No. 24-279

In the Supreme Court of the United States

360 VIRTUAL DRONE SERVICES LLC, ET AL.,
Petitioners,

v.

ANDREW L. RITTER, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA BOARD OF EXAMINERS FOR ENGINEERS AND SURVEYORS, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755 (2018), this Court explained that the First Amendment "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule." *Id.* at 769.

To protect property rights and public safety, North Carolina requires a license to perform land-surveying services. N.C. Gen. Stat. § 89C-1 *et seq.* The question presented here is whether the Fourth Circuit correctly held that North Carolina's licensing requirement for land surveyors, as applied to Petitioners, is a regulation of professional conduct that burdens Petitioners' speech only incidentally.

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INTRODUCTION

In *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755 (2018), this Court clarified that although so-called "professional speech" is not categorically exempt from First Amendment protection, nor does the First Amendment disable States from regulating professional conduct in ways that affect speech only incidentally. *Id.* at 767-68.

The petition here claims that the courts of appeals have diverged in the analysis that they use under *NIFLA* to distinguish between occupational licensing laws that directly and indirectly regulate speech. Specifically, the petition claims that although some circuits have applied what Petitioners call the "traditional speech-conduct standard," other circuits have developed their own "bespoke speech-conduct standard" in the occupational licensing context. Pet. 12, 15.

That alleged split is illusory. The Fourth Circuit below faithfully applied *NIFLA* to hold that North Carolina's licensing requirement for land surveyors primarily regulates professional conduct: Petitioners' use of drones to make maps and 3D digital models that enable measurement of property characteristics like area, distance, and volume. The Ninth Circuit is the only other circuit to have applied *NIFLA* to a state licensing requirement for land surveyors, and it reached the same conclusion as the decision below. *See Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566, at *2 (9th Cir. Apr. 16, 2024) (unpublished), *cert. pet. filed*, No. 24-276 (Sept. 9, 2024).

In the absence of a genuine split, Petitioners allude to purportedly broader doctrinal confusion among the circuits on the *NIFLA* framework. Petitioners' arguments on this score are again mistaken. The courts of appeals have all followed *NIFLA* to resolve First Amendment challenges to occupational licensing laws. Courts have merely reached different conclusions based on the different facts and state licensing regimes at issue in each case. Such case-specific variation should come as no surprise. After all, as this Court recognized in *NIFLA*, "drawing the line between speech and conduct can be difficult." 585 U.S. at 769. And differences in how the circuits apply a well-established legal standard to different circumstances does not constitute a split, let alone one that warrants this Court's review.

To be sure, the circuits have used different verbal formulations to describe the level of scrutiny that applies to professional regulations that affect speech only incidentally. But the single question presented in this case does not encompass any issue regarding the appropriate level of scrutiny. And because the Fourth Circuit applied a more stringent level of scrutiny than other circuits, a split is not outcome-determinative on these facts.

The Fourth Circuit below also decided this case correctly. By regulating the practice of land surveying, the North Carolina legislature seeks to protect consumers from individuals who lack sufficient training and experience to perform accurate measurements of real property. The law targets *who* may conduct themselves as a land surveyor and *how*

they may practice that profession—not *what* they must say. The Fourth Circuit rightly held that, under *NIFLA*, a regulation of this kind falls under the State's longstanding authority to "regulate professional conduct, even though that conduct incidentally involves speech." 585 U.S. at 768.

This Court should deny the petition.

STATEMENT

A. North Carolina regulates the practice of land surveying.

Land surveying is "the primary mode of describing real property," "[d]ating back to ancient periods of history." Monika U. Ehrman, *Hidden Resources*, 13 U.C. Irvine L. Rev. 563, 576 (2023). North Carolina has regulated the practice for centuries. In 1777, the State's colonial-era legislature passed a law establishing a process for appointing county land surveyors, rules for performing land surveys, and penalties for surveyors who failed to comply. The Acts of Assembly of the State of North Carolina, ch. I, §§ I-XIV, 1777 N.C. Sess. Laws 42, 42-47. The State has maintained a licensing regime for land surveyors since 1921. Act of Feb. 25, 1921, ch. 1, §§ 1-17, 1921 N.C. Sess. Laws 47, 47-53.

Today, the State regulates land surveying under the North Carolina Engineering and Land Surveying Act, N.C. Gen. Stat. § 89C-1 *et seq*. The Act prohibits any person from practicing or offering to practice land surveying without first being licensed by the North Carolina State Board of Examiners for Engineers and

Surveyors. *Id.* §§ 89C-2, -3. North Carolina is hardly alone: All fifty States have a licensing requirement for land surveyors. U.S. Bureau of Labor Statistics, *How to Become a Surveyor*, Occupational Outlook Handbook, bit.ly/3Z7XAmJ (last modified Aug. 29, 2024) ("All 50 states and the District of Columbia require surveyors to be licensed before they can provide their services to the public.").

