No. _____

In The

Supreme Court of the United States

RYAN CROWNHOLM; AND CROWN CAPITAL ADVENTURES, INC., D/B/A MYSITEPLAN.COM,

Petitioners,

v.

RICHARD B. MOORE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL GREENBERG
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Ste. 900
Arlington, VA 22203
(703) 682-9320
mgreenberg@ij.org

PAUL V. AVELAR
Counsel of Record
INSTITUTE FOR JUSTICE
3200 N. Central Ave.,
Ste. 2160
Phoenix, AZ 85012
(480) 557-8300
pavelar@ij.org

Counsel for Petitioners

QUESTIONS PRESENTED

1. What standard applies to determine whether an occupational licensing law's restriction on a person's use, creation, and dissemination of information in drawings is a regulation of his speech or of his conduct that incidentally involves his speech?

2. What level of constitutional scrutiny applies to speech regulated by an occupational licensing law?

PARTIES TO THE PROCEEDING

Petitioners (plaintiffs-appellants below) are Ryan Crownholm and Crown Capital Adventures, Inc., d/b/a MySitePlan.com.

Respondents (defendants-appellees below) are Richard B. Moore, in his official capacity as Executive Officer of the California Board for Professional Engineers, Land Surveyors, and Geologists, and Christina Wong, Guillermo Martinez, Fel Amistad, Alireza Asgari, Khaesha Brooks, Rossana D'Antonio, Mike Hartley, Coby King, Elizabeth Mathieson, Frank Ruffino, Wilfredo Sanchez, Fermin Villegas, and Cliff Waldeck, each in his or her official capacity as a Member of the California Board for Professional Engineers, Land Surveyors, and Geologists.[1]

[1] Pursuant to Fed. R. Civ. P. 25(d), Fed. R. App. P. 43(c)(2), and Sup. Ct. R. 35.3, current members of the Board have been automatically substituted as successor parties to previous Board members.

CORPORATE DISCLOSURE STATEMENT

Petitioner 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.

RELATED PROCEEDINGS

U.S. Court of Appeals (9th Cir.):

> *Crownholm, et al.*, v. *Moore, et al.*, No. 23-15138 (Apr. 16, 2024) (as amended); petition for reh'g denied (Apr. 16, 2024).

United States District Court for Eastern District of California:

> *Crownholm, et al.*, v. *Moore, et al.*, No. 22-CV-01720-DAD-CKD (Jan. 24, 2023).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals, App.1a-13a, is unreported. The memorandum opinions and orders of the district court, App.27a-55a, 56a-91a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 2024. A timely filed petition for en banc rehearing was denied on April 16, 2024, and an amended opinion was entered the same day. On June 10, 2024, Justice Kagan extended the time within which to file a petition for certiorari to and including September 9, 2024. Petitioners invoke this Court's jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

This case concerns whether a restriction on speech is immune from First Amendment scrutiny solely because the restriction is imposed by an occupational-licensing law that is generally aimed at regulating conduct. This Court's decisions in *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), and *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), require ordinary First Amendment scrutiny.

Petitioners use publicly available information to create new information in the form of drawings, which they sell to their clients. App.101a-113a. In any other context, the use, creation, and dissemination of information is speech. *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011). So is drawing a picture. *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 587 (2023).

The Ninth Circuit held, however, that Petitioners' speech was conduct—not speech—because California deems it the "practice" of surveying. The court therefore refused to apply any kind of First Amendment scrutiny and determined Petitioners had failed even to state a claim that their free-speech rights were at issue. The Ninth Circuit's decision exemplifies the lower courts' continuing failure to apply "ordinary First Amendment principles" to "professional" speech. *NIFLA*, 585 U.S. at 773. As detailed below, only the Fifth Circuit has successfully followed those principles, while the Fourth, Ninth, and Eleventh Circuits have diverged from them. The lower courts' pronounced confusion regarding the constitutional

protections for speech regulated by occupational-licensing laws warrants this Court's intervention.[2]

A. Background

1. Petitioner Ryan Crownholm was a licensed contractor in California whose projects required permits from local-government building departments. App.99a-100a. These departments often require a site-plan drawing to apply for a permit. App.100a. A site plan is required for permits for all sorts of projects, even those of small scale. App.100a-101a.

Site plans are not authoritative determinations of locations. App.110a, 125a, 129a. They only 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. App.100a-104a. It is a visual image of a proposal to assist in permitting review of the project. App.100a-104a. Even a simple sketch can suffice. App.100a-102a.

While some kinds of permit drawings may need to come from a licensed professional, for many projects, building departments accept site plans drawn by people who are not licensed surveyors. App.100a-104a. Thousands of contractors and homeowners regularly make site plans and submit them to local departments. App.106a.

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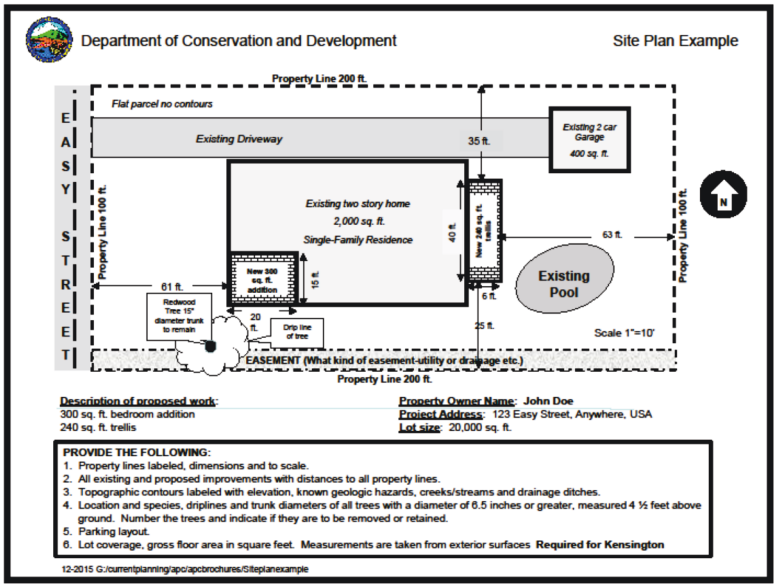
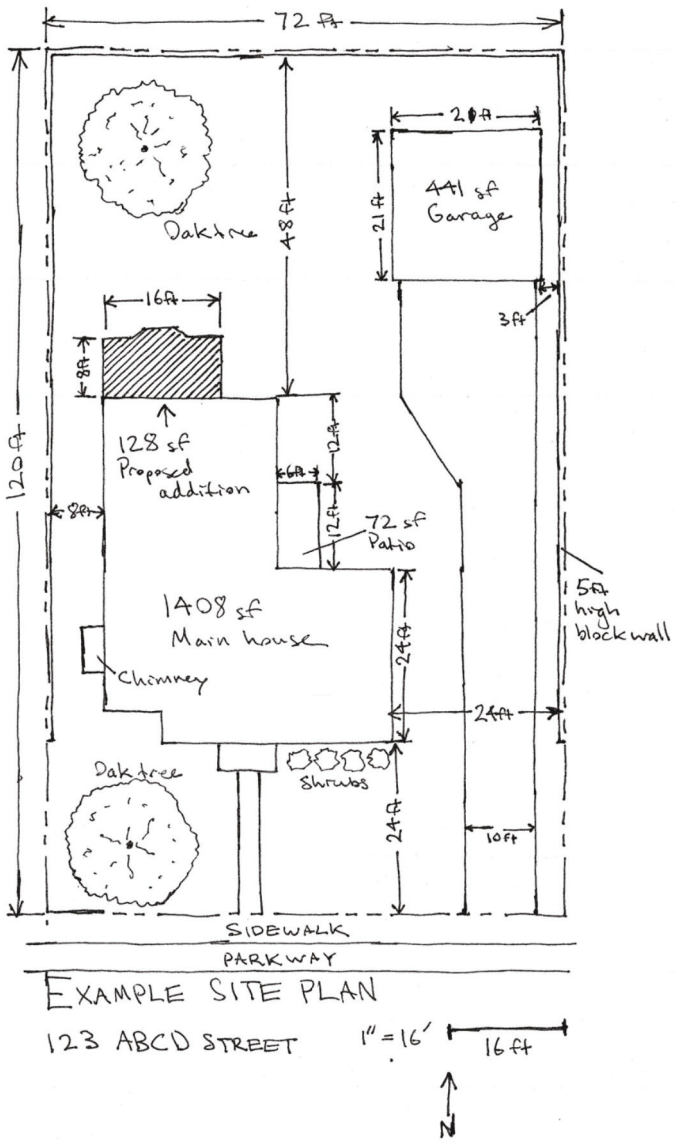
[2] A petition for certiorari filed today in *360 Virtual Drone Services LLC* v. *Ritter* likewise involves a First Amendment challenge to a surveying-licensure law, and its question presented overlaps substantially with the first question presented here.

