No. 24-276

In The

Supreme Court of the United States

RYAN CROWNHOLM; AND CROWN CAPITAL ADVENTURES, INC., D/B/A MYSITEPLAN.COM,

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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioner Crown Capital Adventures, Inc., d/b/a MySitePlan.com, is a Delaware corporation with no parent corporation. No publicly held entity owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

REPLY BRIEF FOR THE PETITIONERS

The circuit courts have split regarding the constitutional protection of speech regulated by professional-licensing laws. Indeed, just since our Petition was filed, additional decisions have exacerbated those splits. Respondents imagine away these splits and ignore the recent decisions cementing them.

There are now petitions to this Court from three circuits concerning the treatment of professional speech: this case (No. 24-276) from the Ninth, *360 Virtual Drone Services LLC* v. *Ritter* (No. 24-279) from the Fourth, and *Chiles* v. *Salazar* (No. 24-539) from the Tenth. A fourth, *Hines* v. *Pardue* from the Fifth Circuit, is forthcoming. These cases demonstrate that, the Fifth Circuit excepted, lower courts are flouting this Court's rulings in *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018), and *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010).

This Court must resolve the lower courts' conflicts regarding the First Amendment protection for speech restricted by professional-licensing laws. It should do so here because this case presents the narrow threshold question distinguishing direct and incidental regulations of speech and, if necessary, a second related question regarding level of scrutiny.

A. The circuit split on the first question presented is clear—and growing.

1. Respondents ignore the question presented. The circuit courts employ three distinct standards to

determine whether an occupational-licensing law's application to a speaker restricts his speech directly or only incidentally to his conduct. Pet. 19-29. Respondents do not dispute this inconsistency, but posit it is not a *conflict*—because the varying decisions abide *NIFLA*'s teaching that "States may regulate professional conduct, even though that conduct incidentally involves speech." BIO 6-7 (quoting 585 U.S. at 768). This ignores the question presented, which is *how to determine* whether a law regulates speech directly or only incidentally to professional conduct.

2. Respondents do not undermine the circuit split as to standards governing the speech/conduct distinction. How to make that distinction *should* be straightforward. Pet. 17-19. *NIFLA* holds that "ordinary First Amendment principles" govern even when speech is restricted through a "professional" regulation. 585 U.S. at 773. And *Holder* instructs that courts are not to examine what a law regulates "generally" to determine whether it is directly restricting speech as applied; rather, courts must determine whether, as applied, the action "triggering coverage under the statute" is speech or conduct. 561 U.S. at 27-28. But the lower courts have not uniformly followed these standards and Respondents do not show otherwise.

As shown, the Ninth Circuit has long treated speech regulated by occupational-licensing laws as *always* "incidental" to the "primary effect" of regulating the occupation's conduct. Pet. 24-25; App.5a. Indeed, the court used to explicitly say as much. *E.g., Pickup* v. *Brown*, 740 F.3d 1208, 1229-1230 (9th Cir. 2014) (restriction on content of talk therapy restricted, not the "communicat[ion of] a message," but "conduct,"

because the regulation was generally aimed at "state-licensed professionals").

Respondents observe that the Ninth Circuit no longer explicitly "elaborate[s]" that it is "categorically exempt[ing]" occupational-licensing laws from First Amendment scrutiny, BIO 6, 9—unsurprising given this Court abrogated *Pickup* and the professional-speech doctrine in *NIFLA*. 585 U.S. at 767-768, 771-773. But the Ninth Circuit has nevertheless continued transmogrifying speech into conduct whenever the speech is restricted by an occupational-licensing law. Pet. 24-25. Thus its continued insistence that "therapy conducted solely through speech" is in fact professional *conduct*. *Tingley* v. *Ferguson*, 144 S. Ct. 33, 33-34 (2023) (Thomas, J., dissenting from denial of certiorari). And its holding below that "visual image[s] * * * depicting property boundaries, structures, and measurements" are "conduct." App.4a-5a (relying on the abrogated *Pickup* decision for support); cf. Pet. 24 (explaining that such images are speech in any other context). Without this Court's review, the Ninth Circuit will continue allowing States to control speech by recharacterizing it as conduct, eliminating free-speech rights from millions who speak for a living. Pet. 37-39; *Tingley*, 144 S. Ct. at 35 (Thomas, J. dissenting from denial of cert.) ("This case is not the first instance * * *, [and] I doubt it will be the last.")

The Ninth Circuit's standard is plainly distinct from the Fourth Circuit's "non-exhaustive list of factors" for "distinguish[ing] between licensing regulations aimed at conduct and those aimed at speech as speech." Pet. 22.

