No. 24-276

In the Supreme Court of the United States

RYAN CROWNHOLM, *et al.*,

Petitioners,

v.

RICHARD B. MOORE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners create and sell site plans that depict the precise distance between property lines and fixed works such as buildings. The state Board for Professional Engineers, Land Surveyors, and Geologists determined that petitioners had practiced land surveying without a license. *See* Cal. Bus. & Prof. Code §§ 8708, 8726. Petitioners sued, arguing that the application of California's land-surveyor licensing statute to them violates the First Amendment. The court of appeals affirmed the dismissal of that claim after reviewing the particular features of petitioners' business model. The questions presented are:

1. Whether the court of appeals correctly held that the application of the licensing statute to petitioners regulated their conduct and only incidentally burdened their speech.

2. Whether the court of appeals employed the correct standard in reviewing the application of a professional licensing statute that regulates conduct and only incidentally burdens speech.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

STATEMENT

1. Like every other State, California requires a license to practice land surveying. *See* Cal. Bus. & Prof. Code § 8708; Pet. App. 76a-77a. Land surveying includes activities in which a person "[l]ocates," "establishes," or "retraces the alignment or elevation" of buildings or other fixed works, or "[l]ocates," "establishes," or "retraces any property line or boundary." Cal. Bus. & Prof. Code § 8726(a)(1), (3). It also includes "[d]etermin[ing] the information shown or to be shown on any map or document prepared or furnished in connection" with these surveying activities. *Id.* § 8726(a)(7).

Land surveying requires specialized training and expertise. *See* C.A. S.E.R. 331-332. Surveyors must be prepared to "render[ ] a professional opinion as to the spatial relationship between fixed works or natural objects and the property line." *Id.* at 298. That distinguishes land surveying from informal drafting. *See id.*; *see also Bryant v. Blevins*, 9 Cal. 4th 47, 63-64 (1994) (Mosk, J., dissenting) (describing "the complexity of the rules of surveying" and "the skill necessary to apply them correctly").

Surveying errors "may result in incorrect locations of property lines, gaps in the location of property ownership rights, or the construction of fixed improvements that encroach on required setbacks" or the property line. Pet. App. 74a (internal quotation marks omitted). Those errors can diminish "the value of the client's land, creat[e] disputes with neighbors whose property lines are affected," and burden the courts with unnecessary litigation. *Id.* (internal quotation marks omitted); *see* 117 A.L.R.5th 23, § 2[a] (2004) ("Any mistake by a surveyor in performing a survey or in stating its results may cause persons relying

thereon to suffer considerable financial loss."); *see also, e.g.*, *Kent v. Bartlett*, 49 Cal. App. 3d 724, 726-727 (1975) (erroneous survey led to encroachment of retaining wall and driveway on neighbor's property); *Roberts v. Karr*, 178 Cal. App. 2d 535, 540-541 (1960) (landowners harmed by surveyor's error in measuring elevation of land).

In light of those concerns, and "[i]n order to safeguard property and public welfare," Cal. Bus. & Prof. Code § 8708, California requires a license to practice land surveying. That requirement has been in place for nearly a century. *See* Pet. 10 (citing 1933 Cal. Stat. 1282). As in other States, the licensing requirement "helps ensure that land surveyors have demonstrated competency and knowledge of relevant state laws and that licensees who violate those standards are subject to discipline." Pet. App. 75a. To obtain a license, applicants must pass examinations testing their "fundamental knowledge of surveying, mathematics, and basic science" and their ability to apply that knowledge in practice. Cal. Bus. & Prof. Code § 8741.1; *see also id.* §§ 8741, 8742; Pet. App. 39a (summarizing education and testing requirements).

The Board for Professional Engineers, Land Surveyors, and Geologists oversees the regulation of land surveyors in California. *See* Cal. Bus. & Prof. Code § 8710. The respondents in this proceeding are the members of that Board and its executive officer. They are charged with "exercising [their] licensing, regulatory, and disciplinary functions" for "[p]rotection of the public." *Id.* § 8710.1. In addition to conducting examinations and issuing licenses, respondents investigate complaints and impose regulatory discipline where appropriate. *Id.* §§ 8745, 8747, 8780.

