NO. 23-1472

In The

United States Court Of Appeals

For The Fourth Circuit

360 VIRTUAL DRONE SERVICES LLC; MICHAEL JONES,

Plaintiffs – Appellants,

v.

ANDREW L. RITTER, in his official capacity as Executive Director of the North Carolina Board of Examiners for Engineers and Surveyors; JOHN M. LOGSDON, in his official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; JONATHAN S. CARE, in his official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; DENNIS K. HOYLE, in his official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; TOYNIA E.S. GIBBS, in her official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; VINOD K. GOEL, in his official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; CEDRIC D. FAIRBANKS, in his official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; BRENDA L. MOORE, in her official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; CAROL SALLOUM, in her official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors; ANDREW G. ZOUTWELLE, in his official capacity as member of the North Carolina Board of Examiners for Engineers and Surveyors,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT RALEIGH

BRIEF OF APPELLEES

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1472 Caption: 360 Virtual Drone Services LLC, et al. v. Andrew L. Ritter, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Andrew L. Ritter, John M. Logsdon, Jonathan M. Care, Dennis K. Hoyle, Toynia E.S. Gibbs, Vinod K. Goel, Cedric D. Fairbanks, Brenda L. Moore, Carol Salloum, Andrew G. Zoutwelle-in their official capacity
(name of party/amicus)

who is Defendants - Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Douglas W. Hanna Date: 6-5-23

Counsel for: Defendants - Appellees

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INTRODUCTION

"States may regulate professional conduct even though that conduct incidentally involves speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018). Thus, Plaintiffs do not have a First Amendment right to practice land surveying without a license. But that is essentially the logic of their argument. Indeed, the modus operandi of the organization representing them, judging by the lawsuits it has filed nationwide, is to tear down professional licensing laws. Taken to its logical conclusion, Plaintiffs' theory would gut licensing regulation of professions, including for the practice of law, medicine, and engineering.

Plaintiffs do not dispute that their proposed activities fall within the definition of the practice of land surveying under the regulatory system enacted by North Carolina's General Assembly. Instead, Plaintiffs advanced a single cause of action under the First Amendment's Speech Clause claiming a right "to create" aerial land images with locational data generated by a computer program and to "disseminate that information to willing customers." J.A. 8 (¶1). That is, they claim a right to engage in the unlicensed practice of land surveying.

Specifically, for entities with property rights (e.g., developers, owners, occupants), Plaintiffs want to create and sell, without a license, measurable maps and digital models of land and structures on land, J.A. 8 (¶1), J.A. 24 (¶77), with data on location, distances, coordinates, and volumes, J.A. 756-759. The North Carolina Engineering and Land Surveying Act defines the practice of land surveying to include "mapping, assembling, and interpreting reliable scientific measures and information relative to the location, size, shape, or physical features of the earth . . . by aerial photography, by global positioning via satellites, or by a combination of any of these methods, and the utilization and development of these facts and interpretations into an orderly survey map, plan, report, description or project." N.C. Gen. Stat. § 89C-3(7)(a). So, the commercial services that Plaintiffs claim a constitutional right to sell constitute land surveying.

As the district court correctly held, the challenged laws are directed at professional conduct—the practice of land surveying, which inherently involves the creation and dissemination of maps with locational data. Even if speech is incidentally implicated (as is often inevitable when States regulate professional practice), the law easily satisfies the

appropriate level of scrutiny. It is substantially drawn to advance the State's substantial interests, including the State's interests in protecting the public from negligence, incompetence, and professional misconduct. Therefore, this Court should affirm.

STATEMENT OF THE CASE

I. North Carolina's General Assembly has long regulated the practice of land surveying, a practice regulated nationwide.

A. North Carolina's Legislature passed the Engineering and Land Surveying Act to regulate the practice of land surveying.

Land surveying is a "centuries-old profession." J.A. 8 (¶1). And it is regulated by all 50 States[1], all of which require a license to perform land surveying services.

[1] All fifty states and the District of Columbia have license requirements for land surveyors. *See* Ala. Code § 34-11-2; Alaska Stat. § 08.48.171; Ariz. Rev. Stat. Ann. § 32-101; Ark. Code Ann. § 17-48-101; Cal. Bus. & Prof. Code § 8700; Colo. Rev. Stat. § 12-120-103; Conn. Gen. Stat. § 20-302; Del. Code Ann. tit. 24, § 2701; D.C. Code § 17-1500; Fla. Stat. § 472.001; Ga. Code Ann. § 43-15-13; Haw. Rev. Stat. § 464-2; Idaho Code § 54-1201; 225 Ill. Comp. Stat. 330/1; Ind. Code § 25-21.5-1-7, 8, 8.5; Iowa Code § 355.1; Kan. Stat. Ann. § 74-7022; Ky. Rev. Stat. Ann. § 322.045; La. Stat. Ann. tit. 37 § 681; Me Stat. tit. 32 § 18202; Md. Code Ann. Health Occ. § 15-101; Mass. Gen. Laws ch. 112 § 81J; Mich. Comp. Laws § 339.2001; Minn. Stat. § 1800.0050; Miss. Code Ann. § 73-13-73; Mo. Rev. Stat. § 327.011; Mont. Code Ann. § 37-67-101; Neb. Rev. Stat. § 81-8, 108; Nev. Rev. Stat. § 625.005; N.H. Rev. Stat. Ann. § 310-A:63; N.J. Stat. Ann. § 45:8-27; N.M. Stat. Ann. § 61-23-2; N.Y. Educ. Law § 7204;

North Carolina's General Assembly first began regulating the private practice of surveying more than 100 years ago. *See* "An Act to Regulate the Practice of Engineering and Land Surveying in the State of North Carolina," Chapter 1 of the 1921 session law. Today, North Carolina regulates land surveying (along with engineering) through the North Carolina Engineering and Land Surveying Act (the "Act"), codified at Chapter 89C of the General Statutes. *See* N.C. Gen. Stat. § 89C-1, *et seq*.

"The Act prohibits any person from practicing or offering to practice land surveying in North Carolina without first being licensed by the Board." *See id*. §§ 89C-2 and 89C-23. The Act establishes the qualifications for a license. *Id*. § 89C-13.

The Act defines the "practice of land surveying":

> Providing professional services such as consultation, investigation, testimony, evaluation, planning, mapping, assembling, and interpreting reliable scientific measurements and information

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N.C. Gen. Stat. § 89C-2; N.D. Cent. Code § 43-19.1-01; Ohio Rev. Code Ann. § 4733.01; Okla. Stat. tit. 59 § 475.1; Or. Rev. Stat. § 672.002; 49 Pa. Code § 37.47; 5 R.I. Gen. Laws § 5-8.1-1; S.C. Code Ann. § 40.22-2; S.D. Codified Laws § 36-18A-1; Tenn. Code Ann. § 62-18-101; Tex. Occ. Code Ann. § 1001.002; Utah Code Ann. § 58-22-102; Vt. Stat. Ann. tit. 26 § 2501; Va. Code Ann. § 54.1-400; Wash. Rev. Code § 18.43.010; W. Va. Code § 23-1-1; Wis. Stat. § 443.01; Wyo. Stat. Ann. § 33-29-201.

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, whether the gathering of information for the providing of these services is accomplished by conventional ground measurements, by aerial photography, by global positioning via satellites, or by a combination of any of these methods, and the utilization and development of these facts and interpretations into an orderly survey map, plan, report, description, or project. The practice of land surveying includes the following:

1. Locating, relocating, establishing, laying out, or retracing any property line, easement, or boundary of any tract of land;
2. Locating, relocating, establishing, or laying out the alignment or elevation of any of the fixed works embraced within the practice of professional engineering;
3. Making any survey for the subdivision of any tract of land, including the topography, alignment and grades of streets, and incidental drainage within the subdivision, and the preparation and perpetuation of maps, record plats, field note records, and property descriptions that represent these surveys;
4. Determining, by the use of the principles of land surveying, the position for any survey monument or reference point, or setting, resetting, or replacing any survey monument or reference point;
5. Determining the configuration or contour of the earth's surface or the position of fixed objects on the earth's surface by measuring lines and angles and applying the principles of mathematics or photogrammetry;

> 6. Providing geodetic surveying which includes surveying for determination of the size and shape of the earth both horizontally and vertically and the precise positioning of points on the earth utilizing angular and linear measurements through spatially oriented spherical geometry; and
> 7. Creating, preparing, or modifying electronic or computerized data, including land information systems and geographic information systems relative to the performance of the practice of land surveying.