Building departments provide detailed instructions for lay people to use in preparing their own site plans. App.102a-104a. They advise lay people to use public geographic information system (GIS) maps to determine required information such as "boundaries," "dimensions," and "size" of the property, and to then add the locations and measurements of "all structures and other physical features" onto the site plan. App.105a. They even provide exemplars:



App.102a (Contra Costa County, https://www.contra-costa.ca.gov/DocumentCenter/View/44308/How-to-Draw-a-Site-Plan?bidId=).



See App.104a (City of San Gabriel, https://www.san-gabrielcity.com/DocumentCenter/View/217/How-to-Prepare-a-Site-Plan---A-Homeowners-Guide?bidId=).

HOW TO PREPARE A

SITE/PLOT PLAN

City of Murrieta – Development Services Department
1 Town Square, Murrieta CA 92562

Information Bulletin

105

August 2019

This Information Bulletin describes how to prepare a typical site/plot plan for construction projects. All plans submitted or reviewed over the counter for a construction permit require a site plan.

Documents Referenced in this Information Bulletin

- California Building Standards Code (CBSC)
- Murrieta Municipal Code (MMC)

I. SITE/PLOT PLAN

A site/plot plan is a drawing that shows all property lines, lot lines, easements, public right-of-ways, buildings, structures located on parcel of property (existing and new). This plan must be legible, drawn to scale or fully dimensioned.

The site/plot plan must be shown on a sheet not smaller than 8.5" x 11" in size. For an example of a site/plot plan see Figure 1 in this bulletin. Noted below is a list of all items required to be shown on the site/plot plan:

A. **Scope of work,** which includes a brief statement clearly describing the scope of work being proposed.

B. **North arrow & drawn to scale or fully dimensioned.**

C. **Property lines** with dimensions.

D. **Exterior dimensions** of all existing and proposed buildings, additions and structures, with dimensions to property lines, dimensions between buildings and structure, and dimensions of architectural projections such as bay windows, fireplaces, etc.

E. **Public Right-of-way dimensions** that include curb to property line distance, or centerline of street to property line distance, and type of paving.

F. **Public improvements,** existing and proposed curb, sidewalk, pedestrian ramps, driveways, etc.

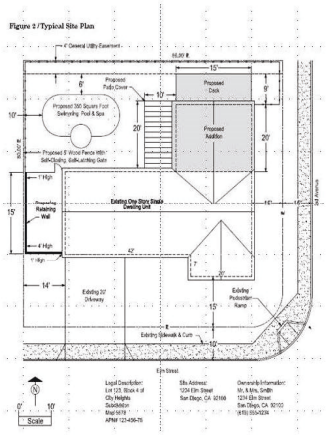
G. **Easements** with dimensions, location and label describing purpose.

H. **Property owner information** including name and address and phone number of the property owner.

I. **Site address** of the construction site.

J. **Legal description** of construction site & Assessor's Parcel # (APN), if available.

Figure 1: Sample Site/Plot Plan



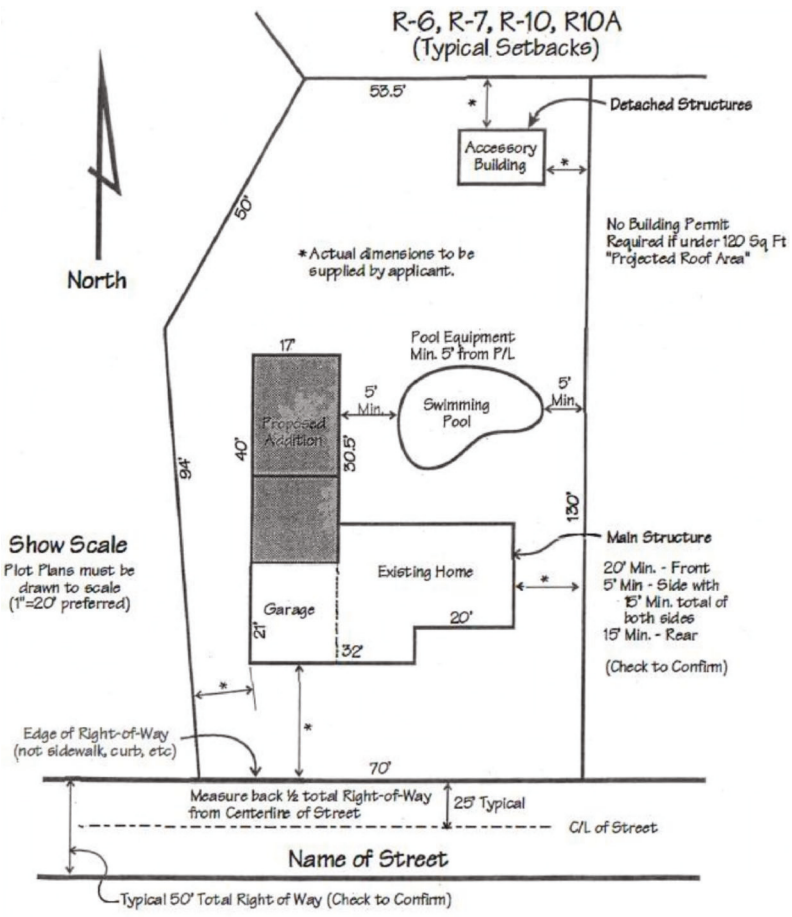
II. SITE INFORMATION

Information regarding a particular lot may be obtained from the Building & Safety Division of the Development Services Department, located at 1 Town Square. Should you have any questions on how to complete a site/plot plan, feel free to come to our counter to ask for assistance or contact a Building Division Technician at (951) 461-6062.

To help you on those smaller projects, a site/plot plan template has been provided on the backside of this Information Bulletin.

Visit our Website at http://www.murrietaca.gov/746/Development-Services

See App.103a (City of Murietta, https://www.murrietaca.gov/DocumentCenter/View/137/Site-Plot-Plan-IB-105?bidId=).