2. Petitioner Ryan Crownholm is a "'serial entrepreneur.'" Pet. App. 99a. He is not licensed to practice land surveying in California. *Id.* at 97a, 149a. He sells "site plans" through one of his companies, petitioner Crown Capital Adventures, Inc. *Id.* at 95a, 97a. According to petitioners, a site plan is "an aerial-view drawing of a property showing features relative to the lot boundaries." *Id.* at 95a.

Petitioners sell their site plans through a website, MySitePlan.com. Pet. App. 97a. When a customer orders a site plan, petitioners prepare the plan "based on publicly available satellite imagery and [Geographic Information System (GIS)] data." *Id.* at 110a. Petitioners' site plans purport to measure precise distances between property lines and structures. *See id.* at 111a; *see also id.* at 7a-8a. And petitioners advertise that their site plans include "measurements between major features." *Id.* at 80a (internal quotation mark omitted); *see* C.A. S.E.R. 279. The labels on the site plans indicate that petitioners' measurements are accurate to within one-tenth or even one-hundredth of a foot. *See, e.g.*, Pet. App. 111a; C.A. S.E.R. 278; *see generally* C.A. S.E.R. 298 ("One one-hundredth of a foot is a common engineering measurement that implies the measurements meet engineering/land surveying standards").

Petitioners sell site plans to customers for various purposes. Pet. App. 111a. One sample plan displayed on petitioners' website—"the most popular version" on offer—says it was created for "[pl]anning for [a] Propane tank." *Id.* at 110a, 111a. Although petitioners' website asserts that their site plans are not legal surveys, the sample plan features no such statement. *Id.* at 108a, 111a. Other site plans sold by petitioners have been used in applying for permits to build new

structures and "for the demolition of a house or another structure." *Id.* at 111a.

A member of the public filed a complaint about petitioners' activities. C.A. S.E.R. 115-119. The Board determined that petitioners engage in unlicensed land surveying because they prepare "site plans which depict the location of property lines, fixed works, and the geographical relationship thereto." Pet. App. 150a; *see* Cal. Bus. & Prof. Code § 8726(a). The Board ordered petitioners to pay a $1,000 fine and stop practicing land surveying without a license. Pet. App. 149a. Petitioners paid the fine and opted not to pursue an administrative appeal of the Board's citation order. *Id.* at 119a.

3. Petitioners then sued respondents. Pet. App. 94a-95a. The complaint alleged, among other things, that the application of California's land-surveyor licensing law to their business violates the First Amendment. *Id.* at 131a. Petitioners moved for a preliminary injunction, and respondents moved to dismiss the complaint for failure to state a claim. *Id.* at 27a, 56a.

The district court denied a preliminary injunction and dismissed the complaint. Pet. App. 54a, 90a. As relevant here, the court concluded that California's licensing law regulates petitioners' conduct and thus does not trigger strict scrutiny under the First Amendment. *Id.* at 37a, 66a-73a. The court then analyzed petitioners' claim under the rational basis standard. *Id.* at 38a. The challenged law satisfies that standard because it is rationally related to the State's interest in protecting the public from incompetent surveying—such as by reducing the risk that building permits will be issued based on incorrect depictions of property lines. *Id.* at 38a-39a; *see id.* at 73a-75a.

Petitioners appealed, challenging both the dismissal of their claims and the denial of their preliminary injunction motion. The court of appeals affirmed. Pet. App. 13a. As to petitioners' First Amendment claim, the court began by analyzing how California's licensing law applies to petitioners' business activities. *Id.* at 3a. It agreed with the district court that petitioners "have been regulated based on their conduct." *Id.* The court of appeals noted that petitioners "assess their clients' needs, access [GIS] information and 'other publicly available imagery,' and use a computer-aided design program to electronically draft site plans." *Id.* at 4a. Those site plans "have the effect of providing a 'professional opinion as to the spatial relationship between fixed works or natural objects and the property line.'" *Id.* at 6a. The court recognized that respondents issued a citation to petitioners based on these "unlicensed land surveying activities." *Id.* at 5a. That action "regulate[d] Plaintiffs' conduct and impose[d] only incidental burdens on their speech." *Id.* at 6a. Consistent with circuit precedent, the court next applied rational basis review. *Id.* It held that the State's legitimate interests in safeguarding property and public welfare are "well served by preventing 'incompetent people and entities [from] disseminating land surveying products.'" *Id.* at 7a.

