated 'economic activity' that was 'speech-adjacent' and imposed only an 'incidental burden[] on speech.'" *PCHS*, 961 F.3d at 1069. This Court agreed the challenged law regulated enrollment agreements (conduct), but disagreed that the law was restricting the plaintiff's teaching (speech) incidentally to that conduct because the regulation's application was triggered by teaching specific subjects. *Id.* at 1069-72. Since "the topic discussed"—that is, the plaintiff's message—triggered the law's

application, this Court held that the law regulated speech as speech, not speech incidentally to conduct. *Id.* at 1073.

This Court's decision in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), also demonstrates the rule. *Conant* recognized that the government can prohibit physicians from *prescribing* marijuana, but held the First Amendment protects their *recommending* marijuana to patients. 309 F.3d at 635. Although both the recommendation and the prescription are carried out through words, only the prescription creates the legal entitlement to access a controlled substance. *Id*. In other words, a prohibition on prescribing survives because it targets words not for their "communicative content," *PCHS*, 961 F.3d at 1070-71, but for their independent legal effect, *Conant*, 309 F.3d at 635-39. Because the government policy in *Conant* prohibited speech regardless of any independent legal effect, this Court upheld an injunction barring the government from punishing mere recommendations. *Id*.

Finally, even this Court's decision in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), is in accord. Although the Court ultimately concluded that the restriction of the plaintiff's speech was triggered by his conduct—his provision of medical treatment, *id.* at 1073, 1075—the Court also re-affirmed the necessity of determining whether a plaintiff's speech or conduct is triggering the regulation, as in *PCHS*. *Id.* at 1075-76; *see also id*. at 1072 (discussing the speech-vs-conduct

distinction in *Conant*). In short, *Tingley*'s speech-vs-conduct determination was based on what the particular speaker in that case did to be regulated. That is the same analysis to be applied here.

Under these principles, the Board is regulating Plaintiffs' "speech as speech," *NIFLA*, 138 S. Ct. at 2374, not merely incidentally to their conduct. Again, Plaintiffs do not engage in *any* relevant conduct, and the district court did not identify any. ER-015-16, ER-051-52. Rather, Plaintiffs' drawings are speech. Part II.A, *supra*. And the Board's citation confirms that, like in *PCHS* and *Conant*, Plaintiffs' speech is regulated specifically because of its communicative effect: Plaintiffs are regulated solely because their drawings "*depict* the location of property lines, fixed works, and the geographical relationship thereto." ER-074, ER-105 (emphasis added). In that way, Plaintiffs' speech is regulated only because of its content, not for some other reason—for example, because it is submitted to the government or because of the independent legal effect it carries. Plaintiffs' drawings carry no independent legal effect; they are not used to authoritatively establish or alter location information, ER-072, ER-119. Indeed, they cannot be so used because they are not signed and stamped, ER-070-71, ER-102. Tellingly, the Board has never claimed that Plaintiffs violated the portion of the statute defining land surveying to include "[d]etermin[ing] the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose

of describing the limit of real property." *Cf.* Cal. Bus. & Prof. Code § 8726(a)(12). Moreover, Plaintiffs' drawings are not exclusively submitted to the government—they are used for many other informational purposes. ER-072-73, ER-103-04. But as the district court recognized, Plaintiffs cannot draw and "distribute 'site plans for permits' *or other uses*." ER-057 (emphasis added). *Cf. W. Watersheds Project*, 869 F.3d at 1195-96 ("data relating to land or land use" protected speech even when submitted to the government).[8]

Given the controlling precedents, Plaintiffs have stated a claim that the Board is regulating their "speech as speech" in violation of the First Amendment. The dismissal of that claim should therefore be reversed. And as explained below, that claim is likely to succeed because the Board cannot meet its narrow-tailoring burden.

C. Plaintiffs are likely to succeed on their free speech claim.

Under First Amendment scrutiny, the government bears an affirmative "burden" to "justify the restriction" on speech. *Doe*, 772 F.3d at 570. "This burden is not satisfied by mere speculation or conjecture"; it requires real evidence. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993). This burden is the same at the

[8] Nor does the Board's restriction stem from Plaintiffs' *sale* of their drawings. Regardless, speech is protected even when it "results from an economic motive," and a restriction on the sale of speech "imposes more than an incidental burden on protected expression." *Sorrell*, 564 U.S. at 567.

preliminary injunction stage: if plaintiffs make "a colorable claim that [their] First Amendment rights have been infringed … the burden shifts to the government to justify the restriction." *Doe*, 772 F.3d at 570.

Content-based restrictions like the one challenged here are "presumptively unconstitutional" and will only survive if the government can prove the regulation passes strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Here, the restriction is based on what the speech "depict[s]." ER-089. The Board therefore bears the burden of "prov[ing] that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171 (cleaned up).

But even if this Court assumes that California's surveyor-licensing law is a content-neutral restriction of Plaintiffs' speech, the Board still must meet intermediate scrutiny. *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality opinion) (declining to decide whether strict or intermediate scrutiny applied because speech restriction failed the more lenient test). Intermediate scrutiny requires the Board to prove that its restriction on Plaintiffs' speech is "narrowly tailored to serve a significant governmental interest." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). The regulation must "directly advance the asserted interest[] and must not be 'more extensive than is necessary to serve that interest.'" *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018). "California's burden under this test is 'heavy.'" *Id*.

Because the district court erroneously found the First Amendment inapplicable, it did not hold the Board to its burden of satisfying any level of heightened scrutiny. ER-052. Under the proper standard, the Board will be unable to meet its burden here.

Applying the wrong standard, the district court asserted that "'safeguard[ing] property and public welfare'" was an "important and legitimate state interest" supporting surveyor licensing. ER-053. In the court's view,

> surveying incorrectly done "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."

ER-053.

But these interests are hardly—if at all—implicated in this as-applied challenge. The Board therefore cannot meet its "heavy" burden to show narrow tailoring. *See Klein v. City of San Clemente*, 584 F.3d 1196, 1203 (9th Cir. 2009) (even if concern about litter is a sufficiently important interest, government must further demonstrate that "that the type of leafleting engaged in by Klein significantly increases the amount of litter in San Clemente").

First, Plaintiffs' site plans are used for purposes that do not implicate government concerns over "incorrect locations of property lines" or "construction of fixed improvements." These include organizing vendors at farmers' markets,

event planning at wedding venues, guiding people to buildings or parking at a hotel or apartment complex, visualizing where solar panels will be placed on an existing roof, and other general planning or information purposes. ER-072-73, ER-102-03. The Board prohibits Plaintiffs' drawings even for these "other uses," which the district court recognized but did not try to justify. ER-057.

Second, even when Plaintiffs' site plans are used to obtain building permits, they are used only when building departments accept site plans from non-surveyors. ER-070, ER-101. Plaintiffs' drawings are not signed or stamped—they are not "authoritative"—and building departments understand they cannot be used for the same purposes as work made by a licensed surveyor. ER-072, ER-101. This is why these building departments teach non-surveyors how to make these very same site plan drawings. ER-067-69, ER-097-100.

Third, Plaintiffs do not—and do not seek to—*authoritatively* determine the location of property lines or fixed works. As the NCEES's Model Rule § 210.25 demonstrates, there is a distinction between determining "authoritative" location (which should require licensure) and non-authoritative uses of location information as a reference for planning, infrastructure management, and general information (where there is no interest in requiring a surveying license). ER-107-09. Plaintiffs' non-authoritative drawings are used only for these more informal purposes. ER-072, ER-109. Indeed, municipalities have been teaching non-surveyors how to

create these same drawings for years, ER-067-69, ER-097-100, and in the district court, the Board could point only to hypothetical harms they might cause.

Moreover, the Board has not even attempted to show "that it seriously undertook to address" the claimed interest "with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494. Obtaining a surveying license requires many years of education, experience, and exams, ER-077, ER-109-11, which "impose[s] serious burdens on [Plaintiffs'] speech." *McCullen*, 573 U.S. at 487. Perhaps the license is the least intrusive way to meet the concerns about "incorrect locations of property lines" that might result from authoritative drawings. ER-050. But as explained above, Plaintiffs do not implicate that interest. Because the Board cannot demonstrate how its licensing requirement "directly advance[s]" its interests as applied to Plaintiffs' speech, *Italian Colors Rest.*, 878 F.3d at 1176, the Board cannot meet its burden.[9] A preliminary injunction is warranted.