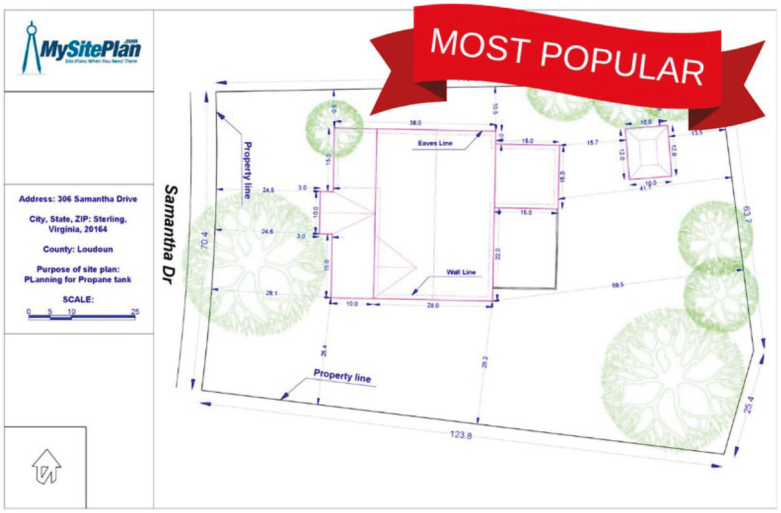
See App.103a (City of Pleasant Hill, https://www.pleasanthillca.gov/DocumentCenter/View/19326/SAMPLE-PLOT-PLAN).

Petitioner Ryan Crownholm learned how to draw site plans from these local-government building departments nearly twenty years ago. App.99a-100a, 104a-105a. As a contractor, he spent substantial time making such drawings for his own projects. See

App.105a. These building departments always accepted his site plans. App.107a. No one thought he—or anyone else—needed a surveyor license to make site plans using publicly available information. App.108a.

Crownholm founded MySitePlan.com in 2013 when other contractors began asking him to create site-plan drawings for their projects too. App.108a. MySitePlan.com has now 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. App.113a. It copies public GIS data and satellite imagery into a computer-aided drawing program to prepare a new site-plan drawing, just as Crownholm learned from California building departments. App.110a.

Like the site-plan exemplars provided by local governments, MySitePlan.com drawings show property lines, buildings and other improvements, dimensions, a scale, and a description of the proposed work. Compare App.102a-104a, with App.110a-111a. MySitePlan.com's drawings are used not just for local-government building departments, but also for general informational uses, like event-layout planning for wedding venues and farmers' markets. App.111a-113a.



App.111a.

Petitioners' site plans do not have a "stamp or seal," the required hallmark of a "survey." App.110a; cf. Cal. Bus. & Prof. Code §§ 8750, 8761 (requiring licensed land surveyors to have a state-created "stamp or seal" for their documents and prohibiting all others from using a stamp or seal). And MySitePlan.com contains numerous disclaimers explaining the uses its drawings may—and may not—be put to. App.108a ("THIS IS NOT A LEGAL SURVEY, NOR IS IT INTENDED TO BE OR REPLACE ONE"); App.108a ("Before ordering: Please verify with your building department that they DO NOT require that the plan [] be prepared by surveyor, architect or engineer.").

2. Eight years after starting MySitePlan.com, and nearly two decades after he started drawing site plans, Crownholm was fined by the California Board for Professional Engineers, Land Surveyors, and

Geologists for doing so. In December 2021, the Board's Executive Officer issued Petitioners a citation. App.113a; see also App.147a-158a. In the Board's view, "[p]reparing" or "offering to prepare" site plans "which depict the location of property lines, fixed works, and the geographical relationship thereto falls within the definition of land surveying." App.114a-115a (citing Cal. Bus. & Prof. Code § 8726(a)(1), (7), (9)). This prohibition applies not just to site plans submitted to the government; any drawing that "depict[s]" the prohibited information is illegal, no matter its informality or intended use. App.8a, 150a. Thus, the Board requires a land-surveyor license merely for drawing and disseminating the basic site plans that Petitioners and countless lay people, including homeowners and contractors, routinely draw and submit to local building departments throughout California; that local building departments routinely accept and teach lay people to draw; and that are used for a variety of other general informational, non-permitting purposes. App.102a-106a, 111a-119a. Practicing "land surveying" (as the Board defines its scope) without a license is a misdemeanor. Cal. Bus. & Prof. Code § 8792(a) and (i).

3. The steady expansion of surveying-practice laws has threatened basic mapmaking and uses of spatial information for many years.

No state licensed surveyors before California did so in 1891. Even then, California's license was purely voluntary for nearly a half-century. See 1933 Cal. Stat. 1282; see also Francois D. Uzes, Chaining the Land: A History of Surveying in California 196-199, 201 (1977).

Armed with mandatory licensure, by the 1950s California land surveyors sought to expand the scope of their exclusive practice. Initially, state officials (interpreting prior versions of the surveying-scope-of-practice law) rebuffed these attempts. The state attorney general opined in 1954 that "[m]ap making is not ipso facto surveying." 23 Ops. Cal. Att'y Gen. 86, 89 (Opinion No. 54-26, Feb. 11, 1954). Instead, the "purpose or method" used to create a map determined whether a land-surveying license was needed. *Ibid*. Making a topographic map by aerial photographs and photogrammetry, then, was not "surveying" when it did not "determine" any property line. *Hill* v. *Kirkwood*, 326 P.2d 599 (Cal. App. 1958). Nor was "surveying, mapping, and computing" for agricultural land leveling the practice of surveying. 19 Ops. Cal. Att'y Gen. 55, 55 (Opinion No. 51-124, Jan. 21, 1952).

The scope of California's surveying-practice laws has steadily grown since then. Today, regulators interpret them such that maps which "depict the location of property lines, fixed works, and the geographical relationship thereto fall[] within the definition of land surveying," no matter how informal their purpose or method of creation. App.114a-115a, 150a. This includes maps for "ostensibly benign purposes (like planning a farmers' market)." App.8a.

Over 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. App.119a (quoting Bruce A. Joffe, *Surveyors and GIS Professionals Reach Accord*, U.S. Geological Survey

Open-File Report 02-370, at 29, https://pubs.usgs.gov/of/2002/of02-370/dmt_02.pdf). 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. App.119a. 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 nonauthoritative uses of location data such as "reference[s] for planning, infrastructure management, and general information." App.119a-124a (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, California has not. App.124a-125a. Its enforcement against Petitioners 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. App.124a-125a.

4. On September 21, 2022, Crownholm signed a notice agreeing not to appeal the Board's citation and paid a $1,000 fine. App.119a.

B. Procedural History

Petitioners then sued in the U.S. District Court for the Eastern District of California, pursuant to 42 U.S.C. 1983 and 28 U.S.C. 1331. Petitioners sought declaratory and injunctive relief from future enforcement of Cal. Bus. & Prof. Code § 8726(a)(1), (7), and (9), and § 8792(a) and (i) against them. See App.114a-118a, 145a-146a. As is relevant here, Petitioners alleged that their creation and dissemination of location information in the form of site-plan drawings is speech. App.95a, 131a-132a; *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011) (the use, "creation and dissemination of information are speech within the meaning of the First Amendment"); see also *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 587 (2023) (drawing a picture is speech). Petitioners also alleged they are regulated based on the content of their speech, because regulation turns only on what their drawings "depict." App.118a; see also *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163-164 (2015) (regulation is content-based if it applies because of the "topic discussed," its "function or purpose," or "cannot be justified without reference to the content of the regulated speech" (cleaned up)).

The Board opposed Petitioners' motion for preliminary injunction, and, separately, sought to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6). The district court denied the preliminary injunction, App.56a-91a, then granted the motion to dismiss, App.27a-55a. Petitioners timely appealed.