The court of appeals denied rehearing en banc, without dissent and without any judge requesting a vote. Pet. App. 92a-93a.

ARGUMENT

Petitioners ask this Court to review two questions related to their as-applied First Amendment claim. The first concerns how to determine whether professional licensing laws regulate conduct or speech. On petitioners' telling, review is necessary because some

courts treat regulations as "immune from First Amendment scrutiny *solely* because the restriction is imposed by an occupational-licensing law that is generally aimed at regulating conduct." Pet. 2 (emphasis added); *see also id.* at 16, 23, 28, 33, 40. But that premise is mistaken. The courts of appeals broadly agree about how to conduct the relevant constitutional inquiry; neither the court of appeals below nor any other circuit categorically exempts professional licensing laws from First Amendment scrutiny; and there is no basis for concluding that petitioners' claim would have fared better in another court. The second question presented, concerning the standard of scrutiny for professional licensing laws that regulate conduct and only incidentally affect speech, also does not warrant this Court's attention. Although the few circuits that have addressed this issue have not settled on a uniform approach, a law like this one would survive review under any existing formulation.

1. Petitioners fail to identify any persuasive reason for this Court to review the first question presented.

a. There is no conflict of authority. Like other circuits that have considered First Amendment challenges in this area, the decision below tracks the approach in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) (*NIFLA*). As *NIFLA* recognized, States may not "treat[] professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 773. But "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.*

at 768.[1] A law is subject to strict scrutiny if it "regulates speech as speech"; by contrast, a law that merely "impos[es] incidental burdens on speech" triggers "less protection." *Id.* at 768-770 (internal quotation marks omitted). "While drawing the line between speech and conduct can be difficult" in individual cases, it is a "long familiar" exercise. *Id.* at 769 (internal quotation marks omitted).

i. Petitioners principally allege a three-way circuit conflict over how to apply the speech-conduct distinction "to surveyor-licensing laws specifically." Pet. 19. They contend that "each of those three [circuits] applied a different form of speech-versus-conduct analysis, and . . . reached three different conclusions." *Id.* That misunderstands the cited decisions.

In *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927 (5th Cir. 2020), the district court dismissed a First Amendment challenge to Mississippi's land-surveyor licensing law. The district court had assumed "that occupational-licensing restrictions are categorically exempt from First Amendment scrutiny." *Id.* at 931. The Fifth Circuit held that *NIFLA* prohibits that kind of categorical exemption. *Id.* It explained that "the relevant question is whether, as applied to Vizaline's practice, Mississippi's licensing requirements regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only

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[1] *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (rejecting First Amendment challenge to requirement that doctors inform patients about the risks of abortion), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-457, 468 (1978) (rejecting First Amendment challenge to regulation that prohibited lawyers from soliciting clients in person).

non-expressive conduct." *Id.* Because the district court "did not perform this analysis," the Fifth Circuit reversed and remanded. *Id.* at 931, 934. It "express[ed] no view on what level of scrutiny might be appropriate for applying Mississippi's licensing requirements to Vizaline's practice," and it declined to "decide to what degree Vizaline's practice constitutes speech or conduct," leaving those questions to the district court in the first instance. *Id.* at 934; *cf. Hines v. Quillivan*, 982 F.3d 266, 272 (5th Cir. 2020) (reversing and remanding in another case involving professional regulation "for the district court to make the initial evaluation of whether conduct or speech is being regulated").

The Fourth Circuit addressed a similar challenge in *360 Virtual Drone Services LLC v. Ritter*, 102 F.4th 263 (4th Cir. 2024), *pet. for cert. pending*, No. 24-279. As in *Vizaline*, the Fourth Circuit recognized that "professional speech" is not exempt from First Amendment scrutiny. *Id.* at 271 (internal quotation marks omitted). The "fact that the challenged law [is] part of a generally applicable licensing regime" cannot, by itself, be "the end of the inquiry." *Id.* at 273 (internal quotation marks omitted). Instead, the court of appeals focused on whether North Carolina's land-surveyor licensing law—"as applied to Plaintiffs"—"is a regulation of 'speech as speech,' or a regulation of professional conduct subject to 'less protection.'" *Id.* at 272 (quoting *NIFLA*, 585 U.S. at 768, 770). The court described a range of considerations that can bear on that inquiry. *See id.* at 274-275. It ultimately concluded that the challenged application of the North Carolina statute was "aimed at conduct." *Id.* at 278.