[9] The district court's "alternative" basis for rejecting the free speech claim—"a long history of regulating land surveying"—fails for the same reasons. ER-054. While there is a history of regulating land surveying, there is no "long history" of regulating non-authoritative drawings of property. *See Hill v. Kirkwood*, 326 P.2d 599 (Cal. 1958) (interpreting prior version of statute, holding that surveyor license requirement did not apply to photogrammetry and map creation that did not "determine" property lines); 23 Ops. Cal. Att'y Gen. 86, 89 (Opinion No. 54-26, Feb. 11, 1954) (interpreting prior version of statute, determining that "topographic mapping is included in the practice of land surveying, or is excluded, according to its purpose or its method. Map making is not ipso facto surveying."); 19 Ops. Cal. Att'y Gen. 55, 55 (Opinion No. 51-124, Jan. 21, 1952) (interpreting prior version of statute, determining that "[w]here the functions of surveying, mapping and computing are carried on in connection with leveling agricultural crop land, they do

* * *

The heart of the district court's decisions in this case was that this case does not involve First Amendment rights. It so found because it applied the wrong legal standard; it looked at what the statute did generally, not what Plaintiffs do that triggers the statute's application to them. Under the proper standards, the Board is violating Plaintiffs' First Amendment rights. The pleaded facts demonstrate that dismissal was error. And the preliminary-injunction record demonstrates the Board cannot meet its burden under First Amendment scrutiny. This Court should reverse the dismissal, order entry of a preliminary injunction, and remand for further proceedings.

III. Plaintiffs have stated and are likely to succeed on their overbreadth and/or vagueness claim.

The district court's failure to recognize this as a free speech case also led it to erroneously reject Plaintiffs' facial overbreadth and vagueness claims. The Complaint and Plaintiffs' briefing establish that the Board's land-surveying restrictions inhibit speech about property and location information. Under the district court's logic, the Board can restrict—as "land surveying"—speech that people across California are engaging in all the time at the invitation of building

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not constitute the practice of civil engineering nor the practice of land surveying[.]"). Moreover, *NIFLA* held that there is no long tradition of failing to protect speech from occupational licensing laws. 138 S. Ct. at 2372.

departments. That plausibly alleges an overbreadth claim that is likely to succeed on the merits. Moreover, the Board's shifting interpretation of "land surveying" makes it impossible for people to know which depictions of location information are prohibited and which are not and allows for subjective, arbitrary, and discriminatory enforcement by the Board. That, in turn, alleges a plausible vagueness claim which is likely to succeed on the merits.

A. Plaintiffs have stated an overbreadth claim that is likely to succeed on the merits.[10]

Outside the First Amendment context, a "typical facial attack" requires the challenger to show that under "no set of circumstances" is a statute valid or that it lacks any "plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 472 (2010). But a lesser showing is needed to facially attack "an overly broad statute" that "may chill the speech of individuals, including those not before the court." *United States v. Hansen*, 25 F.4th 1103, 1106 (9th Cir. 2022), *cert. granted*, 143 S. Ct. 555 (2022); *see City of Houston v. Hill*, 482 U.S. 451, 459 (1987) (laws restricting speech "may be held facially invalid even if they also have legitimate

[10] The district court proceeded by first analyzing Plaintiffs' vagueness claim, then analyzing the overbreadth claim after that, but an overbreadth challenge should be the court's "first task," and if that challenge fails, "[t]he court should *then* examine the facial vagueness challenge." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (emphasis added); *Bauer v. Sampson*, 261 F.3d 775, 782 (9th Cir. 2001) (same).

application"). A statute that reaches "protected First Amendment activity" is "properly subject to facial attack" if "the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984). Courts are "especially" concerned about overbroad statutes restricting speech when as here, the statute "imposes criminal sanctions." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

A statute restricting speech should be "invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (citation omitted). The analysis thus has three steps: (1) construe the statutory text; (2) determine its plainly legitimate sweep, if any; and (3) gauge the amount of speech impacted relative to the legitimate sweep. *Hansen*, 25 F.4th at 1107-11. Under this analysis, Plaintiffs have pled an overbreadth claim that is likely to succeed on the merits.

1. *Construe the statute*.

"The first step in overbreadth analysis is to construe the statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers." *United States v. Williams*, 553 U.S. 285, 293 (2008).

The Board asserted that Plaintiffs unlawfully practiced land-surveying in violation of Cal. Bus. & Prof. Code § 8726(a)(1), (7), and (9). Again, in relevant part, California defines land surveying to include any 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.
> …
>
> (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.

Start with "locating" as used in subsections (a)(1) and (a)(3). These prohibit "locat[ing]" "any property line or boundary of any parcel of land" or "the alignment or elevation of any of the fixed works described in Section 6731" (which includes all "buildings" and "municipal improvements"). This term is otherwise undefined, but to "locate," means merely "to determine or *indicate* the place, site, or limits of." *Locate,* Merriam-Webster, https://www.merriam-webster.com/dictionary/locate (emphasis added) (last accessed May 9, 2023). *Cf. Comite de Jornaleros de*

Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 946 (9th Cir. 2011) (en banc) (employing a common dictionary definition to construe a statute in an overbreadth case). California law thus prohibits *indicating* where a property line or any building, road, or bridge are without a land-surveying license. In that way, Section 8726 criminalizes basically all mapmaking without a license.

The restrictions on "retracing" property lines or alignment or elevation of fixed works in subsections (a)(1) and (a)(3) go even further. A plain reading prohibits not just creating an original map, but also copying from an existing map—whether by placing tissue paper over an existing map, or copying a publicly available computer-based map into a computer drawing program. *See* ER-069, ER-099-101.

And subsection (a)(7) criminalizes the mere process of deciding what to include on a map without a surveying license. That provision prohibits unlicensed people from "determin[ing] the information shown or to be shown on any map or document" that accomplishes one of the functions in paragraphs (1) to (6). So merely deciding what to retrace on an existing map showing the location of buildings, for example, is illegal. *Cf. Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1203-04 (9th Cir. 2018) (explaining that the "process" of creating speech is equally protected as is the final "product"). In short, California's land-surveying

restrictions "criminalize[] a vast amount of informal mapmaking … by anyone without a surveyor's license." ER-115-16.

Given that broad coverage, the Board might be tempted to impose a limiting construction to prevent the statute from being read to sweep so far afield. Mapping professionals have long recognized this problem—that "literal[ly] interpreting" a surveying definition like California's would require a surveying license for all manner of map drawings. ER-107. That is why the NCEES Model Rules recommend requiring a surveying license only for determining "authoritative location." ER-107-09. But as the district court astutely observed, California has not made that commonsense distinction; its "legislature has chosen to proscribe the dissemination of maps depicting fixed works and geographical relationships," without "exception." ER-016.

2. *Plainly legitimate sweep*.

The district court explained its view that the plainly legitimate sweep of requiring a surveying license is in "maintaining property lines." ER-060. The NCEES Model Rules' focus on "authoritative location" supports that view. *See also* Cal. Bus. & Prof. Code § 8726(a)(12) (license is required to determine "the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property").

But non-authoritative drawings using publicly provided data do not conflict with that interest. ER-072-73, ER-109, ER-114-15. As explained below, the district court erred in concluding that the statute's infringement on such informal maps is not an "infringe[ment] upon recognized First Amendment protections." ER-016.

3. *Infringed speech vs. statute's legitimate sweep.*

Even if a statute has some "legitimate application[s]," it is facially invalid if it is "susceptible of regular application to protected expression." *City of Houston*, 402 U.S. at 459, 467. Given the 12(b)(6) standard, an overbreadth challenge should not be dismissed "in the absence of a developed factual record" if the statute sweeps in speech the government "*may* not have a sufficiently strong interest in prohibiting." *Hernandez v. City of Phoenix*, 43 F.4th 966, 981 (9th Cir. 2022) (emphasis added).

As the Complaint alleges and the preliminary-injunction record makes clear, hundreds or thousands of people across California regularly violate § 8726(a) by "submit[ting] site plans based on copied GIS data or Google Maps to county and municipal building permit issuers." ER-068, ER-100-01. *Cf. City of Houston*, 482 U.S. at 466 ("[t]he ordinance's plain language is admittedly violated scores of times daily"). Those hundreds or thousands of people are using, creating, and disseminating information and are engaged in speech, and the district court erred in concluding otherwise. *See* Part II.A, *supra*.

