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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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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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Other authorities:

In this as-applied challenge to a surveyor-licensing law that bars petitioners from communicating aerial maps and models, the Fourth Circuit introduced a novel standard for "distinguishing between licensing regulations aimed at conduct and those aimed at speech as speech." Pet. App. 24a. Rather than evaluating whether the challenged law is triggered by speech or by nonspeech conduct (the customary mode of analysis), the court instead developed a "non-exhaustive list of factors"—including whether the restricted speech "takes place in the private sphere" versus a "traditionally public space" and whether the speech could be construed as "unpopular or dissenting." Pet. App. 24a. That standard conflicts with the standards of other circuits. In an as-applied challenge to a different State's surveyor-licensing law, the Fifth Circuit has adhered to this Court's "traditional conduct-versus-speech dichotomy." *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932 (2020); *see also Hines* v. *Pardue*, 117 F.4th 769, 775, 777 (5th Cir. 2024), *pet. for cert. docketed*, No. 24-920. Meanwhile, the Eleventh Circuit hews to yet another standard—one the Fifth Circuit has repudiated word-for word. Pet. 19-20; Cert. Reply 6. And in the Ninth Circuit, the standard varies based on the panel, despite repeated calls for the court to restore order. Pet. 21-23.

The result is an intractable conflict on the threshold question presented here: 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. Pet. i.

Against this backdrop, we write to draw the Court's attention to circuit-court developments in two cases cited in our petition. In August, the Seventh Circuit acknowledged the split implicated by petitioners' question

presented—citing the decision below by name. "The division between speech and conduct has not been evenly applied throughout the country," the court remarked, "particularly when it comes to licensing schemes that determine which individuals can speak about certain topics." *Richwine* v. *Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025). A month later, the Second Circuit deepened the split and aligned itself with the Fifth Circuit on the question presented here: in yet another as-applied challenge to an occupational-licensing scheme, the court held that New York's unlicensed-practice-of-law statutes restricted the plaintiffs' speech directly, not incidentally, and adopted the Fifth Circuit's analysis in *Hines* v. *Pardue* as "apply[ing] with equal force here." *Upsolve, Inc.* v. *James*, 155 F.4th 133, 142 (2d Cir. 2025). These decisions fortify both the split detailed in our petition and the need for this Court's review.

A. Recent published decisions from the Seventh and Second Circuits reinforce the split on the question presented.

1. In August, the Seventh Circuit affirmed the preliminary injunction issued in *Richwine* v. *Matuszak*, a First Amendment challenge to Indiana's funeral-director licensing law as applied to an unlicensed death doula. 148 F.4th 942. As noted in the petition (at 29-30), death doulas provide comfort and guidance to people near death and to their families. Indiana brought an enforcement action against one such doula, charging her with the "unlicensed practice of funeral services." *Id.* at 946. That led, in turn, to a First Amendment lawsuit and a preliminary injunction. As applied to the doula, the district court reasoned, "[t]he statutes' enforcement here turns entirely on the topics that Plaintiffs discuss and the messages they express," from "'counseling of individuals concerning

methods and alternatives for the final disposition of human remains'" to "'counseling of survivors' about the same." *Richwine* v. *Matuszak*, 707 F. Supp. 3d 782, 800 (N.D. Ind. 2023). Because "the conduct triggering coverage under [Indiana's funeral-director licensure] statute consists of communicating a message," the court rejected the State's view that the statute "only incidentally involve[d] speech," concluded that it restricted the doula's speech based on content, and applied strict scrutiny. *Id.* at 798-99, 803 (citation omitted); *see also* Pet. 20-21, 29-30 (noting district court's decision).

This past August, the Seventh Circuit affirmed. In doing so, it remarked on the very circuit split detailed in the petition here. "The division between speech and conduct has not been evenly applied throughout the country," the court reasoned, "particularly when it comes to licensing schemes that determine which individuals can speak about certain topics." 148 F.4th at 953. On one side of the split, the court identified the Fifth Circuit's decision in *Hines* v. *Pardue*, *supra*, and the Ninth Circuit's decision in *Pacific Coast Horseshoeing School, Inc.* v. *Kirchmeyer*, 961 F.3d 1063 (2020). *Richwine*, 148 F.4th at 953. On the other, it identified the Eleventh Circuit's decision in *Del Castillo* v. *Secretary, Florida Department of Health*, 26 F.4th 1214 (2022), and the Fourth Circuit's decision below. *Richwine*, 148 F.4th at 953-54 (citing *360 Virtual Drone Servs. LLC* v. *Ritter*, 102 F.4th 263, 278 (4th Cir. 2024)).