The Ninth Circuit affirmed. According to that court, "the fact that Plaintiffs' site plans convey

information through language and graphics does not *ipso facto* subject the Act to First Amendment scrutiny." App.4a. Instead, the panel held that Petitioners are "regulated based on their *conduct*" because California calls their speech "unlicensed land surveying conduct." App.3a-5a (emphasis added). In short, the court revived the Ninth Circuit's "professional speech" doctrine that was abrogated by this Court in *NIFLA*. App.3a-5a (citing *Nat'l Ass'n for the Advancement of Psychoanalysis* v. *Cal. Bd. of Psych. (NAAP)*, 228 F.3d 1043 (9th Cir. 2000); *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014); and *Tingley* v. *Ferguson*, 47 F.4th 1055 (9th Cir. 2022), cert. denied, 144 S. Ct. 33 (2023)).

As an alternative, the court held that Petitioners' speech is regulated "merely incidental[ly]" to the law's "primary effect of regulating Plaintiffs' unlicensed land surveying activities." App.5a-6a. The court rejected the argument that California's restriction of Petitioners' "express[ion]" was content-based, on grounds that California did not prohibit Petitioners "from engaging in public discourse * * * including for a change in the law" and because the restriction on depicting properties "is not limited to * * * only certain types of properties." App.5a. But see *Reed*, 576 U.S. at 169 (regulation of "specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter"). Finally, the court concluded that a restriction "impos[ing] only incidental burdens" on speech "is subject to rational basis review." App.6a.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

The decision below entrenches a conflict among the Circuits as to whether this Court's decision in *NIFLA* permits states to relabel speech regulated by an occupational-licensing law as the "conduct" of a "profession" to except it from First Amendment scrutiny. *NIFLA* forecloses that. 585 U.S. at 773 (the fact that speech "requires a professional license from the State" does not affect "the protection that speech receives under the First Amendment"). Nevertheless, the circuits have split regarding the First Amendment protection afforded to speech restricted by occupational-licensing laws—including in several cases regarding the application of land-surveying licensing laws to pure speech. Some circuits, including the Ninth here, continue to treat speech restricted by occupational-licensing laws as not protected by the First Amendment. Other circuits, however, apply ordinary First Amendment principles to such speech.

This circuit split has persisted despite *NIFLA*. Most recently, members of this Court recognized the circuit split regarding speech regulated as therapy practice. *Tingley* v. *Ferguson*, 144 S. Ct. 33 (2023) (Thomas, J., dissenting from the denial of certiorari); *id*. at 35 (Alito, J., dissenting from the denial of certiorari); compare *Tingley* v. *Ferguson*, 47 F.4th 1055 (9th Cir. 2022), cert. denied, 144 S. Ct. 33 (2023) (conversion therapy is conduct, not speech, and receives only rational-basis review), with *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) (conversion therapy is speech, not conduct, and receives strict scrutiny), and *King* v. *Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (conversion therapy is speech, not conduct,

and receives intermediate scrutiny), abrogated on other grounds by *NIFLA*, 585 U.S. at 767. But across professions, and though taking a variety of approaches, the major fault line is between courts making the speech/conduct distinction based on what the *speaker* did to be regulated (as required by *Holder*) or, instead, based on whether the challenged regulation "*generally* functions as a regulation of conduct" (the approach *Holder* rejected). *Holder*, 561 U.S. at 27-28.

Relatedly, the decision below also exacerbates another conflict among the Circuits and this Court's decisions regarding the level of scrutiny to apply to "incidental" regulations of speech. This Court has said incidental regulation of speech receives intermediate scrutiny. But, and likely reflecting their underlying confusion, the circuit courts sometimes apply intermediate scrutiny, sometimes apply rational-basis review, and at least one has invented a bespoke level of scrutiny specifically for speech regulated by occupational-licensing laws.

Resolving these conflicts is critical. Thousands of California homeowners and contractors regularly draw the kinds of site plans Petitioners draw, at local-government invitation. The decision below thus created thousands of new criminals across California. More broadly, the circuit-court conflict centers on whether states may use occupational-licensing laws to gatekeep the creation and dissemination of information—"the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs," *Sorrell*, 564 U.S. at 570—through occupational-licensing laws.

I. The Ninth Circuit's professional speech decision conflicts with decisions from this Court and other Circuits.

A. Professional speech, the speech/conduct distinction, and *NIFLA*.

This Court's decision in *NIFLA* confirmed that there is no general exception to the First Amendment for so-called "professional speech." Allowing states to regulate speech without regard to ordinary First Amendment principles "by simply imposing a professional licensure requirement" "gives the States unfettered power to reduce a group's First Amendment rights." 585 U.S. at 773. In so holding, *NIFLA* stressed that there are only two circumstances in which the Court has afforded speech uttered by "professionals" reduced First Amendment protection. One is where a law "require[s] professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id*. at 768. The other is where the government is regulating "professional conduct, even though that conduct incidentally involves speech." *Ibid*. In all other circumstances, laws that burden "professional" speech on particular subjects receive the same strict scrutiny applicable to content-based restrictions on any other kind of fully protected speech. *Id*. at 773.

Drawing the line between the regulation of speech and the regulation of professional conduct that only incidentally involves speech has, however, split the lower courts. This Court acknowledged that "drawing the line between speech and conduct can be difficult." *Id*. at 769. But "the line is long familiar to the bar"

and "this Court's precedents have long drawn it." *Ibid.* (citations omitted).

This Court explained the distinction between regulations of speech and conduct in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010), and the lower courts' split is a function of those courts' failing to apply *Holder* consistently. Under *Holder*, it does not matter if a law "*generally* functions as a regulation of conduct." *Id.* at 27. In an as-applied case, *Holder* requires courts to determine whether the generally applicable law is directed at a person because of his speech or his conduct. *Id.* at 27-28. Even when a law "may be described as directed at conduct" as a general matter, First Amendment scrutiny is needed when "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. Accordingly, at a minimum, a speaker must be engaged in some regulable conduct for the "incidental regulation" exception to apply. *NIFLA,* 585 U.S. at 770 (licensed notice requirement "not tied to a procedure at all"); *Cohen* v. *California*, 403 U.S. 15, 18 (1971) (conviction was based on speech because defendant had not engaged in "any separately identifiable conduct"); accord *Sorrell*, 564 U.S. at 567 (setting out examples of incidental regulations of speech *triggered* by the regulated person's conduct of hiring, setting fires, and restraining trade).[3]

[3] "Expression can generally be regulated to prevent harms that flow from its noncommunicative elements (noise, traffic obstruction, and the like), but not harms that flow from what the expression expresses. Neither generally applicable laws nor specially targeted laws can be allowed to restrict speech because of what the speech says, unless the speech falls within one of the

Nevertheless, lower courts (including the Ninth Circuit below) frequently ignore *Holder* when it comes to "professional speech." Rather than looking to what the individual did to trigger application of the licensing law, the lower courts find that speech subject to an occupational-licensing law is, at most, incidentally regulated because the licensing law generally functions as a regulation of conduct. Based on this, as shown below, the Circuits have split regarding professional speech and the First Amendment, both as to surveyor-licensing laws specifically and speech restricted by occupational-licensing laws more broadly.

B. The Fourth, Fifth, Ninth, and Eleventh Circuits are split regarding the speech/conduct distinction and occupational licensing.

