No. 24-279

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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The information in the corporate disclosure statement at page ii of petitioners' petition for a writ of certiorari remains accurate, current, and complete.

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INTRODUCTION

In this as-applied challenge to a surveyor-licensing law that bars petitioners from communicating aerial maps and models, the Fourth Circuit introduced a "non-exhaustive list of factors" as its "guideposts" for "distinguishing between licensing regulations aimed at conduct and those aimed at speech as speech." In resisting certiorari, North Carolina's surveying board not once acknowledges the Fourth Circuit's standard aloud. And a Fifth Circuit opinion narrowly postdating our petition confirms that the split on the standard is real and intractable. *Hines* v. *Pardue*, 117 F.4th 769, 775, 777 (2024) (applying "the 'traditional conduct-versus-speech dichotomy'" to hold that a statute "primarily regulates [the plaintiff's] speech—and not merely incidentally to his conduct" (quoting *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932 (5th Cir. 2020))). The board's attempts to minimize the circuit conflict are unavailing, and its merits and vehicle arguments reinforce the need for certiorari: as the board acknowledges, the petition focuses on a "single, 'threshold' issue," and it is one of recurring importance for speakers nationwide.

ARGUMENT

A. As confirmed by a recent Fifth Circuit decision, the circuit conflict is entrenched.

The courts of appeals are fractured on the standard for determining whether an occupational-licensing law restricts speech directly or only incidentally. The board's contrary arguments lack merit.

1. The board contends that the split is "illusory" because the courts of appeals agree that the First Amendment applies differently depending on whether an occupational-licensing law regulates speech directly or incidentally. Opp. 1; Opp. 13-14 (noting that the decision below cited the Fifth Circuit's *Vizaline* opinion for this

workaday proposition). From that shared starting point, however, the courts diverge on the standard for determining *whether* an occupational-licensing law regulates speech directly or only incidentally. That is the conflict implicated by petitioners' question presented. Opp. 1 ("The petition here claims that the courts of appeals have diverged in the analysis that they use . . . to distinguish between occupational licensing laws that directly and indirectly regulate speech."). The Fifth Circuit adheres to this Court's "traditional conduct-versus-speech dichotomy." *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932 (2020). The Fourth Circuit looks instead to a "non-exhaustive list of factors." Pet. App. 24a. The Eleventh Circuit has tied itself to a third standard—one the Fifth Circuit has disavowed verbatim. Pet. 19-21. And in the Ninth Circuit, the standard changes on a panel-to-panel basis, despite repeated calls for en banc intervention. Pet. 21-23.

2. The board strains to harmonize the standards above, but they are irreconcilable.

a. In sanitizing the decision below, the board studiously ignores the legal standard the **Fourth Circuit** developed—remarkably, the court's "non-exhaustive list of factors" gets no stage time in the board's brief. In the board's telling, the Fourth Circuit's (evidently unmentionable) standard "merely reflects this Court's own observation that 'drawing the line between speech and conduct can be difficult.'" Opp. 14. Far from simply accounting for "case-specific considerations" (Opp. 14), however, the decision below seized the "opportunity" to set "principles that can serve as guideposts"—read: a standard. Pet. App. 13a. Those guideposts? The court's "non-exhaustive list of factors . . . 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." Pet. App. 24a. Elsewhere, in fact, the North Carolina Attorney General's Office already is heralding these "guideposts" as a three-part test and pressing judges to probe whether people's "discussions" are "occur[ring] in a traditionally public sphere." Reply in Supp. Mot. to Dismiss, *Polaski* v. *Lee*, No. 24-cv-4, 2024 WL 4388342, at *1-2 (E.D.N.C. July 12, 2024).

b. The board asserts that the **Fifth Circuit**'s standard and the Fourth's are in fact "the same standard." Opp. 17. That, too, is wrong—a point confirmed by a Fifth Circuit opinion that postdates the filing of our petition, that confirms the standard from the court's earlier *Vizaline* decision, and that cements the Fifth Circuit's alignment on the split described above.

i. The Fifth Circuit's late-September decision in *Hines* v. *Pardue* involves a Texas statute that bars veterinarians from engaging in the "practice of veterinary medicine" without first examining the animal (or its premises) in-person. 117 F.4th 769, 772 (2024). Citing this statute, Texas's veterinary-licensing board fined Ron Hines—a retired, physically disabled vet—for providing online advice to animal lovers worldwide. *Id.*; *id.* at 771 ("He merely sends emails."). In the as-applied First Amendment lawsuit that ensued, *id.* at 776 n.35, Dr. Hines contended that the statute was triggered by the communicative content of his e-mails. Texas, for its part, maintained that the statute "restricts Dr. Hines's speech incidentally to the general regulation of conduct." *Id.* at 775.