Like those decisions, the court of appeals below examined "whether Plaintiffs have been regulated based

on their speech or based on their conduct." Pet. App. 3a. It recognized that "the key question is whether 'the conduct triggering coverage under the statute consists of communicating a message.'" *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)). The relevant conduct here involved assessing "clients' needs, access[ing] Geographic Information System ('GIS') information and 'other publicly available imagery,' and us[ing] a computer-aided design program to electronically draft site plans" that "depict[] property boundaries, structures, and measurements." *Id.* at 4a; *see id.* at 6a ("providing 'a professional opinion as to the spatial relationship between fixed works or natural objects and the property line'"). Accordingly, the court reasoned that application of the statute regulates petitioners' "conduct and imposes only incidental burdens on their speech." *Id.* at 6a.

There is no conflict between that analysis and the approach in *Vizaline* or *360 Virtual Drone*. Each of those decisions rejected the view that the application of a professional licensing law is "immune from First Amendment scrutiny solely because" the law "is generally aimed at regulating conduct." Pet. 2. The Fifth Circuit never applied the speech-conduct distinction to the law before it, so *Vizaline* cannot conflict with the decision below on that issue. And although the Ninth Circuit's unpublished memorandum opinion in this case may not have elaborated on every particular consideration informing the court's holding, the case has the same general features that guided the Fourth Circuit's similar conclusion in *360 Virtual Drone*. Petitioners' activity is "conduct that classically falls under the surveying profession"; their site plans convey "an implied accuracy" that "can create significant liability issues" and other problems if the plans are inaccurate; any speech between petitioners and their clients

"takes place in the private sphere"; and the law does not affect "unpopular or dissenting speech." *360 Virtual Drone*, 102 F.4th at 278; *see* Pet. App. 4a-8a.

ii. Petitioners' arguments based on cases from outside the land-surveying context (Pet. 24-28) also fail to establish a relevant conflict.

Petitioners first allege an intra-circuit conflict within the Eleventh Circuit. Pet. 26-28. They contrast one decision holding that a licensing requirement for a "holistic health coach" was aimed at conduct, *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1216 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 486 (2022) (No. 22-135), with others holding that restrictions on certain mandatory employee meetings and on conversion therapy were regulations on speech, *see Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1275 (11th Cir. 2024); *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020). Again, none of those decisions treats professional licensing regimes as categorically exempt from First Amendment scrutiny. *See, e.g.*, *Del Castillo*, 26 F.4th at 1225-1226. And whatever differences in analytical approach (if any) might exist within the Eleventh Circuit, it is "primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). Such difficulties certainly do not provide a basis for granting certiorari in a case out of a different circuit involving a different kind of statute.

Similarly, petitioners contend that Ninth Circuit precedent "conflicts with itself." Pet. 26 (discussing *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020)). Even if certiorari were an appropriate mechanism for resolving intra-circuit conflicts, *but see Wisniewski*, 353 U.S. at 902, that

contention is wrong. In *Pacific Coast Horseshoeing*, the court held that the challenged statute "not only implicate[d] speech," it "engage[d] in content discrimination" by "favor[ing] particular kinds of speech and particular speakers." 961 F.3d at 1072, 1073 (emphasis omitted). California's licensing requirement for land surveyors cannot plausibly be viewed in the same way.

Finally, petitioners allege a conflict regarding First Amendment challenges to regulations on conversion therapy. Pet. 15-16; *see Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023) (No. 22-942); *Otto*, 981 F.3d 854; *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014). Just last Term, however, this Court denied a petition alleging the same conflict. *See Tingley*, 144 S. Ct. 33. And if the Court were ever inclined to review that issue in the future, it would presumably grant certiorari in a case that involves conversion therapy—not land surveying.

b. The court of appeals correctly applied the speech-conduct distinction to the law challenged by petitioners.