The Act defines the "practice of land surveying" to include providing "professional services" about "the location, size, shape, or physical features of the earth." N.C. Gen. Stat. § 89C-3(7)(a). Those services may encompass, for example, "consultation," "investigation," creation of "map[s]," and interpretation of "reliable scientific measurements and information." *Id.* Individuals may perform services of this kind "by conventional ground measurements, by aerial photography, by global positioning via satellites, or by a combination of any of these methods." *Id.*

To earn a license to perform this work, individuals must meet certain training and experience requirements, as well as pass an exam. *Id.* § 89C-13. The Act imposes these requirements to "safeguard life, health, and property, and to promote the public welfare." *Id.* § 89C-2. The public relies on surveyors for accurate land measurements, and mistakes can harm both property owners and their neighbors: "[E]xperience shows that even very minor discrepancies in measurements can create significant liability issues." Pet. App. 24a. As a result, state courts have long faced "a substantial amount of

litigation . . . because of inaccurate and improper surveys," requiring courts "to receive regularly disputes over boundaries, plats, and surveys affecting very substantial property rights." *Chapdelaine v. Tenn. State Bd. of Exm'rs for Land Surveyors*, 541 S.W.2d 786, 788 (Tenn. 1976).

To protect property rights from these harms, the Act charges the Board with enforcing the State's licensing requirement. The Board has authority to discipline licensed surveyors for gross negligence, incompetence, or misconduct, among other things. N.C. Gen. Stat. § 89C-21(a). The Board has no comparable disciplinary authority over unlicensed surveyors. Instead, the Board may investigate unauthorized practice and seek to enjoin it, or refer the matter to a district attorney, who decides whether to pursue misdemeanor charges. *Id.* §§ 89C-10, -23; 21 N.C. Admin. Code § 56.1302. Any individual who is uncertain about whether a given practice constitutes land surveying—and therefore requires a license—may first request a declaratory ruling from the Board about "whether or how" the Act "applies to a given factual situation." 21 N.C. Admin. Code § 56.1205. The Board's ruling is subject to judicial review in state court. N.C. Gen. Stat. § 150B-4. This ability to seek a declaratory ruling thus allows individuals to receive advance guidance about the Act's scope before engaging in activity potentially regulated by the Board.

B. Petitioners engage in the unauthorized practice of land surveying.

Petitioners are Michael Jones and his single-member company, 360 Virtual Drone Services LLC. Petitioners use drones to take aerial photographs and videos for clients. Pet. App. 6a.

Petitioners came to the Board's attention when they started advertising their ability to perform aerial-mapping services, also known as photogrammetric surveying. Pet. App. 6a-7a. Photogrammetry involves making precise measurements of three-dimensional objects and land from two-dimensional photographs, which can be taken using a drone or other technologies. Pet. App. 5a.

Photogrammetry can produce different types of work product. Pet. App. 6a. Petitioners here specifically advertised their ability to create orthomosaic maps. Pet. App. 7a. These maps combine "multiple, overlapping images into one composite image." Pet. App. 6a. In doing so, the maps allow users to measure property characteristics like area, distance, and volume. Pet. App. 6a, 32a-33a. For example, orthomosaic maps "can be used to take volumetric or two-dimensional measurements and to draw property boundaries." Pet. App. 6a; *see* Pet. App. 32a-33a.

To make orthomosaic maps, Petitioners wanted to physically enter a client's property, fly a drone over the property, and take aerial pictures of the property with the drone. Pet. 3. Petitioners then wanted to

prepare a survey by using computer software to turn those pictures into a map. Pet. 3, 5-6. Petitioners wanted to send the final product to the client in exchange for payment. Pet. 6.

Petitioners also hoped to expand their practice by generating three-dimensional digital models using aerial pictures taken by drones. Pet. App. 7a. These models would provide clients with photorealistic images of land or structures that, like orthomosaic maps, would allow users to measure certain property characteristics. Pet. App. 33a. A 3D digital model is a type of survey. CA4 JA 356.

Under North Carolina law, Petitioners needed a land-surveyor license to offer and perform those services. Specifically, Petitioners sought to provide "professional services," like the "investigation" and "evaluation" of property, the creation of "map[s]," and the interpretation of "reliable scientific measurements and information." N.C. Gen. Stat. § 89C-3(7)(a). And they sought to do so by "gathering . . . information" through "aerial photography." *Id.*; *see id.* § 89C-13 (noting that "[l]and surveying encompasses a number of disciplines including . . . photogrammetric (aerial) surveying").