The Seventh Circuit declined to pick a side on the split, reasoning that "even under intermediate scrutiny, [Indiana's] statute fails to pass constitutional muster as applied to [the plaintiffs]." *Id.* at 954. In so holding, however, the court broke with the Fourth Circuit even so. According to the Seventh Circuit, the lowest tier of First

Amendment review even on the table was the traditional intermediate scrutiny of *McCullen* v. *Coakley*, 573 U.S. 464 (2014), and *Ward* v. *Rock Against Racism*, 491 U.S. 781 (1989). *Richwine*, 148 F.4th at 955 (citing both); *see also id.* ("[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." (quoting *McCullen*, 573 U.S. at 486)). Using that level of review, it affirmed the district court's preliminary injunction. *Id.* at 954-57. The Fourth Circuit, meanwhile, has staked out a "loosened intermediate-scrutiny test"—one that it vehemently distinguishes from the "traditional intermediate-scrutiny test" of "the Supreme Court's decisions in *McCullen v. Coakley* and *Ward v. Rock Against Racism*." Pet. App. 20a (internal citations omitted); *see also* Pet. App. 10a ("[O]ur precedent requires that we apply a more relaxed form of intermediate scrutiny . . . ."). Simply, the decision below strayed so far afield that even courts of appeals laboring *not* to split with it cannot help but split with it.

2. In September, the Second Circuit addressed another similar challenge: to an unlicensed-practice-of-law statute as applied to a nonprofit and a pastor who "crafted a program that would train non-lawyers to give legal advice to low-income New Yorkers who face debt collection actions." *Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 103 (S.D.N.Y. 2022); *see also* Pet. 31. Appealing the district court's entry of a preliminary injunction, the State contended that "[t]he licensing regime in this case is a conduct regulation that, at most, burdens plaintiffs' speech only indirectly and incidentally." Appellant's C.A. Reply at 9, *Upsolve, Inc.* v. *James*, No. 22-1345 (2d Cir. Feb. 8, 2023) (Doc. 157). Such a result, the State maintained, would accord with the Fourth Circuit's decision below: "Like the surveyor-license requirement in *360 Virtual*,"

the State argued, "New York's attorney-license requirement targets professional conduct rather than speech as speech." Letter at 1, *Upsolve, Inc.* v. *James*, No. 22-1345 (2d Cir. May 28, 2024) (Doc. 286).

The Second Circuit rejected that view root, stem, and branch. On the threshold question whether New York's law restricted the plaintiffs' speech directly or incidentally, the court aligned itself with the Fifth Circuit's mode of analysis in *Hines* and *Vizaline*. The plaintiffs "simply wish to communicate legal advice to their potential clients regarding how to fill out New York's one-page form for answering debt-collection actions," the court reasoned. *Upsolve, Inc.*, 155 F.4th at 141. Because that communicative act triggered the UPL statutes' application, the court continued, the "Fifth Circuit's conclusion[]" in *Hines* "appl[ies] with equal force here." *Id.* at 142. As in *Hines*, New York's UPL statutes "only 'kick in' when Rev. Udo-Okon and other Justice Advocates convey their legal advice to a client." *Id.* That resolved the threshold question whether the law restricted the plaintiffs' speech or their conduct: contrary to the State's view, "the UPL statutes, as applied here, regulate[d] Plaintiffs' speech." *Id.*; *see also id.* ("In *Hines*, the Fifth Circuit rejected an argument analogous to the one the Attorney General raises here.").[*]

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[*] Both the Second Circuit and the Seventh noted the Fourth Circuit's 2020 opinion in *Billups* v. *City of Charleston*, which "held that a local ordinance . . . prohibiting unlicensed tour guides from leading paid tours 'undoubtedly burden[ed]' speech." *Upsolve, Inc.* v. *James*, 155 F.4th 133, 141 (2d Cir. 2025) (quoting 961 F.3d 673, 683 (4th Cir. 2020)); *see also Richwine* v. *Matuszak*, 148 F.4th 942, 953 (7th Cir. 2025). As discussed in our petition, however, the decision below went to great lengths to retrofit *Billups* with the "non-exhaustive list of factors" standard that now governs in the Fourth Circuit. *See* Pet. 26-27; *see also* Pet. App. 18a-19a ("[A]lthough the regulation in