The Fifth Circuit agreed with Dr. Hines. It confronted the same "threshold" question the Fourth Circuit addressed below: whether "the State's physical-examina-

tion requirement regulate[s] Dr. Hines's speech directly, as Dr. Hines argues, or only incidentally to the law's general regulation of his conduct, as the State counters[.]" *Id.* at 774. But where the Fourth Circuit deployed its "non-exhaustive list of factors" as the standard, Pet. App. 24a, the Fifth Circuit adhered to "the 'traditional conduct-versus-speech dichotomy'" marked out in its *Vizaline* decision, 117 F.4th at 775 (quoting *Vizaline*, 949 F.3d at 932). Unlike the Fourth Circuit, the Fifth Circuit simply "look[ed] at what 'trigger[s] coverage under the statute.'" *Id.* at 777 (quoting *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 28 (2010)). Whether Dr. Hines's e-mails triggered Texas's law depended—at a granular level—on whether they "communicated individualized diagnoses and treatment plans." *Id.* That resolved the threshold speech-conduct question: "the regulation *only* kicked in when Dr. Hines began to share his opinion with his patient's owner," so "the act in which [he] engaged that 'trigger[ed] coverage' under the physical-examination requirement was the communication of a message." *Id.* at 778; *see generally Chiles* v. *Salazar*, 116 F.4th 1178, 1213 n.34 (10th Cir. 2024) ("[W]e see no reason to distinguish between cases involving licensing requirements . . . and cases involving regulations of already-licensed professionals . . . ."), *pet. for cert. docketed*, No. 24-539.*

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* Because it concluded that "the law cannot withstand even *intermediate* scrutiny," the Fifth Circuit "assume[d] without deciding that the law regulates Dr. Hines's speech in a content-neutral manner." 117 F.4th 769, 779 (2024). Judge Ramirez, concurring, would have used strict scrutiny. *Id.* at 785.

The Texas Attorney General's Office has advised the district court in *Hines* that it intends to petition for certiorari, and we understand that it anticipates seeking an extension of its December 26 deadline.

ii. In this way, *Hines* confirms what *Vizaline* made clear: the Fifth Circuit's standard differs fundamentally from the Fourth Circuit's below. *Hines*'s outcome absolutely would have been different had it been litigated in the Fourth Circuit instead of the Fifth. Consider the "non-exhaustive list of factors." Does Dr. Hines's speech "carr[y] economic, legal, public-safety, or health-related consequences"? Certainly, at least according to Texas's veterinary-licensing board. *Hines*, 117 F.4th at 779. Does Dr. Hines's speech take place "in the private sphere" as opposed to "in a traditionally public space"? Absolutely: he e-mails "from his home in Brownsville, Texas." *Id.* at 772. Does Texas's physical-examination requirement "seek[] to quell unpopular or dissenting speech"? Not obviously. On this record, the Fourth Circuit's standard would point to one conclusion: Texas's law "regulates professional conduct and only incidentally burdens speech." Pet. App. 25a. Under the Fifth Circuit's "traditional conduct-versus-speech dichotomy"? The opposite: "the physical-examination requirement primarily regulates Dr. Hines's speech—and not merely incidentally to his conduct." 117 F.4th at 777.

Or flip the script: how would petitioners fare under the Fifth Circuit's standard instead of the Fourth's? Not a close call. The Fifth Circuit would "look[] at what 'trigger[s] coverage under the statute.'" *Id.* And applying that standard to petitioners' maps and models, the "act . . . that 'trigger[s] coverage'" under North Carolina's law is "the communication of a message." *Id.* at 778. As the surveying board conceded, for example, petitioners "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." Pet. App. 43a (emphasis added; citation omitted). In the Fifth Circuit, the

statute without question would be held to restrict petitioners' speech directly, "and not merely incidentally to [their] conduct." *Hines*, 117 F.4th at 777.

c. The division between the standards of the Fifth Circuit and the **Eleventh Circuit** is equally stark. The board asserts that the conflict entails a "convoluted citation exercise" and that the Eleventh Circuit's standard "is the same standard that the Fifth Circuit set out in *Vizaline*." Opp. 16-17. But here is the Eleventh Circuit's 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.) (citation omitted), *cert. denied*, 143 S. Ct. 486 (2022). Here is the standard the Fifth Circuit says this Court has "rejected":

> A statute that governs the practice of an occupation is not unconstitutional as an abridgment 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.

