No. _____

In the Supreme Court of the United States

360 VIRTUAL DRONE SERVICES LLC ET AL.,
PETITIONERS

v.

ANDREW L. RITTER, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In an as-applied First Amendment challenge to Mississippi's surveyor-licensing law, the Fifth Circuit in 2020 held that the standard for determining whether an occupational-licensing law regulates speech or regulates conduct is this Court's "traditional conduct-versus-speech dichotomy." *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932.

Below—in this as-applied challenge to North Carolina's surveyor-licensing law—the Fourth Circuit held that the standard instead entails the balancing of a "nonexhaustive list of factors." App. 24a.

Meanwhile, the Eleventh Circuit in 2022 hewed to a third standard—one the Fifth Circuit two years earlier had repudiated verbatim. *Compare Del Castillo* v. *Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225 (11th Cir.), *cert. denied*, 143 S. Ct. 486 (2022), *with Vizaline, LLC*, 949 F.3d at 931-32.

The question presented is: whether, in an as-applied First Amendment challenge to an occupational-licensing law, the standard for determining whether the law regulates speech or regulates conduct is this Court's traditional conduct-versus-speech dichotomy.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioners (plaintiffs-appellants below) are 360 Virtual Drone Services LLC and Michael Jones. 360 Virtual Drone Services LLC is a single-member limited liability company owned by Michael Jones, a North Carolina citizen. 360 Virtual Drone Services LLC has no stock, and no parent or publicly held companies have any ownership interest in it.

Respondents (defendants-appellees below) are Andrew L. Ritter, in his official capacity as Executive Director of the North Carolina Board of Examiners for Engineers and Surveyors, and John M. Logsdon, Jonathan S. Care, Dennis K. Hoyle, Toynia E.S. Gibbs, Vinod K. Goel, Cedric D. Fairbanks, Brenda L. Moore, Carol Salloum, and Timothy E. Bowes, each in his or her official capacity as a Member of the North Carolina Board of Examiners for Engineers and Surveyors.[*]

[*] Three previously serving board members were defendants in their official capacity at earlier stages of the case: Richard M. Benton; Carl M. Ellington, Jr.; and Andrew G. Zoutewelle. Upon the appointment of their successors in office (Toynia E.S. Gibbs, Vinod K. Goel, and Timothy E. Bowes), those successors were substituted automatically. Fed. R. Civ. P. 25(d); Fed. R. App. P. 43(c)(2); Sup. Ct. R. 35.3.

RELATED PROCEEDINGS

U.S. District Court (E.D.N.C.):

360 Virtual Drone Services LLC v. *Ritter*, No. 21-cv-137 (Mar. 31, 2023)

U.S. Court of Appeals (4th Cir.):

360 Virtual Drone Services LLC v. *Ritter*, No. 23-1472 (May 20, 2024)

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INTRODUCTION

This case presents an important threshold question concerning the application of the First Amendment to occupational-licensing laws: what legal standard should the courts use to determine whether such a law restricts speech or nonspeech conduct? On this question, the courts of appeals are irreconcilably split. The Fifth Circuit adheres to this Court's "traditional conduct-versus-speech dichotomy." With the decision below, the Fourth Circuit has introduced an eye-of-the-beholder standard that looks instead to a "non-exhaustive list of factors." The Eleventh Circuit remains wedded to a "professional speech"-style standard, which the Fifth Circuit has renounced verbatim. The Ninth Circuit, for its part, veers from panel to panel, despite repeated calls (chiefly, from Judge O'Scannlain) for the en banc court to step in. In the past five years alone, in fact, three as-applied challenges to surveyor-licensing laws—specifically—have generated three different standards for determining whether the laws regulated the plaintiffs' speech or their conduct. App. 17a-18a, 24a; *Crownholm* v. *Moore*, No. 23-15138, 2024 WL 1635566, at *2 (9th Cir. Apr. 16, 2024), *pet. for cert. filed* (Sept. 9, 2024); *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932 (5th Cir. 2020).

The question presented is also of pressing nationwide importance. With the growth of modern technology, more and more people earn their living not from their physical conduct, but from the information they can provide. At the same time, the coverage of occupational-licensing regimes has ballooned, "from about 5 percent of workers in the 1950s to about one-quarter of workers today." Jason Furman & Laura Giuliano, *New Data Show that Roughly One-Quarter of U.S. Workers Hold an Occupational License*, White House (Pres. Obama) (June 17, 2016), https://tinyurl.com/yhd3dyum. Increasingly, States use

that power to target speech—from parenting columns to medical advice to health blogs to horse-massage lessons to (as here) photographs. And in response, the lower courts have split on the most basic First Amendment question: whether this Court's traditional speech-conduct standard applies to occupational-licensing laws. Below, for example, the Fourth Circuit applied its "non-exhaustive list of factors" standard to hold that a surveyor-licensing law "regulates professional conduct and only incidentally burdens speech"—even though, as applied to petitioners, the law is triggered by the "map or modeling data" communicated in their photographs.

In this way, the decision below spotlights not just the lower courts' conflict, but also how far afield some of those courts have strayed. "[T]he creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 570 (2011). Yet as even proponents of expansive licensing laws have remarked, the lower courts remain mired in "marked judicial disagreement on the First Amendment implications of licensing." Claudia E. Haupt, *Licensing Knowledge*, 72 Vand. L. Rev. 501, 502 (2019). That disagreement has crystallized on the question presented here, which the decision below cleanly and narrowly isolates. The Court's intervention is warranted.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) is reported at 102 F.4th 263. The opinion of the district court (App. 29a-59a) is not reported but is available at 2023 WL 2759032.

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[1] A petition for certiorari filed today in *Crownholm* v. *Moore* likewise involves a First Amendment challenge to a state surveying-licensure law and reflects a similar question presented.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 2024. On June 24, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 9, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

STATEMENT

A. Background

Recent years have seen the rise of a thriving commercial-drone industry nationwide. A drone is an unmanned aircraft that can fly either autonomously or with a remote pilot on the ground. Using cameras, drones can take photographs of—and collect information about—buildings, land, construction sites, and other property. These photos and data can be used for various purposes, two of which are at the center of this case: aerial orthomosaic maps and photorealistic 3D digital models.

Aerial Orthomosaic Maps. Drones have revolutionized the mapping industry. Using drones, operators can create detailed two-dimensional maps of property by flying a drone over the area, capturing images, and using software to combine them into a single, high-resolution photograph. These composite photos often are called "orthomosaic" or "measurable" maps. (An instructive, five-minute video is available at https://tinyurl.com/2s3zw4dj.)

Because each individual photo is georeferenced (simplified slightly, its metadata contains geographic coordinates), the composite image can also convey useful in-

formation—for example, about distances, elevations, and the like. It can be used to measure the distance from one point to another. Or to estimate the area of a piece of land. Or to identify the elevation of a particular point. Some of this information can be conveyed using traditional means—for example, a scale bar. Alternatively, commercially available mapping software lets users annotate maps and use other tools to derive information from them, including distances, areas, elevations, and volumes.

Similar information is available through any number of public-record sources. Using Google Earth, for example, you can measure the distance between two points or calculate area or (for some places) pinpoint an elevation. *See* Google Earth Help, *Measure distances and areas in Google Earth*, https://tinyurl.com/y5jjtcjx. One of the benefits of custom aerial maps, though, is currentness. A farmer can estimate the amount of crop loss after a storm. A developer can estimate the size of a piece of land. Stakeholders can get up-to-date progress reports on construction projects. And so on.

3D Digital Models. Drones can also be used to capture images for photorealistic 3D models. Much like two-dimensional aerial maps, 3D models can be created by combining georeferenced photos to make a three-dimensional representation of a piece of property. And again as with two-dimensional maps, these models can offer information in various settings. For example, they can be used to inspect hard-to-reach areas (cell towers, for instance). They can recreate crime scenes. They can even be used for cultural preservation—capturing three-dimensional representations of historic sites. Below, for instance, is a

still-shot of a recent 3d digital scan taken of the R.M.S. *Titanic*:

Rebecca Morelle & Alison Francis, *Titanic: First ever full-sized scans reveal wreck as never seen before*, BBC (May 17, 2023), https://tinyurl.com/59n949xx. In short—and much like their two-dimensional counterparts—3D models are composite photographic images that communicate useful information.

B. Facts and procedural history

1. After working for years in information-technology and, before that, as a welder, petitioner Michael Jones discovered a love for photography and videography around 2016. What started as a hobby grew into a small business, with Jones offering his services in and around his hometown of Goldsboro, North Carolina.

Jones soon recognized the extraordinary potential of drones, and he branched out into drone-based photography. He got certified by the FAA to fly drones commercially. And in 2017, he founded 360 Virtual Drone Services LLC. Along with standard drone-photography jobs (e.g., wedding shoots), Jones began offering aerial mapping services as well. He made a profile on a popular commercial-drone website, Droners.io, and selected "Surveying &

Mapping" as one of his project categories. (As he would later explain to the state surveying board, the website did not offer a standalone "Mapping" category. C.A. App. 89, 107.) On his own website, too, he began advertising "video, pictures and orthomosaic maps (Measurable Maps) of [construction] sites."

Over the next year, he made progress. A drone-data company hired him to capture the images needed to create a thermal map of a roof. He captured aerial images of a shopping-mall parking lot. He also started making maps himself. One repeat client, for instance, had hired him to take photos and videos of a real-estate development site. To expand his portfolio, Jones processed those images into an aerial map and pitched the client. That customer chose not to make use of the maps. Undeterred, though, Jones kept advertising mapping as one of his company's offerings.

At no point has Jones been a licensed land surveyor. Nor has he ever deliberately marketed himself as one. Nor has he ever purported to establish legal descriptions of property. Even so, in late 2018 he received a letter from the North Carolina Board of Examiners for Engineers and Surveyors. "Based upon a review of [his company's] web site . . . and an advertisement on the Droners.io web site," the board stated, "it is alleged that the firm may be practicing or offering to practice land surveying." "The services include, but are not limited to, 'Surveying & Mapping,' and providing orthomosaic maps of construction sites." The board gave Jones 15 business days to respond to its "charges." C.A. App. 101.

2. Surveyor-licensing laws are a relatively modern phenomenon. In the eighteenth and nineteenth centuries, some of the Nation's leading historical figures worked as (unlicensed) land surveyors—from Washington to

Lincoln to Thoreau. Not until 1891 did any State (California) enact a surveying-licensing regime. Even then, California's license would remain 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* 196-99, 201 (1977).

North Carolina was later still. Not till 1921 did it create a licensing regime for surveyors. 1921 N.C. Sess. Laws ch. 1. And for nearly another four decades, the license was largely optional; it was required only for people who wanted to "represent [themselves] to be a *registered* land surveyor." 1921 N.C. Sess. Laws ch. 1, sec. 15 (emphasis added). Only in 1959 did lawmakers establish a compulsory license for people engaged in the "practice of land surveying." *Compare* N.C. Gen. Stat. § 89-15 (1957), *with* 1959 N.C. Sess. Laws ch. 1236, sec. 2.

Since then, North Carolina's definition of what qualifies as "the practice of land surveying" has expanded. At first, the law was trained almost entirely on the work of establishing property boundaries—mainly, projects that defined landowners' legal rights.[2] Over the decades, though, the law's compass has grown, far beyond projects with legal implications for property rights. Most recently, in 1998, the law was amended to sweep up "photogrammetry" and any "mapping . . . relative to the location, size, shape, or physical features of the earth, improvements on the earth, the space above the earth, or any part of the earth." N.C. Gen. Stat. § 89C-3(7)(a); 1998 N.C. Sess. Laws ch. 118. Performing any of these activities without

[2] N.C. Gen. Stat. § 89-2(e) (1957) (defining the term to cover "surveying of areas for their correct determination and for conveyancing, or for the establishment or re-establishment of land boundaries or for the plotting of lands and subdivisions thereof, or the determination of elevations and the drawing descriptions of lands or lines so surveyed").

a land-surveyor license is unlawful and exposes the violator to civil and criminal enforcement. App. 4a.

Over the past decade, the law has fallen hardest on an emerging industry: small-time drone operators. North Carolina's surveying law does not regulate the mechanics of flying drones. Nor does it regulate the taking of photos from drones. The law does, however, target communicating those photos without a surveyor license. And in recent years, the State's surveying board has enforced the law relentlessly, warning drone photographers against "aerial surveying and mapping services" and "any resulting map or drawing," "3D models" and "aerial photogrammetry," and "use of orthomosaic software, aerial orthomosaics and models with control point accuracy." Processing images of a building into a 3D model to give "a sense of its appearance from all sides"? "No, this would be within the definition of land surveying." App. 35a. Processing images into a map so a customer can go online and perform rough measurements with a distance tool? Surveying. Only "[i]f there is no meta data or other information about coordinates, distances, property boundaries or anything that falls within the definition of land surveying" can a drone operator lawfully give customers aerial images of their land.

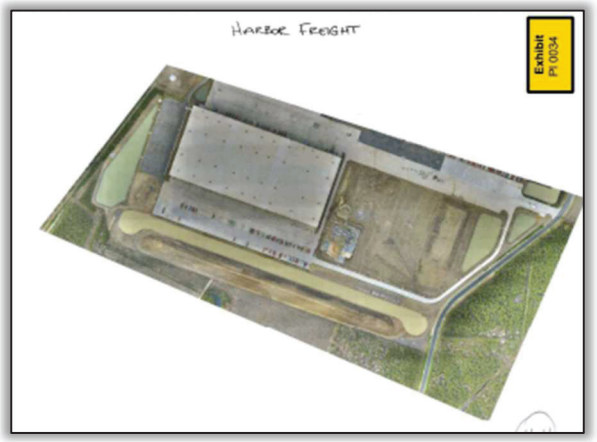
3. Michael Jones learned all this the hard way. Having received the board's letter in December 2018, he responded quickly. He told the board that he had removed the "Mapping and Surveying" category from one of his online profiles. He explained that he had added a long disclaimer for his mapping services. He asked the agency to "[p]lease feel free to correct or offer any revisions that need to be made to this disclaimer." And he asked for guidance about what work he could lawfully perform without a surveyor license. "Please keep in mind," he added, "this would be working WITH the disclaimer on

our site and also with the project manager's [i.e., the customer's] knowledge that we are not licensed surveyors." C.A. App. 106-08.

The board largely ignored Jones's plea for guidance, and after a five-month investigation it ordered him to stop offering his aerial maps. "After a thorough consideration of the investigative materials," the board advised, it "has determined that there is sufficient evidence to support the charge that 360 Virtual Drone Services, LLC is practicing, or offering to practice, surveying in North Carolina, as defined in G.S. 89C-3(6) [sic] without being licensed with this Board." App. 36a. The board stated that the company's unlawful activities "include, but are not limited to: mapping, surveying and photogrammetry; stating accuracy; providing location and dimension data; and producing orthomosaic maps, quantities, and topographic information." As for Jones's questions about disclaimers, the board dismissed them with one sentence: "marketing disclaimer is not appropriate as the services still fall within the practice of land surveying." If Jones's company "fails to come into compliance," the board warned, the agency could "apply to the court for an injunction" or "pursue criminal prosecution."

Jones took heed. For him, getting a land-surveyor license would be prohibitive. (Among many other prerequisites, he would need to spend nine years working under a practicing licensed land surveyor. *See* N.C. Gen. Stat. § 89C-13(b)(1a)(d).) So upon receiving the board's cease-and-desist letter, he stopped trying to develop his mapping business altogether. He stopped offering aerial maps. He stopped taking photos for his customers to process into maps on their own. And he refrained from branching out into other related work—for instance, creating 3D digital models.

4. Jones and his company then filed this lawsuit under 28 U.S.C. §§ 1331 and 1343, asserting that, as applied to their maps and models, North Carolina's surveyor-licensing law violates the First Amendment. As applied to them—the record would come to confirm—the law is triggered exclusively by the communicative content in their images. For electronic versions of the images, for instance, it is the presence of location-related data that triggers the surveying law. App. 37a ("The Board's present position is that plaintiffs cannot provide clients with 'aerial orthomosaic maps' unless they are stripped of location information and any data by which a recipient could make measurements on the maps." (citation omitted)); C.A. App. 346. Likewise for hard-copy or pdf versions, the presence of even a scale bar converts the images into an illegal, unlicensed land survey. C.A. App. 290. Under North Carolina's law, Jones thus can lawfully communicate the first image below, but not the second. Squint and you'll see a scale bar in the bottom right corner of the second image.