See Id. § 89C-3(7)(a).

The Act identifies disciplines that are encompassed by the practice:

> Land surveying encompasses a number of disciplines including geodetic surveying, hydrographic surveying, cadastral surveying, engineering surveying, route surveying, **photogrammetric (aerial) surveying**, and topographic surveying.

See Id. § 89C-13(b)(2) (emphasis added).

Photogrammetry, a discipline of professional land surveying, is primarily concerned with making precise measurements of three-dimensional (3D) objects and of terrain features from two-dimensional (2D) photographs. J.A. 37-38 (¶48). The practice of photogrammetry includes measuring coordinates; quantifying distances, heights, areas, and volumes; preparing topographic maps; and generating digital elevation models and orthophotographs. *Id.*

B. North Carolina's licensing and regulation of the practice of land surveying protects the public interest.

The General Assembly articulated the stated purpose of the Act:

> In order to safeguard life, health, and property, and to promote the public welfare, the practice of engineering and the practice of land surveying in this State are hereby declared to be subject to regulation in the public interest.

N.C. Gen. Stat. § 89C-2. The General Assembly designed the Act to protect the public from negligence, incompetence, and professional misconduct in the profession of land surveying. J.A. 38 (¶50).

As the Board Executive Director testified below, the Act's licensing and oversight promote quality on which the public can rely:

> we're telling the public that we may – we're hiring a licensed surveyor, there's a bar, and the licensed work is going to be above the bar. It's going to be above incompetence, gross negligence, and misconduct. And if it's not above the bar, then the board can hold the licensee responsible for his actions.

J.A. 795. As with the practice of other professions (such as the practice of engineering, which is also regulated by the Act), the licensing standards are designed to establish a minimum level of competence through education, examination, and experience:

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

J.A. 795-796. With property rights and other interests implicated, the public should be able to rely on the work product prepared by those engaged in the practice of surveying. J.A. 402.

And so, land surveying (which, again, includes the discipline of photogrammetry) is a licensed and regulated profession to protect the public from negligence, incompetence, and professional misconduct—i.e., to safeguard against malpractice. J.A. 38 (¶50), J.A. 833. "Relying on untrained and unskilled amateurs to recognize any of the multiple varieties of problems or deficiencies that can arise from the measurements, computations or use of tools for the survey profession to create useful survey data, could be catastrophic to the outcome of a project and harm the public at large who relies on the accuracy and fidelity of this information." J.A. 38 (¶51), J.A. 833.

C. The Act authorizes the Board to regulate those who are licensed to practice land surveying.

To administer the Act, the General Assembly established the North Carolina Board of Examiners for Engineers and Surveyors (the "Board"), *see* N.C. Gen. Stat. § 89C-4, and empowered the Board with rulemaking and enforcement power to protect the public, *see id.* § 89C-10(a).

Under the Act, the Board has authority to discipline only *licensed* land surveyors. *See, e.g., Adams v. N.C. State Bd. of Registration for Prof'l Engineers & Land Surveyors*, 501 S.E.2d 660, 661-63 (N.C. Ct. App. 1998) (Board holding licensed surveyor accountable for gross negligence and incompetence); *In re Suttles Surveying, P.A.*, 742 S.E.2d 574, 578-79 (Board holding licensed surveyor accountable for "truthfulness and ethical behavior" to protect the public).

The Board does not have authority to discipline those engaged in the unlicensed—i.e., unauthorized—practice of land surveying. J.A. 398. For those engaged in the *unauthorized* practice of land surveying, the Board's authority is limited. The Board can investigate the unauthorized practice. When investigating potential unauthorized practice, the Board focuses on the activity—as happened here when the Board learned, among other things, that Plaintiff Jones was holding himself out on an

internet site as providing "Mapping and Surveying" (see below). An official will inquire of the service provider, "Tell me what you're doing, and then I'll take that to the [surveying] committee and the board." J.A. 405. Of course, this requires examining "the product" the service provider is offering in commerce. J.A. 403. If the activity is deemed to fall within the definition of surveying, the official informs the service provider that "you need a license" to perform the activity or the Board may apply to the court for an injunction or may pursue prosecution for a Class 2 misdemeanor. J.A. 110, J.A. 398, J.A. 403; *see also* N.C. Gen. Stat. § 89C-23.

The Board publishes guidelines for the activities that are and are not encompassed by the practice of land surveying. J.A. 37 (¶45), J.A. 490-492. "Any person substantially affected by a statute administered or rule promulgated by the Board may request a declaratory ruling as to whether or how the statute or rule applies to a given factual situation or whether a particular agency rule is valid." Rule 21 NCAC 56.1205.

II. Jones, through his LLC, seeks to practice unlicensed surveying by engaging in economic activity that entails preparing maps and models with geospatial and related data for entities with property rights.

Plaintiffs are not licensed land surveyors in North Carolina (or elsewhere). J.A. 90 (¶24). But they nonetheless want to practice land surveying as defined by North Carolina's General Assembly.

Plaintiff Michael Jones received no formal instruction in photography. J.A. 610. But in 2016 he began photography as a hobby. J.A. 593-595. Later that year, he began providing photography and videography services commercially. J.A. 88 (¶5). Jones also had no formal instruction in the use of drones, but in 2016 he bought a drone and began watching YouTube videos. J.A. 598, J.A. 601, J.A. 610. In 2017, Jones founded a single-member limited liability company, 360 Virtual Drone Services, LLC. ("360 Virtual"). J.A. 89 (¶8). Through 360 Virtual, Jones engages in economic activity by using drone technology to provide photography and videography services for clients with property interests, J.A. 520-521, though he has no education in or prior experience with the discipline of photogrammetry, J.A. 506.

As stated by Jones, "[i]n addition to standard photography jobs, I also began to offer aerial mapping services." J.A. 89 (¶11). To create the

orthomosaic maps (measurable maps), Jones began using a "free version" of software called DroneDeploy, J.A. 644, for which Jones received no formal training, J.A. 663. DroneDeploy offers "mapping software," J.A. 643, and tools to measure distance, volume, elevation, and location, J.A. 757-758, J.A. 766. Jones told the Board that "another function of the DroneDeploy application is the ability to measure area, distance and volume," J.A. 256, and that he could use the program to measure property so the measurements could be used to locate buildings. J.A. 765 (Using "DroneDeploy with a mouse and draw a square and say, 'I want the building here.'"), J.A. 766 (measure a location for a concrete pad or a second building), J.A. 631 (cemetery plot availability).

Using DroneDeploy with a drone and camera, Jones wants "to provide orthomosaic maps to paying customers." J.A. 756-758. This activity involves Jones taking aerial pictures of a property owner's project, transferring the pictures to DroneDeploy, and using software to create the measurable map. J.A. 673-675.

> Q. You're saying that you want to offer and provide those services where you capture these aerial images on behalf of paying clients and using orthomosaic software to stitch those aerial images together to form orthomosaic maps.

> A. Yes, sir.
>
> Q. Okay. And when you're saying "stitching these aerial images together to form orthosmosaic maps," it's really simply sending the data to DroneDeploy and hitting a button and they process it for you?
>
> A. Yes, sir.

J.A. 675. Jones then wants to disseminate the DroneDeploy data to customers as a feature of his mapping service:

> Q. You take the data, you run it through DroneDeploy software, and they spit out this orthomosaic map and you send it to the client?
>
> A. Yes.

J.A. 730. Jones contends both the two-dimensional and the 3D models are "useful" data, Opening Br. 8, by which he presumably means that property owners and developers will use and thus rely on the data for land use. Indeed, Jones testified that the "useful" information is "data the clients need" and are buying from 360 Virtual. J.A. 707.

Jones's claim in this lawsuit also is based on his stated desire "to provide 3D digital models to paying customers," J.A. 757, work he described as "very hard, very tedious stuff." J.A. 772. But Jones testified he has never prepared a 3D model for a client, "because it's very hard and

I didn't get far enough in the learning process." J.A. 543. Indeed, because of his lack of experience, Jones was not "comfortable answering" questions about whether 3D models included volume measurements. J.A. 772.