Whatever interest California has in requiring a license to create and disseminate location information with authoritative, legally binding effect, it has no interest in regulating non-authoritative, informal depictions of where buildings, roads, property lines, and the like are located. But under Section 8726's plain text, a license is required even for depictions as informal as those used to show farmers' market vendors where to set up shop, or to show apartment complex residents where various amenities are, ER-072-73, ER-103-04, or even for simple artwork depicting the location of a house, as the district court hypothesized, *see* ER-016. These are "'obvious examples' of prohibited speech that do not cause the types of problems that motivated the [legislature]." *Comite de Jornaleros*, 657 F.3d at 948; *see Bauer v. Sampson*, 261 F.3d 775, 782 (9th Cir. 2001) (policy sweeping in both "threats" and speech with mere "violent … overtones" was facially overbroad because, while the threats are not protected, "a substantial amount of 'overtones' are not 'threats.'").

The district court likewise erred in holding that the statute's overbreadth is not "real" or "substantial" due to the perceived lack of "evidence that [it] has been enforced against someone engaged in protected speech." ER-060; *see also* ER-016. That error stems in part from the district court's erroneous view that informal maps are not speech. But the district court also believed that a successful overbreadth claim must "cite[] … prosecutions under the statute for engaging in protected

speech." ER-061. Plaintiffs' case is such an example. *See* Part II *supra*. Regardless, no such showing is required. A statute cannot be saved "merely because the Government promise[s] to use it responsibly." *Stevens*, 559 U.S. at 480. The question is only whether the statute is "*susceptible* of regular application to protected expression." *City of Houston*, 402 U.S. at 467 (emphasis added). Indeed, "[t]he party challenging the law need not necessarily introduce admissible evidence of overbreadth"; rather, it must only "'describe the instances of arguable overbreadth.'" *Comite de Jornaleros*, 657 F.3d at 944.

Here, as the Board's enforcement against Plaintiffs demonstrates, California's land-surveying laws are susceptible of regular application to restrict all kinds of informal mapmaking—speech protected by the First Amendment. Whatever California's interest in restricting more formal, legally authoritative location information to licensed surveyors, by restricting informal maps of every stripe in the process it has chosen means far "too imprecise" to achieve that goal. *Joseph H. Munson Co.*, 467 U.S. at 968. For that reason, Plaintiffs have stated an overbreadth claim that is likely to succeed on the merits.

B. Plaintiffs have stated a vagueness claim that is likely to succeed on the merits.

When faced with a vague law, "the role of courts under our Constitution is … to treat the law as a nullity," because "[i]n our constitutional order, a vague law is no law at all." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). Laws must

be sufficiently clear "to allow persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). Voiding "[s]tatutes that are insufficiently clear" serves three bedrock goals: "(1) avoid[ing] punishing people for behavior that they could not have known was illegal"; (2) "avoid[ing] subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers"; and (3) "avoid[ing] any chilling effect on the exercise of First Amendment freedoms." *Id.* "[A] more stringent vagueness test governs"—and statutes must "provide a greater degree of specificity and clarity than would be necessary under ordinary due process principles"—when "First Amendment freedoms are at stake." *Cal. Tchrs. Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1150 (9th Cir. 2001). The "need for clear definitions 'is even more exacting,'" too, where, as here, "a statute subjects violators to criminal penalties." *McCormack v. Herzog*, 788 F.3d 1017, 1031 (9th Cir. 2015) (citation omitted), *abrogated on other grounds*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Here, Section 8726's overbreadth has led the Board to a subjective, shifting interpretation of what constitutes regulated "land surveying." Not only does this result in arbitrary enforcement, it also prevents ordinary people from knowing what is prohibited. Plaintiffs have detailed what the statutory text prohibits: indicating the site of or retracing from an existing map the location of a building or property

line, etc. But in the Board's citation to Plaintiffs, it did not quote the statutory text. Rather, the Board explained, Plaintiffs were illegally practicing land surveying by "depict[ing] the location of property lines, fixed works, and the geographical relationship thereto." ER-074. Spot the difference: The statute only requires, for example, retracing a fixed work *or* retracing a property line. *See* Cal. Bus. & Prof. Code § 8726(a) ("land surveying" includes "any one or more of the following"). In its citation, the Board posited that only depictions showing *both* a fixed work and a property line are prohibited. ER-074. It doubled down on that position in its preliminary injunction briefing in the district court. *See* D. Ct. ECF 13 at 18-19 (relying on declarations, rather than the statutory text, to argue that surveying constitutes only "show[ing] the positions of fixed works … in relationship to property lines"). And it also suggested that drawings showing buildings and property lines are fine, but "measurements" are not. *Id*. at 21-22 (stating that drawings can show fixed works and property lines, but not "measurements between structures and property lines"); ER-062 (district court seeming to adopt the same interpretation).

By the time it moved to dismiss, the Board instead focused on the actual statutory text. *See* D. Ct. ECF 15-1 at 21 ("The violation occurs when a[n] unlicensed person 'does or offers to do any one or more of the' activities" in section 8726(a).") And yet, at oral argument, counsel for the Board introduced an entirely

new distinguishing characteristic: Plaintiffs' drawings could be regulated because they look like a "fancy map," but someone providing the same information in the form of a "rough sketch" should not be "prosecuted and found to be in violation of the land surveying act." ER-037-38. That distinction, aside from being wholly subjective, does not appear on the face of the statute either.

This "I know it when I see it" approach leads to "predictably unpredictable results." *In re Scheer*, 819 F.3d 1206, 1210 (9th Cir. 2016). If the Board itself cannot settle on an exact answer for what the statute prohibits, it necessarily prevents "persons of 'ordinary intelligence a reasonable opportunity to know what is prohibited.'" *Foti*, 146 F.3d at 638. It likewise compounds the risk of subjective, arbitrary, and discriminatory enforcement. *Id*. Indeed, a homeowner wanting to trace a map from GIS—or a building department telling a homeowner to do the same—"might perhaps make some educated guesses as to the meaning of these regulations," but given the Board's moving-target enforcement explanations, they "could never be confident that the [Board] would agree." *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 513 (9th Cir. 1988); *see Forbes v. Napolitano*, 236 F.3d 1009, 1012 (9th Cir. 2000) (suggesting that a change in the meaning of a term over time points to the term being vague); *cf. Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018) (holding a speech restriction unreasonable in part because of "haphazard interpretations the State [] provided in official guidance and

representations to this Court"). Though the Board's ad-hoc enforcement seems to have ensnared only a handful of informal, non-authoritative mappers thus far, D. Ct. ECF 13-1 at 128-62, the "[u]ncertain meaning[]" of the statute will "inevitably lead citizens to 'steer far wider of the unlawful zone.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citation omitted). That conflicts with the vagueness doctrine's goal of "avoid[ing] any chilling effect on the exercise of First Amendment freedoms." *Foti*, 146 F.3d at 638.

The lack of any clarifying definitions for words like "locate" or "retrace" in either the statute or its implementing regulations makes matters worse. A statute that "subjects violators to criminal penalties" makes "the need for clear definitions [] 'even more exacting.'" *McCormack*, 788 F.3d at 1031. The "lack[] [of] a precise definition" of these terms "to focus application of the statute," *see Forbes*, 236 F.3d at 1012, allows the Board to take these shifting positions and "leaves the public uncertain as to the conduct it prohibits," *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Plaintiffs have stated a claim that California's surveying restrictions are unconstitutionally vague, and that claim is likely to succeed on the merits.

IV. Plaintiffs have stated a due process and/or equal protection claim.

Even if this case did not implicate First Amendment scrutiny, Plaintiffs also pleaded plausible substantive due process and equal protection claims for relief.

ER-118-20. Both doctrines protect the right to pursue one's chosen profession under the rational-basis standard. *Merrifield v. Lockyer*, 547 F.3d 978, 984-92 (9th Cir. 2008). Accordingly, Count III is based on cognizable legal theories.

The Complaint alleges sufficient facts to support those theories. Though the rational-basis standard is deferential, it is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Facts are critical under the rational-basis test because plaintiffs bear the burden of using evidence to rebut any presumed rational connection between challenged laws and a government interest. *See United States v. Carolene Prods. Co*., 304 U.S. 144, 152 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed … unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."); *Olson v. California*, 62 F.4th 1206, 1219 (9th Cir. 2023) ("the particular facts of this case" plausibly alleged a rational basis violation). Facts are so critical that denying the opportunity to disprove presumed facts in a rational-basis case "would deny due process." *Carolene Prods.*, 304 U.S. at 152. Where plaintiffs show facts demonstrating irrationality, they win. *Merrifield*, 547 F.3d at 984-86 (discussing *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), and *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999)); *id*. at 992 (discussing evidence of irrationality in that case). Where the facts as pled preclude finding a

rational basis to support a regulation or regulatory distinctions, the complaint satisfies Rule 12(b)(6). *Olson*, 62 F.4th at 1219; *Fowler Packing Co. v. Lanier*, 844 F.3d 809, 814-15 (9th Cir. 2016).