Respondents nowhere contend that the Ninth Circuit—or any circuit other than the Fourth—applies this multifactor standard to answer the question presented. Respondents instead argue that the non-exhaustive factors might have cashed out similarly here *if* the Ninth Circuit used them. BIO 9. But it doesn't use that standard. And it is far from clear that the Fourth Circuit's multifactor standard *can* be applied at the motion-to-dismiss stage, as is presented here.

Regardless, each of these standards is different from the Fifth Circuit's standard for answering the same question: "the traditional taxonomy * * * 'between speech and conduct'" mandated by this Court's precedent. *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 933 (5th Cir. 2020); Pet. 19-21.

Respondents claim that *Vizaline* "cannot conflict with the decision below" because *Vizaline* saved *application* of the standard for the district court on remand. BIO 9. This, again, ignores that the question presented *is* the threshold question of "[w]hat standard" determines whether an occupational-licensing law is regulating speech or conduct. Pet. i. The Fifth Circuit "adhere[s] to the traditional conduct-versus-speech dichotomy," regardless of "whether the challenged regulation is part of an occupational-licensing scheme." *Vizaline*, 949 F.3d at 932. Neither the Ninth nor Fourth Circuits do the same.

Respondents also do not dispute that the Ninth and Fourth Circuits apply the traditional standard in settings *other* than the occupational-licensing context. See Pet. 21-22, 25-26. But the unique-to-occupational-licensing standards applied in the Ninth and

Fourth Circuits are irreconcilable with the Fifth Circuit's standard and this Court's instruction in *NIFLA*.

3. Respondents ignore two recent decisions that cement and widen the circuit split.

Hines v. *Pardue*, 117 F.4th 769 (5th Cir. 2024)—decided two months before the BIO deadline but ignored by Respondents[1]—confirms and widens the split and demonstrates how the *Vizaline* standard applies. *Hines* involved a Texas veterinary-licensing law that bars veterinarians from the "practice of veterinary medicine" without first examining either the animal or its premises in-person. *Id.* at 772. The state fined Dr. Ron Hines, a retired veterinarian, for providing online advice to animal lovers worldwide without examining the animals "that were the subject of his advice." *Ibid.* Hines argued this abridged his free-speech rights, so the Fifth Circuit confronted whether the "physical-examination requirements regulate[s] Dr. Hines's speech directly, as [he] argues, or only incidentally to * * * conduct, as the State counters[.]" *Id.* at 774.

Applying "the 'traditional conduct-versus-speech dichotomy,'" *id.* at 775 (quoting *Vizaline,* 949 F.3d at 932), the court examined "what 'trigger[ed] coverage under the statute'": speech or conduct? *Id.* at 777 (quoting *Holder*, 561 U.S. at 28). What triggered the statute's application to Hines was not "applying a splint or administering medicine," but what he communicated: "individualized diagnoses and treatment plans." *Id.* at 777-778. That triggering action is

[1] Respondents cite an earlier iteration of the case instead. See BIO 8.

speech—so the court held the statute regulated Hines's speech. *Ibid.*

Also unmentioned by Respondents is *Chiles* v. *Salazar*, 116 F.4th 1178 (10th Cir. 2024), pet. for cert. pending, No. 24-539, another decision issued after the Petition but well before the BIO that addresses the question presented. *Chiles* involves Colorado's law prohibiting "mental health professionals from providing 'conversion therapy' to minor clients." 116 F.4th at 1191. The plaintiff, a licensed counselor, provided exclusively "talk therapy." *Id.* at 1193. Over a dissent, however, the majority held the prohibition did not implicate speech. It did not matter to the majority that Colorado was restricting activity "carried out" solely "through use of verbal language," *id.* at 1208, because the ban fell "under the … umbrella of professional conduct [regulations] for mental health professionals," *id.* at 1206 (alterations in original), and regulated one's "role as a licensed professional counselor," *id.* at 1210. So, the majority reasoned, "[a]ny speech affected" was "incidental to the professional conduct" the occupational-licensing scheme regulated. *Id.* at 1209. It rejected the traditional speech-conduct distinction the Fifth Circuit uses, explicitly characterizing *Cohen* and *Holder* as "unavailing" because they did not "deal with regulations of professional conduct." *Id.* at 1212 & n.32. Dissenting, Judge Hartz thought the majority's failure to follow "[w]hat *Cohen* and *Holder* teach" in the "professional" context was its "fundamental error." *Id.* at 1233-1234.

In sum, *Chiles* expressly aligns the Tenth Circuit with the Ninth Circuit's approach, where occupational-licensing laws regulate conduct—period. *E.g.*, *id.* at 1211 (favorably quoting the Ninth Circuit's

Tingley decision). It ignores the Fourth Circuit's multitude-of-factors approach. And it repudiates the traditional standard the Fifth Circuit uses. *Id*. at 1212.[2] (In turn, *Hines* cast doubt on *Chiles*. 117 F.4th at 778 n.50.)