States may regulate professions involving "a certain degree of skill and learning upon which the community may confidently rely," including by imposing limits on who may practice those professions. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). California's land-surveyor licensing statute does just that. *See* Cal. Bus. & Prof. Code §§ 8708, 8726. The court of appeals recognized that a professional licensing statute might nonetheless be subject to strict scrutiny if "'the conduct triggering coverage under the statute consists of communicating a message.'" Pet. App. 3a (quoting *Holder*, 561 U.S. at 28). So it examined petitioners' activities to "determine whether [petitioners] have

been regulated based on their speech or based on their conduct." *Id.*; *see id.* at 4a. That examination revealed that the licensing statute was triggered by petitioners' conduct—assessing their clients' needs and using public records and computer-aided design programs to depict spatial relationships between property boundaries, structures, and other features. *See id.* at 4a-6a; *see also, e.g.*, C.A. S.E.R. 327-328. And "to the extent [petitioners'] activity has some expressive component, the Act's effect on this component is merely incidental to its primary effect of regulating" petitioners' unlicensed professional conduct. Pet. App. 5a.

Petitioners' critique of that analysis is unpersuasive. They first contend that the court of appeals "never examined Petitioners' actions to determine if they were speech or conduct." Pet. 23. But that is precisely what the court did when it examined the details of petitioners' activity "as they describe" it. Pet. App. 4a; *see supra* pp. 8-9.

Petitioners also suggest that California's statute is a content-based regulation because its application "turns only on what [petitioners'] drawings 'depict.'" Pet. 13 (citing *Reed v. Town of Gilbert*, 576 U.S. 155, 163-164 (2015)); *see also id.* at 25-26. But permissible regulations on professional conduct often entail some consideration of a person's speech to determine whether that person is engaged in the regulated professional conduct. For example, applying a ban on "[t]he solicitation of business by a lawyer through direct, in-person communication with the prospective client," *Ohralik*, 436 U.S. at 454, requires determining whether the lawyer solicited the prospective client to pay for legal advice or some other non-legal service. Likewise, applying state law that recognizes "[l]ongstanding torts for professional malpractice,"

NIFLA, 585 U.S. at 769, may require considering whether the speech in question was legal advice. Strict scrutiny is not triggered here just because review of petitioners' site plans confirms that they engaged in unlicensed land surveying. *Cf. City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 72 (2022) ("This Court's First Amendment precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral.").

Last, petitioners' criticism of the breadth of California's land-surveyor licensing statute (Pet. 10-12, 38-39) is misplaced. Petitioners advanced an overbreadth challenge below, which the court of appeals properly rejected. *See* Pet. App. 9a ("Beyond providing no evidence that the Act has actually been enforced so broadly, Plaintiffs' string of hypotheticals depends on an expansive and unsupported reading of the Act." (internal quotation marks omitted)). In this Court, however, petitioners only seek review of their as-applied First Amendment claim. *See, e.g.*, Pet. i, 24-25, 34 n.6.[2]

c. This case would also be a poor vehicle for the Court to elaborate on how the First Amendment applies to professional licensing requirements.

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[2] As the court of appeals acknowledged, California recognizes reasonable limits on its definition of land surveying. *See, e.g.*, Pet. App. 10a (discussing limits in California Business and Professions Code Section 8726(a)(7)); Cal. Bus. & Prof. Code § 8727 (surveys made solely for geological or landscaping purposes by persons licensed to practice geology or landscape architecture do not constitute surveying if they "do not involve the determination of any property line"); 23 Ops. Cal. Att'y Gen. 86, 90 (1954) (definition of land surveying does not encompass "map making in the abstract").

Petitioners identify no basis for concluding that *any* court would view the application of California's land-surveying statute to their activities as a regulation of "speech as speech." *NIFLA*, 585 U.S. at 770. They characterize the unpublished decision below as "deviat[ing]" from the Fourth Circuit (Pet. 22) because the court below did not elaborate on the analytical "guideposts" for distinguishing conduct from speech. *360 Virtual Drone*, 102 F.4th at 272. But both courts—confronted with the application of similar licensing statutes to similar conduct—held that the statute "regulates professional conduct and only incidentally burdens speech." *360 Virtual Drone*, 102 F.4th at 278; *see* Pet. App. 6a; *supra* pp. 8-10; *cf. Vizaline*, 949 F.3d at 934 (declining to reach question whether application of land-surveying statute regulates speech).