Plaintiffs' Complaint meets that standard. As laid out below, it alleges that, unlike California's regulation of authoritative location determinations, Plaintiffs' informal, non-authoritative drawings do not implicate any legitimate government interest. And it alleges that the Board has no legitimate interest in banning Plaintiffs' drawings while not banning the substantively identical drawings created by hundreds of homeowners and contractors every day. Accordingly, dismissal of Count III should be reversed.[11]

A. Plaintiffs have stated a substantive due process claim.

Substantive due process requires (1) a legitimate purpose supporting the regulation and (2) a sufficient fit between that interest and the regulation as applied to the plaintiff. *Merrifield*, 547 F.3d at 986-92 (recognizing that "first aspect of the rational basis test" was met by "the government's interests in public health and safety and consumer protection" but then analyzing the fit between that interest and Merrifield's occupation). Accordingly, while a state can establish standards of qualification to practice an occupation, "any qualification must have a rational

[11] Plaintiffs did not seek a preliminary injunction on this count.

connection with the applicant's fitness or capacity to practice [his profession]." *Id.* at 986. Where the government applies a regulatory framework designed for a specific occupation to a person whose occupation is sufficiently different from that occupation, that person faces "an unconstitutional barrier on his liberty under the Due Process Clause." *Id.*

> Here, the district court found that California
>
> > has a legitimate interest in regulating those who practice land surveying within its borders to ensure that they provide at least minimally competent services to the public and to avoid building permits being issued based on unreliable data … even if land surveys are only used during the early stages in the permitting process and even if the site plans do not purport to be authoritative.

ER-018-19. But the facts alleged—which must be taken as true and viewed in the light most favorable to Plaintiffs—preclude this assumption. Simply, what Plaintiffs do "is so different from the occupation of professional land surveyors that the government's interest in regulating professional surveyors—ensuring accurate authoritative location survey products—is not implicated." ER-118. Plaintiffs therefore alleged that the interest in requiring a license extends only to authoritatively determining or representing location. ER-119. The NCEES's model rule, building departments' accepting identical site plans from non-surveyors and teaching non-surveyors how to draw them, and the Board's lack of evidence that requiring a license for non-authoritative uses achieves any state interest, all bolster this allegation. ER-097-101, ER-104, ER-107-09, ER-114.

Rather than take those allegations as true and viewing them favorably, the district court assumed them away, stating that regulating Plaintiffs' non-authoritative drawings "avoid[s] building permits being issued based on unreliable data." ER-018. It could only reach that conclusion by ignoring other allegations, too.

First, Plaintiffs' drawings are used for purposes that have *nothing to do* with building permitting: weddings, farmers' markets, and other event-layout planning; outdoor dining planning for restaurants; maps for apartment complexes, hotels, and motels to show tenants and guests the location of buildings and units, amenities, and rooms; and several others. ER-103-04. Even on the district court's terms, there is no interest in requiring a license for these drawings, yet Plaintiffs are still prohibited from drawing site plans for these "other uses." ER-057.

Second, even as to their use for building permits, Plaintiffs alleged that local building departments distinguish between projects requiring a land surveyor site plan and those that do not. ER-097. For projects that do not, they routinely accept non-surveyors' site plan drawings. ER-097-101. They have done so for decades and continue to do so. ER-099-101. They even teach non-surveyors—including Ryan—how to draw site plans identical to Plaintiffs', using sources, information, and methods identical to those that Plaintiffs use. ER-097-100. And building departments—not the Board—are empowered to decide which site plans are

acceptable and which are not. Cal. Building Code ch. 1, div. 2, § 107.2.6 (2022) (authorizing building officials to "waive or modify" site plan requirements). Those departments have decided that it is safe for the public to use site plans prepared by non-surveyors for at least some permitting purposes. ER-101, ER-104. And the fact that thousands of other non-surveyors draw identical site plans (without evidence of harm or enforcement by the Board) further undercuts the district court's hypothesis. ER-114, ER-117, ER-119. It is at least plausible that there is not a "rational connection" between California's interests and its suppression of Plaintiffs' non-authoritative drawings.

The barriers imposed on Plaintiffs' work are not just unrelated to California's interest; they are also crushing. It would require at least six years of specific education and experience (gained under a licensed land surveyor) and passing multiple exams to become a licensed professional land surveyor. ER-109-10, ER-119. Again, these licensing requirements may be justified for those who engage in activities related to determining or representing "authoritative" location, but Plaintiffs don't do that. ER-107-09.

As this Court recognized in *Merrifield*, a "marginal overlap" between Plaintiffs' work and the government's interest makes these burdens particularly unjustified. 547 F.3d at 984. The mismatch here parallels those in *Craigmiles* and *Cornwell*.

In *Craigmiles*, the plaintiffs only sold caskets—but the state required them to get licensed as funeral directors to do so. 312 F.3d at 224. This meant they had to complete a year of school and a year of apprenticeship (or two years of apprenticeship) and pass an examination. *Id*. at 222. This "two years and thousands of dollars" for education and training was "undoubtedly a significant barrier." *Id*. at 224-25. And while the state defended the requirement as "insur[ing] that those who handle dead bodies may dispose of them safely and prevent the spread of communicable diseases," plaintiffs "would not handle the bodies, much less engage in any embalming services," making those justifications irrelevant. *Id*. at 225. As applied, therefore, there was no "rational relationship to any of the articulated purposes." *Id*. at 228-29.

Similarly, in *Cornwell*, the plaintiff was an "African hair braider" who engaged in "natural hair care," but California required her to get a cosmetology license. 80 F. Supp. 2d at 1102, 1107. The state claimed this requirement was generally supported by the need to protect public health and safety. But based on record evidence, the court concluded that the 1,600-hour cosmetology licensing regime had so little overlap with the plaintiff's "limited range of activities" that, as applied, it violated the constitution. *Id*. at 1108-19. If 1,600 hours or two years of "marginally relevant" training lacks a rational basis, it is *plausible* that the six years of marginally relevant training here also lacks a rational basis.

Plaintiffs do not challenge California's authority to impose a surveyor license requirement generally. But the facts pled support Plaintiffs' "due process claim that [they are] *different* from" professional land surveyors "and should not be treated the *same* as them, because such treatment is an unconstitutional barrier on [their] liberty under the Due Process Clause." *Merrifield*, 547 F.3d at 986. Dismissal was error; this Court should reverse and remand this claim.

B. Plaintiffs have stated an equal protection claim.

Under equal protection, "similarly situated persons must be treated equally." *Merrifield*, 547 F.3d at 992. A plaintiff need not be "similar in all respects to" the privileged group; instead, the plaintiff "must be similar in those respects that are relevant to [the government's] own interests and its policy." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017). Even if a regulation has a rational basis as applied, exemptions from the regulation based on distinctions that undercut, rather than further, the rational basis render the regulation unconstitutional. In *Merrifield*, for example, California law required pest controllers who did not work with pesticides to nonetheless obtain a "pesticide" pest controller license. 547 F.3d at 991-92. This Court observed that this requirement was not irrational because non-pesticide pest controllers might encounter pesticides in their work. *Id*. But California also exempted some non-pesticide pest controllers from the license and those who were exempted were just as, if not more, likely to encounter pesticides.

Id. Therefore, this Court held that the licensing requirement violated equal protection. *Id*. at 992; *see also Olson*, 62 F.4th at 1219 (law intended to ensure contract workers were afforded employee protections plausibly violated equal protection because law exempted similar classes of contractors, which was plausibly grounded in "lobbying" and "backroom dealing" rather than a legitimate state interest); *Fowler Packing*, 844 F.3d at 815 (similar for law providing exemptions from a safe harbor from unexpected minimum-wage liability).