III. In response to Jones's marketing of services, the Board opened an investigation to determine if Plaintiffs are engaging in the unauthorized practice of surveying.

Jones admitted that he was advertising on a website (Droners.io) as having experience in providing services for "Mapping and Surveying." J.A. 488 (¶9). Jones also advertised that his company, 360 Virtual, is a "**Professional** Aerial Data & Media Drone Service Company." J.A. 176 (emphasis added). Finally, Jones advertised the service of preparing orthomosaic maps (measurable maps). J.A. 488 (¶10), J.A. 637.

Based on Jones's advertising, the Board opened an investigation in December 2018 to determine if he was practicing or offering to practice land surveying in North Carolina without a license. Jones told the Board that Virtual Drone offered orthomosiac maps (measurable maps). J.A. 34 (¶21). Jones also admitted "that at one time he advertised the ability to provide measurements" to customers. J.A. 256. For example, Jones

looked to sell orthomosaic maps to developers/owners of construction sites for progression projects. J.A. 513.

Following its investigation, the Board gave Jones "notice that practicing, or offering to practice, land surveying in North Carolina, as defined in G.S. 89C-3(7)," without a license is a violation of the Act. J.A. 110-111. The Board's notice stated that Jones had the right "to request a declaratory ruling regarding whether your particular *conduct* is lawful." J.A. 111 (emphasis added).

Plaintiffs' opening brief here claims Jones was largely ignored when he "asked for guidance about what kinds of work he could lawfully perform without a surveyor license." Opening Br. 15. But the Board's notice identified the process for Jones to seek a declaratory ruling as to whether or how the statute applies to a given factual situation, J.A. 111; *see also* 21 NCAC 56.1205. Jones did not follow that process.

The process established by the Act recognizes that determining whether activity constitutes land surveying entails a factual inquiry; the focus is on the activity itself ("Tell me what you are doing"). *See* J.A. 405. With 360 Virtual, Jones wants to engage in economic activity by preparing (1) "aerial maps that contain measurable information" and

(2) "3D digital models." Opening Br. 2. There is no dispute that these activities are encompassed by the General Assembly's definition of the practice of land surveying.

Plaintiffs' contention that this case is about providing a photo of property with a "north arrow" is not well taken. Opening Br. 30. That hypothetical would not be an orthomosaic map. The Board testified that "just because you put a north arrow . . . on a piece of paper doesn't make it surveying." J.A. 387.

Instead, Jones claims a First Amendment right to practice land surveying without a license (and thus without Board oversight). That is what this case is about.

IV. Proceedings below.

Plaintiffs filed this lawsuit alleging that the Act prohibits them from creating, processing, and disseminating images of land and structures, purportedly in violation of the First Amendment.

After written discovery, depositions, and the filing of expert reports, the parties filed cross-motions for summary judgment on the First Amendment claim. Defendants' motion relied on various witnesses: Andrew L. Ritter ("Ritter"), in his capacity as executive director of the

Board and as Rule 30(b)(6) deponent for the Board; Plaintiff Jones in his personal capacity and as Rule 30(b)(6) deponent for plaintiff 360 Virtual; Plaintiffs' designated expert witness on drones and mapping (Alex Abatie); and Defendants' expert witness on photogrammetry (Mark Schall). J.A. 960.

In granting summary judgment for Defendants, the district court properly framed the issue as involving the regulation of professional conduct that incidentally involves speech. J.A. 976. The court recognized that the challenged statutes are part of a generally applicable licensing regime restricting the practice of surveying. J.A. 978.

The district court acknowledged that there is no categorical immunity from the First Amendment "for a category called 'professional speech,'" citing *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361 (2018). J.A. 975-976. But as the district court observed, *NIFLA* also recognized that "less protection" is afforded to professional speech in two contexts, one of which is that "States may regulate professional conduct, even though that conduct incidentally involves speech." J.A. 976 (quoting *NIFLA*). The district court applied that test, informed by this Court's precedent in *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019), which reviewed a trade

association's First Amendment challenge to North Carolina's statute prohibiting the unauthorized (i.e., unlicensed) practice of law. J.A. 978.

The district court then held that the challenged surveying statutes survive intermediate scrutiny because they are sufficiently drawn to protect the State's substantial interests. J.A. 979-980.

The Act was "sufficiently drawn" to those interests, the district court concluded, based on record evidence that the Act requires a level of competence to protect the public, that the Act protects the public from misrepresentations as to professional status or experience, and creates a system of accountability by authorizing the Board to hold licensees accountable from negligence, incompetence, and professional misconduct. J.A. 980. Plaintiffs' actions are restricted only insofar as Plaintiffs seek to prepare for commercial distribution maps or models with location information or property images capable of measurement; Plaintiffs remain free to convey maps and models that do not contain measurable data or lines indicating the approximate position of property boundaries. J.A. 981. Quoting this Court's precedent in *Capital* (unauthorized practice of law), the district court noted that although "[a]nother state legislature might balance the interests differently,"

"intermediate scrutiny requires only a reasonable fit between the challenged regulation and the state's interest – not the least restrictive means." J.A. 981. The court concluded that "the Act is constitutional as applied to plaintiffs." J.A. 982.

SUMMARY OF ARGUMENT

The district court correctly held that the Act does not violate Plaintiff's First Amendment rights.

A. The Act targets conduct—the practice of land surveying—and therefore strict scrutiny does not apply.

The Supreme Court in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018), and this Court in *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019), made clear, as have other circuits after *NIFLA*, that States may regulate professional conduct even when the regulation incidentally restricts speech. This Court in *Capital* applied the conduct/speech distinction in rejecting a challenge to a licensing law regulating professional practice, despite the plaintiff's claim there that the law forbade the plaintiff from communicating legal advice to its members. And this Court explained there, because the law was directed at conduct, case law addressing "content-based" restrictions was inapposite.

Plaintiffs are challenging the regulation of professional conduct—licensure of the practice of surveying, a profession which necessarily involves preparing property maps with locational information for those property interests. And so, any incidental speech restriction is entitled to less protection than Plaintiffs demand. Their argument that the Act is content-based is misguided because the challenged statutes regulate conduct and, in any event, are content-neutral.

B. The district court correctly held that the challenged provisions satisfy intermediate scrutiny for a conduct regulation incidentally burdening speech.

The district court applied the same standard that this Court applied in *Capital*. North Carolina's interest in licensing and regulating the profession of land surveying with Board oversight is substantial. And the Act is sufficiently drawn to protect the State's substantial interests in protecting the public by requiring qualifications for licensure and accountability to the Board for malpractice or unethical practice. Plaintiffs' approach to intermediate scrutiny flouts precedent and ignores context.

ARGUMENT

The district court correctly held that the Act does not violate Plaintiffs' First Amendment rights.

A. The Act targets conduct—the practice of land surveying—and therefore strict scrutiny does not apply.

The district court faithfully applied the longstanding principle that the States may regulate professional conduct, even though that conduct incidentally involves speech, without triggering strict scrutiny. J.A. 975-976 (citing *NIFLA*, 138 S. Ct. at 2372).

1. The Supreme Court in *NIFLA* made clear that States may regulate professional conduct that incidentally involves speech.

In *NIFLA*, the Supreme Court addressed First Amendment free speech principles applicable to the regulation of professional speech. The case involved California's compelled disclosures by licensed and unlicensed crisis pregnancy centers. 138 S. Ct. 2368-70. In that context involving a State law that "regulates speech as speech," *id.* at 2374, the Court rejected California's argument for a freestanding doctrine of "professional speech" that would categorically immunize such speech from normal First Amendment scrutiny. The Court (reviewing the challenge at the preliminary-injunction stage) did not "foreclose the

possibility" that there might be some reason in the future "for treating professional speech as a unique category that is exempt from ordinary First Amendment principles," *id.* at 2375, but the Court did not need to decide because, regardless, the plaintiffs had a likelihood of success to warrant a preliminary injunction without strict scrutiny. *Id.*

But importantly for purposes of this case, the Court also observed that it "has afforded less protection for professional speech" in two contexts inapplicable in *NIFLA*. *Id.* at 2372-74. The first context concerns a species of compelled disclosures. *Id.* at 2372. The second context is applicable here: "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* This is because the "'First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'" *Id.* at 2373 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011)).