Nor does this case implicate concerns about "state regulators . . . increasingly widening the scope of occupational-licensing laws to restrict who may make use of and disseminate basic information." Pet. 38; *see* New England Legal Foundation Br. 11-13. Land surveying is a longstanding profession that requires specialized training and expertise. *See* C.A. S.E.R. 331-332. California established a voluntary licensing scheme for land surveyors in the nineteenth century. *See* 1907 Cal. Stat. 310-312; C.A. S.E.R. 40-42 (1891 statute). It has required a license to practice land surveying for nearly a century. *See* 1933 Cal. Stat. 1282. And its statutory definition of land surveying "has remained relatively unchanged" for 80 years. Pet. App. 76a. California is not alone: "all 50 states and the U.S. territories require that land surveyors be licensed." *Id.* at 76a-77a.

Finally, petitioners' certiorari-stage arguments hint at a shift in their interpretation of the requirements of California's land-surveying statute. In the proceedings below, petitioners conceded that "we do fall within the statutes." C.A. S.E.R. 21; *see id.* at 8 ("we agree that what we do falls within the very broad constraints of the definition of land surveying"); Pet. App. 8a (petitioners "conceded at oral argument that their site plans are subject to regulation under the Act"). But their petition strikes a different note: They now say "*the Board* requires a land-surveyor license merely for drawing and disseminating the basic site plans that Petitioners . . . routinely draw," based on "*the Board's view*" that site plans "fall[] within the definition of land surveying." Pet. 10 (emphasis added). And petitioners now seem to disagree with that interpretation of state law. They cite past state authority for a narrower understanding of California's land-surveying statute, *see id.* at 11, and they attribute the "grow[th]" in "California's surveying-practice laws" to how "*regulators* interpret them," *id.* (emphasis added).

If petitioners dispute respondents' interpretation of the state licensing statute, they could have sought a definitive resolution of that question in state court. They did not. *See* Pet. 12. Uncertainty surrounding petitioners' views about the proper interpretation of the governing statute renders this case especially unsuitable for constitutional analysis by this Court. *Cf. Moyle v. United States*, 144 S. Ct. 2015, 2021 (2024) (Barrett, J., concurring) ("[S]ince we granted certiorari, the parties' litigating positions have rendered the scope of the dispute unclear, at best.").[3]

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[3] Compounding that uncertainty, petitioners are currently challenging a subsequent citation in which the Board again concluded

(continued…)

2. Petitioners also ask the Court to address what standard of review applies to a professional licensing law that regulates conduct and only incidentally burdens speech. Pet. i, 33-37. In *NIFLA*, this Court held that such speech is entitled to "less protection" than strict scrutiny. 585 U.S. at 768. Lower courts have followed that guidance. *See* Pet. 36-37. Although courts have not yet coalesced around a uniform approach as to what particular standard of review should apply, the formulations employed across the circuits in the wake of *NIFLA* would all lead to the same result in this case.

The court of appeals below relied on circuit precedent in applying rational basis review. Pet. App. 6a-8a (citing, *e.g.*, *Tingley*, 47 F.4th at 1077). That approach is generally consistent with *NIFLA* and prior cases, which recognized that a "reasonable" informed consent law may be a permissible regulation of the medical profession without applying any form of heightened scrutiny. *NIFLA*, 585 U.S. at 770 (quoting *Casey*, 505 U.S. at 884). As the court of appeals explained, moreover, the application of California's surveyor-licensing statute to petitioners is rationally related to the State's legitimate interests in precise and reliable surveying. Pet. App. 6a-8a. Petitioners

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that petitioners' site-plan activities constitute practicing land surveying without a license under California's statute. *See* Pet. App. 12a n.5; Ryan Crownholm, Case No. 2024060431 (Cal. Off. of Admin. Hearings, Gen. Jurisdiction Div.) (hearing scheduled for May 1, 2025). In that administrative proceeding, petitioners say they intend to argue that they "are not engaged in the practice of surveying as defined by statute." C.A. Dkt. 52 at 7. If that administrative appeal is unsuccessful, petitioners could file a state-court action advancing their interpretation of state law. *See* Cal. Code Civ. Proc. § 1094.5.

do not contest the lower courts' conclusion that the statute survives rational basis review.