Plaintiffs pleaded that they are similarly situated to "other non-surveyors, including contractors and homeowners with no surveyor training, who create non-authoritative site plans for planning, infrastructure management, general information, and submission to California county and municipal building permit issuing departments purposes." ER-120. Further, they pleaded that local building departments across California teach non-surveyors how to draw site plans just like Plaintiffs' drawings—just like they taught Ryan how to make such drawings years ago. ER-097-101. They pleaded that California does not prohibit these other non-surveyors from creating these non-authoritative site plans for the same permitting uses Plaintiffs' drawings are often used for, and that there is no distinction between Plaintiffs and these other non-surveyors that is rationally related to any legitimate government interest. ER-119-20.

The Board has seemingly agreed with Plaintiffs' allegation that it views Plaintiffs' site plans as illegal, but not the similar ones created by homeowners and contractors across California every day. ER-119-20. Counsel for the Board explained the basis for the Board's position at oral argument on the Board's motion to dismiss:

> [W]hen you submit a fancy map like they do with all the measurements to a planning department, they don't know that behind it is no assurance of accuracy. So I don't believe it's the same as some rough sketch that a homeowner would provide, although it's hard to deal in the abstract about what might be submitted.
>
> You know, the Board investigates all complaints that appear to allege, you know, violation of the Land Surveyors Act, but there's no case that 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. In short, the basis for the Board's distinction is that Plaintiffs' maps look too "fancy." Again, Plaintiffs' drawings—containing the same information and created in the same way—are substantively identical to those drawn by other lay people, which the Board says do *not* require a license. ER-098-101.

There is no rational basis for that distinction. As far as the Board appears to make that distinction due to concerns about "accuracy," it falls flat; the drawings created by lay homeowners and contractors would come with the same concern. And in any event, local building officials are in the best position to know—and have the authority to determine—when a project needs a site plan signed, stamped,

certified, or sealed by a surveyor. *See* pp. 4-11, above; Cal. Building Code ch. 1, div. 2, § 107.2.6; *cf.* ER-018 (district court's hypothesis that licensing requirement "avoid[s] building permits being issued based on unreliable data."). And neither Plaintiffs' drawings nor the substantively identical drawings submitted by homeowners or contractors carry a signature, stamp, certification, or seal. ER-101-02.[12]

The district court evaluated this claim using the wrong framework. The district court analyzed this as a class-of-one claim. ER-020-21. Because a class-of-one claim is "premised on unique treatment rather than on a classification," ER-020, the district court dismissed this claim because Plaintiffs did not "allege that [other] individuals' site maps similarly violated the statute, were reported to the Board, and despite that, [the Board] chose only to investigate and cite plaintiffs." ER-020.

Plaintiffs did not make those allegations because Plaintiffs are not pursuing a class-of-one claim; rather, Plaintiffs pleaded that they have been irrationally

[12] As far as the Board asserts that Plaintiffs' "fancy" maps might lead consumers or building departments to believe that Plaintiffs' drawings are the work of a licensed surveyor, ER-038—the Complaint plausibly negates that basis, too. Plaintiffs "do not claim to be licensed professional surveyors," and they "do not claim that their site plans are surveys, certified, or authoritative; indeed, they clearly state that their site plans are not surveys, are not certified, and are not a substitute for a survey." ER-101-04; ER-109; ER-119.

classified. ER-119 ("California does not prohibit other non-surveyors, including contractors and homeowners with no surveyor training, from creating non-authoritative site plans"). A class of one claim is "premised on unique treatment rather than on a classification." *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008). Here there is a classification: Plaintiffs' drawings—though they depict the same information as non-prohibited drawings—look too "fancy." ER-037-38. The district court did not evaluate that classification. But under the Rule 12(b)(6) standard, it is plausible that classification does not rationally further the government's interest in assuring "minimally competent services to the public" or "avoid[ing] building permits being issued based on unreliable data." ER-018. Dismissal was unwarranted, and this Court should reverse.

V. The remaining preliminary injunction factors favor Plaintiffs.

As explained above, this case implicates First Amendment rights and Plaintiffs are likely to succeed on the merits of those speech-related claims. Plaintiffs also satisfy the remaining preliminary injunction factors.

"[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009). The Board has already cited Plaintiffs, imposed fines, and directed them to stop speaking. ER-074, ER-087-92. Plaintiffs can only legally return to speaking if Ryan completes the years-long process to obtain a

surveyor license. ER-109-11. Without preliminary relief for the pendency of this litigation, Plaintiffs will be forced to forgo their First Amendment rights for the (likely) years required to fully litigate their claims. Because they are likely to prevail on their First Amendment claims, preliminary relief is warranted.

That Plaintiffs sell their speech only exacerbates their irreparable injury because the law threatens their livelihood. A restriction on the freedom of speech is "more serious" when the speech restriction would cause a plaintiff to "lose her income." *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983) (directing district court to issue preliminary injunction). Plaintiffs have already been forced to turn away new customers because of the Board's enforcement. ER-077. Before the citation, California sales constituted about sixteen percent of MySitePlan.com's business. ER-076. Preliminary relief is thus necessary to prevent the loss of a sizeable part of Plaintiffs' business during litigation and the threat of permanently losing a satisfied customer base Plaintiffs spent years and money carefully cultivating. ER-076-77. Accordingly, Plaintiffs will suffer irreparable harm absent a preliminary injunction.[13]

[13] The district court claimed that injunctive relief was not necessary in part because Ryan could be "compensated with money damages if plaintiffs were to ultimately succeed in this action." ER-062. But in their official capacities as state officials, the defendants cannot be sued for damages. *See Doe v. Lawrence Livermore Nat'l Lab'y*, 131 F.3d 836, 839 (9th Cir. 1997). And the Eleventh Amendment bars Plaintiffs from recovering from the Board itself. *Id*.

The remaining preliminary injunction factors—the balance of the equities and the public interest—also favor Plaintiffs. Most simply, "the fact that Plaintiffs have raised serious First Amendment concerns compels a finding that … the balance of hardships tips sharply in Plaintiffs' favor." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc) (cleaned up). The Board will not be harmed by an injunction; it has no interest in enforcing an unconstitutional law. *Id*. Similarly, the public has no interest in suppressing protected speech; rather, there is a "significant public interest in upholding First Amendment principles," and "prevent[ing] the violation of a party's constitutional rights" is "always in the public interest." *Id*. (citations omitted). Moreover, Plaintiffs (like thousands of other lay people) have been creating these site plans for years, and there is no evidence of harm flowing from them—further cementing the lack of any public interest in prohibiting them during this litigation.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the dismissal of each cause of action stated in the Complaint, ORDER the entry of a preliminary injunction for the duration of this litigation, and REMAND for further proceedings.

STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases.

Dated: May 10, 2023

Respectfully Submitted,

/s/ Paul V. Avelar
Paul V. Avelar
INSTITUTE FOR JUSTICE
398 S. Mill Ave., Suite 301
Tempe, AZ 85281
(480) 557-8300
pavelar@ij.org

Michael Greenberg
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 901
Arlington, VA 22203
(703) 682-9320
mgreenberg@ij.org

S. Michael Kernan
THE KERNAN LAW FIRM, APC
9663 Santa Monica Blvd., Suite 450
Beverly Hills, CA 90210
(310) 490-9777
MKernan@kernanlaw.net

Counsel for Plaintiffs-Appellants

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS
9TH CIR. CASE NUMBER 23-15138

I am the attorney or self-represented party.

This brief contains 13,871 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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

[X] 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 Fed. R. App. P. 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;
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[] 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).

Dated: May 10, 2023

/s/ Paul V. Avelar
Paul V. Avelar

Counsel for Plaintiffs-Appellants

ADDENDUM

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U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cal. Building Code ch. 1, div. 2, § 107.2.6 (2022)

The construction documents submitted with the application for permit shall be accompanied by a site plan showing to scale the size and location of new construction and existing structures on the site, distances from lot lines, the established street grades and the proposed finished grades and, as applicable, flood hazard areas, floodways, and design flood elevations; and it shall be drawn in accordance with an accurate boundary line survey. In the case of demolition, the site plan shall show construction to be demolished and the location and size of existing structures and construction that are to remain on the site or plot. The building official is authorized to waive or modify the requirement for a site plan where the application for permit is for alteration or repair or where otherwise warranted.

Cal Bus & Prof Code § 8726. "Land surveying"

(a) A person, including any person employed by the state or by a city, county, or city and county within the state, 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 works embraced within the practice of civil engineering, as described in Section 6731.

(2) Determines the configuration or contour of the earth's surface, or the position of fixed objects above, on, or below the surface of the earth by applying the principles of mathematics or photogrammetry.

(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.