Vizaline, 949 F.3d at 931-32 (citation omitted). Voilà.

3. Nothing else in the board's submission casts doubt on the division in authority. The board recites that the inconsistent standards detailed above reflect merely "fact-specific applications" of a single "well-established legal standard." Opp. 2, 13. Yet that wishful thinking cannot be squared with what the courts have said and done. The board also comments on the state of the law in the Ninth Circuit. Opp. 17-19. As described in our petition, however, Judge O'Scannlain's (and others') decade-long plea for

that court to align its precedent with this Court's traditional speech-conduct principles captures in miniature the division described above. Pet. 21-23. Since our petition was filed, moreover, the Tenth Circuit, too, has issued an opinion where the "fundamental" dispute is whether "a regulation that bars speech because of what it communicates is a direct regulation of speech, not a regulation of conduct that incidentally affects speech." *Chiles*, 116 F.4th at 1233-34 (Hartz, J., dissenting). Across a range of First Amendment litigation, the split implicated by the question presented is growing steadily worse.

B. The surveying board nowhere defends the legal standard adopted by the decision below.

Though unwilling to utter the Fourth Circuit's standard aloud, the board offers that "the decision below was rightly decided." Opp. 21. Its arguments reinforce the need for this Court's review.

1. The board asserts that its statute merely "targets *who* may practice land surveying and *how* they may go about doing so—not *what* land surveyors say." Opp. 22. Of course, the specific attributes of North Carolina's statute do not bear directly on the question presented, which concerns a threshold issue: what First Amendment standard applies? On remand, the lower courts would thus have every chance to apply the correct standard to North Carolina's statute in the first instance. Pet. 33. It bears emphasis, though, that the board's words are eye-catchingly similar to the district-court decision reversed in *Vizaline*—italics and all. *Vizaline*, 949 F.3d at 930-31.

Likewise misplaced are the board's comments on the "public-safety-related" interests behind its statute. Opp. 22 (citation omitted). On the merits, those interests certainly may inform whether the law satisfies the appropriate level of scrutiny. But given its threshold non-

exhaustive-list-of-factors standard, the Fourth Circuit had no occasion to apply anything resembling an appropriate level of scrutiny. Rather, the court forswore this Court's "classic formulation" of even intermediate scrutiny and substituted a "more relaxed" tier that, for instance, "does *not* require" governments to show "that a speech restriction does not burden substantially more speech than necessary." Pet. App. 10a, 21a, 23a (citation omitted). *But cf. Hines*, 117 F.4th at 784 ("[W]e consider whether the physical-examination requirement 'burden[s] substantially more speech than is necessary to further the government's legitimate interests.'"). Only thus could the court uphold North Carolina's mapping-and-modeling ban while conceding that "perhaps a disclaimer would suffice to resolve the concerns in this case." Pet. App. 28a. If the record below shows anything, it's that the Fourth Circuit's threshold error "matter[ed]" enormously. Pet. App. 19a. Beyond that, the board's views on the virtues of its statute are best left for remand.

The board also claims that petitioners' position is "unpredictable" and "destabilizing." Opp. 25-26. Petitioners' submission, however, is simply that occupational-licensing laws be subject to "ordinary First Amendment principles." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 773 (2018). And those principles apply straightforwardly to the scenarios in the board's brief. Licensing requirements for x-ray techs (Opp. 26) tend to be triggered, not by communicating information, but by applying radiation to human bodies—nonspeech conduct. A law regulating what registers of deeds accept into county records (Opp. 25-26) differs in obvious ways from laws that (as here) "prevent" private citizens from communicating information with one another. Pet. App. 24a. As for the board's caution (Opp. 25) that petitioners' theory could allow for narrow as-applied challenges to other

occupational-licensing regimes—that's hardly new. Pet. 29-31. Not only do the skies remain unfallen, but the experiences of *amici* illustrate why licensing boards, no less than other state actors, can pose real threats to free-speech rights.