The circuits will not settle this conflict themselves; they have only exacerbated it since the Petition was filed. This Court's intervention is needed to again reorient lower courts to the traditional speech-conduct taxonomy.

4. Applying the Fifth Circuit's traditional conduct-versus-speech standard here would yield a different result at the 12(b)(6) stage. Here, the action that "trigger[ed] coverage under the statute," *Hines*, 117 F.4th at 777 (quoting *Holder*, 561 U.S. at 28), was Petitioners' "[p]reparing" drawings "which depict the location of property lines, fixed works, and the geographical relationship thereto." App.114a-115a; Pet. 24. This triggering action—preparing drawings depicting useful information—is speech. Pet. 24.

Respondents wrongly claim that the proper standard is consistent with the one applied below. BIO 11. They claim that the Ninth Circuit identified some non-speech conduct Petitioners engage in: "assessing their clients' needs and using public records and computer-aided design programs to depict spatial

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[2] *Chiles*, 116 F.4th at 1214, also rejects *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), which largely tracked the Fifth Circuit's traditional standard. See Pet. 26-27. The Eleventh Circuit, however, has elsewhere tracked the Ninth and Tenth Circuits' approaches. See *ibid*. Respondents say the Eleventh Circuit's "internal difficulties" do not merit this Court's review. BIO 10. The difficulties, however, exemplify the conflicts across now five circuits over the question presented.

relationships." BIO 12. Even if these actions are conduct, they are immaterial because they did not "trigger" the statute's coverage. *Holder*, 561 U.S. at 28. Cohen triggered California's disturbing-the-peace statute, not for *wearing* a jacket, but for what his jacket "communicat[ed]." *Cohen* v. *California*, 403 U.S. 15, 18 (1971). Hines triggered Texas's veterinary-licensing law, not by "viewing charts or considering different medical reports," but for "shar[ing] his opinion" with animals' owners. 117 F.4th at 778. Similarly here, Petitioners did not trigger California's surveyor-licensing law by assessing client needs, accessing databases, or using a computer. Contra BIO 12. *Respondents themselves* said that the information Petitioners' drawings "depict" triggered regulation. App.114a-115a. Depicting information is speech, making Respondents' restriction one of Petitioners' speech under the Fifth Circuit's (and this Court's) standard—but not under the varied standards used by other courts, including the Ninth Circuit.

This Court should grant the petition to end that conflict.

B. Respondents confirm the split on Petitioners' second question presented.

1. If this Court agrees that the traditional conduct-versus-speech standard applies, this Court may not need to address the second question presented. The Court could reverse on that threshold question and remand for the Ninth Circuit to apply the correct speech-conduct standard and, in turn, the correct level of scrutiny. Pet. 33-34; cf. *NIFLA*, 585 U.S. at 773-775 (forgoing content-neutral-versus-content-

based analysis because law failed even intermediate scrutiny); *Hines*, 117 F.4th at 778-779 (same).

If, however, the incidental-regulation doctrine does apply here, as the Ninth Circuit believed, the second question presented should be addressed.

2. Respondents admit the circuits are conflicted—and deviate from this Court's instructions—regarding "incidental regulation" of occupational speech.

Respondents admit the circuits "have not yet coalesced around a uniform approach" to the standard of scrutiny for occupational-licensing laws regulating speech incidentally. BIO 16. They admit the "rational basis" standard applied below differs from the Fourth's Circuit's "'loosened intermediate-scrutiny test for professional-conduct-focused regulations.'" BIO 17. They claim only that the result might have been the same under the Fourth Circuit's higher-than-rational-basis standard. *Ibid*. But if the court below did not apply the right standard, it should be given the opportunity to do so on remand, see *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76-77 (2022)—especially at the 12(b)(6) stage. See *360 Virtual Drone Servs. LLC* v. *Ritter*, 102 F.4th 263, 270 (4th Cir. 2024) (deciding on summary judgment record).

More importantly, Respondents admit the conflict between the Fourth and Ninth Circuits stems from their having created special rules for speech regulated by professional-licensing laws. BIO 17; see also *Chiles*, 116 F.4th at 1215 n.38. Petitioners noted—and Respondents do not dispute—the several circuits

where "incidental" regulations receive *ordinary* intermediate scrutiny, as this Court's precedent requires. Pet. 34-36. Respondents distinguish these decisions, however, because they do not involve "a professional licensing law." BIO 17; see BIO 18 n.4 (acknowledging the Ninth Circuit applies ordinary intermediate scrutiny to incidental regulations outside the "professional" speech context).