Four Circuits have addressed speech regulated by occupational-licensing laws, and they have reached varying conclusions based on whether they draw the line between speech and conduct as required by *NIFLA* and *Holder*. Three of these circuits have specifically addressed speech regulated by surveyor-licensing laws; each of those three cases applied a different form of speech-versus-conduct analysis, and they thus reached three different conclusions.

1. The Fifth Circuit has faithfully applied the analytical approach dictated by *NIFLA*. *In Vizaline,*

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exceptions to protection (e.g., threats or false statements of fact) or unless the restriction passes strict scrutiny." Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1284 (2005)

LLC v. *Tracy*, 949 F.3d 927, 928 (5th Cir. 2020), a company that "convert[ed] existing legal descriptions of real property into computer-generated drawings and * * * [sold] them to community banks as a low-cost alternative to formal land surveys" was prosecuted for the unlicensed practice of surveying. As here, Vizaline argued this violated their First Amendment right to use, create, and disseminate information. *Ibid.* The district court held that surveyor-licensing laws, which govern "'who is permitted to provide certain professional services and who is not * * * do not trigger First Amendment scrutiny'" because they "merely 'incidentally'" regulated Vizaline's speech. *Id.* at 930-931.

The Fifth Circuit reversed because this analysis—the same employed by the Ninth Circuit here—"runs afoul of *NIFLA*." *Id.* at 932. In the Fifth Circuit, a regulation of speech that is part of a generally applicable licensing provision is not categorically exempt from First Amendment scrutiny. *Id.* at 932-933. Instead, following *NIFLA*, the Fifth Circuit recognized it must apply "the traditional conduct-versus-speech dichotomy." *Id.* at 932; see also *id.* at 933 ("*NIFLA* reoriented courts toward the traditional taxonomy that 'draw[s] the line between speech and conduct.'"). Thus, "the relevant question is whether, *as applied* to [the speaker's] practice, [the] licensing requirements regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct." *Id.* at 931 (emphasis added). That is the *Holder* analysis: What did the individual do to "trigger[]" application of

the regulation? 561 U.S. at 28. The Fifth Circuit remanded for that determination in the first instance.[4]

In addition to *Vizaline*, the Fifth Circuit has also recognized that veterinarian-licensing laws are potentially subject to First Amendment challenge depending on whether the speaker—a licensed veterinarian prohibited from giving veterinarian advice over the internet—was regulated for his speech or conduct. *Hines* v. *Quillivan*, 982 F.3d 266, 272 (5th Cir. 2020). As in *Vizaline*, *Hines* remanded for the district court to "make the initial evaluation of whether conduct or speech is being regulated." *Ibid.*

Thus, the Fifth Circuit is consistent with both *NIFLA* and *Holder* in applying the traditional speech/conduct analysis when facing an as-applied First Amendment challenge to a surveyor or other occupational-licensing law.

2. The Fourth Circuit has taken a fundamentally different approach to the speech/conduct distinction. Outside the occupational-licensing context, the Fourth Circuit has applied the traditional speech/conduct analysis. *E.g.*, *PETA, Inc.* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 826 (4th Cir. 2023) (it is "irrelevant that the law 'may be described as directed at conduct' where plaintiffs triggered the statute by 'communicating a message'" (quoting *Holder*, 561 U.S. at 28)), cert. denied, 144 S. Ct. 325 (2023). But in cases

[4] On remand, the case settled after Mississippi adopted an exemption from its licensing law for, inter alia, all documents that display a one-sentence, 12-point-font disclaimer. Stipulation of Settlement and Dismissal for Mootness, No. 18-cv-531 (S.D. Miss. Dec. 17, 2020) (Doc. 58).

involving speech regulated by occupational-licensing laws—and specifically surveyor licensing—the court has rejected the traditional speech/conduct analysis.

In *360 Virtual Drone Services LLC* v. *Ritter*, the court invented a "non-exhaustive list of factors" to "distinguish[] between licensing regulations aimed at conduct and those aimed at speech as speech." 102 F.4th 263, 278 (4th Cir. 2024). That "variety of factors" includes "whether the speech carries economic, legal, public-safety, or health-related consequences"; "whether the speech takes place in a traditionally public space," as opposed to on private property; and whether the law being challenged "appears to regulate some kind of unpopular or dissenting speech." *Id.* at 274-275.[5] Under these factors, the court determined that "as applied to Plaintiffs, the relevant provisions of the [North Carolina surveying law] are aimed at conduct." *Id.* at 278.

The court's multi-factorial "aimed at conduct" analysis deviates from the traditional speaker-based speech/conduct analysis required by *Holder*. Indeed, at no point did the court deny that the Plaintiffs were engaged in speech, *ibid.*, nor did it identify any separately identifiable conduct in which Plaintiffs engaged.

3. The Ninth Circuit's analysis here deviates from both the Fourth and Fifth Circuits. The panel below

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[5] Moreover, according to the Fourth Circuit, these factors also dictate whether to apply "the traditional intermediate-scrutiny test" or a "loosened intermediate-scrutiny test for professional-conducted-focused regulations," *id.* at 276, as discussed further below.

held that speech regulated by land-surveyor licensing laws is not speech at all because California deems it "unlicensed land surveying conduct." App.4a. Under that view, all that matters is whether Petitioners' speech is regulated by a generally applicable licensing regime; if so, it is *never* speech at all, but always conduct. App.5a. This is the "professional speech" exception to the First Amendment all over again, and it directly conflicts with *NIFLA*. 585 U.S. at 767.

The panel below thus took a third, different approach to making the speech/conduct distinction. Even though it acknowledged a duty to determine whether Petitioners were "regulated based on their speech or based on their conduct," App.3a, it never examined Petitioners' actions to determine if they were speech or conduct. Cf. *Vizaline*, 949 F.3d at 931. Nor did it engage in a multifactorial analysis to determine whether the regulation was of speech or conduct. Cf. *360 Virtual Drone*, 102 F.4th at 278. Instead, it deemed Petitioners' speech "conduct" solely because California defined Petitioners' speech to be within the scope of a licensed occupation. App.5a-6a. Cf. *360 Virtual Drone*, 102 F.4th at 273 ("the fact that the Act generally functions as a regulation on professional conduct cannot be dispositive" (cleaned up)).

Under the Ninth Circuit's approach, it does not matter what Petitioners did to be regulated—engage in speech only, in conduct, or some combination of the two. All that matters is that the licensing regime is *generally* aimed at conduct—in other words, the law *mostly* regulates conduct in its applications to people other than Petitioners. App.3a-5a. Here, all that Petitioners do—the only thing "triggering coverage" of

California's licensing requirements, *Holder*, 561 U.S. at 28—is speech. They use, create, and disseminate information, which is "speech within the meaning of the First Amendment," *Sorrell*, 564 U.S. at 570, in the form of drawings, which is speech that "qualif[ies] for the First Amendment's protections," *303 Creative*, 600 U.S. at 587. They are regulated because of what their drawings "depict." App.150a. Tellingly, the panel below never identified any "conduct" that Plaintiffs engaged in, only speech. *Cf.* App.4a ("the fact that Plaintiffs' site plans convey information through language and graphics does not *ipso facto* subject the Act to First Amendment scrutiny").