(4) Makes any survey for the subdivision or resubdivision of any tract of land. For the purposes of this subdivision, the term "subdivision" or "resubdivision" shall be defined to include, but not be limited to, the definition in the Subdivision Map Act (Division 2 (commencing with Section 66410) of Title 7 of the Government Code) or the Subdivided Lands Law (Chapter 1 (commencing with Section 11000) of Part 2 of Division 4 of this code).

(5) By the use of the principles of land surveying determines the position for any monument or reference point that marks a property line, boundary, or corner, or sets, resets, or replaces any monument or reference point.

(6) Geodetic surveying or cadastral surveying. As used in this chapter:

(A) Geodetic surveying means performing surveys, in which account is taken of the figure and size of the earth to determine or predetermine the horizontal or vertical positions of fixed objects thereon or related thereto, geodetic control points, monuments, or stations for use in the practice of land surveying or for stating the position of fixed objects, geodetic control points, monuments, or stations by California Coordinate System coordinates.

(B) Cadastral surveying means performing a survey that creates, marks, defines, retraces, or reestablishes the boundaries and subdivisions of the public land survey system of the United States.

(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.

(8) Indicates, 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.

(9) Procures or offers to procure land surveying work for themselves or others.

(10) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed, or practiced.

(11) Coordinates the work of professional, technical, or special consultants in connection with the activities authorized by this chapter.

(12) Determines the information shown or to be shown within the description of any deed, trust deed, or other title document prepared for the purpose of describing the limit of real property in connection with any one or more of the functions described in paragraphs (1) to (6), inclusive.

(13) Creates, prepares, or modifies electronic or computerized data in the performance of the activities described in paragraphs (1), (2), (3), (4), (5), (6), (11), and (12).

(14) Renders a statement regarding the accuracy of maps or measured survey data.

(b) Any department or agency of the state or any city, county, or city and county that has an unregistered person in responsible charge of land surveying work on January 1, 1986, shall be exempt from the requirement that the person be licensed as a land surveyor until the person currently in responsible charge is replaced.

(c) The review, approval, or examination by a governmental entity of documents prepared or performed pursuant to this section shall be done by, or under the direct supervision of, a person authorized to practice land surveying.

Cal Bus & Prof Code § 8750. Seal of licensee

Upon being licensed, each licensee shall obtain a stamp or seal of the design authorized by the board bearing the licensee's name, number of certificate, and the legend "Licensed Land Surveyor," or "Professional Land Surveyor."

Cal Bus & Prof Code § 8761. Documents prepared by licensed land surveyor; Requirements

(a) Any licensed land surveyor or civil engineer authorized to practice land surveying may practice land surveying and prepare maps, plats, reports, descriptions, or other documentary evidence in connection with that practice.

(b) All maps, plats, reports, descriptions, or other land surveying documents shall be prepared by, or under the responsible charge of, a licensed land surveyor or civil engineer authorized to practice land surveying and shall include his or her name and license number.

(c) Interim maps, plats, reports, descriptions, or other land surveying documents shall include a notation as to the intended purpose of the map, plat, report, description, or other document, such as "preliminary" or "for examination only."

(d) All final maps, plats, reports, descriptions, or other land surveying documents issued by a licensed land surveyor or civil engineer authorized to practice land surveying shall bear the signature and seal or stamp of the licensee and the date of signing and sealing or stamping. If the land surveying document has multiple pages or sheets, the signature, seal or stamp, and date of signing and sealing or stamping shall appear, at a minimum, on the title sheet, cover sheet or page, or signature sheet, unless otherwise required by law.

(e) It is unlawful for any person to sign, stamp, seal, or approve any map, plat, report, description, or other land surveying document unless the person is authorized to practice land surveying.

(f) It is unlawful for any person to stamp or seal any map, plat, report, description, or other land surveying document with the seal or stamp after the certificate of the

licensee that is named on the seal or stamp has expired or has been suspended or revoked, unless the certificate has been renewed or reissued.

Cal Bus & Prof Code § 8792. Misdemeanors

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.

(b) Presents as their own the license of a professional land surveyor unless they are the person named on the license.

(c) Attempts to file as their own any record of survey under the license of a professional land surveyor.

(d) Gives false evidence of any kind to the board, or to any board member, in obtaining a license.

(e) Impersonates or uses the seal, signature, or license number of a professional land surveyor or who uses a false license number.

(f) Uses an expired, suspended, surrendered, or revoked license.

(g) Represents themselves as, or uses the title of, professional land surveyor, or any other title whereby that person could be considered as practicing or offering to practice land surveying, unless the person is correspondingly qualified by licensure as a land surveyor under this chapter.

(h) Uses the title, or any combination of that title, of "professional land surveyor," "licensed land surveyor," "land surveyor," or the titles specified in Sections 8751 and 8775, or "land surveyor-in-training," or who makes use of any abbreviation of that title that might lead to the belief that the person is a licensed land surveyor or holds a certificate as a land surveyor-in-training, without being licensed or certified as required by this chapter.

(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.

(j) Violates any provision of this chapter.

Cal. Code Regs. tit. 16 § 404- Definitions

For the purpose of the rules and regulations contained in this chapter, the following terms are defined. No definition contained herein authorizes the practice of professional engineering as defined in the Professional Engineers Act.

…

(w) "Land surveying" is that practice defined in Section 8726 of the Code.

Opinion No. 51-124—January 21, 1952

SUBJECT: CIVIL ENGINEERING: Surveying, mapping and computing carried on solely in connection with leveling of agricultural crop land, do not constitute practice of, nor practice of land surveying.

Requested by: BOARD OF REGISTRATION FOR CIVIL AND PROFESSIONAL ENGINEERS.

Opinion by: EDMUND G. BROWN, Attorney General.
Willard A. Shank, Deputy.

The Board of Registration for Civil and Professional Engineers, has asked the following question:

Does surveying, mapping, and computing for land leveling for purely agricultural purposes which does not include the determination of boundaries or leveling of ground for foundations for engineering structures constitute the practice of civil engineering as defined by section 6731, Business and Professions Code, or land surveying as defined by section 8726, Business and Professions Code?

Our conclusion may be summarized as follows:

Where the functions of surveying, mapping and computing are carried on in connection with leveling agricultural crop land, they do not constitute the practice of civil engineering nor the practice of land surveying as defined in the Business and Professions Code.

ANALYSIS

The Board of Registration for Civil and Professional Engineers has asked whether surveying, mapping and computing for the purpose of leveling land for agricultural uses constitutes civil engineering as defined in section 6731, Business and Professions Code, or land surveying as defined by section 8726, Business and Professions Code. Section 6731 reads as follows:

> "Civil engineering embraces the following studies or activities in connection with fixed works for irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, municipal improvements, railroads, highways, tunnels, airports and airways, purification of water, sewerage, refuse disposal, foundations, framed and homogeneous structures, buildings or bridges:
>
> (a) The economics of, the use and design of, materials of construction and the determination of their physical qualities.
>
> (b) The supervision of the construction of engineering structures.
>
> (c) The investigation of the laws, phenomena and forces of nature.
>
> (d) Appraisals or valuations.
>
> (e) The preparation and/or submission of design, plans and specifications and engineering reports.
>
> Nothing in this chapter shall prohibit the preparation of plans, drawings, specifications, estimates, or instruments of service for single or

multiple dwellings not more than two stories and basement in height; garages or other structures appurtenant to such dwellings; farm or ranch buildings; or any other buildings, except steel frame and concrete buildings, not over one story in height, where the span between bearing walls does not exceed twenty-five (25) feet.

Civil engineering also includes city and regional planning insofar as any of the above features are concerned therein, and geodetic, municipal and topographic surveying."

Section 8726 reads as follows:

"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:

(a) Locates, relocates, establishes, re-establishes, or retraces any property line or boundary of any parcel of land or any road, right of way, easement, alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Chapter 7, Division 3 of this code.

(b) Makes any survey for the subdivision or resubdivision of any tract of land.

(c) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary or corner, or sets, resets or replaces any such monument or reference point.

(d) Determines the configuration or contour of the earth's surface or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of trigonometry.

(e) Geodetic or cadastral surveying.

(f) 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 subsections (a), (b), (c), (d) and (e).

(g) Indicates, 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 he practices or offers to practice land surveying in any of its branches.

(h) Procures or offers to procure land surveying work for himself or others.

(i) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed or practiced."