One example cited by the *NIFLA* Court is *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978). That case involved a state bar's prohibition on lawyers' in-person solicitation of remunerative employment, "a business transaction in which speech is an essential but subordinate component." *Id.* at 457. In upholding the prohibition, the

Court determined that "[a] lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns," and "falls within the State's proper sphere of economic and professional regulation." *Id.* at 459. The lawyer's activity was "subject to regulation in furtherance of important state interests," *id.*, as "the State bears a special responsibility for maintaining standard among members of the licensed professions," *id.* at 460.

NIFLA also cited *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992), in which the First Amendment right to not speak was "implicated" by a regulation governing the practice of medicine. *Id.* at 884. In upholding the challenged regulation, the Court held that speech was implicated "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.*

2. This Court in *Capital* applied the conduct/speech distinction in rejecting a challenge to a licensing law regulating professional practice.

After *NIFLA*, this Court applied the conduct/speech rule in rejecting a First Amendment challenge to a North Carolina licensing regime that bars the unauthorized (i.e., unlicensed) practice of a profession: law. *See Capital Associated Indus., Inc. v. Stein*, 922 F.3d

198, 207 (4th Cir. 2019). (The district court below cited the case by the name of the defendant—*Stein*—but for simplicity here we will cite the case as *Capital*.) The suit in *Capital* was brought by a trade association ("Capital"). Capital was seeking to enjoin enforcement of North Carolina's unauthorized practice of law ("UPL") statutes against Capital so it could provide legal services to its members. *Id*. at 202, 204. Capital sought to help its members "resolv[e] private differences" by drafting legal documents for use by its members and by speaking with its members to advise on labor and employment issues. *Id*. at 206.

On appeal in this Court, Capital argued that the UPL statutes were content-based (and identity-based) regulations of speech—by prohibiting Capital from speaking advice about legal issues—and so must survive strict scrutiny. The State countered that strict scrutiny did not apply because the UPL statutes regulate professional conduct with only incidental burdens on speech. This Court agreed with the State.

This Court held that "North Carolina's ban on the practice of law by corporations fits within *NIFLA*'s exception for professional regulations that incidentally affect speech," because the "ban is part of a generally applicable licensing regime that restricts the practice of law to bar

members and entities owned by bar members." *Id.* at 207. This Court cited the Supreme Court's "recogni[tion] that the States have . . . broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). Licensing laws "inevitably" have some effect on speech, this Court observed, "[b]ut that effect is merely incidental to the *primary objective* of regulating the conduct of the profession." *Capital*, 922 F.3d at 207 (emphasis added).[2]

Having relied on *NIFLA* and rejected strict scrutiny, *Capital* held that the level of scrutiny for the regulation of professional conduct could be no more than a form of intermediate scrutiny: "To survive intermediate scrutiny, the defendant must show 'a substantial state interest' and a solution that is 'sufficiently drawn' to protect that

[2] This Court's invocation of that principle is in line with the decisions of other circuits that, in confronting First Amendment challenges to licensing regulations after *NIFLA,* invoked *NIFLA* for the proposition that "States may regulate professional conduct, even though that conduct incidentally involves speech." *See Brokamp v. James*, 66 F.4th 374, 391 (2d Cir. 2023); *Tingley v. Ferguson*, 47 F.4th 1055,1077-78 (9th Cir. 2022) (applying rational basis review), *reh'g denied*, 57 F.4th 1072 (9th Cir. 2023), *cert. filed* 22-1150 (filed May 24, 2023); *Castillo v. Secy, Fla. Dep't of Health*, 26 F.4th 1214, 1222-23 (11th Cir. 2022); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020).

interest." *Id* at 209. This Court held that North Carolina's licensing scheme fulfilled that test. *Id.*

3. Plaintiffs are challenging the regulation of professional conduct, and so any incidental speech restriction is entitled to less protection than they demand.

By regulating the practice of surveying, North Carolina's licensing law targets conduct, not speech or the expression of certain content. If speech is involved, it is incidental to the regulation of conduct—the practice of surveying. The district court was correct, therefore, to hold that this Court's decision in *Capital* controls the analysis. Plaintiffs, by contrast, inappropriately blur the distinction between speech and conduct.

Plainly, North Carolina's Act regulates a practice—land surveying—by barring unauthorized practice. The General Assembly declared that "[i]n order to safeguard life, health, and property, and to promote the public welfare, ***the practice*** of engineering and ***the practice*** of land surveying in this State are hereby declared to be subject to regulation in the public interest." N.C. Gen. Stat. § 89C-2 (emphasis added). So, the Act makes it unlawful to "***practice, or offer to practice***, engineering or land surveying in this State without first being licensed."

Id. § 89C-23 (emphasis added); *see also id.* § 89C-2 ("It shall be unlawful for any person to practice or to offer to practice engineering or land surveying in this State . . . unless the person has been duly licensed."). The target of regulation (and one of the statutes challenged by Plaintiffs) quite literally is titled the "***Practice*** of land surveying," *id.* § 89C-3(a)(7) (emphasis added), which encompasses the preparation of work product at issue in this case. *See id.* The district court was correct that "the challenged provisions of the Act are part of a generally applicable licensing regime that restricts the practice of surveying to those licensed." J.A. 978. And the district court was right to seek guidance from and analogize to *Capital*, which is binding precedent.

Capital is devastating for Plaintiffs' challenge, because the *sine qua non* of their challenge is a quest for a form of scrutiny stiffer than the standard applied in *Capital*. So, Plaintiffs try to distinguish *Capital* factually, but their argument does not withstand analysis.

Specifically, Plaintiffs try to minimize the speech aspect of what Capital was seeking to do, but obviously the practice of law involves communicative aspects in addition to non-communicative aspects. *See* 922 F.3d at 208. Capital sought to offer an array of legal services.

Capital was seeking to help its members "draft legal documents (such as contract or employee handbooks)" and "to answer questions about employment and labor law." *Id.* at 202. To communicate answers to questions, Capital operated a call center where members could speak to Capital's staff of human resources experts. *Id.* Describing itself an "expressive association," Capital emphasized its speech, which it described as "counseling"; and stressed the following: that "the legal *advice* that [it] wishes to offer—i.e., the spoken guidance CAI's attorneys would provide members—is protected speech"; that this "legal advice is speech—not conduct"; and that this speech "is censored due to the communication's content" because, under the UPL statutes, whether Capital can "speak to its members . . . depends on what words [it] uses." *See* Br. of Appellant 6, 27, 36-37,40, No. 17-2218, *Capital Associated Indus., Inc. v. Stein* (4th Cir. Dec. 11, 2017). It was that speech that formed the basis for Capital's "content-based" theory.

But this Court recognized that "[t]he UPL statutes don't *target* the communicative aspects of practicing law, such as the advice lawyers may give to clients. Instead, they *focus more broadly* on the question of *who may conduct themselves as a lawyer*." 922 F.3d at 208; *see also Brokamp* 66 F.4th at 393 (noting that "[l]ike any license requirement, the one here

at issue regulates—and to that extent limits—who can use the title 'mental health counselor,' or "practice mental health counseling," . . . .).[3]

The same reasoning applies here, where generating locational data is part and parcel of the practice surveying, since conduct entails preparing an image of property with locational data for clients like property developers, owners, and lessees. The incidental speech restriction cannot be severed from the practice of surveying, any more than Capital's call-center counseling could be severed from Capital's practice of law.