2. Venturing far beyond the decision below, the board posits that North Carolina's statute "finds independent support in history and tradition." Opp. 23. Again, petitioners' question presented does not call on this Court to pass judgment on North Carolina's statute in the first instance, and the board would have every chance to develop its history-and-tradition theories on remand. For now, one historical note: North Carolina's surveyor-licensing law was first enacted in 1921, became broadly mandatory only in 1959, and was expanded to aerial images like petitioners' in 1998. Pet. 7.

C. The question presented is important and should be resolved in this case.

As the *amicus* briefs and the number of courts to have confronted the issue attest, the question presented is of real national importance. The board nowhere argues otherwise, and what arguments it makes do not counsel against review.

The board points out that petitioners have not asked the Court to review, as a secondary question, "the level of scrutiny that applies *after* a court concludes that a law primarily regulates professional conduct and burdens speech only incidentally." Opp. 19. Yet the board concedes that "the Court need not decide" that second-order issue to resolve petitioners' actual question presented. Opp. 20. That the Fourth Circuit's novel and erroneous "non-exhaustive list of factors" standard led to its debuting an equally novel and erroneous tier of "loosened" First Amendment scrutiny certainly spotlights the im-

portance of petitioners' question presented. Pet. 27-28. But if anything, the petition's focus on a "single, 'threshold' issue" (Opp. 19) cuts in favor of review, not against it.

Equally misplaced is the board's suggestion that a case about "conversion therapy" would be better suited for review. Opp. 18-19. Not only is petitioners' question presented more narrowly focused than those typically presented in conversion-therapy cases (*e.g.*, Pet. for Cert. at i, *Tingley* v. *Ferguson*, No. 22-942), but cases like petitioners' have more obviously broad applicability to Americans in all walks of life. Litigation over conversion-therapy laws, for example, often involves hotly contested allegations of viewpoint discrimination (*e.g.*, *id.* at 15), which are less common for the many people who find their ideologically neutral photos, advice, blogs, newspaper columns, and e-mails targeted by occupational-licensing boards. Pet. 29-30; *cf. Hines*, 117 F.4th at 788-89 (Ramirez, J., concurring) (reasoning that Texas's law was triggered by speech even if not viewpoint-discriminatory). This case thus cleanly isolates a "single, 'threshold' issue" (Opp. 19) that will bring clarity to a question of significance for many ordinary Americans. Br. of John Rosemond et al. 7 ("A wide range of industries is potentially affected by this body of law."); Br. of DroneDeploy, Inc. et al. 13 (discussing impact of Fourth Circuit's decision on "business-to-business and conservation and safety-related applications of drone technology").

The board observes (Opp. 8) that petitioners did not request a "declaratory ruling" from the agency about "whether or how" its statute "applies to a given factual situation." 21 N.C. Admin. Code 56.1205(a). There of course was no requirement that petitioners do so. *See Cooksey* v. *Futrell*, 721 F.3d 226, 241 (4th Cir. 2013). Nor was there any reason to: under the statute, communicating their aerial maps and models is undisputedly

forbidden. Opp. 7 (agreeing); Pet. App. 43a, 45a. The board's declaratory-ruling mechanism poses no obstacle to this Court's review—just as it posed none for the courts below—and the board nowhere argues differently.

The board also notes that this Court declined to review the Eleventh Circuit's *Del Castillo* decision in 2022. Opp. 15. In just two years, however, the split on the question presented has deepened markedly. Not until this case, for example, did the Fourth Circuit settle on its "non-exhaustive list of factors," and state actors already are harnessing that standard with a will. Particularly given the record of overreach by licensing boards nationwide, the need for the Court's intervention is acute.

Lastly, the board dutifully calls for further percolation. Opp. 26. But to what end? The question presented has been ventilated across the Nation. That still more cases are in the pipeline (Opp. 26) merely highlights the question's recurring importance. And as the Fourth Circuit foresaw, this case is the perfect vehicle for resolving it. Pet. App. 13a ("[T]his case provides an opportunity to sketch some of the applicable principles that can serve as guideposts through this thicket.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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