C.A. App. 418.

C.A. App. 99; *see also* C.A. App. 342-43 (board's expert, confirming).

5. The district court granted summary judgment to the board, App. 29a-59a, and in a published decision, the Fourth Circuit affirmed, App. 1a-28a. The court of appeals did not deny that, as applied to Jones and his company, North Carolina's surveying law was triggered by the communicative content of their photographic images. Even so, the court held that "as applied to Plaintiffs, the relevant provisions of the Act are aimed at conduct" and restrict their speech only incidentally. App. 24a. In so holding, the court staked out a new standard for determining whether the law regulated speech or conduct—one based on a "non-exhaustive list of factors." App. 24a. As one factor, the court pointed to the fact that Jones's speech occurs "in the private sphere," not "a traditionally public space." App. 24a. As another, the court observed that Jones's images would not convey "unpopular or dissenting" viewpoints. App. 25a. As another, it opined that aerial maps and 3D models might carry "economic" and "legal" consequences. App. 24a; *see also* App. 17a. Combined, this "variety of factors" led the court to hold that

the surveying law "regulates professional conduct and only incidentally burdens speech." App. 17a, 25a.

Having developed a new speech-conduct standard, the court then developed a new level of First Amendment scrutiny. "[T]ypically," the court acknowledged, "a content-*based* regulation of speech *as speech* would trigger strict scrutiny." App. 19a. And for "most content-neutral restrictions on speech," the court added, "intermediate scrutiny" would "require[] the government to produce 'actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary.'" App. 23a. But for "a regulation of professional conduct that only incidentally impacts speech," the court debuted a "quite different," "more relaxed," and "lower" level of scrutiny. App. 10a, 19a, 21a. Under it, speech-restrictive laws can be sustained despite the ready availability of obvious less-speech-restrictive alternatives. App. 23a; *see also* App. 28a (acknowledging that "perhaps a disclaimer would suffice to resolve the [State's] concerns in this case"). Applying its new, "loosened" level of scrutiny, App. 20a, the court upheld North Carolina's mapping-and-modeling ban.

REASONS FOR GRANTING THE PETITION

The decision below aggravates a conflict among the courts of appeals on a threshold First Amendment question: in an as-applied challenge to an occupational-licensing law, what is the standard for determining whether the law regulates the plaintiff's speech or their conduct? Or, to put a finer point on it, do licensing laws have their own bespoke speech-conduct standard or do ordinary First Amendment principles apply? In addressing this question, the Fourth, Fifth, and Eleventh Circuits have fractured, with the Ninth Circuit flipping from panel to panel despite repeated calls for en banc intervention. The

conflict is entrenched. The Fourth Circuit's multi-factor test is wrong. And with the dramatic expansion of occupational-licensing laws (and their attendant investigations and enforcement), the question presented is of practical and legal importance. The Court's review is warranted.

A. The decision below deepens a conflict among the courts of appeals.

The Fourth Circuit's decision exacerbates a circuit conflict on an issue of nationwide importance: the proper standard for determining whether an occupational-licensing law regulates nonspeech conduct or regulates speech. The Fifth and Eleventh Circuits have staked out fundamentally different views. And with the decision below, the Fourth Circuit has now forged a third path—in conflict with the standards of both the Fifth and the Eleventh Circuits and in grave tension with that of the Ninth.

1.a. To start: the basics. In as-applied free-speech cases, the Court has long recognized that a first-order question is whether the challenged law regulates speech or regulates nonspeech conduct. Ordinarily, the answer to that question dictates the level of First Amendment review (if any). If the law regulates "'nonspeech' conduct" that "bears absolutely no connection to any expressive activity," the First Amendment usually is not implicated at all. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 706 n.3 (1986). If, by contrast, "[t]he only 'conduct'" triggering the law "is the fact of communication," *Cohen* v. *California*, 403 U.S. 15, 18 (1971), the law calls for heightened First Amendment scrutiny—strict if it is content-based, intermediate if content-neutral. *See McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014). And if "'speech' and 'nonspeech' elements are combined in the same course of conduct," a law triggered purely by the "noncommunicative aspect of [the] conduct" may impose "incidental limita-

tions" on the communicative aspect. *United States* v. *O'Brien*, 391 U.S. 367, 376, 381-82 (1968). (David O'Brien's draft-card prosecution is the classic example.) For laws that burden speech "incidental[ly]" in this way, *id.* at 376, the level of review "is little, if any, different" from the intermediate scrutiny that applies to content-neutral laws. *Texas* v. *Johnson*, 491 U.S. 397, 407 (1989) (citation omitted).

Against this backdrop, governments' "comparative freedom to regulate conduct sometimes tempts political bodies to try to recharacterize speech as conduct." *Honeyfund.com Inc.* v. *Governor of Fla.*, 94 F.4th 1272, 1278 (11th Cir. 2024). But the standard for distinguishing between the two is relatively straightforward. Even if a statute "*generally* functions as a regulation of conduct," it calls for heightened scrutiny as a restriction on speech when, "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 27-28 (2010). If the law's application to a particular plaintiff "depends on what they say," then it regulates speech directly. *Id.* at 27.

b. For a time, several courts of appeals marked out a set of entirely "different rules" for laws that regulated what they called "professional speech." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 767 (2018) (*NIFLA*). Those courts "define[d] 'professionals' as individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.'" *Id.* (quoting *Moore-King* v. *Cnty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013)). And the courts would exempt those regimes from the usual "rule that content-based regulations of speech are subject to strict scrutiny." *Id.* They would not evaluate whether, as applied to the plaintiffs before them, the laws were

triggered by speech or by nonspeech conduct. Rather, upon identifying the law as a "generally applicable licensing provision[]," the courts would either apply a complaisant level of First Amendment review or none at all. *E.g.*, *Moore-King*, 708 F.3d at 569 (citation omitted). The most eye-catching example arose in (of all places) the Fourth Circuit, where the court of appeals immunized from First Amendment scrutiny a licensing law triggered by the "spiritual counseling" of a fortune teller. *Id.*

This Court abrogated that line of lower-court precedent in 2018. In its decision in *NIFLA*, the Court held that it had never "recognized 'professional speech' as a separate category of speech." 585 U.S. at 767. More broadly, the Court reiterated its "reluctan[ce] to mark off new categories of speech for diminished constitutional protection." *Id.* (citation omitted). The Court thus saw no basis to "exempt" laws restricting so-called professional speech from "ordinary First Amendment principles." *Id.* at 773. Chief among those principles was the standard described above—"the line between speech and conduct." *Id.* at 769. Simply, the analytic framework is the same. In determining whether speech is regulated directly or incidentally (or not at all), the speech-conduct standard applies to licensing laws just as it applies elsewhere. *Id.* ("'[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,' and professionals are no exception to this rule.'" (internal citation omitted)); *id.* ("[T]his Court's precedents have long drawn [the line between speech and conduct], and the line is 'long familiar to the bar.'" (internal citations omitted)).

2. Despite the clarity of *NIFLA*'s teaching, the courts of appeals have fractured on whether the traditional speech-conduct standard in fact applies when an asserted speech restriction comes in the form of a licensing law.

a. The **Fifth Circuit** adheres to *NIFLA* rigorously: it held in 2020 that an as-applied First Amendment challenge to a State's surveyor-licensing law must be analyzed using this Court's "traditional conduct-versus-speech dichotomy." *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932. A case much like this one, *Vizaline* involved a small company that provided geospatial imaging services to the banking industry (basically, computer-generated aerial maps with GIS boundary lines superimposed on them). *Vizaline, LLC* v. *Tracy*, No. 18-cv-531, 2018 WL 11397507, at *1 (S.D. Miss. Dec. 20, 2018). Convinced that the maps amounted to unlicensed surveying, Mississippi's surveying board sued to enjoin the business and disgorge its profits. 949 F.3d at 928. In the First Amendment action that ensued, the district court dismissed the company's case. Purporting to apply *NIFLA*, the court recounted that "States may regulate professional conduct, even though that conduct incidentally involves speech." 2018 WL 11397507, at *3 (quoting *NIFLA*, 585 U.S. at 768). But without considering whether, as applied to the mapping company, Mississippi's surveying law was triggered by speech or by conduct, the court short-cut the analysis: it held that the licensing requirements "merely 'incidentally infringed upon' [the company's] speech because they only 'determin[e] *who* may engage in certain speech.'" 949 F.3d at 931 (first alteration added).

The Fifth Circuit reversed. This Court's decision in *NIFLA*, the court reasoned, had emphatically "rejected" the lower-court trend of applying bespoke First Amendment standards to licensing regimes. *Id.* at 932. In adjudicating First Amendment challenges to licensing laws, rather, the courts were admonished to "adhere[] to the traditional conduct-versus-speech dichotomy." *Id.* In this way, *NIFLA* "reoriented courts toward the traditional taxonomy that 'draw[s] the line between speech and

conduct.'" *Id.* at 933. For the level of First Amendment protection in no way "turns on whether the challenged regulation is part of an occupational-licensing scheme." *Id.* at 932.

Nor, the Fifth Circuit added, did *NIFLA*'s discussion of "incidental" speech restrictions modify the speech-conduct standard described above. Quite the opposite: "[t]his was merely an application of the general principle that legislatures may 'impos[e] incidental burdens on speech' by regulating 'commerce or conduct.'" *Id.* (quoting *NIFLA*, 585 U.S. at 769). At base, in determining whether speech is regulated directly or incidentally (or not at all), the speech-conduct standard applies to licensing laws just as it applies elsewhere. *Id.* ("'[P]rofessionals are no exception to th[e] rule' that states may enact 'regulations of professional conduct that incidentally burden speech.'"). Tracking *NIFLA*'s logic, the Fifth Circuit thus announced a simple bottom-line holding: for "occupational-licensing regime[s]" no less than for any other statute, it "reiterate[d]" this Court's "insistence on the conduct-speech analysis" that applies everywhere else. *Id.* at 934.[3]

b. With the decision below, the **Fourth Circuit** staked out a fundamentally different standard from the Fifth's. Outside the occupational-licensing context, the Fourth Circuit has properly stated the traditional speech-conduct mode of analysis. *PETA, Inc.* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 826 (remarking that it is "irrelevant that the law 'may be described as directed at

[3] Having articulated the standard, the Fifth Circuit remanded for the district court to apply it. On remand, the case settled after Mississippi adopted an exemption from its licensing law for all documents that display a one-sentence disclaimer. C.A. App. 116-18; Stipulation of Settlement and Dismissal for Mootness, No. 18-cv-531 (S.D. Miss. Dec. 17, 2020) (Doc. 58).

conduct' where plaintiffs triggered the statute by 'communicating a message'" (quoting *Humanitarian L. Project*, 561 U.S. at 28)), *cert. denied*, 144 S. Ct. 325, 326 (2023). But below, the court forged a different path. "[T]he fact that a regulation . . . prohibits particular speech in the professional context," the court posited, "does not automatically mean it is aimed at speech . . . ." App. 16a. And in place of the Fifth Circuit's "traditional conduct-versus-speech dichotomy," *Vizaline, LLC*, 949 F.3d at 932, the decision below substituted a "non-exhaustive list of factors" to "distinguish[] between licensing regulations aimed at conduct and those aimed at speech as speech," App. 24a. 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." App. 17a-18a, 24a.

"Applying the[se] principles," the court then held that, "as applied to [petitioners], the relevant provisions of the [North Carolina surveying law] are aimed at conduct." App. 23a-24a. The court nowhere denied that, as applied to Michael Jones and his company, the surveying law is triggered by the communicative content in their images; in fact, the court accepted that the law operates to "prevent [them] . . . from selling two- or three-dimensional maps or models of areas of land that contain measurable data." App. 24a. Using "the non-exhaustive list of factors we set out above," however, the court held that the law nonetheless restricts conduct and affects Jones's speech only incidentally. First, the court remarked that Jones's maps and models could carry "economic" or "legal" consequences—if, for example, someone were to use them to "calculat[e] 'the amount of fencing they might need'" or if

they were somehow to give rise to a boundary dispute. App. 24a. Second, the court observed that Jones would be communicating his maps and models "in the private sphere" (on his own property or that of his customers) rather than "in a traditionally public sphere" like a "public sidewalk[]." App. 17a-18a, 24a-25a. Lastly, the court opined that the "map or modeling data" would not "constitute[] unpopular or dissenting speech." App. 25a. These factors, the court summed up, "all point to the conclusion that the Act regulates professional conduct and only incidentally burdens speech." App. 25a. That determination "matter[ed]" greatly, the court added, "because it carries consequences for our level of scrutiny." App. 19a. For "restrictions [that] are primarily aimed at professional conduct and only incidentally burden speech," the court proceeded to introduce a "quite different," "more relaxed," "loosened," and "lower" level of First Amendment scrutiny. App. 10a, 19a, 20a, 21a, 23a.

c. Decisions from the Eleventh Circuit and the Ninth magnify the disarray.

In many contexts, the **Eleventh Circuit** holds to the traditional speech-conduct standard. *Honeyfund.com Inc.*, 94 F.4th at 1278. But not for occupational-licensing laws. For those, the Eleventh Circuit's standard remains—word for word—the one the Fifth Circuit says was "rejected" in *NIFLA*. *Vizaline, LLC*, 949 F.3d at 932. Eschewing the "traditional taxonomy that 'draw[s] the line between speech and conduct,'" *id.* at 933, the Eleventh Circuit has stuck to its guns. In 2022, it reaffirmed its standard: "[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." *Del Castillo* v. *Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225 (11th Cir.) (quoting

Locke v. *Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011), in turn quoting *Accountant's Soc'y of Va.* v. *Bowman*, 860 F.2d 602, 604 (4th Cir. 1988)), *cert. denied*, 143 S. Ct. 486 (2022). Meanwhile, the Fifth Circuit in 2020 quoted that same sentence from *Bowman*—verbatim—as emblematic of the "professional speech doctrine" this Court has "rejected." *Vizaline, LLC*, 949 F.3d at 931-32. On the face of their opinions, the Eleventh and the Fifth Circuits espouse two irreconcilable standards—with the Fourth Circuit's "non-exhaustive list of factors" now doing duty as a third. App. 24a.

Seeing the Eleventh Circuit's standard in action spotlights the divide. The plaintiff in *Del Castillo* brought a First Amendment suit after Florida fined her $500 for "'providing individualized dietary advice in exchange for compensation in Florida'" without a dietetics license. 26 F.4th at 1217. Based on the standard above, however, the Eleventh Circuit refused to apply any level of First Amendment scrutiny. The court cited no "'separately identifiable' conduct to which the speech was incidental." *See Tingley* v. *Ferguson*, 57 F.4th 1072, 1075-76 (9th Cir. 2023) (statement of O'Scannlain, J., respecting denial of rehearing en banc). Rather, the court classed the plaintiff's thoughts and words ("assessing," "research[ing]," and "integrating information") as "occupational conduct" and in turn held that the dietetics law "only incidentally burdened [her] free speech rights." 26 F.4th at 1225-26. In this way—and in a marked departure from the Fifth Circuit's standard above—"[t]he *Del Castillo* decision seem[ed] to at once reject the professional speech doctrine, while in the same breath endorsing it under another name." 2 *Smolla & Nimmer on Freedom of Speech* § 20:37.40 (Apr. 2024 update); *see also Richwine* v. *Matuszak*, 707 F. Supp. 3d 782, 803 (N.D. Ind. 2023) ("*Del Castillo* allowed a state to transform pure speech about

diet advice into non-expressive conduct by simply labeling it 'the practice of dietetics.' Applying the same rationale, professors' lectures could become 'the practice of instruction'; musicians' songs could become 'the practice of composing' and; writers' op-eds could become 'the practice of journalism.'"), *appeal docketed*, No. 24-1081 (7th Cir.).