The process of land leveling for agricultural purposes involves several operations. The area to be leveled is first staked. That is, stakes are placed at different points in the field and the elevations at those points are determined by use of a transit or level. The earth is then moved by a grading and floating process to fill in the low spots and level off the high spots.

Civil engineering as defined by section 6731 concerns studies or activities in connection with fixed works. There are no fixed works constructed in the process of land leveling for agricultural use.

Only one of the subdivisions of section 8726 defining land surveying appears to have application to the procedure of land leveling and that is subdivision (d), which states in part that land surveying consists of determining the configuration or contour of the earth's surface by means of measuring lines and angles and the application of principles of trigonometry. The principles of trigonometry, however, are not used in land leveling for agricultural purposes and the definition would not be applicable.

We are of the opinion, therefore, that by statutory definition the process of leveling crop land is excluded from the practices of civil engineering and land surveying.

Opinion No. 51-196—January 21, 1952

SUBJECT: MUNICIPAL WATER SYSTEM need not obtain franchise from county to install and maintain necessary conduits along county roads to furnish extramural service to county residents in unincorporated areas.

Requested by: COUNTY COUNSEL, SANTA CLARA COUNTY.

Opinion by: EDMUND G. BROWN, Attorney General.
Raymond H. Williamson, Deputy.

Honorable Howard W. Campen, County Counsel of Santa Clara County, has requested the opinion of this office on the following question:

Whether a municipally owned and operated water system must obtain a franchise from the County in order to extend its service beyond the boundaries of the municipality into unincorporated areas.

Our conclusion may be summarized as follows:

Under Article XI section 19 of the California Constitution and section 10102 of the Public Utilities Code a municipality operating its own water system need not obtain a franchise from a county in order to install and maintain conduits in and along county roads for the purpose of furnishing extramural water service to inhabitants residing in unincorporated areas.

ANALYSIS

We are advised by the County Counsel that the above question was prompted by the fact that two cities within the County of Santa Clara have made extensions of their water systems into unincorporated areas in order to service inhabitants outside the city limits. These particular extensions are not located along the route of the conduit used to supply water to the city.

received credit for hours of study in the various branches of cosmetology in other states. They come to California asking that the courses completed and the credit for hours of study be evaluated by the Board of Cosmetology in order that they may complete their courses and study in cosmetology and be qualified to meet the requirements to take the examination for the branch of cosmetology which they wish to practice in this State.

Sections 7332, 7342 and 7351 relate respectively to the qualifications an applicant must possess to take an examination for a hairdresser and cosmetician, or cosmetologist, electrologist or manicurist. There are not provisions in these sections that the educational and training qualifications required be acquired in schools and other teaching establishments in the State of Califorina. To the contrary, it is provided that the educational requirements must equal those required by schools in California, that the schools or establishments of teaching must be licensed, and that such schools or establishments of teaching be approved by the State of California.

It is further provided by section 7310, subdivision (c) of the Business and Professions Code that the Board may adopt rules for governing the recognition of, and the courses to be given to, the study of cosmetology, or any of its branches, under a hairdresser and cosmetician or cosmetologist, or in a school of cosmetology, licensed under the laws of another state.

Therefore, pursuant to section 7420 of the Business and Professions Code, out-of-state persons who have been licensed in their state to practice one or more of the branches of cosmetology may apply for a license to practice in California the like branch of cosmetology for which they were licensed in the other state.

Those persons who have completed courses or have received credit for study in the various branches of cosmetology who wish to apply for and take an examination in California may have their courses or hours of study in cosmetology evaluated by the Board in order that they might complete their course of study and qualify to take the examination for the particular branch of cosmetology they wish to practice in this State.

Opinion No. 54-26—February 11, 1954

SUBJECT: PHOTOGRAMMETRY — Topographical maps prepared by, under contracts between aerial mapping firms and Department of Public Works, for use of Division of Highways and Division of Water Resources, do not call for services within the scope of Civil and Professional Engineers' Act or Land Surveyors' Act.

Requested by: STATE CONTROLLER.

Opinion by: EDMUND G. BROWN, Attorney General.
Leonard M. Friedman, Deputy.

Honorable Robert C. Kirkwood, State Controller, submits the following question:

The State Department of Public Works has let contracts to a number of aerial mapping firms, which have undertaken to furnish topographic maps, prepared by photogrammetry, for use by the Division of Highways and the Division of Water Resources. In general the contract specifications require the contracting firms to furnish the State with aerial photographs, contour maps, field notes, and control data covering described areas. The contractors are required to establish ground controls in the field and to make all ground control surveys necessary to insure horizontal and vertical accuracy of the maps. The maps do not determine or show property lines, boundaries or corners. They do not lay out or determine any locations for fixed works such as bridges, highways or waterworks. Do these contracts call for services within the scope of the Civil and Professional Engineers' Act or the Land Surveyors' Act?

Our conclusion is summarized as follows:

The contracts in question do not call for services within the scope of the Civil and Professional Engineers' Act or the Land Surveyors' Act.

ANALYSIS

In 16 Ops. Cal. Atty. Gen. 60 we held that a person engaged in mapping or surveying otherwise covered by the Civil and Professional Engineers' Act or the Land Surveyors' Act is not exempted merely because he employs photogrammetric methods. In view of this conclusion objections have been presented to the State Controller, asserting the invalidity of the mapping contracts described at the outset of this opinion. The Controller requests our advice in the matter. His request is premised on the principle that a contract with an unlicensed person or firm is illegal and void when it contemplates services for which the law requires a license.

Photogrammetry is the science or art of obtaining reliable measurements by means of photography (American Society of Photogrammetry, Manual of Photogrammetry, 2d edition, 1952, p. 1; Whitmore, Advanced Surveying and Mapping, 1949, p. 344). While photogrammetry has numerous applications, its principal use is in map making. Here we are concerned with aerial photogrammetry. This of course connotes the use of aerial photographs. Stereophotogrammetry means that overlapping pairs of photographs are observed and measured, or interpreted, in a viewing device which gives a three-dimensional view and creates the illusion that the observer is viewing a relief model of the terrain (Manual of Photogrammetry, supra, p. 1). Practically all modern photogrammetric mapping instruments utilize the principles of stereophotogrammetry (id., p. 8).

Topographic mapping by photogrammetry involves the following basic steps:

1. Ground control, that is, ascertainment of elevations and distances between "control points" consisting of prominent topographic features in the area to be covered by the aerial photographs;

2. Aerial photography of the terrain;

3. Insertion of overlapping aerial photographs in a stereoscopic plotting machine and adjustment of optical and mechanical controls to project a perfected three-dimensional reproduction or "model" of the terrain onto a viewing screen;

4. Compilation, that is, manipulation of the machine to transfer contours and planimetric features from the three-dimensional view to a map, by means of a movable tracing table;

5. Field checking the resulting map for accuracy through ordinary ground survey methods.

The Land Surveyors' Act and the Civil and Professional Engineers' Act are separate licensing statutes which contain interlocking provisions. Both of these acts are contained in the Business and Professions Code and all statutory references in this opinion will be to that code.

Section 8726 is a part of the Land Surveyors' Act. It defines "land surveyor" as one who does any of the following:

"(a) Locates, relocates, establishes, re-establishes, or retraces any property line or boundary of any parcel of land or any road, right of way, easement, alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Chapter 7, Division 3 of this code.

"(b) Makes any survey for the subdivision or resubdivision of any tract of land.

"(c) By the use of the principles of land surveying determines the position for any monument or reference point which marks a property line, boundary or corner, or sets, resets or replaces any such monument or reference point.

"(d) Determines the configuration or contour of the earth's surface or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of trigonometry.

"(e) Geodetic or cadastral surveying.

"(f) 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 subsections (a), (b), (c), (d) and (e).

"(g) Indicates, 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 he practices or offers to practice land surveying in any of its branches.

"(h) Procures or offers to procure land surveying work for himself or others.

"(i) Manages, or conducts as manager, proprietor, or agent, any place of business from which land surveying work is solicited, performed or practiced."

Section 8727 provides as follows: "Surveys, made exclusively for geological or landscaping purposes or aerial photography or photogrammetry and not involving the determination of any property line, do not constitute surveying within the meaning of this chapter." In 16 Ops. Cal. Atty. Gen. 60, supra, we concluded that this section exempts only the preliminary or incidental ground survey made in connection with photogrammetric mapping but not the mapping itself.