Plaintiffs also accuse the district court below (just as Capital's unsuccessful cert petition accused this Court of having done in *Capital*,

[3] Plaintiffs' characterization of the facts of *Capital* surely would come as a surprise to Capital's counsel, who emphasized in this Court that the State was regulating speech as speech by regulating Capital's communication of advice to its members, and that the regulation was content-based because it was tied to the subject of law. The briefs filed by Capital in this Court are remarkably similar to Plaintiffs' brief. Likewise, Capital's failed cert petition emphasized that Capital's challenge was directed at Capital's desire to communicate legal advice, argued that this Court erred in holding that the regulation of legal advice was a regulation of conduct that only incidentally burdened speech, argued that the regulation was content-based (legal advice, no other types of advice), and complained that this Court misapplied *NIFLA* and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), by allegedly carving out professional speech for special treatment to avoid strict scrutiny for content-based censorship. Pet. for Writ of Cert., No. 19-281, *Capital Associated Indus., Inc. v. Stein* (U.S. Aug. 30, 2019).

see n.3, *supra*) of having adopted a type of categorical immunity for professional speech that *NIFLA* rejected, but that argument has no merit. In fact, the district court quoted *NIFLA* for the proposition that the Court's precedents "did not recognize such a tradition for a category called 'professional speech'" that would immunize such speech from any First Amendment review. J.A. 975-976. The district court then invoked *NIFLA*'s declaration that professional speech is afforded less protection in two contexts, one of which is that "States may regulate professional conduct, even though that conduct incidentally involves speech." J.A. 976. In applying that principle (which *Capital* called an "exception," 922 F.3d at 207), the district court quite naturally sought guidance from *Capital*, and reasonably deemed the regulation here "[a]kin to the regulation at issue" there. J.A. 978. As further proof that the district court did not provide blanket immunity for professional speech, the district court applied the same standard of scrutiny applied in *Capital* (see below). Which is why Plaintiffs' argument is really a thinly veiled attack on this Court's precedent, which heeded *NIFLA*.

So, it is Plaintiffs who misapply precedent, while also ignoring the significance of history and tradition. From "time immemorial" the States

have established standards for licensing practitioners and prohibited the unauthorized practice of professions. *Dent v. State of W.Va.*, 129 U.S. 114, 122 (1889). In decisions dating back to the 19th Century, the Supreme Court has upheld States' power to regulate professional practice with professional licensing requirements barring unauthorized practice.[4] Hence *NIFLA*'s recognition that a law targeting professional conduct is one of the "situations in which states have *broader authority* to regulate the speech of professionals than that of nonprofessionals." *Capital*, 922 F.3d at 207 (emphasis added).

Finally, Plaintiffs' contention that the district court's ruling conflicts with *Vizaline*, 949 F.3d 927, is nonsense. *Vizaline* simply held

[4] *E.g.*, *Dent*, 129 U.S. at 122 ("As one means to this end [of securing the general welfare] it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely…. The nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonably study or application, no objection to their validity can be raised because of their stringency of difficulty."); *Hawker v. New York*, 170 U.S. 189, 195 (1898) ("It is within the power of the legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled, and learned men.") (internal quotation marks omitted); *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 611 (1935) ("That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute.").

that the district court there "erred in holding that occupational-licensing restrictions are categorically exempt from First Amendment scrutiny." *Id.* at 931. The Fifth Circuit remanded for the lower court to apply the framework applied by the district court here, i.e., to consider whether the State was regulating only speech, regulating speech as an incident to the regulation of non-expressive professional conduct, or regulating only non-expressive conduct. *Id.* at 933 ("While we hold the district court erred by categorically exempting occupational-licensing requirements from First Amendment scrutiny, we express no view on what level of scrutiny might be appropriate for applying Mississippi's licensing requirements to Vizaline's practice. We also need not decide to what degree Vizaline's practice constitutes speech or conduct. We merely reiterate *NIFLA*'s insistence on the conduct-speech analysis.").

So, *Vizaline* is in sync with the district court's methodology below. (Despite the remand in *Vizaline*, the district court there never got to perform the proper analysis because, as the district court's docket there reveals, the parties settled via a state court consent order that allowed the activity in dispute without running afoul of the definition of land surveying under Mississippi law. *See* ECF Doc. 32 (Case No. 1:17-cv-

00902). It is Plaintiffs who would create a circuit split. *See* n.2, *supra* (citing cases from other circuits rejecting post-*NIFLA* First Amendment challenges to licensing regulations).

4. Plaintiffs' argument that the Act is content-based is misguided because the challenged statutes regulate conduct and, in any event, are content-neutral.

Plaintiffs argue that North Carolina's licensing of the practice of land surveying imposes a content-based speech restriction warranting strict scrutiny. Again, this argument is foreclosed by *Capital*, which recognized that First Amendment law for content-based restrictions does not apply to regulations directed at conduct with incidental speech restrictions. Moreover North Carolina's licensing law is content-neutral, even assuming for argument's sake that its regulation of economic activity incidentally regulates speech by regulating the dissemination of locational data inherent in a land survey.

In *Capital*, Capital argued for strict scrutiny by relying on the Supreme Court's decisions on content-based speech and contending that the challenged licensing statutes censured Capital's speech (its communication of advice to members) based on subject matter (only legal advice). *See* Br. of Appellant 36-40, No. 17-2218, *Capital Assoc. Indus.,*

Inc. v. Stein (4th Cir. Dec. 11, 2017). But this Court rebuffed Capital's argument: "Because the statutes regulate conduct, we need not engage with these descriptors," i.e., the descriptors "content-based" and "identity-based." 922 F.3d at 204 n.4. In other words, the law on content-based speech restrictions was inapplicable because the challenged licensing law had the primary objective of regulating practice, with speech restricted only incidentally. *See id.*

Indeed, this Court noted that "in many of the cases concerning conduct, a law had an incidental impact on speech with particular content—such as anticompetitive agreements, discriminatory statements, prices, or informed consent—yet the Supreme Court declined to apply strict scrutiny." *Id.* This Court also noted that "[t]he *NIFLA* Court mentioned such cases to illustrate an exception [for laws targeting conduct] without any indication that they should receive strict scrutiny." *Id.* That is, conduct regulations that incidentally involve speech are an "exception" to the rules invoked by Capital and by Plaintiffs here.

And that makes perfect sense. The regulation of a professional practice (i.e., conduct) frequently restricts speech incidentally because, for example, those engaged in the economic activity communicate with

clients, patients, customers, etc. *See Castillo*, 26 F.4th at 1225-26 ("Assessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech. They are 'occupational conduct'; they're what a dietician or nutritionist does as part of her professional services."); *see also Tingley*, 47 F.4th at 1082 ("What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment [conduct]."). Indeed, this Court in *Capital* remarked that "[l]icensing laws *inevitably* have some effect on the speech of those who are not (or cannot be) licensed." 922 F.3d at 208 (emphasis added). And such incidental restrictions inevitably will be tied to the subject matter of the particular profession at issue—a link Plaintiffs would decry as "content-based."

So, Plaintiffs' theory would spark a revolution. Their method is to myopically focus on a licensing law's incidental speech restrictions—divorced from the practice (the conduct) to which they are incidental—and demand strict scrutiny because those incidental restrictions (naturally) are linked to the subject matter of the profession. This would

functionally require strict scrutiny for most laws regulating professional practice. But as *Capital* observed, "[m]any laws that regulate the conduct of a profession or business place incidental burdens on speech, yet the Supreme Court has treated them differently than restrictions on speech." *Id.* at 207-08.

The foregoing point suffices to reject Plaintiffs' argument, but Plaintiffs are also wrong to contend that the Act is not content-neutral. To decide if a law is content-neutral, a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys," *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); if the law is "facially content neutral," a court will consider the law's purpose to determine if the law was adopted "because of disagreement with the message" conveyed, *id.* at 164.

On its face, the Act does not target the communicative aspects of practicing surveying but rather focuses on who may practice as a surveyor in North Carolina (by requiring licensure and establishing minimum qualifications) and defining what activity functions as the practice of land surveying. *See Brokamp*, 66 F.4th at 393-94 ("New York's mental health counseling license requirement does not turn on the

content of what a person says" but rather "merely determines who is qualified as a mental health counseling professional" (internal quotation marks omitted)); *cf. Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (observing regulation is content-neutral if it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others"). The Act regulates the activities that function as land surveying, activities that inherently involve land with identifying locational information. *See Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 60 (2006) ("[T]he Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."). Any impact on speech is merely incidental to the primary objective of regulating the conduct of the profession of surveyors.

Nor can Plaintiffs draw support from the Act's purposes. "[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *McCullen v. Coakley*, 573 U.S. 464, 480 (2014) (internal quotation mark omitted). That is true here.

Plaintiffs argue that the Act's application requires the State to review 360 Virtual's maps and models to determine if the law applies. Opening Br. 29. Citing a snippet from *Holder*, Plaintiffs argue that "[a]s applied to Jones, 'the conduct triggering coverage under [North Carolina's] statute consists of communicating a message.'" Opening Br. 34. But *Holder* did not involve licensing or the regulation of professional conduct that incidentally involves speech. The Court in *Holder* analyzed a statute criminalizing material support to foreign-terrorist organizations when a person imparted "a specific skill" or "specialized knowledge" to such organizations. *Holder*, 561 U.S. at 12-13. However, the statutes did not apply when the person provided only "general or unspecialized knowledge." *Id*. at 27. Based on that distinction, the Court concluded that the statute directly "regulate[d] speech on the basis of its content." *Id*. Here, the Act makes no such content-based distinction. Instead, the Act regulates who may practice the profession of surveying.