For its part, the **Ninth Circuit** suffers a stubborn intra-circuit split that captures the nationwide division in miniature. In 2020, for instance, the court adhered faithfully to the traditional speech-conduct standard in the licensing context: a suit brought by a farrier school and a would-be student challenging California's "ability-to-benefit" statute, under which people without a high-school diploma could enroll in vocational schools only if they first passed a government exam. The district court dismissed the plaintiffs' First Amendment claim outright, on the view that the law "regulated 'economic activity' that was 'speech-adjacent' and imposed only an 'incidental burden[] on speech.'" *Pac. Coast Horseshoeing Sch., Inc.* v. *Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020). But applying the traditional speech-conduct standard, the Ninth Circuit saw things differently. Speaking through Judge Bybee, the court observed that "[a]lthough the [law] is a form of education licensing by the State, the First Amendment deprives the states of 'unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.'" *Id.* (quoting *NIFLA*, 585 U.S. at 773). By regulating access to certain educational programs based on the programs' content, California's ability-to-benefit requirement "squarely implicates

the First Amendment." *Id.* (citing *Humanitarian L. Project*, 561 U.S. at 28).[4]

Other panels of the Ninth Circuit take a different approach. In the (more contentious) context of laws regulating sexual-orientation-related therapy, for example, circuit judges and Members of this Court alike have criticized the Ninth Circuit's departure from the traditional speech-conduct standard and its trend toward "simply labeling therapeutic speech as 'treatment'" and thereby "turn[ing] it into non-speech conduct." *Tingley*, 57 F.4th at 1077 (statement of O'Scannlain, J., joined by Ikuta, R. Nelson, and VanDyke, JJ., respecting denial of rehearing en banc); *see also Tingley* v. *Ferguson*, 144 S. Ct. 33, 34 (2023) (Thomas, J., dissenting from the denial of certiorari) ("If speaking to clients is not speech, the world is truly upside down. [SB 5722] sanction[s] speech directly, not incidentally—the only 'conduct' at issue is speech." (citation omitted)); *Tingley*, 144 S. Ct. at 35 (Alito, J., dissenting from the denial of certiorari) ("It is beyond dispute that these laws restrict speech, and all restrictions on speech merit careful scrutiny."); *Pickup* v. *Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., joined by Bea and Ikuta, JJ., dissenting from denial of rehearing en banc) ("SB 1172 prohibits certain 'practices,' just as the statute in *Humanitarian Law Project* prohibited 'material support'; but with regard to those plaintiffs as well as the plaintiffs here, those laws targeted speech."), *abrogated by NIFLA*, 585 U.S. 755.

That same "labeling game" (*Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc)) has played out in other cases as well. Most

[4] After the case was remanded, lawmakers repealed the ability-to-benefit requirement, and the case settled. Stipulation and Order of Settlement, No. 17-cv-2217 (E.D. Cal. Dec. 3, 2021) (Doc. 67).

recently, the Ninth Circuit harnessed *Tingley* and *Pickup* and declined to apply any First Amendment review in a case not unlike this one: involving a surveying law that banned unlicensed "site plans" (maps derived from GIS data and publicly available imagery). *Crownholm* v. *Moore*, No. 23-15138, 2024 WL 1635566, at *2 (9th Cir. Apr. 16, 2024), *pet. for cert. filed* (Sept. 9, 2024). The court recast the plans as "unlicensed land surveying conduct." *Id.* And "just as the state may constitutionally ban a particular medical treatment that requires the use of speech"—the court held—"so too may the state bar unlicensed persons from creating maps that have the effect of providing a 'professional opinion as to the spatial relationship between fixed works or natural objects and the property line.'" *Id.* (citing *Tingley* v. *Ferguson*, 47 F.4th 1055, 1073 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023)).

3. At base, there is a substantial and direct circuit conflict on the question presented. In adjudicating free-speech challenges to occupational-licensing laws, the Fifth Circuit adheres to the "traditional conduct-versus-speech dichotomy" that applies in First Amendment cases more broadly. The Eleventh Circuit hews to a standard the Fifth Circuit has repudiated verbatim. And with the decision below, the Fourth Circuit has charted a third conflicting path—under which a "non-exhaustive list of factors" leaves speech and conduct to the eye of the beholder. On the West Coast, meanwhile, the same conflict has been playing out in microcosm, with the Ninth Circuit's mode of analysis veering from panel to panel despite repeated calls for en banc intervention. This Court has recently granted certiorari in cases with the same or shallower asserted conflicts on threshold questions of First Amendment law. *E.g.*, *NRA* v. *Vullo*, 602 U.S. 175 (2024) (1-1 split). Here, too, the conflict is intractable and the Court's intervention warranted.

B. The standard adopted by the decision below is unadministrable and contravenes this Court's precedent.

The Fourth Circuit's decision "hinge[d]" on introducing a "non-exhaustive list of factors" as the legal standard for "distinguishing between licensing regulations aimed at conduct and those aimed at speech as speech." App. 9a, 24a. In substituting that "variety of factors" for the traditional speech-conduct analysis (App. 17a), the court replaced a standard "long familiar to the bar" with one that is unprecedented, unadministrable, and, here, case-dispositive. *NIFLA* 585 U.S. at 769 (citation omitted).

1. The Fourth Circuit's standard bears no likeness to this Court's "traditional conduct-versus-speech dichotomy." *Vizaline, LLC*, 949 F.3d at 932. Most notably, the court of appeals' list of "factors" omits the one factor that matters: whether "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Humanitarian L. Project*, 561 U.S. at 28; *see also* C.A. App. 346 ("Q. . . . So really the georeferencing information is what triggers the surveying definition, is that what you're saying? A. That's correct. . . . "); App. 37a. Nor does the court's standard account for a similarly intuitive teaching of this Court's speech-conduct precedent: that a restriction on speech qualifies as incidental only if it "does not apply unless the government would have punished the conduct regardless of its expressive component." *Masterpiece Cakeshop* v. *Colo. C.R. Comm'n*, 584 U.S. 617, 663-64 (2018) (Thomas, J., concurring in part and concurring in the judgment). Nothing betrays the flaws in the Fourth Circuit's standard more clearly than the result below: a law triggered—at a granular level—by the information in photographs, which the court held regulated petitioners' conduct, not their speech.

The Fourth Circuit's factors also do not fit with anything this Court has ever said about the line between speech and conduct. According to the court of appeals, for instance, "speech . . . [that] takes place in the private sphere" is more susceptible to being labeled nonspeech conduct than "speech [that] takes place in a traditionally public space." App. 24a. At risk of stating the obvious, however, States enjoy no more power to police speech in the "private sphere" than they do on "public sidewalks." App. 24a. The distinction between public and non-public forums certainly may inform *other* First Amendment inquiries—namely, whether the government has the power to restrict speech "on property that it owns and controls." *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992). But contrary to the court of appeals' view, it has nothing to do with the antecedent line between speech and conduct more broadly. *Cf. Consol. Edison Co. of N.Y.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 540 (1980) ("[T]he Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests of a government in overseeing the use of its property.").

The court's other factors are equally misconceived. For example, whether a statute "regulate[s] some kind of unpopular or dissenting speech" (App. 18a) could well inform whether the law discriminates based on viewpoint—a particularly "egregious" First Amendment violation. *Vidal* v. *Elster*, 602 U.S. 286, 293 (2024) (citation omitted). But it says nothing about the first-order question whether the law targets nonspeech conduct or speech. Nor does the court's third non-exhaustive factor: "whether the speech carries economic, legal, public-safety, or health-related consequences." App. 24a. All but the most inept officials, after all, can couch their laws as targeting *some* sort of "adverse effects." *Sorrell* v. *IMS*

Health Inc., 564 U.S. 552, 577 (2011). In fact, this Court routinely evaluates as direct speech restrictions laws that check all three of the Fourth Circuit's "conduct" factors. *E.g.*, *id.* at 567-68; *Humanitarian L. Project*, 561 U.S. at 27-28.

2. The Fourth Circuit's standard not only conflicts with this Court's precedent; it is unadministrable. In distinguishing a speech restriction from a conduct restriction, for example, why does it matter whether the law's target is speaking in a "public space" versus a "private sphere"? For that matter, what *is* a "public space"? The great outdoors, where Michael Jones would do most of his mapping and modeling? Evidently not. App. 24a. But if an open field doesn't qualify, what does? And on the Fourth Circuit's second non-exhaustive factor, how are judges supposed to decide what does and doesn't qualify as "unpopular or dissenting" speech? Conduct a poll? Hazard a best guess? As for the third factor—"whether the speech carries economic, legal, public-safety, or health-related consequences"—is that a free space on the government's bingo card? Or something more? And how does the standard cash out when some factors are on one side of the scale and some on the other?

The decision below raises all these questions (and more). And within the Fourth Circuit itself, precedent is proof positive of the standard's unworkability. As the decision below acknowledges, a different Fourth Circuit panel in 2020 invalidated an occupational-licensing requirement for tour guides—and in doing so held squarely that the requirement "cannot be classified as a restriction on economic activity that incidentally burdens speech." *Billups* v. *City of Charleston*, 961 F.3d 673, 683. According to the decision below, that case and this one coexist in harmony under the court's "non-exhaustive list of factors" standard. *See* App. 15a-19a. And yet. Consider the

factors. On her tours, Kim Billups planned to "describ[e] . . . Charleston, discuss[] the Civil War, and tell[] jokes." 961 F.3d at 678. Not an obvious example of "unpopular or dissenting" speech. App. 24a. Meanwhile, Charleston insisted that its law was crucial to its "economic well-being and . . . tourism industry." 961 F.3d at 683-84. So (according to the city, at least) tour-guide speech carried real "economic . . . consequences." App. 24a. Which leaves only one of the Fourth Circuit's factors potentially separating that case from this one: that Ms. Billups would communicate with her customers mainly on sidewalks while Michael Jones would communicate with his customers on their property and from his own.

We could go on. Under the Fourth Circuit's standard, for instance, California's "ability-to-benefit" requirement discussed above would surely be "a regulation aimed at conduct that incidentally burdens speech." App. 19a. So would the fortune-teller license the Fourth Circuit upheld in 2013 (unless, perhaps, a judge were to consider the occult sciences sufficiently "unpopular or dissenting"). So, too, of course, would the material-support statute in *Humanitarian Law Project*. Each of these laws was self-evidently triggered by speech. Yet under the Fourth Circuit's standard, they would be treated as restrictions on nonspeech conduct instead.

3. The Fourth Circuit left no doubt that its standard "matter[ed]" to this case's outcome. App. 19a. On the premise that North Carolina's mapping-and-modeling ban "is a regulation of professional conduct that only incidentally impacts speech," the court declined to consider whether the law was content-based as applied to Jones. App. 10a. "[W]here '[a] statute[] regulate[s] *conduct*," the court stated, "we need not engage with . . . descriptors like 'content-based and identity-based.'" App. 19a (citation omitted). For much the same reason, the court declined

even to treat the law as content-neutral. *See* Appellants' C.A. Br. 48-55 (explaining that the law would fail not just strict scrutiny, but the intermediate scrutiny applicable to content-neutral laws). "[F]or most content-neutral restrictions on speech," the court acknowledged, "intermediate scrutiny requires the government to produce 'actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary.'" App. 23a. But the court jettisoned that "traditional" understanding of intermediate scrutiny in favor of a "quite different," "more relaxed," and "lower" version—one unique to "restrictions [that] are primarily aimed at professional conduct and only incidentally burden speech." App. 10a, 19a-20a, 21a, 23a. This hitherto-unknown level of review "does *not* require" the government to show that its law "does not burden substantially more speech than necessary." App. 23a (citation omitted). Armed with "loosened" intermediate scrutiny (App. 20a), the court thus upheld North Carolina's mapping-and-modeling ban despite the ready availability of far less speech-restrictive alternatives. App. 28a ("[P]erhaps a disclaimer would suffice to resolve the concerns in this case . . . ."); Appellants' C.A. Reply 26-28 (cataloguing less speech-restrictive alternatives used in Kentucky, Missouri, Virginia, Wisconsin, and other States).

C. The question presented is important, and this case is the ideal vehicle for addressing it.

The question presented in this case is a threshold, recurring one of substantial legal and practical importance. This case presents the question cleanly and is an optimal vehicle for the Court's review.

1. This Court has recognized the importance of adhering to "ordinary First Amendment principles" in evaluating the constitutionality of laws restricting occupational

speech. *NIFLA*, 585 U.S. at 773. Yet as even proponents of expansive licensing laws have observed, the lower courts remain mired in "marked judicial disagreement on the First Amendment implications of licensing." Claudia E. Haupt, *Licensing Knowledge*, 72 Vand. L. Rev. 501, 502 (2019). A key ground of disagreement remains the threshold question presented here. Americans in Texas operate under one standard, Americans in Florida under another, Americans in Virginia under yet another.

This lack of clarity visits real harms on real people. As licensing regimes have proliferated, so too have the priorities of their enforcers. And their zeal has spurred a raft of First Amendment violations. Oregon's engineering board, for example, fined a man $500 for criticizing the mathematical formula used to time yellow traffic lights. The "unlicensed practice of engineering."[5] The Kentucky psychology board targeted nationally syndicated columnist John Rosemond for publishing his parenting column in Kentucky newspapers. The "unlicensed practice of psychology."[6] The North Carolina dietetics board took a literal red pen to a health blog. The "unlicensed practice of dietetics."[7] Funeral-director boards from California to Indiana have targeted death doulas (who provide comfort and guidance to people near death and to their families)

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[5] Patricia Cohen, *Yellow-Light Crusader Fined for Doing Math Without a License*, N.Y. Times (Apr. 30, 2017), https://tinyurl.com/2p9my5mr; *see also Järlström* v. *Aldridge*, 366 F. Supp. 3d 1205 (D. Or. 2018).

[6] Jacob Gershman, *Judge Scolds Kentucky for Trying to Censor Parenting Columnist*, Wall St. J. (Oct. 2, 2015), https://tinyurl.com/ye2yupr2; *see also Rosemond* v. *Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015).

[7] Adam Liptak, *Blogger Giving Advice Resists State's: Get a License*, N.Y. Times (Aug. 6, 2012), https://tinyurl.com/2p97pfvy.

for the "unlicensed practice of funeral services."[8] Last spring, Minnesota warned a farm that it could no longer teach horse-massage without getting a "private career school" license.[9] The list goes on.[10] And on.[11]

Most of these enforcement campaigns have (eventually) been scotched by district courts' faithful application of this Court's precedents. *See* nn. 5-9, *supra*. But many of those cases would come out the other way under the multi-factor test of the Fourth Circuit; at minimum, their outcomes would be far less predictable. And the consequences of that uncertainty are grave. For most people, getting targeted by the State for having used their ideas, advice, or photos to make a living or improve their community is a devastating experience. (Recall that petitioners here were threatened with criminal prosecution for sharing "data" and "information." App. 36a.) Not only that, their customers and communities lose out as well. The traffic-light enthusiast in Oregon, for example? It turns out he was right all along.[12]

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[8] *Richwine* v. *Matuszak*, 707 F. Supp. 3d 782 (N.D. Ind. 2023), *appeal docketed*, No. 24-1081 (7th Cir.); *Full Circle of Living & Dying* v. *Sanchez*, No. 22-cv-1306, 2023 WL 373681 (E.D. Cal. Jan. 24, 2023).

[9] *Mox* v. *Olson*, No. 23-cv-3543, 2024 WL 3526913 (D. Minn. July 24, 2024).

[10] *E.g.*, Matthew Gault, *State Charges 77-Year-Old for 'Practicing Engineering Without a License'*, Vice (June 25, 2021), https://tinyurl.com/5dzrxb65; *see also Nutt* v. *Ritter*, 707 F. Supp. 3d 517 (E.D.N.C. 2023).

[11] Garrett Epps, *License to Speak: The state of Oregon is abusing its authority to regulate professional services to silence its critics*, The Atlantic (May 5, 2017) (recounting investigation into professor for unlicensed practice of geology), https://tinyurl.com/5fzn66kh.

[12] Karl Bode, *Man Fined for Engineering Without a License Was Right All Along*, Vice (Mar. 2, 2020), https://tinyurl.com/ye99pm9e.