The Ninth Circuit's refusal to apply First Amendment scrutiny to speech regulated by an occupational-licensing law conflicts directly with *Holder* and *NIFLA*. Under *Holder*, even when a law "may be described as directed at conduct," First Amendment scrutiny is needed when "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." 561 U.S. at 28. But the Ninth Circuit has long refused to apply *Holder* to "professional" speech. *Pickup*, 740 F.3d at 1230. Even after *NIFLA* made clear that "ordinary First Amendment principles" applied to professional speech, 585 U.S. at 773, the Ninth Circuit still refused to revisit its speech/conduct distinction case law, *Tingley*, 47 F.4th at 1077. Instead, as demonstrated here, it continues its conflict with this Court's precedents regarding the speech/conduct distinction when it comes to speech regulated by an occupational license. App.4a (relying on *Pickup* and *Tingley* to reject the speech/conduct distinction here). This continuing refusal has resulted in the need for this Court to again

address *NIFLA*'s application to the free-speech rights of people regulated by occupational-licensing laws. See *Tingley*, 144 S. Ct. at 35 (Thomas, J., dissenting from denial of certiorari) ("This case is not the first instance of the Ninth Circuit restricting medical professionals' First Amendment rights, and without the Court's review, I doubt it will be the last."); *ibid.* (Alito, J., dissenting from denial of certiorari) ("[A]ll restrictions on speech merit careful scrutiny * * * .").

The Ninth Circuit is also inconsistent post-*NIFLA*. In comparison to this case and *Tingley*, the court took a conflicting path in *Pacific Coast Horseshoeing School, Inc.* v. *Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020) ("*PCHS*"). In *PCHS*, a school that taught horseshoeing was, as part of a larger licensing law for private post-secondary schools, prohibited from entering an enrollment contract with a student. *Id.* at 1066-1067. The state and district court asserted that the regulation did "not implicate speech at all" because it regulated "only non-expressive conduct—namely, the execution of the enrollment agreement." *Id.* at 1068. But, relying on *Holder* and *Sorrell*, the Ninth Circuit held that the regulation was, as applied, a regulation of speech because the regulation turned on the content of what was taught and the identity of the teacher. *Id.* at 1069-1073. Because the regulator had to consider the content of the speech (teaching) to determine whether a violation had occurred, the law was subject to ordinary First Amendment scrutiny. *Id.* at 1073.

Had the panel below followed *PCHS*, it would have applied some form of heightened scrutiny because Petitioners are regulated based on the content of their

drawings—what they "depict." App.150a. Had the *PCHS* panel done what the panel below did, PCHS would have lost because the restriction on enrollment was part of a general licensing scheme for schools. Cf. 961 F.3d at 1069 (under *Holder*, "a law which may be described as directed at conduct nevertheless implicates speech where the conduct triggering coverage under the statute consists of communicating a message" (cleaned up)). Thus, the Ninth Circuit not only conflicts with other circuits as to whether *Holder*'s speech/conduct analysis governs in the licensing context, it conflicts with itself.

4. Finally, though it has not addressed speech regulated by a surveyor-licensing law specifically, the Eleventh Circuit is of two minds about professional speech. As noted above, the Eleventh Circuit held in *Otto* that a restriction on conversion therapy was a regulation of speech, not of conduct. 981 F.3d at 865. Therapy was a practice that plaintiffs wanted to engage in, but that practice "consists—entirely—of words." *Ibid.* The court rejected the idea that the government can "regulate speech by relabeling it as conduct." *Ibid.* "[C]haracterizing speech as conduct is a dubious constitutional enterprise, and labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *Ibid.* (cleaned up).

Notwithstanding *Otto* (and *NIFLA*), however, the same court also held that a prohibition of speech about diet by an unlicensed person was a restriction of conduct. In *Del Castillo* v. *Secretary, Florida Department of Health*, Del Castillo was prohibited from giving "tailored advice on dietary choices, exercise

habits, and general lifestyle strategies" to clients because the state deemed that to be the practice of dietetics, a licensed occupation. 26 F.4th 1214, 1216-1217 (11th Cir. 2022). Relying on its pre-*NIFLA* precedents, the court held that "[a] statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Id.* at 1225 (cleaned up). And because the license is *generally* directed at "occupational conduct," the court did not analyze whether Del Castillo was engaged in speech or conduct. *Id.* at 1225-1226. See also App.4a-5a (panel below relying on *Del Castillo*).

And just to further confuse matters, the court then ignored *Del Castillo* and relied on *Otto* in rejecting the "latest attempt to control speech by recharacterizing it as conduct." *Honeyfund.com Inc.* v. *Governor*, 94 F.4th 1272, 1275 (11th Cir. 2024). Florida prohibited employers from holding mandatory employee meetings that endorsed certain beliefs, but allowed discussion that did not endorse those beliefs. *Id.* at 1275-1276. Florida argued that "ordinary First Amendment review does not apply because the law restricts conduct, not speech," because the law banned meetings, not speech. *Id.* at 1277. The court rejected this "clever framing" because, where "the conduct-not-speech defense is raised," the courts apply a test, based on *Cohen* v. *California*, 403 U.S. 15 (1971), that asks "whether enforcement authorities must examine the content of the message that is conveyed to know whether the law has been violated." 94 F.4th at 1278 (citation omitted).

Accordingly, when the "conduct-not-speech defense" is raised in the Eleventh Circuit, the courts sometimes look to what the regulation is generally directed at (*Del Castillo*) and sometimes at what triggers the regulation's application (*Otto* and *Honeyfund.com*).

* * *

As shown above, the lower courts are split regarding regulations of "professional speech," notwithstanding this Court's decision in *NIFLA*. The split comes down to inconsistency in drawing the distinction between regulations of speech and regulations of conduct under *Holder*. Most circuits have no trouble applying the traditional speech/conduct distinction when faced with laws *other than* occupational-licensing laws. *E.g.*, *PETA*, 60 F.4th at 826; *PCHS*, 961 F.3d at 1069-1073; *Honeyfund*, 94 F.4th at 1278. But only the Fifth Circuit has applied that traditional framework to "professional" speech. The Fourth and Ninth (and sometimes Eleventh) Circuits have failed to follow those "ordinary First Amendment principles" when speech is swept up by an occupational-licensing law. See *NIFLA*, 585 U.S. at 773. In the Ninth Circuit, such speech is categorically not protected because occupational-licensing laws *generally* regulate "unlicensed * * * conduct," regardless of whether they are triggered by speech in any particular application. App.4a. In the Fourth Circuit, a "variety of factors may come into play." *360 Virtual Drone*, 102 F.4th at 274. And in the Fifth Circuit, as this Court has directed, the court will look to what the speaker has done to trigger the application of the regulation. *Vizaline*, 949 F.3d at 931.

Given these conflicting decisions, people using, creating, and disseminating spatial information in multiple jurisdictions—like Petitioners—will have inconsistent free-speech rights because of the lower courts' conflicting approach to applying this Court's decision in *NIFLA*. Only this Court can settle the lower-court conflicts regarding First Amendment protections for speech regulated under licensing laws that "generally" regulate conduct.

C. There is a clear way forward.

That the First Amendment applies to speech regulated by occupational-licensing laws does not, contrary to some lower courts' fears, invalidate all occupational licensing. Instead, "ordinary First Amendment principles," *NIFLA*, 585 U.S. at 773, answer those fears.

First, most occupational-licensing laws are applied, most of the time, to conduct. Performing surgery; cutting hair; handling client funds; building a bridge, dam, or home—all are non-expressive conduct. Facial free-speech challenges to most occupational licensing laws are therefore unlikely to succeed, cf. *Moody* v. *NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (First Amendment facial standard asks "whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep" (cleaned up)), even though narrow challenges to particular applications—like this one—may.