The case actually implicated by Plaintiff's argument is *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464 (2022), but it is unhelpful for Plaintiffs. That case involved a sign regulation, as did the earlier *Reed* decision on which Plaintiffs rely here. City of Austin

officials had to read the signs to determine whether the regulation applied, but of course that did not mean that the regulation singled out a topic or subject matter for different treatment, because "First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Id.* at 1473.

> [E]nforcing the City's challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location. Unlike the sign code at issue in *Reed*, however, the City's provisions at issue here do not single out any topic or subject matter for different treatment. A sign's substantive message itself is irrelevant to the application of the provisions; there are no content-discriminatory classifications for political messages, ideological messages, or directional message concerning specific events, including those sponsored by religious and nonprofit organizations. Rather, the City's provisions distinguish based on location: A given sign is treated differently based solely on whether it is located on the same premises as the thing being discussed or not. The message on the sign matters only to the extent that it informs the sign's relative location.

Id. at 1472-73.

So, the Supreme Court in *City of Austin* rejected a construction of *Reed* "to mean that if a reader must ask, who is the speaker and what is

the speaker saying to apply a regulation, then the regulation is automatically content based." *Id.* at 1471 (cleaned up); *see also Brokamp*, 66 F.4th at 396 (applying *City of Austin* in rejecting argument that mental health counseling license requirement is content-based); *GEFT Outdoor, LLC v. City of Westfield*, 39 F.4th 821, 825 (7th Cir. 2022) (observing that, in *City of Austin*, the Supreme Court "altogether rejected [idea] that a need-to-read requirement" to determine whether communication falls within statutory prohibition "necessarily shows regulation based on the content of speech"). Here, enforcing the ban on the unauthorized practice of land surveying requires a review of work product (a measurable map) to determine if it meets the definition of surveying.

In the end, Plaintiffs' logic would wreak havoc in the law by inappropriately blurring the distinction between speech and conduct. *Cf. United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). "[T]he First Amendment does prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell,* 564 U.S. at 567. "That is why a ban on race-based hiring

may require employers to remove "'White Applicants Only'" signs; why 'an ordinance against outdoor fires' might forbid 'burning a flag'; and why antitrust laws can prohibit 'agreements in restraint of trade.'" *Id.* (citations omitted).

B. The district court correctly held that the challenged provisions satisfy intermediate scrutiny for a conduct regulation incidentally burdening speech.

The district court held that the Act satisfies intermediate scrutiny, applying the same standard that this Court applied in *Capital* to a professional-practice licensing law that targeted conduct (practice) and only incidentally restricted speech. Plaintiffs' quest for super-stringent form of intermediate scrutiny is misguided. This Court should affirm.

1. The district court applied the same standard that this Court applied in *Capital*.

Again, in *Capital* this Court concluded that the challenged licensing statutes targeted conduct (unauthorized practice of law), with incidental restrictions on speech, and so strict scrutiny could not apply. This Court observed that while Supreme Court cases "have not been crystal clear about the appropriate standard of review, we do know that the state actors involved were not required to demonstrate a compelling interest and narrow tailoring." 922 F.3d at 208. And this Court deemed it

significant that *NIFLA* "did highlight laws regulating 'professional conduct' as an area in which it 'has afforded *less* protection for professional speech.'" *Id.* (emphasis in *Capital*) (quoting *NIFLA*, 138 S. Ct. at 2372).

So, this Court concluded "with some confidence that the standard for conduct-regulating laws can't be greater than intermediate scrutiny." *Id.* at 208-09. And this Court proceeded to apply an intermediate level of scrutiny that "fits neatly with the broad leeway that states have to regulate professions." *Id.* at 209.

> To survive intermediate scrutiny, the defendant must show "a substantial state interest" and a solution that is "sufficiently drawn" to protect that interest.

Id.[5]

Applying the standard, this Court ruled that "North Carolina's interest in regulating the legal profession to protect clients is at least substantial." *Id.* The justifications included a concern that

[5] Other courts have applied rational-basis review in this context involving a regulation of professional conduct that only incidentally burdens speech. *See Tingley*, 47 F.4th at 1077-78 (applying rational basis review); *see also Castillo*, 26 F.4th at 1218, 1226 (affirming district court decision that applied rational basis). While the Board believes this would be an appropriate level of review, it does not matter because the Act satisfies intermediate scrutiny.

"[p]rofessional integrity could suffer if the state allows lawyers to practice on behalf of organizations owned and run by nonlawyers and to collect legal fees from clients," and that the involvement of nonlawyers "could compromise professional judgment and generate conflicts." *Id.* Finally, the Court held that North Carolina "established a *reasonable fit* between its UPL statutes and [its] substantial government interest." *Id.* at 210 (emphasis added).

To be sure, this Court acknowledged that "[a]nother state legislature might balance the interests differently." *Id.* That presumably was a response to Capital's argument that "[i]dentical associations provide legal services to members in other states without any problems," supported by "declarations from three peer associations that offer legal services through staff attorneys to member-employers in Illinois, Pennsylvania, New Jersey, Colorado, Utah, and Arizona," where the "legal advice and services they provide mirrors what [Capital] seeks to offer its members." Br. of Appellant 8-9, 27, 36-37,40, No. 17-2218, *Capital Associated Indus., Inc. v. Stein* (4th Cir. Dec. 11, 2017).

But this Court was not impressed, remarking that "intermediate scrutiny requires only a 'reasonable fit' between the challenged regulation and that state's interest—not the least restrictive means."

922 F.3d at 210 (quoting *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)).

Had this Court required North Carolina to pursue the least restrictive means to advance its interests—a form of strict scrutiny lurking in Plaintiffs' approach to intermediate scrutiny—it would have defied Supreme Court precedent and created a circuit split. *See, e.g.*, *Ward,* 491 U.S. at 798-99 (applying "intermediate" standard; the law need not be the "least restrictive" means of achieving the government's interest, so long as the interest "would be achieved less effectively absent the regulation" and the law does not "burden substantially more speech than is necessary to further the government's legitimate interests"); *Brokamp*, 66 F.4th at 391 (explaining that intermediate scrutiny to licensing requirement does not demand least restrictive means).

2. North Carolina's interest in regulating the profession of land surveying is substantial.

As the district court correctly ruled, North Carolina has a substantial interest in establishing a licensing requirement for and regulating the profession of land surveying. J.A. 979. Plaintiffs do not dispute that what they are proposing to do falls within the legislative definition of the practice of land surveying.

The General Assembly found that the Act's requirements are warranted to "safeguard life, health, and property, and to promote the public welfare." N.C.G.S. § 89C-2; *cf. Goldfarb*, 421 U.S. at 792 ("States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."). Record evidence confirms the State's substantial interest in protecting the public from negligence, incompetence, and professional misconduct in the profession of land surveying. J.A. 38 (¶50), J.A. 795-796. And, of course, "the Legislature intended its rules on the practice of surveying to protect property interests in North Carolina." *Suttles Surveying*, 742 S.E.2d at 578-79. No doubt, protecting property rights is a legitimate government interest. *McCullen*, 573 U.S. at 486-87.

The Act empowers the Board to hold licensed surveyors accountable for gross negligence and incompetence, *see Adams*, 501 S.E.2d at 661-63, and for other professional standards, including "truthfulness and ethical behavior," "the very issues for which the Legislature granted the Board power to promulgate professional rules protecting the 'safety, health, and

welfare of the public.'" *Suttles Surveying*, 742 S.E.2d at 578 (citations omitted).

The interests at play here are at least substantial ones.