In this area, clear First Amendment standards are key. As in other contexts, moreover, applying the traditional speech-conduct standard would not imperil occupational-licensing regimes writ large. Measured against the line between speech and conduct, many applications of licensing laws do not implicate the First Amendment at all. Rather, they are triggered by easy-to-identify conduct, not by speech. Much medical practice, for instance, is composed of nonspeech conduct—performing medical procedures and issuing prescriptions are two obvious examples. *Tingley*, 57 F.4th at 1081 (statement of O'Scannlain, J., respecting denial of rehearing en banc) ("Although prescriptions do involve words, they are also legally efficacious acts, and so can be regulated as conduct."). Likewise for lawyers, many parts of the practice of law can be regulated based on noncommunicative characteristics—for instance, the independent legal effect of a contract, the holding of client funds, or the binding of clients to legal obligations. Other aspects (e.g., representing clients in court) are susceptible to greater regulation given courts' status as nonpublic forums. *Cf. Huminski* v. *Corsones*, 396 F.3d 53, 91 (2d Cir. 2005). At the same time, application of ordinary First Amendment principles ensures that even lawyer-licensing requirements do not violate free-speech rights on an as-applied basis. *Lawline* v. *Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) (rejecting facial challenge but remarking that "[t]here may well be many activities which lawyers routinely engage in which are protected by the First Amendment and which could not be constitutionally prohibited to laypersons"); *Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 103 (S.D.N.Y. 2022) (preliminarily enjoining unlicensed-practice-of-law statute as applied to nonprofit and reverend who "crafted a program that would train non-lawyers to give legal advice to low-income New Yorkers who face debt collection actions"), *appeal docketed*, No. 22-1345 (2d Cir.).

Land surveying is of a piece. North Carolina is free, for instance, to say that only licensed surveyors can give documents the legal imprimatur of a state-issued seal. In fact, the State already so provides. N.C. Gen. Stat. § 89C-23. North Carolina is free to say that plats can be recorded only under the seal of a licensed surveyor; much like a medical prescription, recorded plats are "legally efficacious acts" and can be regulated based on that non-communicative characteristic. *Tingley*, 57 F.4th at 1081 (statement of O'Scannlain, J., respecting denial of rehearing en banc). Again, North Carolina already so provides. N.C. Gen. Stat. § 47-30(d). North Carolina is free, as well, to say that buildings can be constructed or modified—conduct—only upon the submission of papers sealed by a licensed surveyor. Again, many cities already so provide. *E.g.*, City of Durham, *Plans Review Requirements* (requiring "[s]caled plot plan sealed by a NC registered surveyor if there is addition to or change of footprint on parcel. (residential)"), https://tinyurl.com/muzkzp7t. Simply, what was true in 2018 remains true today: there is no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *NIFLA*, 585 U.S. at 773. Nothing in the decision below counsels otherwise.

2. This case is a perfect vehicle for deciding the question presented. The Fourth Circuit made clear that its decision "hinge[d]" on "questions of law." App. 9a-10a; *see also* App. 9a ("[T]he core facts are essentially undisputed."). And the threshold nature of the court's error cleanly isolates the question presented. Based on its peculiar speech-conduct standard, the court declined to analyze North Carolina's mapping-and-modeling ban as either content-based *or* content-neutral. Rather, it upheld the law using a new level of constitutional scrutiny—which, it took pains to note, was "quite different" from

and "more relaxed" than the "traditional" intermediate scrutiny that applies to content-neutral laws. App. 10a, 19a-20a. For this Court's purposes, the question presented thus is as self-contained as it is important. The existing circuit conflict can be resolved by "reorient[ing]" the lower courts "toward the traditional taxonomy that 'draw[s] the line between speech and conduct,'" *Vizaline, LLC*, 949 F.3d at 933, after which the case can be remanded for the Fourth Circuit to apply that traditional speech-conduct standard in the first instance and, if appropriate, address whether North Carolina's law is content-neutral or content-based.

CONCLUSION

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

Respectfully submitted.

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SEPTEMBER 9, 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-1472

360 VIRTUAL DRONE SERVICES LLC; MICHAEL JONES,
PLAINTIFFS-APPELLANTS,
v.
ANDREW L. RITTER, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; JOHN M. LOGSDON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; JONATHAN S. CARE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; DENNIS K. HOYLE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; TOYNIA E.S. GIBBS, IN HER OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; VINOD K. GOEL, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; CEDRIC D. FAIRBANKS, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; BRENDA L. MOORE, IN HER OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; CAROL SALLOUM, IN HER OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND

SURVEYORS; ANDREW G. ZOUTWELLE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS, DEFENDANTS-APPELLEES.

Argued: Jan. 23, 2024
Decided: May 20, 2024

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh
LOUISE W. FLANAGAN, District Judge
(5:21-cv-00137-FL)

Before AGEE, WYNN, and THACKER, Circuit Judges

WYNN, Circuit Judge.

Michael Jones and his wholly owned company, 360 Virtual Drone Services LLC ("Plaintiffs"), would like to provide customers with aerial maps and 3D digital models containing measurable data. But the North Carolina Board of Examiners for Engineers and Surveyors ("Board") has taken the position that doing so would constitute engaging in the practice of land surveying without a license, in violation of the North Carolina Engineering and Land Surveying Act ("Act"). Plaintiffs sued various members of the Board in their official capacities, arguing that the restriction on their ability to offer these services without first obtaining a surveyor's license violates their First Amendment rights.

The district court granted summary judgment for Defendants. We conclude that the Board has not violated Plaintiffs' First Amendment rights and therefore affirm.

I.

The following facts are undisputed, except as noted.

A.

North Carolina regulates land surveying through the North Carolina Engineering and Land Surveying Act. N.C. Gen. Stat. § 89C-1 to -2. The Act "declare[s]" "the practice of land surveying" in North Carolina "to be subject to regulation in the public interest," specifically, "[i]n order to safeguard life, health, and property, and to promote the public welfare." *Id.* § 89C-2. The Board's Rule 30(b)(6) witness explained that the Act effectuates these purposes in part by assuring the public that "licensed work" is "going to be above [the level of] incompetence, gross negligence, and misconduct" and by "establishing a minimum level of competence" for licensure. J.A. 300–01.[1] The Act creates the Board "to administer [its] provisions," including by investigating violations of the surveyors' rules of professional conduct and taking disciplinary actions where they are violated. N.C. Gen. Stat. § 89C-4; see id. § 89C-20 to -22.

Obtaining a surveyor's license is a rigorous process. An applicant must (1) "be of good character and reputation," as established through "five character references . . . , three of whom are professional land surveyors or individuals acceptable to the Board, with personal knowledge of the applicant's land surveying experience"; (2) "submit exhibits, drawings, plats, or other tangible

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

evidence of land surveying work executed by the applicant under proper supervision and which the applicant has personally accomplished or supervised"; (3) submit to an interview "if the Board determines it necessary"; and (4) meet one of several different combinations of "education, technical, and land surveying experience." *Id.* § 89C-13(b), (b)(1a). For example, an individual who has completed a high school diploma or its equivalent but who lacks an associate or bachelor-of-science degree in surveying must demonstrate "a record satisfactory to the Board of *nine years or more* of progressive practical experience under a practicing professional land surveyor"—or seven years, plus the completion of "a Land Surveyor Apprenticeship"—and must pass at least two examinations. *Id.* § 89C-13(b)(1a)(d)–(d1) (emphasis added).

Practicing land surveying without a license exposes an individual to civil and criminal misdemeanor liability. *Id.* § 89C-23. The same is true for a "firm, partnership, organization, association, corporation, or other entity using or employing the words . . . 'land surveyor' or 'land surveying,' or any modification or derivative of those words in its name or form of business or activity." *Id.*; *see id.* § 89C-24 (providing for the licensure of corporations and business firms). The Act does, however, provide some exceptions to the licensing requirement, such as that unlicensed individuals may "[e]ngag[e] in . . . land surveying as an employee or assistant under the responsible charge of a . . . professional land surveyor." *Id.* § 89C-25(4). None of the Act's exceptions are applicable here.

The Act defines the "[p]ractice of land surveying," in relevant part, as "[p]roviding professional services such as . . . mapping, assembling, and interpreting reliable scientific measurements and information relative to the

location, size, shape, or physical features of the earth, improvements on the earth, the space above the earth, or any part of the earth," including where "the gathering of information for the providing of these services is accomplished . . . by aerial photography, . . . and the utilization and development of these facts and interpretations into an orderly survey map, plan, report, description, or project." *Id.* § 89C-3(7), (7)(a). The Act specifies that "[t]he practice of land surveying includes," among other things, "[l]ocating, relocating, establishing, laying out, or retracing any property line, easement, or boundary of any tract of land;" "[d]etermining the configuration or contour of the earth's surface or the position of fixed objects on the earth's surface by measuring lines and angles and applying the principles of mathematics or *photogrammetry*;" and "[c]reating, preparing, or modifying electronic or computerized data, including land information systems and geographic information systems relative to the performance of the practice of land surveying." *Id.* § 89C-3(7)(a)(1), (5), (7) (emphasis added).

At issue here is the regulation of photogrammetry, which "is the art, science, and technology of obtaining reliable information about physical objects and the environment through processes of recording, measuring, and interpreting photographic images and patterns of recorded radiant electromagnetic energy and other phenomena." J.A. 277. Such images can be collected by drone using visual cameras, infrared sensors, and Light Detection and Ranging ("LiDAR") sensors, depending on the data needed. J.A. 69; *see* J.A. 78–79 (noting that infrared sensors can collect images that, when stitched together, "allow[] a client to see a comprehensive map of the temperature of various objects across a large area" and that drones can be used to create 3D or topographical maps using visual images or LiDAR).

Photogrammetry's work product can include orthomosaic maps and 3D models. Both forms of work product provide measurable, image-based data, but an orthomosaic map is created with solely top-down images, while producing a 3D model requires images from other angles. "Because of lens distortion, a single image taken straight down from above" does not "provide reliable measurements," but "[b]y combining multiple, overlapping images into one composite image"—an orthomosaic map—"points that appear in multiple images can be triangulated and measurements become possible." J.A. 71; *accord* J.A. 69 ("Orthomosaic (or 'ortho') mapping is the process of creating a composite aerial image from many smaller images that are combined and tiled into an image showing a larger area than any single original image depicts."). Orthomosaic maps can be used to take volumetric or two-dimensional measurements and to draw property boundaries.

B.

Jones began providing photography and videography services in North Carolina around 2016, and in 2017, he founded 360 Virtual Drone Services LLC, through which he offered a variety of drone-photography services to paying clients. Jones has never had formal instruction in drone piloting or photography—he has a GED, and his prior professional experience is in welding and information technology—but taught himself those skills using the internet. He also took an exam to be certified by the Federal Aviation Administration to pilot the drone. Through his company, Jones offered standard photography and videography services—for example, for weddings. So far, so good.

The trouble came when Jones also began offering aerial mapping services through his LLC, despite lacking a

surveyor's license in North Carolina (or any other state). On his website, Jones explicitly advertised that he could create orthomosaic maps and noted that they could be used, for example, by "construction companies [to] monitor the elevation changes, volumetrics for gravel/dirt/rock, and watch the changes and progression of the site as it forms over time." J.A. 201. His website also stated that his company "cater[ed] to many industries such as solar, roofing, construction, marketing and advertising, commercial & residential real estate, search and rescue, agriculture, thermal inspection, Orthomosaic maps, ground footage, and more." J.A. 177.

It is unclear from the record whether Jones ever actually provided an orthomosaic map to a paying customer. *Compare* J.A. 505 (Jones's February 22, 2022, deposition testimony as the Rule 30(b)(6) witness for 360 Virtual Drone Services, stating that he had never "provided any services in the field of photogrammetry . . . for paying customers"), *and* J.A. 936 (Plaintiffs agreeing that "[i]t is undisputed that 360 Virtual Drone Services LLC never provided a measurable orthomosaic map or 3D digital model to a paying customer"), *with* J.A. 662 (Jones stating in his July 21, 2021, deposition that he generated somewhere between five and fifteen orthomosaic maps for paying customers). But he did complete an orthomosaic map to pitch to a client and provided paying customers with various products that appear to implicate the Act, including the raw aerial images and data the customers needed to create thermal and aerial maps themselves; aerial images with associated location data, including elevation data; and aerial photographs where Jones had drawn rough property lines using Photoshop. Jones has never produced a 3D model for a client because it is beyond his current skill set, but he avers that he would like to learn how to do so in the future.

In a December 2018 letter, the Board informed Jones that it was opening an investigation into whether 360 Virtual Drone Services was practicing land surveying without a license. Jones responded by email in January 2019, noting that he had added a disclaimer to his website, and he met with the Board's investigator in person the following month. Nevertheless, the Board sent another letter in June 2019 indicating that in its view, Jones was acting in violation of the Act. Following these interactions, Jones "stopped trying to develop [his] mapping business," though he has continued to provide non-map aerial images and videos for clients. J.A. 91. And while the Board has since "disavow[ed] any intent to initiate enforcement proceedings against Plaintiffs based on the act of producing a PDF image of a map that does not contain measurable information" or "an aerial photograph, without measurable information, that includes lines indicating the approximate position of property lines for marketing purposes," J.A. 489–90; *accord* J.A. 547, Jones would like to be able to engage in the full range of mapping activities that he was pursuing before receiving the Board's December 2018 letter.

Accordingly, Jones and 360 Virtual Drone Services LLC sued the Board in March 2021, alleging facial and as-applied violations of their free-speech rights under the First Amendment. They sought declaratory and injunctive relief.

The parties cross-moved for summary judgment, and the district court granted the Board's motion while denying Jones's. *360 Virtual Drone Servs. LLC v. Ritter*, No. 5:21-CV-137-FL, 2023 WL 2759032, at *1 (E.D.N.C. Mar. 31, 2023). The court concluded that Jones had standing to challenge the statute based on his desire to create "two-dimensional and three-dimensional maps with geospatial

data." *Id.* at *7. And it concluded that the Engineering and Land Surveying Act implicated the First Amendment. *Id.* at *9. But it found that the challenged provisions constituted "a generally applicable licensing regime that restricts the practice of surveying to those licensed" and primarily regulated *conduct* rather than *speech*, such that intermediate scrutiny applied. *Id.* at *11. Finally, the court concluded that the Act survived intermediate scrutiny. *Id.* at *12–14. Plaintiffs timely appealed, pursuing only their as-applied (not facial) challenge to the Act.[2]

II.

"We review a grant of summary judgment de novo, applying the same legal standards as the district court while viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. Summary judgment is appropriate when 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Reyes v. Waples Mobile Home Park Ltd. P'ship*, 91 F.4th 270, 276 (4th Cir. 2024) (citation omitted) (quoting Fed. R. Civ. P. 56(a)).

We agree with the district court that Jones possesses standing to challenge the Act as applied to him. *See 360 Virtual Drone Servs.*, 2023 WL 2759032, at *6–7 (citing *Abbott v. Pastides*, 900 F.3d 160, 176 (4th Cir. 2018)). And the core facts are essentially undisputed. So this appeal hinges on two questions of law: what level of scrutiny we must apply in evaluating the Act's constitutionality as

[2] At oral argument, Plaintiffs' counsel conceded that "on its face, North Carolina's surveying licensing law doesn't violate the First Amendment." Oral Argument at 2:21–2:25, *360 Virtual Drone Servs. LLC v. Ritter*, No. 23-1472 (4th Cir. Jan. 23, 2024), https://www.ca4.uscourts.gov/OAarchive/mp3/23-1472-20240123.mp3.

applied to Plaintiffs, and whether the Act can survive that scrutiny. Applying intermediate scrutiny, we conclude that it can.

III.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting U.S. Const. amend. I). But, as with many other cherished constitutional freedoms, "[l]aws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it." *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014). So, "because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable" here. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 637 (1994).

Plaintiffs argue that we should apply either strict scrutiny or the form of intermediate scrutiny this Court has applied to content-neutral regulations of the time, place, and manner of speech. We disagree. Because the Act is a regulation of professional conduct that only incidentally impacts speech, our precedent requires that we apply a more relaxed form of intermediate scrutiny that mandates only that the restriction be "sufficiently drawn" to protect a substantial state interest.

A.

"[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely[.]" *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). Thus, it is well established that the "practice"

of professions like medicine is "subject to reasonable licensing and regulation by the State." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *accord Stuart*, 774 F.3d at 247 ("The state may establish licensing qualifications[.]" (citing *Dent*, 129 U.S. at 122)). But that does not mean "that all regulation of speech in the [professional] context merely receives rational basis review." *Stuart*, 774 F.3d at 249. "Speech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 767 (2018). To the contrary, the precedent of this Court and the Supreme Court establish that professional regulations—like other regulations implicating speech—are subject to various levels of scrutiny, depending on their nature.