Section 6731, which is a part of the engineering law, states that civil engineering includes "geodetic, municipal and topographic surveying." A registered civil engineer may practice land surveying without a surveyor's license (sec. 8731). A licensed surveyor may, in turn, practice land surveying without registration as a civil engineer (sec. 6743).

Our primary task is to determine whether the definition of land surveying in section 8726 encompasses the photogrammetric mapping called for by the contracts in question. As we read section 8726, surveying (in the statutory sense) and topographic mapping are not synonymous. Subdivision (f) covers topographic mapping in connection with any of the "functions" described in subdivisions (a) through (e). The familiar doctrine that mention of one thing excludes those things not mentioned *("expressio unius est exclusio alterius")* bars statutory coverage of mapping in connection with any function other than those described. The functions enumerated in section 8726 are expressed either in terms of their purpose or in terms of their method. Thus topographic mapping is included in the practice of land surveying, or is excluded, according to its purpose or its method. Map making is not ipso facto surveying.

It is at this point that we now diverge from the position taken by us in 16 Ops. Cal. Atty. Gen. 60, supra. In that opinion we stated: "The preparation of maps, as heretofore defined, whether by aerial or ground photogrammetry, or by other means, constitutes land surveying or civil engineering for which a license is required, except as the maps are prepared for purposes exempted under section 8727." The quoted statement strongly implies that topographic mapping ipso facto constitutes land surveying or civil engineering, regardless of the method employed and regardless of the purposes or "functions" enumerated in section 8726. To that extent, the quoted statement is inconsistent with the view expressed herein and is disapproved.

Subdivisions (a) and (f) of section 8726 embrace topographic mapping if it is done for a described purpose. Subdivision (a) says that a person practices land surveying if he "locates . . . establishes . . . any . . . alignment or elevation for any of the fixed works embraced within the practice of civil engineering. . . ." These "fixed works" include water power, water supply and flood control works, as well as highways and bridges (sec. 6731).

A topographic map ordered by the State Division of Highways will eventually be used in highway and bridge planning. A map ordered by the Division of Water Resources may eventually be used in planning waterworks. Nevertheless.

the present contracts involve no specific projects. They call for a map, an abstract creation. These are not construction-site maps. They do not determine or delineate locations "for" future highways, future bridges or future waterworks. The purpose for which the map will eventually be used is of concern only to the buyer, not to the map maker. We believe that these portions of section 8726 are aimed at mapping as an integral step in designing and locating specific projects, not map making in the abstract. Thus the present contracts call for no services within the joint ambit of subdivisions (a) and (f).

The maps in question are not prepared for tract subdivision purposes. They require no determination of property lines, boundaries or corners. Hence they do not fall within subdivision (b) or subdivision (c).

According to subdivision (f) topographic mapping in connection with the function described in subdivision (d) constitutes land surveying. Subdivision (d) turns upon a method rather than a purpose. The method is that of determining contours and positions by means of "measuring lines and angles, and applying the principles of trigonometry." This of course is the traditional method of land surveying. Our analysis of photogrammetric mapping techniques indicates that it does not employ this method except at the ground control stage of the process.

Let us refer at this point to our outline of the five basic steps in photogrammetric mapping. Step No. 2 is not surveying. Steps Nos. 1 and 5 are definitely surveying since they employ the techniques described by section 8726(d). They are outside the licensing law, however, since section 8727 exempts surveys made exclusively for aerial photography or photogrammetry and not involving the determination of property lines.

If any collision with the licensing law occurs, it is at steps Nos. 3 and 4. We ourselves have examined a stereoscopic plotting machine and observed its operation. The machine operator engages in none of the geometric or trigonometric calculations associated with surveying. To a large extent, these calculations are inherent in the optical and mechanical design of the machine. For the remainder, these calculations are replaced by the manipulation of optical and mechanical controls. These manipulations, in turn, depend on the operator's innate stereoscopic vision, his acquired visual acuity, his training in photographic interpretation and his manual dexterity.

Concededly, the operator makes some computations. He must convert the elevations shown at the control points, and the distances between them, into corresponding adjustments of the machine controls, so that the vertical and horizontal scales in the projected image are the equivalent of the map scales. This computation is a matter of arithmetic or, at the most, of simple algebra.

Complex procedures are required in the adjustment and operation of the stereoscopic plotter. A detailed narrative of the standard procedures for operating a widely-used plotting machine indicates a complete absence of geometric and trigonometric computations on the part of the operator (see Manual of Photo-

grammetry, supra, Ch. XV). The operator possesses, or at least applies, none of the basic principles of measurement and computation common to the land-surveying profession. He is a skilled machine operator, photographic interpreter and draftsman—not a surveyor.

In our view, steps Nos. 3 and 4 of the photogrammetric mapping process require none of the operations described by subdivision (d) of section 8726. Thus the entire process is outside that branch of land surveying described in subdivision (d).

Subdivision (e) of section 8726 covers geodetic or cadastral surveying. Geodetic surveying is that which takes account of the figure and size of the earth by direct measurements, such as triangulation, leveling and gravimetric observations (Manual of Photogrammetry, supra, p. 821). The ground distances involved in the present mapping are hardly so extensive as to require compensation for earth curvature. To the extent that such compensation may be necessary, the correction of distortions in the projected stereoscopic image (through visual observation and adjustment of mechanical and optical controls) automatically corrects any vertical deformation caused by curvature of the earth (Manual of Photogrammetry, supra, p. 715). Again, this is not cadastral surveying, since the maps are not prepared for any official land register or assessment book. Being neither geodetic nor cadastral surveying, this mapping is outside subdivision (e).

The remaining subdivisions of section 8726 enumerate activities with reference to "land surveying" as described in subdivisions (a) through (e). Consequently the mapping in question is entirely outside the scope of all the various subdivisions of section 8726.

Consideration of sections 8726 and 8727 as interdependent parts of a single statutory scheme fortifies our view of the former section. Section 8727 exempts surveys made exclusively for aerial photography or photogrammetry. The exemption of surveying for a particular objective (photogrammetry) strongly implies that the objective itself is outside the statutory pale. Certainly there would be little logic in exempting that part of the process which is indubitably land surveying if the remainder of the process required a license.

Although it has been urged that section 8727 should be construed to exempt the entire photogrammetric mapping process, we see no need to make that determination here, because, as we believe, the particular contracts in question are outside the purview of section 8726.

Section 6731 brings "geodetic, municipal and topographic surveying" within the practice of civil engineering. Does this "surveying" include anything more than that which section 8726 defines as "land surveying"? We think not. These provisions are parts of separate acts which are contained in a single code. For purposes of statutory construction the entire code is regarded as a single statute (*In re Porterfield,* 28 Cal. 2d 91, 100). A licensed surveyor may practice his pro-

fession as defined by section 8726, without collision with the engineers' act (see sec. 6743). Similarly, a registered civil engineer may practice his own profession (which includes geodetic, municipal and topographic surveying) without a surveyor's license (see sec. 8731). If section 6731 included any surveying activities other than those mentioned in section 8726, the result would be to exclude land surveyors from some phases of geodetic, municipal and topographic surveying. Such a result is contrary to the basic intent of these interlocking statutes. The "surveying" mentioned in section 6731 includes nothing that is not embraced by section 8726. Since the mapping in question is outside section 8726, it likewise falls outside section 6731.

We conclude that these photogrammetric mapping contracts of the Department of Public Works do not call for activities within the scope of the engineers' or land surveyors' licensing laws.

Opinion No. 53-245—February 15, 1954

SUBJECT: CLINICAL LABORATORY TECHNICIAN — Person operating a school training persons for, without approval of Department of Public Health, is in violation of Business and Professions Code section 1289, even though school does not purport to offer instruction leading to licensure.

Requested by: DIRECTOR OF PUBLIC HEALTH.

Opinion by: EDMUND G. BROWN, Attorney General.
Wayne D. Hudson, Deputy.

The Honorable Wilton L. Halverson, Director of Public Health, has requested the opinion of this office on the following question:

Is a person operating a school in clinical laboratory technics, but not purporting to train individuals for licensure as clinical laboratory technicians, in violation of Chapter 3 of Division 2 of the Business and Professions Code?

The conclusion reached may be summarized as follows:

The act described is a violation of section 1289 of the Business and Professions Code.

ANALYSIS

The provisions of Chapter 3 of Division II of the Business and Professions Code provide for the comprehensive regulation of clinical laboratory technology. This technology involves the application of developed techniques in obtaining data for use in ascertaining the presence, progress and source of disease in human beings (Business and Professions Code sec. 1206).