Instead of conducting rational basis review, the Fourth Circuit applied a "loosened intermediate-scrutiny test for professional-conduct-focused regulations" in *360 Virtual Drone*. 102 F.4th at 276. It asked whether the regulation was "sufficiently drawn to protect a substantial state interest." *Id.* at 278 (internal quotation marks omitted). Here, as in *360 Virtual Drone*, there are "substantial state interests" in "protecting property interests and promoting the public welfare" by ensuring that land surveying "conforms to a minimum level of competence." *Id.* at 279. And a requirement that persons obtain a license to practice land surveying is sufficiently drawn to protect those interests. *See id.* at 280. Again, petitioners do not contend that California's land-surveyor licensing statute would fail the Fourth Circuit's standard.

Petitioners instead argue (Pet. 34-36) that regulations on professional conduct that incidentally burden speech should be subject to a more demanding intermediate scrutiny test from *United States v. O'Brien*, 391 U.S. 367 (1968). But none of the cases they cite for that proposition applied that test to a professional licensing law that regulates conduct and only incidentally burdens speech. Their principal authority, *National Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 777 (5th Cir. 2024), *cert. denied*, No. 23-1105 (Oct. 7, 2024), involved state restrictions on the use of drones to surveil people or private property. The court applied the intermediate scrutiny test "[i]n an abundance of caution," based on considerations specific to aerial surveillance, even though "the non-expressive aspects of the [law] predominate over any

expressive component." *Id.* at 790; *see also id.* at 793 (intermediate scrutiny applies "[a]t most").[4]

In any event, the outcome of this case would not have been different under petitioners' preferred test, which requires a showing that the challenged regulation is appropriately tailored to advancing "an important or substantial governmental interest" that "is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377. California's licensing requirement furthers the State's important interests in protecting property and public welfare. *See* Pet. App. 7a-8a, 38a-39a, 74a-75a; *supra* pp. 1-2, 16-17. Those interests are unrelated to the suppression of free expression. The statute regulates only who may practice land surveying; it does not govern what licensed surveyors may say; it does not affect anyone's right to "engag[e] in public discourse" or advocate for a change in the law. Pet. App. 5a; *see id.* at 68a-70a. And California's tailored definition of land surveying (*see id.* at 9a-10a; *supra* p. 13 & n.2) does "not burden substantially more speech than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc.*

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[4] In *Billups v. City of Charleson*, 961 F.3d 673 (4th Cir. 2020), the court applied intermediate scrutiny, but only after concluding that the challenged ordinance "burden[ed] protected speech" and was *not* "a business regulation governing conduct that merely imposes an incidental burden on speech." *Id.* at 682, 684. Petitioners' other examples do not arise in the context of professional licensing. *See Pac. Coast Horseshoeing*, 961 F.3d 1062 (restriction on student enrollment in certain private postsecondary classes); *Ben's Bar, Inc. v. Vill. of Somerset*, 316 F.3d 702 (7th Cir. 2003) (prohibition on liquor sales in adult entertainment establishments). Moreover, as petitioners "conceded at oral argument" below, the passage in *Pacific Coast Horseshoeing* on which they rely was "dicta" that "is not binding" on the court of appeals. Pet. App. 7a n.2.

v. FCC, 512 U.S. 622, 662 (1994) (internal quotation marks omitted).

In short, petitioners' First Amendment claim would fail under any of the formulations described in the petition. And at this juncture—just six years after *NIFLA*—only a few circuits have weighed in on the proper standard of review for regulations on professional licensing that incidentally burden speech. *See, e.g.*, *Vizaline*, 949 F.3d at 934 ("we express no view on what level of scrutiny might be appropriate"); *Del Castillo*, 26 F.4th at 1226 (affirming district court without expressly addressing standard of review). Both considerations counsel against taking up that question in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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