The Supreme Court's 2018 decision in *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*") provides a useful starting point. NIFLA involved a challenge at the preliminary-injunction stage to California statutes requiring licensed and unlicensed pregnancy clinics to post certain notices. *Id.* at 760–61, 765. Relevant here is its discussion of the provision applicable to licensed clinics, which were being compelled to speak (by posting certain notices) as part of the regulation of their profession. The notice requirement was thus content based. *Id.* at 766.

Normally, a content-based regulation of speech as speech would be subject to strict scrutiny. *Id.* (citing *Reed*, 576 U.S. at 163). But in *NIFLA*, "the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulate[d] 'professional speech,'" which it treated as "a separate category of speech . . . subject to different

rules."[3] *Id.* at 766–67. The Supreme Court rejected that categorical treatment of "professional speech," noting that it "ha[d] not recognized 'professional speech' as a separate category of speech" entitled to lesser protections. *Id.* at 767. However, the Court did not ultimately resolve whether strict scrutiny applied to the notice requirement for licensed clinics because it concluded that the requirement "[could]not survive even intermediate scrutiny." *Id.* at 773; *accord id.* (leaving open "the possibility that some . . . reason exists" to "treat[] professional speech as a unique category that is exempt from ordinary First Amendment principles"); *cf. Stuart*, 774 F.3d at 248 (pre-*NIFLA*, declining to "conclusively determine whether strict scrutiny ever applies" in situations involving "content-based regulation of speech" in the professional context because the regulation in question failed intermediate scrutiny).

In reaching this conclusion, the Supreme Court recognized that it "*ha[d]* afforded less protection for professional speech" in one relevant circumstance, although that circumstance did not "turn[] on the fact that professionals were speaking."[4] *NIFLA*, 585 U.S. at 768 (emphasis added). Specifically, Supreme Court precedent allowed States to "regulate professional conduct, even [where] that conduct incidentally involves speech." *Id.* But, the Court concluded, that circumstance did not apply to the licensed-clinic notice at issue in NIFLA. That is,

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[3] This Court, too, had adopted the "professional speech doctrine" before *NIFLA*. *E.g.*, *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013), *abrogated by NIFLA*, 585 U.S. 755.

[4] The Supreme Court also recognized a second circumstance where less protection applied—"to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'"—but that circumstance is not at issue in the case at bar. *NIFLA*, 585 U.S. at 768.

the required notice fell outside the context of "professional conduct." *Id.* at 770. This was because the requirement "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure [was] ever sought, offered, or performed." *Id.* So, it "regulate[d] speech as speech." *Id.*

The first question before us, therefore, is whether the Act—as applied to Plaintiffs—is a regulation of "speech as speech," or a regulation of professional conduct subject to "less protection." *Id.* at 768, 770; *cf. Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 931 (5th Cir. 2020) (remanding for district court to analyze whether the licensing requirements at issue "regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct"). Of course, "drawing the line between speech and conduct can be difficult," *NIFLA*, 585 U.S. at 769, and "[t]here are few absolutes in the difficult area of professional regulation and professional expression," *Stuart*, 774 F.3d at 255. However, this case provides an opportunity to sketch some of the applicable principles that can serve as guideposts through this thicket.

Because *NIFLA* did not itself involve a regulation of professional conduct subject to reduced First Amendment protections, it did not elaborate much on what such a regulation might look like. But it did provide a helpful example: the requirement, upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that doctors give women seeking abortions certain information. *NIFLA*, 585 U.S. at 769–70 (citing *Casey*, 505 U.S. at 884). The Supreme Court held in *Casey*, and reiterated in *NIFLA*, that the law challenged in *Casey* regulated professional *conduct* because it "regulated speech only 'as part of the *practice* of medicine, subject to

reasonable licensing and regulation by the State.'" *Id.* at 770 (quoting *Casey*, 505 U.S. at 884). And, the Court concluded, the law merely aimed to support the patient's informed consent to a medical procedure. *Id.*; *see Stuart*, 774 F.3d at 250–55 (distinguishing a similar, but more extreme, law from the one at issue in *Casey* and concluding that that law violated the First Amendment).

More recently, in *Capital Associated Industries, Inc. v. Stein*, this Court considered a challenge to a professional-practice restriction after *NIFLA*. *Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207 (4th Cir. 2019). In that case, the plaintiff challenged North Carolina's unauthorized practice of law ("UPL") statute—specifically, its ban on the practice of law by corporations. *Id.* at 202. The plaintiff was a trade association that "want[ed] to provide legal services to its members" through its call center, but could not do so "because state law forbid[] corporations from practicing law"—even if the call-center staff member was themselves an attorney. *Id.* The district court granted summary judgment to the defendants. *Id.* We affirmed, concluding that the statute was a regulation of professional conduct that only incidentally burdened speech. *Id.* at 202, 207.

In so concluding, we emphasized that the ban on the practice of law by corporations was "part of a generally applicable licensing regime that restricts the practice of law to bar members and entities owned by bar members" and stated that "any impact the UPL statutes have on speech is incidental to the overarching purpose of regulating who may practice law." *Id.* at 207. We also noted that "the practice of law has communicative and non-communicative aspects," but that the statutes "don't target the communicative aspects of practicing law, such as the advice lawyers may give to clients. Instead, they focus

more broadly on the question of who may conduct themselves as a lawyer." *Id.* at 208. We concluded by saying that "[l]icensing laws inevitably have some effect on the speech of those who are not (or cannot be) licensed. But that effect is merely incidental to the primary objective of regulating the conduct of the profession." *Id.*; *accord Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1226 (11th Cir.) (upholding license requirement for nutritionists as regulation of "occupational conduct"), *cert. denied sub nom. Del Castillo v. Ladapo*, 143 S. Ct. 486 (2022).

To be sure, "*NIFLA* rejected the proposition that First Amendment protection *turns on* whether the challenged regulation is part of an occupational-licensing scheme." *Vizaline*, 949 F.3d at 932 (emphasis added). So "the fact that the Act 'generally functions' as a regulation on professional conduct" cannot be dispositive; rather, the court must evaluate the particular provision at issue and determine whether it "targets 'speech as speech,' rather than professional conduct that just so happens to sweep up speech." *Nutt v. Ritter*, --- F.Supp.3d ---, No. 7:21-CV-00106-M, 2023 WL 9067799, at *14 (E.D.N.C. Dec. 20, 2023) (quoting *NIFLA*, 585 U.S. at 770). Put another way, our reference in *Capital Associated Industries* to the fact that the challenged law was "part of a generally applicable licensing regime" could not be (and was not) the end of the inquiry; it was a descriptive statement that helped to contextualize a provision that we otherwise concluded was a regulation of conduct. *Cap. Associated Indus.*, 922 F.3d at 207.

Indeed, in *Billups v. City of Charleston*—another post-*NIFLA* case—this Court considered a generally applicable licensing regime that we concluded was directed at speech, not conduct. *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020). There, we held that a city

ordinance requiring tour guides offering paid tours in Charleston's historic districts to obtain a license—which necessitated passing a test and jumping through other hoops—imposed a burden on speech that was more than incidental because it "completely prohibit[ed] unlicensed tour guides from leading visitors on paid tours—an activity which, by its very nature, depends upon speech or expressive conduct." *Id.* at 683.

Read together, *Capital Associated Industries* and *Billups* help to draw the boundary lines around what constitutes a conduct-focused professional regulation. The fact that a regulation falls within a generally applicable licensing regime does not automatically mean it is aimed at conduct, as *Billups* demonstrates. But the fact that a regulation directs or prohibits particular speech in the professional context does not automatically mean it is aimed at speech, either, as *Capital Associated Industries* and *Casey* establish. *Cf.* 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 20:37.40 (3d ed. 1996 & Supp. 2024) ("While a state may require a law license to practice law, . . . a state may not require a license to write a law review article, or operate a website devoted to commentary and critique on legal issues.").

Further, contrary to Plaintiffs' suggestion, *see* Opening Br. at 33–34, finding the line between speech and conduct is not as simple as asking whether the prohibition is literally one against verbal or written "speech," on the one hand, or one against "conduct" (i.e., nonverbal action) on the other. To the contrary, this line is quite blurry, since of course nonverbal action can constitute speech for constitutional purposes (e.g., a silent protest) and written or verbal speech can constitute professional conduct (e.g., writing a prescription). *See NIFLA*, 585 U.S. at 769 (acknowledging that "drawing the line between speech and

conduct can be difficult"); Smolla, *supra*, § 20:37.40 ("The point at which the profession of ideas becomes the practice of a profession remains murky at best in modern First Amendment jurisprudence, an ongoing work-in-progress.").

Instead, in drawing the line between a regulation aimed at professional conduct that incidentally burdens speech and one aimed at speech as speech, a variety of factors may come into play.

For example, courts are more likely to view a licensing regime limiting who may engage in certain professional conduct as conduct-focused for purposes of the First Amendment analysis where the conduct carries legal, health, economic, or public-safety-related consequences, such as in the realms of law, medicine, accounting, and engineering. *E.g.*, *Stuart*, 774 F.3d at 247 ("The state's power to prescribe rules and regulations for professions, including medicine, has an extensive history."); *NIFLA*, 585 U.S. at 769 (medicine); *Dent*, 129 U.S. at 122 (medicine); *Cap. Associated Indus.*, 922 F.3d at 207 (law); *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566, at *2 (9th Cir. Apr. 16, 2024) (per curiam) (surveying); *Del Castillo*, 26 F.4th at 1226 (dietetics and nutrition); *Tingley v. Ferguson*, 47 F.4th 1055, 1082 (9th Cir. 2022) (psychotherapy), *cert. denied*, 144 S. Ct. 33 (2023); *cf. Billups*, 961 F.3d at 682–83 (regulation was *not* conduct-focused where the licensing regime was aimed at giving tours, the practice of which does not carry any of the aforementioned consequences).

Factors that courts have considered in concluding that a licensing regime is aimed at speech *as speech*—not conduct—include (1) where the regulation is aimed at speech taking place in a traditionally public sphere, *e.g.*, *Billups*, 961 F.3d at 683 ("The Ordinance undoubtedly burdens

protected speech, as it prohibits unlicensed tour guides from leading paid tours—in other words, speaking to visitors—on certain public sidewalks and streets[,] . . . . where First Amendment rights are at their apex." (citing *Frisby v. Schultz*, 487 U.S. 474, 480–81 (1988))); and (2) where the regulation appears to regulate some kind of unpopular or dissenting speech, *e.g.*, *NIFLA*, 585 U.S. at 771 (noting the risk that Government regulation of professional speech can be used "to suppress unpopular ideas or information" (quoting *Turner Broad. Sys.*, 512 U.S. at 641)); *Stuart*, 774 F.3d at 246 (noting that "the statement compelled" in that case was "ideological"); *Cap. Associated Indus.*, 922 F.3d at 208 (emphasizing, in concluding that the licensing regime at issue was conduct-focused, that the statutes did *not* "target the communicative aspects of practicing law, such as the advice lawyers may give to clients"); *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020) ("[T]he First Amendment has no carveout for controversial speech.").

So, for example, *Capital Associated Industries* involved a classic regulation of conduct with an incidental burden on speech: the law prohibited certain entities from offering legal services or advice (speech that has economic and legal consequences), and had no readily apparent implications for unpopular or dissenting speech. *Cap. Associated Indus.*, 922 F.3d at 207–08. And the speech in *Casey*—although compelling speech and thus foreclosing some forms of dissent, on a subject that is hotly disputed—carried legal and health-related consequences and was made in a private, doctor-patient relationship, and thus fell on the conduct end of the spectrum. *NIFLA*, 585 U.S. at 769–70 (citing *Casey*, 505 U.S. at 884). By contrast, although the regulation in *Billups* did not impact the content of licensed tour guides' speech, that speech had no economic, legal, public-safety, or health-related

consequences and was made in a traditional public space, and thus was being regulated *as* speech. *Billups*, 961 F.3d at 677, 683.

B.

The distinction between a regulation aimed at conduct that incidentally burdens speech, and a content-neutral regulation of speech as speech, matters because it carries consequences for our level of scrutiny. As noted above, typically, a content-*based* regulation of speech *as speech* would trigger strict scrutiny. *Reed*, 576 U.S. at 163–64. But where "[a] statute[] regulate[s] *conduct*, we need not engage with . . . descriptors" like "content-based and identity-based." *Cap. Associated Indus.*, 922 F.3d at 209 n.4 (emphasis added). Instead, we analyze regulations of conduct—as well as content-neutral regulations of speech—under intermediate scrutiny. But our case law spells out at least two distinct intermediate-scrutiny tests, which carry quite different burdens.[5]

[5] It is not unprecedented to recognize variable intermediate scrutiny tests. In *United States v. Marzzarella*, the Third Circuit stated that "[i]n the First Amendment speech context, intermediate scrutiny is articulated in several different forms." *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (collecting cases), *abrogated on other grounds by N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). We recognized the same in *United States v. Chester*, which cited *Marzzarella*'s discussion of the "various forms of intermediate scrutiny." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (citing *Marzzarella*, 614 F.3d at 98), *abrogated on other grounds by Bruen*, 597 U.S. 1. To be sure, both Chester and Marzzarella spoke of these "various forms" as still "essentially shar[ing] the same substantive requirements." *Id.* (quoting *Marzzarella*, 614 F.3d at 98). But we conclude that *NIFLA* and *Capital Associated Industries*, both of which were decided after *Marzzarella* and *Chester*, recognized requirements different from the earlier line of cases.

Specifically, and as detailed further below, there is a distinction between (1) the traditional intermediate-scrutiny test we applied in our decisions in *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015), and *Billups*, 961 F.3d 673, in reliance on the Supreme Court's decisions in *McCullen v. Coakley*, 573 U.S. 464 (2014), and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), and (2) the loosened intermediate-scrutiny test for professional-conducted-focused regulations we applied in our decision in *Capital Associated Industries*, 922 F.3d 198, in reliance on the Supreme Court's decision in *NIFLA*, 585 U.S. 755.

We note at the outset that the other circuits to have evaluated the applicable level of scrutiny for conduct-focused regulations post-*NIFLA* have applied rational basis review, not intermediate scrutiny. *See Del Castillo*, 26 F.4th at 1226 (11th Cir.) (concluding, based on pre-*NIFLA* Eleventh Circuit law, that "[b]ecause the [challenged] Act is a professional regulation with a merely incidental effect on protected speech, it is constitutional under the First Amendment," and thus affirming the district court's rejection of the plaintiff's First Amendment claim—which had applied rational basis review—without the need for further analysis (cleaned up)); *Tingley*, 47 F.4th at 1077 (9th Cir.) (applying rational basis review, based on pre-*NIFLA* Ninth Circuit law); *Crownholm*, 2024 WL 1635566, at *2 & n.2 (9th Cir.) (applying rational basis review to a post-*NIFLA* challenge to a land-surveying act, and dismissing a reference to intermediate scrutiny in another post-*NIFLA* case as dicta); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 436 (6th Cir. 2019) (rejecting intermediate scrutiny).[6]

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[6] *Cf. Vizaline*, 949 F.3d at 934 (5th Cir.) (declining to express any "view on what level of scrutiny might be appropriate for applying [the challenged] licensing requirements to [the plaintiff]'s practice");

We are, of course, bound by our Circuit's prior decisions on this point. But we note the fact that other circuits have applied rational basis review to make clear that our Circuit has not gone out on a limb in applying a lower form of intermediate scrutiny to conduct-focused licensing regimes than to content-neutral time, place, and manner regulations. To the contrary, that we apply intermediate scrutiny at all means the law in our Circuit is more rigorous for legislatures to satisfy than it is in other circuits.