3. The Act is sufficiently drawn to protect the State's substantial interests.

The district court correctly determined that the Act is "sufficiently drawn" to protect the State's interest. J.A. 981. A reasonable fit may be established in any number of ways, including "simple common sense" and the intent of the legislature as set forth in the law, as well as history, consensus, and case law. *See Recht v. Morrisey*, 32 F.4th 398, 413-14 (4th Cir. 2022); *United States v. Chapman*, 666 F.3d 220, 226-27 (4th Cir. 2012). Applying the standard applied by this Court in *Capital*, the district court confirmed that "defendants have established a reasonable fit between the Act" and the State's substantial interest. *Id.*

The licensing of land surveyors in North Carolina establishes a minimum level of competence (via education, exam, and experience). J.A. 38 (¶50), J.A. 795-796. Common sense dictates that minimum standards

serve to protect the public.[6] Allowing unauthorized practice would mean a policy of *caveat emptor* (let the buyer beware), as confirmed by the testimony of Plaintiffs' purported expert witness:

> Q. And then obviously there's some risks because we talked about errors. And the risks are that I really don't know what I'm doing and I provide a faulty work product to this client who's relying on me to provide accurate information, right?
>
> A. There's the potential for that.
>
> Q. And that potential could not only impact my client but it could impact others, meaning their neighbors, if it's an issue involving boundaries or real estate, correct?
>
> A. Potentially, yes.
>
> * * *
>
> Q. How is the client -- how is the client protected in that scenario against somebody who really doesn't know what they are doing but is often

[6] As to minimum standards, Jones is not qualified by education and experience. Jones does not have relevant educational experience (after receiving his GED he did not pursue higher education related to surveying). J.A. 586. On the issue of work experience, Jones worked as a welder, entered the IT field, picked up photography as a hobby, J.A. 587-588, J.A. 594, bought a drone, watched YouTube videos, J.A. 610, and began working with free software to create measurable maps, J.A. 643-644. He has no formal training or education in use of the software, J.A. 663, nor does he have experience in the field of photogrammetry. J.A. 506.

> the client services in the field of photogrammetry?
>
> A. That's up to the client.
>
> Q. Okay. So buyer beware?
>
> A. Okay.
>
> Q. Is that true?
>
> A. Yes.

J.A. 901-902.

The General Assembly has a different take. Licensing and regulation protect the public from negligence, incompetence, professional misconduct. *See* J.A. 38 (¶50). And this case involves the surveying discipline of photogrammetry, which is "a very complicated and ever evolving science and industry, with challenges and difficulties that require highly trained and skilled staff, most often certified or licensed by a professional organization or regulatory Board." J.A. 827.

Based on record evidence, the fundamental principle used in the discipline of photogrammetry is triangulation. *Id.*, J.A. 874. Ground control points (also known as key points) are used for measurement to obtain absolute accuracy. J.A 74, J.A. 822, J.A. 825, J.A. 829. Instead of manually placing ground points, the software relied upon by 360 Virtual

does all the work ("It does the triangulation and the stitching of images, yes."). J.A. 869-870. As acknowledged by Plaintiffs' expert on the use of drones for mapping and 3D modeling, the software accuracy (without using ground control points) is only "good enough to give a rough estimate" on location, not absolute accuracy. J.A. 884, J.A. 887. Therein lies the problem: the public should rely on accurate information from surveying data. J.A. 402. Compounding the problem, Jones does not know anything about key points, nor does he have a basic understanding why key points are important in photogrammetry:

> Q. And then DroneDeploy talks about key points. Do you know what that means when they're using key points to do this process?
>
> A. I mean, I'm assuming key points are just things you need to know, like certain parts of the process. I don't know what they're referring to as key points.
>
> Q. Do you know anything about key points?
>
> A. No, sir.
>
> Q. Have you ever been trained in key points as it relates to drone photogrammetry?
>
> A. No, sir.

J.A. 750. Mistakes involving the creation and sale of measurable maps not only harm the buyer (citizen) but would also harm neighboring property owners. J.A. 833 (potential harm to the public), J.A. 901.

So, the Act is sufficiently drawn by requiring a license and establishing a system of accountability for the licensed. The Board holds licensed surveyors accountable for gross negligence and incompetence, *see, e.g.*, *Adams*, 501 S.E.2d at 661-63, as well as for unethical and untruthful conduct, *see, e.g.*, *Suttles Surveying*, 742 S.E.2d at 578-79. By contrast, an unlicensed surveyor is not accountable to the Board's disciplinary authority for mistakes with measurable maps or unethical and untruthful conduct. The Act protects property interests in North Carolina. *Suttles Surveying*, 227 N.C. App. at 70; N.C.G.S. § 89C-2. As a neighboring State's highest court has remarked, "The Court judicially knows that a substantial amount of litigation has been engendered in the past because of inaccurate and improper surveys, and the Court continues to receive regularly disputes over boundaries, plats, and surveys affecting very substantial property rights of the citizens of the state." *Chapdelaine v. Tennessee State Bd. of Examiners for Land Surveyors*, 541 S.W. 2d 786, 788 (Tenn. 1976).

The public needs to rely on surveyors and to rely on the accuracy of their work; mistakes can create chaos. *See* J.A. 402. Even reported cases bear witness to this. *See, e.g.*, *Graham v. Deutsche Bank Nat. Tr. Co.*, 768 S.E.2d 614, 615-16 (N.C. Ct. App. 2015) (adjoining lots purchased without hiring surveyors; after development, a potential purchaser of one of the properties had it surveyed, revealing that portions of the house and septic system on one lot encroached on the other lot, resulting in lawsuit and order requiring removal of the encroaching structures); *Brandao v. DoCanto*, 951 N.E.2d 979, 983 (Mass. Ct. App. 2011) (13-inch encroachment required removal of two-and-one-half story, two-unit condominium building); *Blackburn v. Wong*, 904 So.2d 134, 135 (Miss. 2004) ("After his law office was completed, [the plaintiff] was advised by his surveyor that a portion of the building [17 feet] had been inadvertently built on [a lot owned by the defendant].").

Expert testimony in this case confirmed that "[r]elying on untrained and unskilled amateurs to recognize any of the multiple varieties of problems or deficiencies that can arise from the measurements, computations or use of tools for the survey profession to create useful survey data, could be catastrophic to the outcome of a

project and harm the public at large who relies on the accuracy and fidelity of this information." J.A. 833.

4. Plaintiffs' approach to intermediate scrutiny flouts precedent and ignores context.

Unsurprisingly, land surveying is a regulated profession nationwide, with a long history and tradition. Plaintiffs argue that 17 of the 50 States do not regulate 3D modeling, Opening Br. 51. But another way of putting it is that North Carolina is in the mainstream, and certainly not "out on a limb." *See Recht*, 32 F.4th at 415 (applying intermediate scrutiny in the context of commercial speech and noting, "In fact, two other States have passed nearly identical legislation [to the challenged legislation], and several others have considered similar laws in recent legislative sessions."). Jones admittedly does not have experience in 3D modeling because "it's very hard and I didn't get far enough in the learning process." J.A. 543. Yet, Jones is here seeking the legal authority to create and sell 3D models – models which Plaintiffs' expert witness acknowledges requires a certain amount of experience. J.A. 908-910. Without licensure, clients would have no way of knowing whether Plaintiffs have the necessary experience.

As this Court explained in *Capital* (in response to the plaintiff's argument and proof that some States allowed what North Carolina forbade with its unauthorized-practice law), a law is not unconstitutional under intermediate scrutiny because "[a]nother state legislature might balance the interests differently." 922 F.3d at 209-10. This is because the level of scrutiny applied "requires only a reasonable fit between the challenged regulation and the state's interest – not the least restrictive means." *Id.* at 210. The Constitution does not drag all States to the lowest denominator among them, which would entail a handful of States—perhaps even one—dictating for all.

Nevertheless, Plaintiffs cite a handful of other States' laws and then demand proof that the General Assembly actually "tried and considered," but deemed inadequate, such "less-speech-restrictive alternatives." Opening Br. 55. It is difficult what to make of this argument. The argument seems to call for proof that the General Assembly considered breaking with consensus or a longstanding tradition of land surveying regulation by dispensing with a licensing requirement or redefining the practice. In effect, Plaintiffs' logic would seem to demand proof that the General Assembly considered

unconventional *deregulation*. This argument is made even though unlicensed surveyors are not accountable to the Board (which has special expertise and authority), and even though photogrammetry implicates concerns (about property rights, professional competency, etc.) that implicate the Act's checks on competency and accountability.