Second, the "incidental regulation" doctrine, properly understood, allows for regulation of speech

that is truly *incidental* to—and only triggered by—a person's regulable conduct. The classic example of laws that regulate speech incidentally to conduct are those that require informed consent for a medical procedure. *NIFLA*, 585 U.S. at 769-770 (citing *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833 (1992)). Those laws require physicians to speak, but—unlike the laws in *NIFLA*, *Holder*, or here—the compelled speech is *triggered* by non-communicative conduct: performing a surgical procedure. That is how this Court has always applied the rule for speech incidental to regulable noncommunicative conduct in other contexts. See *Sorrell*, 564 U.S. at 567 ("That is why a ban on race-based hiring may require employers to remove 'White Applicants Only' signs, why an ordinance against outdoor fires might forbid burning a flag, and why antitrust laws can prohibit agreements in restraint of trade." (cleaned up)). In each case, the restriction is triggered by conduct: hiring, setting a fire, or restraining trade. But where a regulation "is not tied to a procedure at all," the regulation is of "speech as speech." *NIFLA*, 585 U.S. at 770.

Third, when speech has independent legal effect, laws that regulate speech for its legal effect rather than for its communicative content are also "incidental" regulations. Therefore, although the First Amendment protects *advising* a patient to take a controlled substance, it does not protect a physician's prescription that—although communicated in writing—creates a legal entitlement to access that controlled substance. *Conant* v. *Walters*, 309 F.3d 629, 635 (9th Cir. 2002).

Fourth, government can choose whose speech it will officially recognize. Just as a state can restrict physician prescriptions that, through writing, create a legal entitlement, it can restrict whose writing it will recognize for such prescriptions. Therefore, a state may allow licensed physicians to write prescriptions even if it does not give any effect to writings by unlicensed persons. See also *Nutt* v. *Ritter*, 2023 U.S. Dist. LEXIS 231517, at *50-51 (E.D.N.C. Dec. 19, 2023) (noting that limitation on use of an official stamp to certify engineering reports addressed issue of incompetent engineering *practice* while still allowing unlicensed people to *communicate* about engineering topics).

Fifth, government can, consistent with *NIFLA*, regulate commercial advertising by professionals. 585 U.S. at 768. Among other regulations, this allows greater leeway to regulate the use of certain professional titles—for example, "certified public accountant"—which may otherwise mislead consumers about the speaker's qualifications. *E.g., Ibanez* v. *Fla. Dep't of Bus. & Pro. Regul.*, 512 U.S. 136, 144 (1994); *Peel* v. *Att'y Registration & Disciplinary Comm'n*, 496 U.S. 91, 94 (1990).

Sixth, these cases are largely inapplicable to speech in special government-created forums, such as a lawyer appearing before a court. See, *e.g.*, *Berner* v. *Delahanty*, 129 F.3d 20, 26 (1st Cir. 1997) ("A courthouse—and, especially, a courtroom—is a nonpublic forum.").

Finally, even where strict scrutiny applies to a restriction on speech, government can meet its burden

with a sufficient showing. *Holder*, 561 U.S. at 39 (upholding content-based restriction of speech).

These "ordinary First Amendment principles," *NIFLA,* 585 U.S. at 773, will limit First Amendment scrutiny of most occupational regulations. But these limiting principles do not apply here. Petitioners here do not challenge surveyor licensing on its face. *E.g.*, App.96a. They only engage in speech, not conduct, and are regulated based on what their speech "depicts," so "incidental regulation" does not apply. *E.g.*, App.118a, 150a. Their speech has no independent legal significance; it cannot be used, for example, as part of a deed to establish property rights. App.125a. Petitioners do not seek to force the state to recognize their site-plan drawings as surveys. App.108a-110a. They do not claim to be surveyors, registered or otherwise, do not use (or seek to use) the licensed-surveyor stamp, and don't claim that their site-plan drawings are surveys; indeed, Petitioners repeatedly say they do not do surveys, their drawings are not surveys, and their drawings cannot be used as surveys are used. App.108a-110a. Nor does this case involve special government-created forums because Petitioners' drawings are prohibited no matter their function; even layouts for farmers' markets are regulated, and it is perfectly legal for building departments to accept non-surveyor site plans. App.7a-8a. Finally, at the motion-to-dismiss stage, the State cannot meet its evidentiary burden under any level of First Amendment scrutiny based on the Complaint alone.

* * *

Notwithstanding this Court's decision in *NIFLA*, the Circuits continue to reach divergent decisions about "professional speech" because they inconsistently follow this Court's precedents elucidating the distinction between speech and conduct. In any other circumstance, Petitioners' use, creation and dissemination of information in the form of drawings would be deemed speech, not conduct. But in the Ninth Circuit, because that speech is restricted by a surveyor "licensing" law, it is categorically deemed conduct, not speech. This categorical rule is not the rule in either the Fourth or Fifth Circuits. And more generally, the Fourth, Fifth, Ninth, and Eleventh Circuits have applied a variety of approaches in resolving cases where the government's "conduct-not-speech defense" is raised. This Court should grant certiorari to ensure a uniform approach.

II. The Ninth Circuit decision applying rational basis to "incidental regulation" of speech conflicts with decisions from this Court and other Circuits.

As detailed above, the decision below broke with this Court's precedent in holding that California's surveying restrictions "regulate[] Plaintiffs' conduct and impose[] only incidental burdens on their speech." App.6a. Under *Holder*, because the application of the regulation turns on what Petitioners' drawings "depict," it is not an incidental regulation; it is a regulation based on the content of speech. 561 U.S. at 27.

But even assuming that the Ninth Circuit was correct that this case involves only an incidental regulation of speech, the court further erred by holding that

restrictions "impos[ing] only incidental burdens" on speech are subject only "to rational basis review." App.6a. That conclusion breaks with this Court's decisions, exacerbates another circuit split, and conflicts even with prior Ninth Circuit decisions. Unlike the decision below, this Court, as well as a majority of the Circuits, have explained that intermediate scrutiny governs "incidental" burdens on speech. Even then, however, the Circuits are confused regarding the content of that intermediate scrutiny.

1. When "speech and nonspeech elements are combined in the same course of conduct," the government may place "incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968) (marks omitted). It may only do so, however, when it has "a sufficiently important governmental interest in regulating *the nonspeech element*." *Id.* at 376 (emphasis added); see also *id.* at 377 ("[I]f it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression and if the incidental restriction * * * is no greater than is essential to the furtherance of that interest.").[6]

[6] As *Holder* recognized, "*O'Brien* does not provide the applicable standard for reviewing a content-based regulation of speech," even if the statute "*generally* functions as a regulation of conduct." 561 U.S. at 27. Under the *Holder* standard, this as-applied case involves a content-based restriction of speech demanding still "more rigorous scrutiny" because Petitioners' "conduct triggering coverage under the statute consists of communicating a message," *i.e.*, depicting certain information in drawings. *Id.* at 27-28; Part I, *supra*.

O'Brien remains the test for regulations that "incidentally burden[] speech" today. See *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 189, 217 (1997) (citing *O'Brien*). While the Court had not settled on the "intermediate scrutiny" terminology in 1968, *O'Brien* "applied what we have since called 'intermediate scrutiny.'" *Holder*, 561 U.S. at 26; compare *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014) (clarifying intermediate-scrutiny standard as prohibiting a "burden [on] substantially more speech than is necessary to further the government's legitimate interests"), with *O'Brien*, 391 U.S. at 377 (requiring restriction be "no greater than is essential to the furtherance" of the government's interest).