Turning to the two lines of cases relevant for intermediate scrutiny, in *Reynolds v. Middleton*, we followed the classic formulation from *Ward v. Rock Against Racism*—echoed in *McCullen v. Coakley*—that in the context of a challenge to a "[c]ontent-neutral time, place, and manner regulation[]," intermediate scrutiny means that the "restrictions must be narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." *Reynolds*, 779 F.3d at 225–26 (cleaned up); *accord McCullen*, 573 U.S. at 477 (citing *Ward*, 491 U.S. at 791). We stated that the Supreme Court's "rejection of the Commonwealth [of Massachusetts]'s narrow-tailoring arguments [in *McCullen*] makes it clear that intermediate scrutiny . . . require[s] the government to present *actual evidence* supporting its assertion that a speech restriction does not burden substantially more speech than necessary." *Reynolds*, 779 F.3d at 229 (emphasis added); *see McCullen*, 573 U.S. at

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Hines v. Quillivan, 982 F.3d 266, 272 (5th Cir. 2020) (same); *Brokamp v. James*, 66 F.4th 374, 392 (2d Cir. 2023) (applying intermediate scrutiny, but only after assuming without deciding that the professional services at issue "consist[ed] only of speech *without any nonverbal conduct*" (emphasis added)), *cert. denied*, 144 S. Ct. 1095 (2024); *Otto*, 981 F.3d at 868 (11th Cir.) (applying strict scrutiny because the ordinances in question were "content-based regulations of speech").

496. Thus, the government's "argument unsupported by the evidence will not suffice to carry [its] burden." *Reynolds*, 779 F.3d at 229.

In *Billups*, we concluded that "[r]ead together, *Reynolds* and *McCullen* establish the following rule: To prove that a content-neutral restriction on protected speech is narrowly tailored to serve a significant governmental interest, the government must, inter alia, present evidence showing that—before enacting the speech-restricting law—it 'seriously undertook to address the problem with less intrusive tools readily available to it.'" *Billups*, 961 F.3d at 688 (quoting *McCullen*, 573 U.S. at 494); *accord People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 831 (4th Cir.), *cert. denied*, 144 S. Ct. 325, and *cert. denied sub nom. Stein v. People for the Ethical Treatment of Animals, Inc.*, 144 S. Ct. 326 (2023).

Yet in evaluating North Carolina's UPL statute in *Capital Associated Industries*, we noted that in Supreme Court cases "review[ing] restrictions on conduct that incidentally burden speech," "the state actors involved *were not required to demonstrate a compelling interest and narrow tailoring*." *Cap. Associated Indus.*, 922 F.3d at 208 (emphasis added). Rather, "[t]o survive intermediate scrutiny" in such a case, "the defendant must show 'a substantial state interest' and a solution that is 'sufficiently drawn' to protect that interest." *Id.* at 209 (quoting *NIFLA*, 585 U.S. at 773). Further, the defendant need only show "a 'reasonable fit between the challenged regulation' and the state's interest—not [that the regulation is] the least restrictive means" for achieving its goal. *Id.* at 209–10 (quoting *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010), *abrogated on other grounds by N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)).

And, in resolving the legality of the UPL statute at issue in *Capital Associated Industries*, we relied on common sense—not specific evidence—to conclude that the defendant had met this burden. *Id.* at 209–210.

NIFLA and *Capital Associated Industries* suggest that the burden for defendants in cases involving regulations aimed at professional conduct that incidentally burden speech is not exceedingly high. *See NIFLA*, 585 U.S. at 768 (referring to "less protection"); *Cap. Associated Indus.*, 922 F.3d at 207 ("We recognize that the States have . . . broad power to establish standards for licensing practitioners and regulating the practice of professions." (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975))). In *Capital Associated Industries*, we concluded that the form of intermediate scrutiny we found to apply was "a sensible result, as it fits neatly with the *broad leeway* that states have to regulate professions." *Cap. Associated Indus.*, 922 F.3d at 209 (emphasis added).

The upshot is that for most content-neutral restrictions on speech, intermediate scrutiny requires the government to produce "actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary." *Reynolds*, 779 F.3d at 229. But where the restrictions are primarily aimed at professional conduct and only incidentally burden speech, intermediate scrutiny does *not* require such evidence, and instead just requires that the restriction be "sufficiently drawn" to protect "a substantial state interest." *Cap. Associated Indus.*, 922 F.3d at 209 (quoting *NIFLA*, 585 U.S. at 773).

IV.

Applying the principles established above to the facts of this case, we conclude that the Act survives Plaintiffs' as-applied First Amendment challenge.

A.

First, applying the non-exhaustive list of factors we set out above for distinguishing between licensing regulations aimed at conduct and those aimed at speech as speech—whether the speech carries economic, legal, public-safety, or health-related consequences; whether the speech takes place in a traditionally public space; and whether the regulation seeks to quell unpopular or dissenting speech—we conclude that, as applied to Plaintiffs, the relevant provisions of the Act are aimed at conduct.

As applied to Plaintiffs, the challenged portions of the Act prevent an unlicensed and untrained person who is not acting under the supervision of a licensed surveyor from selling two- or three-dimensional maps or models of areas of land that contain measurable data. This is conduct that classically falls under the surveying profession. And it carries economic and legal consequences. When an individual provides a map or 3D model of land with a scale bar or other measurable data, there is an implied accuracy. Plaintiffs' expert conceded that "[t]here[was] the potential for" errors in the form of "provid[ing] a faulty work product to [a] client who's relying on [the business] to provide accurate information," which could impact the client—for example, related to calculating "the amount of fencing they might need"—as well as "their neighbors, if it's an issue involving boundaries or real estate." J.A. 900–01. Indeed, experience shows that even very minor discrepancies in measurements can create significant liability issues. *E.g.*, *Brandao v. DoCanto*, 951 N.E.2d 979, 982–83 (Mass. App. Ct. 2011) (affirming judgment ordering defendants to remove portion of condominium structure due to 13.2-inch encroachment).

The speech at issue also takes place in the private sphere, not on public sidewalks like with the tour guides

in *Billups*. And there is no suggestion that the map or modeling data Plaintiffs would like to produce constitutes unpopular or dissenting speech, nor that the Act directs surveyors' speech once licensed. *See 360 Virtual Drone Servs.*, 2023 WL 2759032, at *11 ("Although surveying, like the practice of law, has 'communicative and non-communicative aspects,' the Act does not control what surveyors may tell their clients, instead 'focus[ing] more broadly on the question of who may conduct themselves as a [surveyor].'" (alteration in original) (quoting *Cap. Associated Indus.*, 922 F.3d at 208)).

Accordingly, the factors we have identified all point to the conclusion that the Act regulates professional conduct and only incidentally burdens speech.

B.

Second, we must apply the appropriate form of intermediate scrutiny to the facts before us. Again, for a conduct-based regulation, intermediate scrutiny does not require the state actors "to demonstrate a compelling interest and narrow tailoring," nor that the regulation is "the least restrictive means." *Cap. Associated Indus.*, 922 F.3d at 208, 210. Instead, they "must show 'a substantial state interest' and a solution that is 'sufficiently drawn' to protect that interest"—that is, that there is "a 'reasonable fit between the challenged regulation' and the state's interest." *Id.* at 209–10 (first quoting *NIFLA*, 585 U.S. at 773; then quoting *Chester*, 628 F.3d at 683). They can, but need not, point to specific record evidence to support this contention.

Plaintiffs do not dispute that protecting property interests and promoting the public welfare by assuring the public that the work performed by surveyors conforms to a minimum level of competence are substantial state interests. Nor could they. As the district court rightfully

stated, "[a]s a general matter, the regulation of the practice of surveying safeguards property rights, which rights governments have a legitimate interest in protecting," and in this case "[t]he record evidence reflects that the Act establishes a minimum level of competence, thereby protecting the public from negligence, incompetence, and professional misconduct." *360 Virtual Drone Servs.*, 2023 WL 2759032, at *12 (first citing *McCullen*, 573 U.S. at 486 ("We have . . . previously recognized the legitimacy of the government's interest[] in . . . protecting property rights[.]"); then citing *In re Suttles Surveying, P.A.*, 742 S.E.2d 574, 578–79 (N.C. Ct. App. 2013) ("[A]s N.C. Gen. Stat. § 89C-2 makes clear, the Legislature intended its rules on the practice of surveying to protect property interests in North Carolina."); then citing N.C. Gen. Stat. § 89C-13 (creating education, examination, and experience requirements for licensure); and then citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions.")).

So the only question is whether, as applied to Plaintiffs, the challenged provisions are sufficiently drawn to protect those substantial state interests. We agree with the district court that they are. *Id.* at *13 ("[T]he Act is 'sufficiently drawn' to th[e protected] interest where [P]laintiffs' actions only are restricted to the extent they seek to create maps or models conveying location information or property images capable of measurement.").

Our decision in *Capital Associated Industries* is again instructive. That case involved a more draconian law than the one at issue here, which we nevertheless upheld. Under the challenged UPL law, "when legal issues ar[o]se, [the plaintiff]'s [call center] experts ha[d] to steer the conversation elsewhere, end the conversation, or

refer the [association] member to outside counsel"—*even when the individual speaker was an attorney*. *Cap. Associated Indus.*, 922 F.3d at 202. Nevertheless, we concluded that "[b]arring corporations from practicing law" was "sufficiently drawn to protect" North Carolina's "interest in regulating the legal profession to protect clients." *Id.* at 209.

In so holding, we did not impose a heavy burden on North Carolina. Rather, we noted several potential issues in the absence of the regulation—"[p]rofessional integrity could suffer," and "[n]onlawyers would likely supervise lawyers representing third-party clients at [Capital Associated Industries], which could compromise professional judgment and generate conflicts between client interests and the corporation's interests"—and explained that the law was a reasonable fit because it "proscrib[ed] law practice by organizations that pose the most danger, while exempting organizations that pose little danger." *Id.*

Similarly, the Act in this case protects the professional integrity of surveyors: a surveying license is not easy to obtain, and there is a public interest in ensuring there is an incentive for individuals to go through that rigorous process and become trained as surveyors. Further, the Act protects consumers from potentially harmful economic and legal consequences that could flow from mistaken land measurements. Tellingly, when asked how a client would be "protected" in the absence of the Act "against somebody who really doesn't know what they are doing but is [offering] the client services in the field of photogrammetry," Plaintiffs' expert responded, "That's up to the client"—meaning, he agreed, "buyer beware." J.A. 902. We agree with the Board that the First Amendment doesn't require the State to accept this caveat-emptor view of regulating surveying.

At the same time, the Act limits its scope to activities that fall within the traditional practice of surveying. So, for example, Plaintiffs may still engage in the activities that fall within their area of experience and expertise—namely, taking aerial photos—and can even draw rough property lines in certain circumstances. *See* J.A. 489–90, 547. They only may not provide the sort of measurable data that falls within the realm of the profession of surveying.

And while perhaps a disclaimer would suffice to resolve the concerns in this case, the Board does not have to show that the regulation is "the least restrictive means" available to protect the substantial interests at play. *Cap. Associated Indus.*, 922 F.3d at 210. The wisdom of the State's policy choices among the options permitted by the Constitution are, of course, beyond the purview of this Court.

V.

States do not have a constitutional blank check when it comes to licensing regimes. As *NIFLA* and *Billups* demonstrate, merely placing a regulation aimed at speech into a licensing regime does not insulate it from scrutiny as a regulation of speech. *E.g.*, *NIFLA*, 585 U.S. at 773 (rejecting the idea that "States [have] unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement"). And even where a regulation is in fact aimed at professional conduct, States must still be able to articulate how the regulation is sufficiently drawn to promote a substantial state interest. But where, as here, the State carries that burden, we can ask no more of the State, and its licensing requirement will survive First Amendment scrutiny.

AFFIRMED

APPENDIX B

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

No. 5:21-CV-137-FL

360 VIRTUAL DRONE SERVICES LLC AND MICHAEL JONES, PLAINTIFFS,

v.

ANDREW L. RITTER, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; JOHN M. LOGSDON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; JONATHAN S. CARE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; DENNIS K. HOYLE, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; RICHARD M. BENTON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; CARL M. ELLINGTON, JR., IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; CEDRIC D. FAIRBANKS, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS; BRENDA L. MOORE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS; CAROL

SOLLOUM, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS; AND ANDREW G. ZOUTWELLE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS, DEFENDANTS.

ORDER

This matter comes before the court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (DE 31, 35). For the reasons that follow, defendants' motion is granted and plaintiffs' motion is denied.

STATEMENT OF THE CASE

Plaintiffs, a drone-photography company and its single member, commenced this action March 22, 2021, alleging provisions of the North Carolina Engineering and Land Surveying Act,N.C. Gen. Stat. §§ 89C-1, *et seq.* (the "Act") prohibit them and others similarly situated from creating, processing, and disseminating images of land and structures, in violation of the First Amendment. See N.C. Gen. Stat. §§ 89C-2, 89C-3(7), 89C-23, and 89C-24. Plaintiffs sue defendants in their official capacities as executive director and members of the North Carolina Board of Examiners for Engineers and Surveyors (the "Board"), the agency responsible for enforcing the Act. Plaintiffs seek declaratory and injunctive relief pursuant to the First and Fourteenth Amendments to the United States Constitution; the Civil Rights Act of 1871, 42

U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

Defendants' motion for summary judgment challenges the court's subject matter jurisdiction. Alternatively, defendants seek judgment in their favor with reliance upon: 1) testimony by Andrew L. Ritter ("Ritter"), in his capacity as executive director of the Board and as Rule 30(b)(6) deponent for the Board; plaintiff Michael Jones ("Jones") in his personal capacity and as Rule 30(b)(6) deponent for plaintiff 360 Virtual Drone Services, LLC ("360 Virtual Drone"); and Alex Abatie ("Abatie"), plaintiffs' designated expert witness on drones and mapping; 2) discovery responses; and 3) defendants' disclosure of expert testimony by Mark S. Schall ("Schall").

In support of its motion, plaintiffs introduce: 1) plaintiff Jones's declaration; 2) plaintiffs' webpage; 3) a map created by plaintiff Jones with and without a scale bar; 4) the Board's 2018 and 2019 letters to plaintiffs; 5) an email by plaintiff Jones to a potential client; 6) letters from the Board to other drone companies; 7) deposition testimony of David S. Tuttle ("Tuttle"), in-house counsel to the Board; 8) email correspondence between Tuttle and a drone operator regarding application of the Act; 9) testimony by William Casey ("Casey"), the Board's assigned investigator; Clyde Anthony Alston ("Alston"), another Board investigator; and Schall; 10) the Board's investigative report of plaintiffs and other drone companies; 11) defendants' response in discovery; and 12) a declaratory and advisory opinion from Mississippi and Kentucky, respectively, exempting activities from the definition of the practice of land surveying.

STATEMENT OF UNDISPUTED FACTS

North Carolina regulates land surveying through the Act.[1] (Pl. Resp. Stmt. Facts (DE 45) ¶ 1 (citing N.C.G.S. §§ 89C-1, et seq.)). The Act establishes the Board to administer its provisions and forbids "any person from practicing or offering to practice land surveying in North Carolina without first being licensed by the Board." (Id. ¶¶ 2, 5). Land surveying is designated as a "profession," and encompasses "a number of disciplines including geodetic surveying, hydrographic surveying, cadastral surveying, engineering surveying, route surveying, photogrammetric (aerial) surveying, and topographic surveying." (Id. ¶ 4). The Board also "publishes policies to include or exclude activities that fall within, or outside, the definition of the practice of land surveying." (Id. ¶ 45). Pursuant to the Act, those who practice land surveyance without a license are subject to investigation by the Board. (Id. ¶ 6).

Abutting this regulatory scheme is the recent "rise of a thriving commercial-drone industry" in which drones "take photographs of—and collect data about—buildings, land, construction sites and other property." (Def. Resp. Stmt. Facts (DE 43) ¶ 1). Operators then are able to create a map of properties over which they fly by combining the photographs captured into a single, high-resolution photograph, called an "orthomosaic" map, which is a type of map described by the parties as a "measurable" map. (Id. ¶ 2). The photographs can include embedded "georeferenced" information, and the orthomosaic maps resulting then are capable of conveying to the user "information about the land" mapped. (Id. ¶ 3). For instance,

[1] Where a fact asserted in the movants' statement of material facts is undisputed, the court cites to the opposing parties' responsive statement of facts, where it indicates the fact is admitted, undisputed, or without opposing fact.

users can measure the distance from one point to another, or estimate the area or elevation of a piece of land. (Id.). Images captured by drones also can be used to create "photorealistic 3D models of land and structures." (Id. ¶ 5). These three-dimensional models too can include "geotagged" information for the purpose of measurement. (Id.).