The Second Circuit vacated the lower court's preliminary injunction and, in doing so, further spotlighted the real-world stakes differentiating its standard from the Fourth Circuit's. Having determined that New York's statutes restricted the plaintiffs' speech directly, the court classified that restriction as content-neutral, not content-based, and remanded for the district court to apply intermediate scrutiny in the first instance. *Id.* at 143-44; *see also* Appl. for Extension at 2, *Upsolve, Inc.* v. *James*, No. 25A381 (previewing criticisms of the court's content-neutrality analysis). Within the Fourth Circuit, by comparison, identically situated speakers are far worse off. Having used its "non-exhaustive list of factors" standard to hold that North Carolina's surveyor-licensing law "regulates professional conduct and only incidentally burdens speech," the Fourth Circuit openly declined to "'engage with . . . descriptors' like 'content-based'" or content-neutral. Pet. App. 19a, 25a. In turn, it declined to apply the "traditional intermediate-scrutiny test" applicable to content-neutral speech restrictions—the very one contemplated by the Second Circuit's mandate—and instead debuted its "quite different," "more relaxed," "lower," and "loosened" brand of First Amendment scrutiny. Pet. App. 10a, 19a, 20a-21a.

For their part, lower courts in the Fourth Circuit have gotten the message: last December, one applied the circuit's new "more relaxed form of intermediate scrutiny" to dismiss on the pleadings a First Amendment challenge materially identical to that considered by the Second Circuit in *Upsolve*. *Polaski* v. *Lee*, 759 F. Supp. 3d 683, 688

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.").

(E.D.N.C. 2024) (quoting *360 Virtual Drone Servs. LLC*, 102 F.4th at 271); *see also id.* at 685 (dismissing challenge to UPL laws brought by "a nonprofit organization dedicated to expanding access to justice in North Carolina"); Order, *Polaski* v. *Lee*, No. 25-1038 (4th Cir. Feb. 3, 2025) (Doc. 26) (holding appeal in abeyance pending this Court's resolution of this case).

B. The Seventh and Second Circuits' decisions confirm the need for this Court's intervention.

Since the petition was filed, no fewer than three published circuit-court decisions have issued that either acknowledge, cement, or deepen the split implicated by the question presented. *Richwine*, 148 F.4th at 953 (acknowledging); *Hines*, 117 F.4th at 777-78 (cementing); *Upsolve, Inc.*, 155 F.4th at 142-43 (deepening). And critically, none of those decisions would have looked remotely similar under the Fourth Circuit's nonexhaustive-list-of-factors standard. Applying that standard, Indiana's funeral-director licensure law almost certainly would qualify as "a regulation of professional conduct that only incidentally impacts speech." Pet. App. 10a. So classified, it then would have been relegated to the Fourth Circuit's "more relaxed," "lower," and "loosened" tier of First Amendment scrutiny. Likewise with Texas's restriction on Dr. Hines's animal-care tips. Cert. Reply 5-6. And with New York's ban on Reverend Udo-Okon's debt advice. *Polaski*, 759 F. Supp. 3d at 688 (applying Fourth Circuit's "more relaxed form" of scrutiny in materially identical challenge to North Carolina law (citation omitted)).

Far from self-correcting, the split is worsening steadily. Since the two circuit-court decisions detailed above, in fact, yet another case cited in our petition has reached judgment. Pet. 30 & n.9. In October, a district court in Minnesota enjoined enforcement of the State's "private

career school" licensure law against a horse-care teacher. Applying this Court's traditional speech-conduct standard, the court held that Minnesota's licensing requirements "[we]re triggered by the content and purpose of [the teacher's] speech." *Mox* v. *Olson*, No. 23-cv-3543, 2025 WL 2996727, at *14 (D. Minn. Oct. 24, 2025). On that basis, it rejected the State's view "that the [law] regulates conduct and has only incidental effects on speech." *Id.* Once again, the result under the Fourth Circuit's standard would almost certainly have been different—except (perhaps?) to the extent equine-care lessons are communicated in public fields, not private stables.

The latest tranche of lower-court decisions also drives home this case's practical importance. Aggressive licensing boards are here to stay, as are First Amendment challenges resisting them. *See, e.g.*, Br. Amici Curiae of John Rosemond et al. 7; *see also* Br. Amici Curiae of Parties in Other First Amendment Cases Pending Before the Court at 19-25, *Chiles* v. *Salazar*, No. 24-539 (June 11, 2025). And in every such case, the first-order legal question will be the same: what is the proper standard for determining whether the challenged law restricts the plaintiffs' speech directly, incidentally, or not at all? Is it the standard embraced by the Fifth Circuit, the Second, and (on a good day) the Ninth? The standard adhered to by the Eleventh and repudiated by the Fifth? Or the standard of the Fourth, under which the degree of First Amendment protection depends on such considerations as whether the speaker finds herself on a sidewalk or in a sitting room? Only this Court can resolve the split, and this case—where "the core facts are essentially undisputed" (Pet. App. 9a)—remains an ideal one in which to do so.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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