The argument is not well taken. Plaintiffs' proposed standard relies on case law that is inapposite. Before explaining why, it bears note that, under the First Amendment, context matters. Take, for example, commercial speech. The First Amendment "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression," *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563 (1980), allowing commercial speech to be "subject to modes of regulation that might be impermissible in the realm of noncommercial expression," *Bd. of Trs. v. Fox*, 492 U.S. 469, 477 (1989). Which is why this Court, in a recent commercial speech case, distinguished First Amendment cases that "arose in a different context," including *Reed*, which "concerned political speech at the heart of the First Amendment," a "totally different context." *Recht*, 32 F.4th at 408.

This case involves the context confronted in *Capital*, a generally-applicable professional licensing scheme directed at conduct (the practice of surveying) and (at best) only incidentally involving speech, professional speech. *NIFLA* recognized the incidental-speech context as one of "two contexts," 138 S. Ct. at 2374, warranting "*less protection* for professional speech," *id.* at 2365 (emphasis added). Plaintiffs instead rely on cases involving different contexts—namely laws (like the ones reviewed in *NIFLA*) directed at "speech as speech," *id.* at 2374, and indeed contexts that lie at the heart of the First Amendment.

For example, *Billups v. City of Charleston, S.C.*, 961 F.3d 673 (4th Cir. 2020), held that the challenged law was directed at speech (speaking to tourists about Charleston), not at conduct with only incidental burdens on speech. *Id.* at 683 ("The Ordinance, however, cannot be classified as a restriction on economic activity that incidentally burdens speech."). And, importantly, the law was directed at speech in "traditional public fora"—"public sidewalks and streets"—"where First Amendment rights are at their apex." *Id.* (internal quotation marks omitted). Thus, as the district court below noted, the law in *Billups* involved a different context than this case, which involves an area in which "states have 'broader authority' to regulate." J.A. 981 (quoting *Capital*, 922 F.3d at 207).

Billups relied on this Court's decision in *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015), also relied on by Plaintiffs here. But *Reynolds* reviewed a local ordinance that, again, directly regulated speech (solicitation of charitable contributions) in a traditional public forum (public streets).[7] *See id.* at 225.

Reynolds sought guidance from *McCullen v. Coakley*, 573 U.S. 464 (2014), which too involved traditional public fora and not a professional practice regulation. *McCullen* reviewed a unique law, enacted by Massachusetts, that created a fixed buffer zone around abortion clinics, preventing abortion opponents from communicating with abortion seekers in traditional public fora. Critical to the Court's analysis: the law "[b]y its very terms . . . regulate[d] access to 'public way[s]' and 'sidewalk[s]," "areas occupying a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *Id.* 476 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). These areas, the Court explained, "have immemorially been held in trust for the use of the public and, time out of mind, have

[7] Plaintiffs Opening Brief acknowledges that the Act does not mark out restrictions on time, place, and manner. Opening Br. 52-53.

been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Id.* (internal quotation marks omitted). They are places "where the government's ability to regulate speech is '*very limited*.'" *Id.* at 477 (emphasis added) (quoting *Grace*, 461 U.S. at 177). Yet in those places, Massachusetts's law was thwarting "forms" of speech ("normal conversation and leafletting") that "have historically been more closely associated with the transmission of ideas than others." *Id.* at 488. This put "vital First Amendment interests at stake." *Id.* at 2540. The law was "truly exceptional" because "no other State" had done this, *id.* at 490, and the State had available to it a "variety of approaches that appear capable of serving its interests, *without excluding individuals from areas historically open for speech and debate*," *id.* at 494 (emphasis added). Again, context matters.

Plaintiffs also rely on this Court's split decision in *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fedn., Inc.*, 60 F.4th 815 (4th Cir. 2023) ("*PETA*"), *cert. pet. Pending* 22-1150 (filed May 26, 2023). But that case involved "novel restrictions" on a special category of speech: "protected newsgathering." *See id.* at 821, 832-33; *see also id.* at 835 ("[W]e decline to enjoin any potential applications of the

Act outside the newsgathering context."). So the law went to the heart of the First Amendment. And the law's provisions "chill[ed] an alarming about of speech," *id.* at 831, which led this Court to demand more of an evidentiary obligation "[b]efore a State may pass such expansive speech restrictions," *id.* at 832. The Court ultimately concluded that the "novel restrictions on newsgathering" at issue "do not fit any of the State's professed interests in passing the Act." *Id.* at 832-33. So again, the case is far afield.

In sum, Plaintiffs rely heavily on cases involving laws targeting speech, special categories of speech, and specially protected fora traditionally reserved for the exchange of ideas. But here the context concerns licensing and regulation of a professional practice, a law directed at conduct, a law that (at best) involves speech only incidentally (professional speech), and certainly not a law restricting the exchange of ideas in a traditional public forum.

So, again, the analogous case is *Capital*, which required "a reasonable fit between [unauthorized practice] statutes" and the State's interest, *Capital*, 922 F.3d at 210, and not more—not explicit proof of failed attempts or a consideration of alternative avenues of

communication.[8] As noted, in *Capital* it did not matter for intermediate scrutiny that the plaintiff found a handful of other States that regulated less restrictively. To be sure, courts may properly consider whether the challenged law is an "outlier"—i.e., "lack[ing] traditional counterparts" or having "few parallels in contemporary practice"; "the more 'exceptional' a rule, the more likely which might trigger concern that the government has overlooked less burdensome 'options that could serve its interests just as well.'" *Drummond v. Robinson Twp.*, 9 F.4th 217, 222 (3d Cir. 2021) (quoting *McCullen*, 573 U.S. at 490). This case, by contrast, does not involve an outlier. North Carolina "is not out on a limb." *Recht*, 32 F.4th at 415.

Lurking in Plaintiffs' argument seems to be a premise that intermediate scrutiny demands *the least restrictive means*. That argument is foreclosed by *Capital*, conflicts with Supreme Court precedent, and would create a circuit split, as explained above.

[8] Here, Plaintiffs remain free to create and distribute photos of land that do not constitute the practice of land surveying, and anyone seeking to become a land surveyor in North Carolina can (as in other States) acquire the requisite qualifications to apply for a license. Plaintiffs' complaint did not challenge the qualifications for licensure or assert a claim that their proposed activities are not encompassed by the definition of land surveying.

For these reasons, Plaintiffs' argument for a "disclaimer" accommodation does not withstand analysis, but it also bears noting that Plaintiffs' proposed disclaimer puts the burden on citizens to understand what they are buying and how the information can be used, while telling citizens that the information does have a relative degree of accuracy.[9] J.A. 227 ("These maps do have a RELATIVE accuracy of 1-3 inches."). The public is relying on accurate information and may not understand the difference between a relative degree of accuracy as compared to absolute accuracy. Also, the public may not fully understand the Act's accountability checks that protect against malpractice and unethical practice, a system that holds a licensed surveyor accountable for accuracy. Plaintiffs claim that they want to provide information that is useful, meaning that the information is sufficiently accurate to be used

[9] Plaintiffs purport to cite five States with a different approach, two involving advisory opinions (Kentucky and Mississippi). It is not evident that the Kentucky opinion would apply to Plaintiffs because the Kentucky opinion raises concerns about reasonable reliance on precise locations contained in the activities ("[t]hese activities must be accomplished by or under the direct supervisory control of a professional land surveyor."). J.A. 120-122. As to the state statutes cited, it is not evident that Virgina would allow the disclaimer Jones advocates because the Virginia statute does not allow the use of photogrammetric methods to create maps "for the design, modification, or construction of improvements to real property," "nor provide any measurement showing the relationship of any physical improvements to any property line or boundary." Va. Code § 54.1-402(C).

for locational purposes by property developers, owners, and lessees. A policy of *caveat emptor* also ignores the reality that mistakes in surveying data can harm third parties with neighboring land. The legislature is not required to allow the unlicensed to disclaim their way out of providing surveys on which the public may rely, any more than the legislature is required to do so for the unlicensed practice of engineering (also regulated by the Act). The Act reflects a legislative judgment that is logical and works to protect the public.

* * *

In the final analysis, and beyond precedent, Plaintiffs' logic (evidently as a feature, not a bug) lacks an adequate limiting principle. Adopting that logic would doom untold professional licensing laws that the various States have enacted to protect public interests.

CONCLUSION

The judgment of the district court should be affirmed.

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Respectfully Submitted,

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