Jones began providing photography and videography services in North Carolina in 2016, and eventually incorporated "drone-based aerial photography" into his business. (Id. ¶¶ 6, 8). In October 2017, Jones founded 360 Virtual Drone as a single-member company. (Id. ¶ 8). Through his newly founded company, Jones branched out into drone-based, "aerial mapping services," creating a profile on a "popular commercial-drone website, Droners.io, and selected 'Surveying & Mapping' as one of his project categories." (Id. ¶ 9). On this website he advertised "video, pictures and orthomosaic maps (Measurable Maps) of [construction] sites," writing "[w]ith this information, construction companies can monitor the elevation changes, volumetrics for gravel/dirt/rock, and watch the changes and progression of the site as it forms over time." (Id. ¶ 10).

Over the course of the following year Jones was hired to fly his drone over a Walmart distribution center and capture images, then used by a drone data company "to create a thermal map of the roof." (Id. ¶ 11). He also was hired to capture aerial images of a shopping-mall parking lot, which images "likewise could be used to create an aerial map." (Id.). At some point during this time, Jones began making orthomosaic maps himself, in one instance processing images taken periodically for a repeat customer into an aerial map and pitching the product to the client. (Id. ¶ 12). The client chose not to make use of the

maps, but Jones continued to advertise mapping as one of 360 Virtual Drone's offerings. (Id.).

Jones is not a licensed land surveyor and 360 Virtual Drone is not licensed as a surveying business. (Id. ¶¶ 13-14). In December 2018, Jones received a letter from the State Board of Examiners stating that it had "authorized an investigation" of 360 Virtual Drone to determine whether it was in violation of the Act by "practicing or offering to practice land surveying in North Carolina without a license." (Id. ¶ 17). Between 2016 to 2020, the Board issued at least half a dozen comparable letters to other drone operators, similarly placing them on notice that practicing, or offering to practice, land surveying in North Carolina without being licensed is a violation of the Act, (Id. ¶¶ 18-20), along lines:

> If the company fails to come into compliance, further action may be pursued by the Board as authorized in G.S. 89C-10(c) and 89C-23 to apply to the court for an injunction. The activities include, but are not limited to: collection of survey data; aerial surveying and mapping services; any resulting map or drawing; 3D models; and aerial photogrammetry

(Id. ¶ 19). One drone operator submitted questions in response, and the Board's in-house counsel provided the following answers by email, appearing below in blue:

Mr. Armstrong,

As to your questions:
1. I take aerial photographs of land for a developer and use software to stitch the images together. I sell him the individual photographs without any geological references.
If there is no meta data or other information about coordinates, distances, property boundaries or anything that falls within the definition of land surveying in GS 89C-3(7) then simple taking and providing the photographs does not require a land surveying license.

2. I take the same photographs and process them into a topographic contour map to show elevation so the developer can determine if too much grading would be needed before buying the land and paying for a surveyor.
No, this would be within the definition of land surveying.

3. There is a structure on this land, so I take the same photographs and process them into a 3D model so the developer can get a sense of its appearance from all sides and from top to bottom.
No, this would be within the definition of land surveying.

4. The developer wants to know the relative size of the land, so I process the same photographs so the developer can go online and do rough order of magnitude measurements using a distance tool.
No, this would be within the definition of land surveying.

5. The developer also wants to get a feel for the area and volume of a large stock pile of stone left on the property, so I process the same photographs so the developer can go online and draw a polygon around the stock pile and use a software tool to tell him area and cubic yards contained in the stock pile.
No, this would be within the definition of land surveying, as further explained in the Board's Volume Computation Surveys Policy.

Would it make a difference I delivered the photographs to the developer stating that the images are not a licensed survey?
No, it would still be within the definition of land surveying.

(Tuttle Email (DE 38-17)).

Jones promptly responded to the Board's investigation letter, and February 7, 2019, the assigned board investigator met with Jones for an interview. (Def. Resp. Stmt. Facts (DE 37) ¶ 27). What was discussed during that interview is disputed. Jones contends the investigator advised him that "giving a client an aerial photograph that contains geospatial metadata," "stitching aerial photographs together to create an orthomosaic map," and giving a client aerial images on which he had drawn lines approximating property boundaries all would qualify as the unlicensed practice of surveying. (Jones Decl. (DE 38-3) ¶¶ 30-32). The board investigator denies having offered Jones guidance on what he legally could and could not do. (Casey Dep. (DE 20) 44:15-45:3).

Jones thereafter was informed by letter dated June 13, 2019:

> After a thorough consideration of the investigative materials, the Board's Review Committee has determined that there is sufficient evidence to support the charge that 360 Virtual Drone Services, LLC is practicing, or offering to practice, surveying in North Carolina, as defined in G.S. 89C-3(6) without being licensed with this Board.
>
> At its regular meeting on June 12, 2019 the Board concurred with the recommendation of the Review Committee, which was to place 360 Virtual Drone Services, LLC on notice that practicing, or offering to practice, land surveying in North Carolina, as defined in G.S. 89C-3(7) without being licensed with this Board and to place the company on notice that practicing, or offering to practice land surveying in North Carolina without being licensed with the Board, is a violation of G. S. 89C-24, 55B and 57D.
>
> If the company fails to come into compliance, further action may be pursued by the Board as authorized in G. S. 89C-10(c) and 89C-23 to apply to the court for an injunction or pursue criminal prosecution. The activities include, but are not limited to: mapping, surveying and photogrammetry; stating accuracy; providing location and dimension data; and producing orthomosaic maps, quantities, and topographic information. In addition, marketing disclaimer is not appropriate as the services still fall within the practice of land surveying.

(Def. Resp. Stmt. Facts (DE 37) ¶ 35). The letter also noted the following:

> You are hereby notified that the opinion expressed herein is not a final legal determination. An occupational licensing board does not have the authority to order discontinuance of current practices. Only a court may determine that the law has been violated or is being violated and, if appropriate, impose a remedy or penalty for the violation. Further, pursuant to G.S. 150B-4, and per Board Rule 21 NCAC 56 .1205, you may have the right, prior to initiation of any court action by the occupational licensing board, to request a declaratory ruling regarding whether your particular conduct is lawful

(Pl. Resp. Stmt. Facts (DE 45) ¶ 33).

In response to the Board's June 13, 2019, letter, Jones stopped developing his mapping business. (Def. Resp. Stmt. Facts (DE 37) ¶ 36). He ceased offering aerial maps and declined jobs to capture images for others intending to make such maps. (Id.). Jones "refrained from branching out into other mapping-related work as well—for instance, using aerial images to create 3D digital models." (Id.). He additionally stopped adding lines on real-estate marketing images to approximate property boundaries. (Id.).

The Board's present position is that plaintiffs cannot provide clients with "aerial orthomosaic maps" unless they are stripped of location information and any data by which a recipient could make measurements on the maps. (Id. ¶ 39). Unlicensed persons also cannot provide clients with three-dimensional digital models of land or structure. (Id. ¶ 46). They can, however, produce "marketing images that contain lines indicating the approximate position of property boundaries." (Id. ¶ 52).

COURT'S DISCUSSION

A. Standard of Review

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).[2]

Once the moving party has met its burden, the non-moving party then must "come forward with specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). Only disputes between the parties over facts that might affect the outcome of the case properly preclude entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (holding that a factual dispute is "material" only if it might affect the outcome of the suit and "genuine" only if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party).

"[A]t the summary judgment stage the [court's] function is not [itself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 249. In determining whether there is a genuine issue for trial, "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [non-movant's] favor." Id. at 255; see United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)

[2] Internal citations and quotation marks are omitted from all citations unless otherwise specified.

("On summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion.").

Nevertheless, "permissible inferences must still be within the range of reasonable probability, . . . and it is the duty of the court to withdraw the case from the [fact-finder] when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982). Thus, judgment as a matter of law is warranted where "the verdict in favor of the non-moving party would necessarily be based on speculation and conjecture." Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485, 489 (4th Cir. 2005). By contrast, when "the evidence as a whole is susceptible of more than one reasonable inference, a [triable] issue is created," and judgment as a matter of law should be denied. Id. at 489-90.

B. Analysis

1. Plaintiffs' Article III Standing

Defendants contend plaintiffs have not suffered an injury in fact and the court accordingly lacks standing. This is not correct. Plaintiffs have standing.

The United States Constitution extends the subject matter jurisdiction of the federal judiciary to "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1. "Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). Thus, lack of standing is a deficiency that places litigation outside the court's subject matter jurisdiction. See S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC, 713 F.3d 175, 185 (4th Cir. 2013).

The party invoking federal jurisdiction bears the burden of established the following three elements, together amounting to the "irreducible constitutional minimum of standing:"

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). "[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158 (2014). Standing requirements are somewhat more relaxed in First Amendment cases, which leniency manifests itself most commonly in the injury-in-fact requirement. Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013); see Secretary of State of Md. v. Joseph H. Munson Co., Inc., 467 U.S. 947, 956 (1984); Benham v. City of Charlotte, N.C., 635 F.3d 129, 135 (4th Cir. 2011). The injury-in-fact requirement is the element primarily at issue here.

Plaintiffs seek to enjoin the Board from enforcing N.C. Gen. Stat. §§ 89C-2, 89C-3(7), 89C-23, and 89C-24 against the creation of two- and three-dimensional maps

with geospatial data or otherwise allowing for measurements of the land pictured.

The United States Court of Appeals for the Fourth Circuit recognizes two ways in which litigants may establish the requisite ongoing injury when seeking to enjoin government regulation. First, they may allege an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and that there exists a credible threat of prosecution thereunder. Abbott v. Pastides, 900 F.3d 160, 176 (4th Cir. 2018); see Susan B. Anthony, 573 U.S. at 159. "Second, they may refrain from exposing themselves to sanctions under the policy, instead making a sufficient showing of self-censorship—establishing, that is, a chilling effect on their free expression that is objectively reasonable." Abbott, 900 F.3d at 176; see Cooksey, 721 F.3d at 235 ("In First Amendment cases, the injury-in-fact element is commonly satisfied by a sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising h[is] right to free expression."). "Either way, a credible threat of enforcement is critical; without one, a putative plaintiff can establish neither a realistic threat of legal sanction if he engages in the speech in question, nor an objectively good reason for refraining from speaking and self-censoring instead." Id.

Under the first approach, although the plaintiff need not engage in conduct that arguably violates the law to satisfy the injury-in-fact requirement, intentions to engage in the conduct must be concrete. See Susan B. Anthony, 573 U.S. at 159. "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the actual or imminent injury." Lujan, 504 U.S. at 564 (emphasis in original). "To establish a

credible threat of prosecution, plaintiffs must allege fears of state prosecution that are not imaginary or speculative and are actual and well-founded [enough to establish] that the statute will be enforced against them." Maryland Shall Issue, Inc. v. Hogan, 971 F.3d 199, 217 (4th Cir. 2020).

The second approach requires plaintiffs to make sufficient showing of self-censorship, by establishing a "chilling effect" on their free expression. Cooksey, 721 F.3d at 235. "[S]ubjective or speculative accounts of such a chilling effect, however, are not sufficient." Benham, 635 F.3d at 135; Laird v. Tatum, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."). "Any chilling effect . . . must be objectively reasonable." Benham, 635 F.3d at 135. "Government action will be sufficiently chilling when it is likely [to] deter a person of ordinary firmness from the exercise of First Amendment rights." Id.

In accordance with the first approach, plaintiffs have demonstrated concrete and particular intention to create two-dimensional, orthomosaic maps and maps otherwise facilitating measurement, for instance by scale bar. Prior to receiving notice from the Board, plaintiffs advertised on their website "video, pictures, and orthomosaic maps (Measurable Maps) of [construction] sites. (Def. Resp. Stmt. Facts (DE 37) ¶ 10). On one occasion, plaintiff Jones created an orthomosaic map and pitched it to a repeat client. (Id. ¶ 12). Although the client chose to pass, plaintiffs continued to advertise the service on the website. Id. Plaintiff Jones also previously had provided clients with aerial maps with scale bars included allowing for basic measurement of the land. (Jones Decl. (DE 38-

3) ¶ 38). Plaintiffs' intent to create these products thus cannot be described as conjectural or hypothetical.

Plaintiffs also have demonstrated a credible threat of prosecution where they previously were investigated by the Board for advertising and creating these products, and where the Board still maintains that aerial mapping conveying location data about distances, coordinates, volumes, and elevations falls under the definition of surveying. (See Def. Resp. Stmt. Facts (DE 37) ¶ 39 ("The Board's current position is that Plaintiffs can create aerial orthomosaic maps but cannot give the maps to anyone if the maps contain location information, georeferenced data, or any information that a recipient could use to make measurements on the maps."); (Def. Resp. (DE 42) at 3 ("The commercial products Plaintiffs seek to offer to consumers falls under the definition of land surveying.").

Whereas plaintiffs previously have advertised and produced orthomosaic, or measurable, maps for clients, plaintiff Jones has not made three-dimensional models for clients. Prior to the investigation, however, he had begun practicing making such models for himself with images captured by his drone. Once Jones understood following the investigation that the Board considered three-dimensional mapping unlawful in the absence of a surveyors' license, he stopped developing that part of his business:

> I'm not going to expose myself to having the Board come after me again, so I'm not going to develop a 3D model side of my business while it's illegal. But if I could do it without the Board coming after me, I would start building up my skills with 3D modeling and start developing a 3D modeling side of my mapping business too.

(Jones Decl. (DE 38-3) ¶ 39).

Article III does not require a plaintiff to "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." Steffel v. Thompson, 415 U.S. 452, 459 (1974); see MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128-129 (2007) ("[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat.") (emphasis in original).

Here, plaintiff Jones has proffered evidence that he intended to create three-dimensional maps for clients, and indeed had begun practicing their production, but his efforts were "chilled" by the Act and the Board acting pursuant to it. Where the Board has expressed, and still maintains that construction of such three-dimensional models falls under land surveyance, the chilling effect plaintiffs experienced was "non-speculative and objectively reasonable." Cooksey, 721 F.3d at 236. Indeed, the Board cautioned plaintiffs that if the company continued with its practices the Board could pursue further action including criminal prosecution. Such is "likely to deter a person of ordinary firmness from" continuing to create three-dimensional models. Id.

In sum, plaintiffs have established injury in fact with respect to creation of two-dimensional and three-dimensional maps with geospatial data. With injury-in-fact established, the causation and redressability elements of standing easily are satisfied here. Plaintiffs declare that if not for the Act and the Board's interventions they would offer orthomosaic maps to clients again and would develop their business with respect to three-dimensional modeling. (Jones Decl. (DE 38-3) ¶¶ 34, 38-39). An injunction against enforcement of the challenged sections of the

Act would remove the threat to plaintiffs' planned activities, satisfying the redressability requirement. Plaintiffs accordingly have standing.

In opposition, defendants contend plaintiffs must establish that they previously have engaged in the course of conduct arguably affected with a constitutional interest and that they have ceased engaging in those activities out of fear of liability. Defendants argue plaintiffs cannot make that showing respect to orthomosaic maps and three-dimensional models as the only service plaintiffs in fact ceased providing were aerial photos with approximate property boundaries. Defendants, however, mischaracterize both the evidence on record and the appropriate standard. First, the record shows that plaintiffs did in fact produce an orthomosaic map for a client. Though the client passed, the map still was produced and was offered, demonstrating a concrete intention to engage in that part of the market. Though plaintiffs had not similarly created a three-dimensional for a client, plaintiff Jones created models for himself, and the record reflects that his endeavors reasonably were chilled by the Board's investigations.

Where the court has subject matter jurisdiction, it proceeds to the merits.

2. First Amendment

Under the Act, as interpreted and enforced by the Board, only licensed land surveyors may create aerial orthomosaic maps three-dimensional digital models of land and structures; and aerial images containing location, distance, volumetric, and elevation data. See N.C. Gen. Stat. §§ 89C-2, 89C-3(7), 89C-23, and 89C-24; (Def. Stmt. Resp. Stmt. Facts (DE 43) ¶ 39). Plaintiffs contend that on their face and as applied to them, challenged provisions of the

Act violate the right to create, use, and disseminate information under the First Amendment. The court disagrees.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018). As an initial matter, where plaintiffs raise both an as applied and facial challenge, a threshold consideration is the difference between these challenges:

> The difference between a facial challenge and an as-applied challenge lies in the scope of the constitutional inquiry. Under a facial challenge, a plaintiff may sustain its burden in one of two ways. First, a plaintiff asserting a facial challenge "may demonstrate 'that no set of circumstances exists under which the law would be valid, or that the law lacks any plainly legitimate sweep.'" Second, a plaintiff asserting a facial challenge may also prevail if he or she "show[s] that the law is 'overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" Under either scenario, a court considering a facial challenge is to assess the constitutionality of the challenged law "without regard to its impact on the plaintiff asserting the facial challenge." In contrast, an as-applied challenge is "based on a developed factual record and the application of a statute to a specific person[.]"

