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.

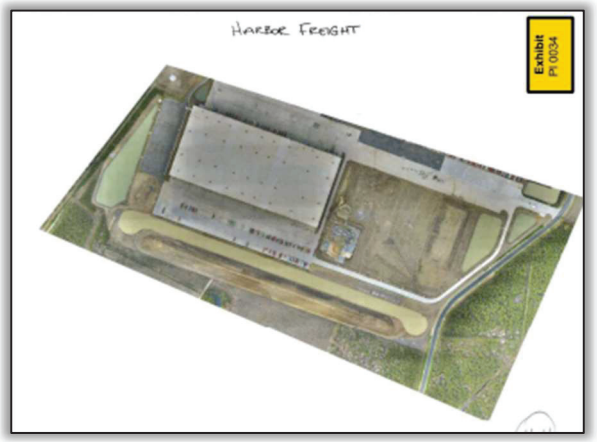
3. Michael Jones learned all this the hard way. Having received the board's letter in December 2018, he responded quickly. He told the board that he had removed the "Mapping and Surveying" category from one of his online profiles. He explained that he had added a long disclaimer for his mapping services. 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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