This special rule directly contravenes this Court's instruction in *NIFLA*: professional speech is not a "unique category * * * exempt from ordinary First Amendment principles." 585 U.S. at 773. Thus, even if the Ninth Circuit were right that California prohibits Petitioners' speech only "incidentally," the Ninth Circuit's choice of rational-basis scrutiny deviates from the ordinary intermediate scrutiny applied in other circuits and mandated by this Court's precedent. Pet. 34-36.

3. Applying ordinary intermediate scrutiny here would yield a different result. Contra BIO 18-19. Under ordinary intermediate scrutiny, government bears the burden both "to prove real harm" and to show why less-burdensome alternatives would not work. *Hines*, 117 F.4th at 782, 785 ("'risks' of harm—or hypothetical concerns—that, according to the evidence, have never materialized" are insufficient).

Respondents' outside-the-complaint claims of harm from Petitioners' drawings (which the lower courts credited under rational-basis review) are insufficient at the pleadings stage. App.133a-134a.[3] The

[3] Respondents also wrongly claim a member of the public complained about Petitioners. BIO 4. In fact, a licensed surveyor

complaint's allegations further preclude finding harm given local building departments' longstanding practice of teaching non-surveyors to create and use drawings identical to Petitioners'. App.100a-105a. The complaint also identifies less-restrictive alternatives, like disclaimers, sign-and-stamp requirements, or limitations on uses, App.108a-110a, 125a. Even Respondents identify less-restrictive options, like displaying more-prominent disclaimers on drawings or less-precise measurements (coincidentally, a concession that the restriction is content-based). BIO 3. This Court need not conduct the intermediate-scrutiny analysis itself in the first instance, but it can take note that applying that standard—as required by other Circuits' and this Court's caselaw—would not have yielded a dismissal below.

C. There are no vehicle problems.

The Petition demonstrates that this case's motion-to-dismiss posture makes it a good vehicle to resolve the questions presented, Pet. 39-40, and Respondents do not show otherwise.

1. Respondents clearly apply the challenged law to Petitioners' speech. Respondents note that they have continued prosecuting Petitioners in follow-on proceedings. BIO 15. But that makes this case an especially good vehicle because there is no uncertainty that Respondents apply the licensing law to restrict Petitioners' speech—and this Court can be confident

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complained. C.A. S.E.R. 116. This is unsurprising; licensing laws are often weaponized for anticompetitive, rather than health-and-safety, purposes. *N.C. State Bd. of Dental Exam'rs* v. *FTC*, 574 U.S. 494, 505 (2015); *id*. at 516-517 (Alito, J., dissenting).

in ruling on that application. See *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 162 (2014) (constitutional challenge allowed where speech "arguably proscribed" by challenged statute); cf. *Expressions Hair Design* v. *Schneiderman*, 581 U.S. 37, 54 & n.3 (2017) (Sotomayor, J, concurring in the judgment) (advocating for certifying question to state court given State's oft-shifting statutory interpretation).

Respondents also claim a purported change in Petitioners' argument counsels against review. BIO 15 n.3. There has been no change. Petitioners have always asserted that California's definition of "surveying," read literally, "criminalizes a vast amount of informal mapmaking and information conveying" that Respondents have no reason to regulate, so Respondents choose not to enforce the law in every circumstance. App.136a-139a. Therefore, even though Petitioners' site plans are not what normal people think of as "surveying"—indeed, California did not historically consider this to be surveying, Pet. 10-11, and local governments routinely *instruct* unlicensed people how to make and submit identical drawings, Pet. 3-9—Petitioners' speech falls within California's broad definition of surveying practice. BIO 15. This is a good vehicle to clarify the First Amendment implications when broad occupational-practice definitions sweep up pure speech.

2. This case is a good vehicle for resolving the narrowest threshold questions of widespread importance. Respondents suggest the Court should consider a case involving "conversion therapy" instead of this one. BIO 11. But this petition cleanly presents the narrow threshold issues dividing the lower courts in wide-

ranging factual settings: the standard for determining *whether* an occupational-licensing law regulates speech or conduct and, if necessary, the scrutiny applied to speech regulated by an occupational-licensing law. It arises from a case-dispositive 12(b)(6) holding. And this case does not involve additional issues of religious speech and viewpoint discrimination, cf. Pet. for Cert. at 3., *Tingley* v. *Ferguson* (No. 22-942), the presence of which may complicate the occupational-speech analysis for the "wide range of industries * * * potentially affected by this body of law." Br. of John Rosemond et al. 7; accord Br. of New England Legal Found. 11 (noting the "veritable explosion of state licensing laws applied to ever more varied forms of work"); *NIFLA*, 585 U.S. at 773 ("As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others."). This case is, therefore, a good vehicle for training the Court's focus on the narrowest questions with widespread applicability.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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