Educ. Media Co. at Virginia Tech v. Insley, 731 F.3d 291, 298 n.5 (4th Cir. 2013). Plaintiffs suggest that their facial challenge rests upon much the same argument and evidence as their as applied challenge, contending that their First Amendment rights have been abridged by the

Board, and other similarly situated drone owners have been harmed by the Board in much the same way.[3] Their facial and as applied challenge thus collapse into one initial inquiry for the court: did the Board violate plaintiffs' First Amendment rights? Only upon that violation being established must the court consider whether other drone owners have been similarly harmed, and whether the application of the rules against plaintiffs and those drone owners is numerically "substantial" as compared to "the statute's plainly legitimate sweep," thus rendering the challenged provisions facially unconstitutional. Educ. Media Co., 731 F.3d at 298 n.5. The court accordingly will first determine whether the statutes as applied to plaintiffs violate their First Amendment right to freedom of speech.

"An individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated." Sorrell v. IMS Health Inc., 564 U.S. 552, 568 (2011). The "First Amendment draws no distinction between the various methods of communicating ideas," and case law establishes photographs and videos, as well as the process of their capture, are speech protected by the First Amendment. Superior Films, Inc. v. Dep't of Educ., 346 U.S. 587, 589 (1954) (Douglas, J., concurring); see

[3] Plaintiffs fail to make specific argument with respect to their facial challenge in their motion for summary judgment. (But see Compl. (DE 1) ¶ 112 ("On their face, N.C. Gen. Stat. §§ 89C-2, 89C-3(7), 89C-23, and 89C-24 sweep up a broad swath of speech, including orthomosaic images, 3D digital models, oblique aerial images, and images containing data about locations, distances, elevations, and sizes of land or objects. In this way, North Carolina's land-surveying licensing law is substantially overbroad, as it sweeps in significant amounts of speech that North Carolina has no conceivable interest in regulating.").

Burstyn v. Wilson, 343 U.S. 495, 502 (1952) (holding that movies are a protected form of speech); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010) ("Laws enacted to control or suppress speech may operate at different points in the speech process."). The court sees no reason for distinguishing under the First Amendment between images captured by earlier technology and those captured remotely by drone. See United States v. Miller, 982 F.3d 412, 417 (6th Cir. 2020) ("Courts often must apply the legal rules arising from fixed constitutional rights to new technologies in an evolving world."); Nat'l Press Photographers Ass'n v. McCraw, 594 F. Supp. 3d 789, 804 (W.D. Tex. 2022) ("[C]ourts have never recognized a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded . . . . This reasoning holds just as true for photographs and videos captured by drone[.]" (emphasis added)).

Thus, the court holds as a matter of law that plaintiffs have established that the use of drones to capture images for the purpose of conveying "orthomosaic" or "measurable" information is protected expression and, by regulating this activity, the Act implicates the First Amendment.

As a general matter, in determining whether a regulation abridges the freedom of speech courts distinguish between content-based and content-neutral regulations of speech. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Id. "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by

its function or purpose." Id. Content-based regulations are "presumptively unconstitutional" and subject heightened scrutiny. Id. "[A] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." Id. at 165.

By comparison, content-neutral speech regulations are those that are "justified without reference to the content of the regulated speech." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47, 49 1986 (emphasis omitted in the first quotation). These regulations are subject to a lesser scrutiny under the First Amendment, requiring that they be "narrowly tailored to serve the government's legitimate, content-neutral interests." Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). But see Reed, 576 U.S. at 166 (strict scrutiny applies to a law neutral on its face if the purpose or justification for it is content-based).

Relevant to the instant action, however, is recognition by the Supreme Court of the United States in Nat'l Inst. of Fam. & Life Advocs. v. Becerra ("NIFLA"), 138 S. Ct. 2361 (2018) that while the Court's precedents "did not recognize such a tradition for a category called 'professional speech,'" pursuant to which category the lower courts had applied lesser standards of scrutiny to professionals' speech to clients,

> [t]his Court has afforded less protection for professional speech in two circumstances . . . . First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their "commercial speech." See, e.g., Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,

> 471 U.S. 626, 651 (1985); Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010); Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 455-456 (1978). Second, under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech. See, e.g., id., at 456; Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

Id. at 2372 (internal citations omitted in part) (holding neither exception was implicated in the case).

In Capital Associated Industries, Inc. v. Stein, the Fourth Circuit applied the latter of those two exceptions, holding that North Carolina's ban on the practice of law by corporations fit within NIFLA's exception for professional regulations that incidentally affect speech. 922 F.3d 198, 207 (4th Cir. 2019). The plaintiff, Capital Associated Industries ("CAI"), was a trade association of employers with the mission of "fostering successful employment relationships." Id. at 202. One of its most popular services was a call center by which members could speak to human resources experts. Id. CAI wanted to expand its offerings so it could answer questions regarding employment and labor law, as well as offer help in drafting legal documents. Id. To that end, CAI sued state prosecutors to enjoin the enforcement of state unauthorized practice of law statutes against it, contending in relevant part that the statutes unlawfully burdened its freedom of speech. Id.

The Fourth Circuit compared the ban on corporations practicing law to other laws regulating professions previously considered by the Supreme Court:

> Many laws that regulate the conduct of a profession or business place incidental burdens on

> speech, yet the Supreme Court has treated them differently than restrictions on speech. For example, while obtaining informed consent for abortion procedures implicates a doctor's speech, the state may require it "as part of the practice of medicine, subject to reasonable licensing and regulation." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.). Bans on discrimination, price regulations, and laws against anticompetitive activities all implicate speech—some may implicate speech even more directly than licensing requirements. But the Supreme Court has analyzed them all as regulations of conduct. See Expressions Hair Design v. Schneiderman, 137 S.Ct. 1144, 1150-51 (2017); Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 62 (2006); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

Id. at 207-08. In determining that the unauthorized practice of law statutes similarly targeted conduct rather than speech, the Fourth Circuit found significant that the statutes did not "target the communicative aspects of practicing law, such as the advice lawyers may give to clients." Id. at 208. "Instead, they focus more broadly on the question of who may conduct themselves as a lawyer." Id.

Looking to the specific provisions challenged, section 89C-2 declares that "[i]n order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying . . . [are] subject to regulation in the public interest," pursuant to which it is:

> unlawful for any person to practice or to offer to practice engineering or land surveying in this State, as defined in the provisions of this Chapter,

> or to use in connection with the person's name or otherwise assume or advertise any title or description tending to convey the impression that the person is either a professional engineer or a professional land surveyor, unless the person has been duly licensed.

N.C. Gen. Stat. § 89C-2. Section 89C-3(7) defines the practice of land surveying as

> professional services such as consultation, investigation, testimony, evaluation, planning, mapping, assembling, and interpreting reliable scientific measurements and information relative to the location, size, shape, or physical features of the earth, improvements on the earth, the space above the earth, or any part of the earth, . . . and the utilization and development of these facts and interpretations into an orderly survey map, plan, report, description, or project,

N.C. Gen. Stat. § 89C-3(7), enumerating activities included.

Section 89C-23 describes penalties for violating the Act:

> Any person who shall practice, or offer to practice, engineering or land surveying in this State without first being licensed in accordance with the provisions of this Chapter, or any person, firm, partnership, organization, association, corporation, or other entity using or employing the words "engineer" or "engineering" or "professional engineer" or "professional engineering" or "land surveyor" or "land surveying," or any modification or derivative of those words in its name or form of business or activity except as licensed under this Chapter or

> in pursuit of activities exempted by this Chapter, or any person presenting or attempting to use the certificate of licensure or the seal of another, or any person who shall give any false or forged evidence of any kind to the Board or to any member of the Board in obtaining or attempting to obtain a certificate of licensure, or any person who shall falsely impersonate any other licensee of like or different name, or any person who shall attempt to use an expired or revoked or nonexistent certificate of licensure, or who shall practice or offer to practice when not qualified, or any person who falsely claims that the person is registered under this Chapter, or any person who shall violate any of the provisions of this Chapter, in addition to injunctive procedures set out hereinbefore, shall be guilty of a Class 2 misdemeanor.

N.C. Gen. Stat. § 89C-23. Finally, section 89C-24 provides for the licensure of corporations and business firms that engage in the practice of engineering or land surveying. N.C. Gen. Stat. § 89C-24.

Akin to the regulations at issue in Stein, the challenged provisions of the Act are part of a generally applicable licensing regime that restricts the practice of surveying to those licensed. See Stein, 922 F.3d at 207; Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) ("We recognize that the States have . . . broad power to establish standards for licensing practitioners and regulating the practice of professions.")). Although surveying, like the practice of law, has "communicative and non-communicative aspects," the Act does not control what surveyors may tell their clients, instead "focus[ing] more broadly on the question of who may conduct themselves as a

[surveyor]." Stein, 922 F.3d at 208; see N.C. Gen. Stat. § 89C-13 (providing general requirements for licensure).

Thus, consistent with Stein, the provisions at issue here fit within NIFLA's exception for professional regulations that regulate conduct with an incidental impact on speech. Stein, 922 F.3d at 208. "Licensing laws inevitably have some effect on the speech of those who are not (or cannot be) licensed," like plaintiffs. Id. "But that effect is merely incidental to the primary objective of regulating the conduct of the profession." Id.

The court in Stein held that "intermediate scrutiny" is the appropriate standard for reviewing conduct regulations that incidentally impact speech, reasoning as follows:

> Although the Court's cases have not been crystal clear about the appropriate standard of review, we do know that the state actors involved were not required to demonstrate a compelling interest and narrow tailoring. And NIFLA itself provides ample support for the view that strict scrutiny shouldn't apply to the UPL statutes. As noted, the NIFLA Court chose not to decide whether strict or intermediate scrutiny applied to the law at issue. 138 S.Ct. at 2375-77. But the Court did highlight laws regulating "professional conduct" as an area in which it "has afforded less protection for professional speech." Id. at 2372 (emphasis added). Thus, we can say with some confidence that the standard for conduct-regulating laws can't be greater than intermediate scrutiny.

Id. at 208-09. Citing to NIFLA, the court required that the defendant show "a substantial state interest" in regulating the unauthorized practice of law and a solution

that is "sufficiently drawn" to protect that interest. Id. at 209.

The court held that North Carolina's ban on the practice of law by corporations survived that standard, concluding that "North Carolina's interest in regulating the legal profession to protect clients is at least substantial." Id.

> Professional integrity could suffer if the state allows lawyers to practice on behalf of organizations owned and run by nonlawyers and to collect legal fees from clients. Nonlawyers would likely supervise lawyers representing third-party clients at CAI, which could compromise professional judgment and generate conflicts between client interests and the corporation's interests.

Id. The court held that the state's "solution" was "sufficiently drawn" to protect that interest where the state had "proscrib[ed] law practice by organizations that pose the most danger, while exempting organizations that pose little danger." Id.

Applying Stein and NIFLA here, North Carolina also has a "substantial state interest" in regulating the unauthorized practice of surveying. As a general matter, the regulation of the practice of surveying safeguards property rights, which rights governments have a legitimate interest in protecting. McCullen v. Coakley, 573 U.S. 464, 486 (2014) ("We have, moreover, previously recognized the legitimacy of the government's interests in . . . protecting property rights[.]"); see In re Suttles Surveying, P.A., 227 N.C. App. 70, 76 (2013) ("As N.C. Gen. Stat. § 89C–2 makes clear, the Legislature intended its rules on the practice of surveying to protect property interests in North Carolina.").

That interest expressly is declared in section 89C-2, wherein it provides that the practice of land surveying is "subject to regulation in the public interest" in order to "safeguard life, health, and property, and to promote the public welfare." N.C. Gen. Stat. § 89C-2. The record evidence reflects that the Act establishes a minimum level of competence, thereby protecting the public from negligence, incompetence, and professional misconduct. See N.C. Gen. Stat. § 89C-13 (creating education, examination, and experience requirements for licensure); (Defs. 30(b)(6) Test. (DE 39-5) 10:15-25, 11:1-8 ("We're [] establishing a minimum level of competence via the three E's – the education, exam, and experience.")); see also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 460 (1978) ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."). The Act also protects the public from misrepresentations as to professional status or expertise, and additionally creates a system of accountability by instilling with the Board authority to hold licensees accountable for malpractice.

> When somebody gets licensed, what we're telling the citizens of North Carolina is they have met a minimum level of competence, and the work they're going to receive from that licensee meets that minimum level of competence. If it doesn't, again, then the board by statute has the ability to remedy the situation.

(Defs. 30(b)(6) Test. (DE 39-5) 10:15-25, 11:1-8); see N.C. Gen. Stat. § 89C-10 (instilling with the Board the power to investigate licensees); N.C. Gen. Stat. § 89C-21 ("The Board may reprimand the licensee, suspend, refuse to renew, refuse to reinstate, or revoke the certificate of licensure, require additional education or, as appropriate, require reexamination, for any engineer or land surveyor,

who is found guilty of . . . [f]raud or deceit . . . [g]ross negligence, incompetence, or misconduct in the practice of the profession[.]")

On the record before it, and as applied to plaintiffs, the Act is "sufficiently drawn" to that interest where plaintiffs' actions only are restricted to the extent they seek to create maps or models conveying location information or property images capable of measurement. Stein, 922 F.3d at 209. Where plaintiffs seek only to convey images, including images with lines indicating the position of property boundaries, the Act does not apply. See N.C. Gen. Stat. § 89C-3(7); (Def. Resp. Stmt. Facts (DE 37) ¶ 52). Though "[a]nother state legislature might balance the interests differently," "intermediate scrutiny requires only a reasonable fit between the challenged regulation and the state's interest—not the least restrictive means." Stein, 922 F.3d at 209-10. As defendants have established a reasonable fit between the Act and a substantial government interest, the Act survives intermediate scrutiny.

Plaintiffs in opposition describe the challenged provisions of the Act as content and identity-based restrictions on speech. Where the court has determined that the statutes regulate conduct, however, the court "need not engage with these descriptors." Stein, 922 F.3d at 209 n.4 (rejecting the same argument). Plaintiffs also argue defendants fail to satisfy intermediate scrutiny under Billups v. City of Charleston, S.C., 961 F.3d 673 (4th Cir. 2020) as they have not demonstrated that "less-speech-restrictive alternatives" actually were "tried and considered" and deemed inadequate before enacting the Act. Id. at 681. The court in Billups, however, did not analyze the regulation in issue under the NIFLA's exception for regulations of professional conduct with an incidental effect on speech, pursuant to which states have "broader

authority" to regulate. Stein, 922 F.3d at 207. Under that exception, the Fourth Circuit in Stein did not require that defendants demonstrate consideration of alternatives, instead looking only for a "reasonable fit," even where "[a]nother state legislature might balance the interests differently." Id. at 209-210. Compare id. at 208-209 (holding that state actors in NIFLA and related cases "were not required to demonstrate a compelling interest and narrow tailoring" and requiring instead that the defendant show "a substantial state interest" and a solution that is "sufficiently drawn" to protect that interest), with Billups, 961 F.3d at 685 (requiring that the regulation be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

Pursuant to the NIFLA exception as applied by Stein, the Act is constitutional as applied to plaintiffs, and defendants' motion for summary judgment on plaintiffs' as-applied challenge is accordingly allowed. Where plaintiffs' facial challenge was based upon others similarly situated to plaintiffs, that challenge too fails on the same basis.

CONCLUSION

Based on the foregoing, defendants' motion for summary judgment (DE 31) is GRANTED and plaintiffs' motion for summary judgment (DE 35) is DENIED. Judgement shall be entered in favor of defendants, and each side shall bear its own costs. The clerk is DIRECTED to close this case.

SO ORDERED, this the 31st day of March, 2023.

/s/ LOUISE W. FLANAGAN
LOUISE W. FLANAGAN
United States District Judge