2. Most Circuits have followed this Court's precedent.

Earlier this year, the Fifth Circuit confronted a Texas statute prohibiting use of a drone "to 'capture an image' of someone or private property with an intent to surveil the subject of the image." *Nat'l Press Photographers Ass'n* v. *McCraw*, 90 F.4th 770, 777 (5th Cir. 2024), pet. for cert. docketed, No. 23-1105 (Apr. 11, 2024).[7] While this restriction did not regulate "*what* image is captured," it did regulate "*where* it is taken from * * * and *how* it is taken"; accordingly, it "no doubt ha[d] an incidental effect on speech." *Id.*

[7] To be clear, Texas's drone-surveillance laws at issue in *McCraw* have nothing to do with the laws at issue in *360 Virtual Drone*, the Fourth Circuit case arising from North Carolina's enforcement of its surveyor-licensing laws to a drone user. See p. 22, above.

at 790, 793. Accordingly, the court explained, "intermediate scrutiny applies." *Id*. at 793.

The Seventh Circuit applied the same intermediate scrutiny in *Ben's Bar, Inc.* v. *Village of Somerset*, 316 F.3d 702 (2003). There, an "Adult cabaret" named Ben's Bar challenged a ban on selling or consuming alcohol at "adult entertainment" venues. *Id*. at 707-708. The ordinance was targeted at conduct—selling or consuming alcohol. But, Ben's Bar pointed out, the ordinance required it to choose between either its First Amendment right to (through its dancer-employees) "convey[] an erotic message" and "sell[ing] alcohol during their performances." *Id*. at 708. This "incidental impact upon expressive conduct" required intermediate scrutiny. *Id*. at 713.

Even the Ninth Circuit—notwithstanding the decision below—has observed that "[i]f legislation regulates conduct but incidentally burdens expression," that legislation receives "intermediate scrutiny." *PCHS*, 961 F.3d at 1068 (quoting *Turner* and citing *O'Brien*).

3. Despite this Court's and the circuit decisions cited above, the decision below held that "incidental burdens on [] speech" receive only "rational basis review." App.6a. In so doing, it cast *PCHS* aside as "dicta." App.7a n.2. The Ninth Circuit thus joined the minority of a Circuit split: Only the Eleventh Circuit had previously applied "rational basis review" to a law that "incidentally burdened" a plaintiff's free-speech rights. *Del Castillo*, 26 F.4th at 1218, 1226.

4. Yet the confusion in the Circuits extends further still, as the Fourth Circuit's decision in *360 Virtual Drone* demonstrates. That case created a unique intermediate-scrutiny test specifically "for professional-conduct-focused regulations" that incidentally burden speech, one "loosened" from "the traditional intermediate-scrutiny test" that it ordinarily applies. 102 F.4th at 276. This "quite different," "more relaxed," "lower" level of scrutiny allows "common sense" to supersede "specific evidence." *Id.* at 271, 275-277. Cf. *Billups* v. *City of Charleston*, 961 F.3d 673, 688 (4th Cir. 2020) (requiring the government to "present evidence" to meet its intermediate-scrutiny narrow-tailoring burden). This bespoke standard of review finds no support in this Court's decisions nor in those of other Circuits.

* * *

Not only are the circuits split as to the distinction between regulations of professional speech and professional conduct, they are also split as to the scrutiny to apply to regulations of professional conduct that incidentally involve speech. This Court's review is warranted to clear the confusion in whether regulations that "incidentally" burden speech receive intermediate scrutiny, rational-basis review, or something different altogether.

III. The questions presented are important.

In this Information Age, countless people (including Petitioners) earn a living by using, creating, and disseminating information, and their ranks will only grow as technology makes information more readily

available. Paradoxically, as technology makes useful information more democratized than ever before, state regulators are increasingly widening the scope of occupational-licensing laws to restrict who may make use of and disseminate basic information. See pp. 10-12, above. Information is "the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Sorrell*, 564 U.S. at 570. The petition for certiorari should be granted because there must be a uniform rule governing the constitutional status of the use, creation, and dissemination of information when it is limited by licensing laws.

Treating speech as conduct because it is subject to a license "gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 585 U.S. at 773. Petitioners operate in "nearly all U.S. States," App.113a, and their First Amendment right to do so differs from jurisdiction to jurisdiction. See also *Vizaline*, 949 F.3d at 929 ("Vizaline * * * operates in five states"). As the circuit splits set out above demonstrate, Americans now face a patchwork of inconsistent judicial decisions governing whether speech central to their livelihood is protected as speech or not.

Even beyond earning a living, California's law threatens the rights of ordinary people to make drawings of their own property. App.100a, 104a. Thousands of homeowners and contractors already do identical drawings at their local government's direction. App.106a. Anyone using the measurement tool in Google Maps, https://www.google.com/maps, can make a drawing that depicts property lines,

dimensions, and distances with measurements in violation of California law. See App.105a-106a. The courts should be more cautious before casting all of these people as criminals.

The government does not have and cannot grant a monopoly over spatial information. Even twenty years ago, experts recognized that a "literal interpretation" of practice of surveying definitions would mean that a large amount of spatial information, including GIS, would be illegal in the hands of people other than licensed surveyors. App.119a (quoting Bruce A. Joffe, *Surveyors and GIS Professionals Reach Accord*, U.S. Geological Survey Open-File Report 02-370, at 29, https://pubs.usgs.gov/of/2002/of02-370/dmt_02.pdf). And today, spatial information—data that is attached to a unique location as in GIS—is used in public health; urban planning; banking; insurance; supply chain management; forestry, timber, and other resource management; earth sciences, biology, and many other fields. App.105a; see also U.S. Geological Survey, *What is a geographic information system (GIS)?*, https://www.usgs.gov/faqs/what-geographic-information-system-gis. As this case—and the petition for certiorari in *360 Virtual Drone Services, LLC* v. *Ritter* filed this same day—demonstrates, if spatial information may be monopolized by surveyor-licensing laws without any First Amendment protections, then the States have the very "unfettered power" this Court warned against in *NIFLA*.

IV. This case is a good vehicle.

This case is a good vehicle to resolve the questions presented. The question here is whether Petitioners

have *pled* a First Amendment violation (and, if needed, what level of review applies). The panel decision below turns entirely on its determination that Petitioners cannot plead a free speech violation because the occupational-licensing law that restricts their speech generally regulates conduct—and therefore no First Amendment scrutiny applies here. App.3a-6a. Because this appeal arises under Fed. R. Civ. P. 12(b)(6), there are no disputed facts and whether the government can meet its interest and tailoring burdens to restrict Petitioners' speech is not yet relevant.

Whether the First Amendment applies at all to Petitioners' speech is outcome-determinative to this appeal. In sum, there is no barrier that would prevent this Court from addressing the question(s) presented. The petition should therefore be granted.

CONCLUSION

The petition for a writ of certiorari should be granted. If the petition for certiorari in *360 Virtual Drone Services LLC* v. *Ritter* (also filed today) is granted as well, the Court may wish to consolidate the two cases. If the *360 Virtual Drone* petition is granted and the petition here is not, this petition should be held pending the Court's decision in *360 Virtual Drone* and then disposed of as appropriate in light of that decision.

Respectfully submitted.

MICHAEL GREENBERG
INSTITUTE FOR JUSTICE
901 N. Glebe Rd.,
Ste. 900
Arlington, VA 22203
(703) 682-9320
mgreenberg@ij.org

PAUL V. AVELAR
Counsel of Record
INSTITUTE FOR JUSTICE
3200 N. Central Ave.,
Ste. 2160
Phoenix, AZ 85012
(480) 557-8300
pavelar@ij.org

Counsel for Petitioners