But Petitioners did not have a license to perform this work. Jones is not a licensed land surveyor, and 360 Virtual Drone Services is not a licensed surveying business. Pet. App. 34a. To the contrary, Jones has no training or prior experience in photogrammetry. CA4 JA 506. Jones also lacks any "formal instruction in drone piloting or photography." Pet. App. 6a.

The Board sent Petitioners a letter notifying them that the Board was opening an investigation into whether they had engaged in the unauthorized practice of land surveying. Pet. App. 8a. Based on its investigation, the Board concluded that they had done so. Pet. App. 8a, 36a-37a. But the Board made clear that its conclusion was "not a final legal determination." Pet. App. 37a. Instead, the Board informed Petitioners of their right to request a declaratory ruling on their conduct before the Board pursued any enforcement action. Pet. App. 37a.

Petitioners declined to seek a declaratory ruling from the Board. They chose instead to stop offering aerial-mapping services and file this lawsuit.

C. The lower courts unanimously reject Petitioners' First Amendment challenge.

Seeking to offer aerial-mapping services without first obtaining a land-surveyor license, Petitioners sued the Board's members and its Executive Director in their official capacities. Pet. App. 2a. Petitioners alleged that the State's licensing requirement violated the First Amendment as applied to them. Pet. App. 8a-9a & n.2. They sought declaratory and injunctive relief. Pet. App. 8a.

Following extensive discovery, the district court granted Respondents' motion for summary judgment. Pet. App. 59a. Applying the framework articulated by this Court's decision in *NIFLA*, the district court held that the State's licensing requirement for land surveyors is a "professional regulation[ ]" primarily aimed at "conduct," with only "an incidental impact on

speech." Pet. App. 54a. The court therefore applied intermediate scrutiny and upheld the law. Pet. App. 54a-58a.

On appeal, a unanimous Fourth Circuit panel affirmed.

The Fourth Circuit also looked to this Court's decision in *NIFLA* as the "starting point" for its analysis. Pet. App. 11a. The Fourth Circuit explained that, in *NIFLA*, this Court "rejected . . . 'professional speech' as a separate category of speech entitled to lesser protections" under the First Amendment. Pet. App. 12a. Instead, when a law regulates "speech as speech," ordinary First Amendment standards continue to apply. Pet. App. 13a (quoting *NIFLA*, 585 U.S. at 770). At the same time, the Fourth Circuit recognized that *NIFLA* also preserved the longstanding rule that States may "regulate professional conduct, even [where] that conduct incidentally involves speech." Pet. App. 12a (quoting *NIFLA*, 585 U.S. at 768). Citing the Fifth Circuit's post-*NIFLA* decision in *Vizaline, L.L.C. v. Tracy*, the Fourth Circuit thus explained that claims like Petitioners' raised a threshold question: "whether the licensing requirements at issue 'regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct.'" Pet. App. 13a (quoting 949 F.3d 927, 931 (5th Cir. 2020)).

The Fourth Circuit acknowledged that "drawing the line between speech and conduct can be difficult," Pet. App. 13a (quoting *NIFLA*, 585 U.S. at 769), and

that "a variety of factors may come into play" in this analysis. Pet. App. 17a. But the court nonetheless recognized some "boundary lines." Pet. App. 16a. On the one hand, "[t]he fact that a regulation falls within a generally applicable licensing regime does not automatically mean it is aimed at conduct." Pet. App. 16a. On the other hand, "the fact that a regulation directs or prohibits particular speech in the professional context does not automatically mean it is aimed at speech." Pet. App. 16a. Thus, the Fourth Circuit explained that a court must ultimately "evaluate the particular provision at issue and determine whether it targets speech as speech, rather than professional conduct that just so happens to sweep up speech." Pet. App. 15a.

The Fourth Circuit then applied this legal framework to the facts here. Following this Court's recognition in *NIFLA* that "drawing the line between speech and conduct can be difficult," 585 U.S. at 769, the Fourth Circuit closely examined the factual record relating to North Carolina's licensing regime for land surveyors. Pet. App. 3a-8a, 24a-25a. Based on this review, the court concluded that Petitioners' practice of land surveying involves some amount of First Amendment protected speech. Pet. App. 25a. But the court also concluded that North Carolina's licensing requirement is primarily aimed at professional conduct. Pet. App. 24a-25a. As the court explained, the law "prevent[s] an unlicensed and untrained person" from engaging in the practice of land surveying by preparing and selling "two- or three-dimensional maps or models of areas of land that

contain measurable data"—"conduct that classically falls under the surveying profession." Pet. App. 24a. The court also found relevant that the licensing requirement did not "direct[ ] surveyors' speech once licensed" or otherwise target "unpopular or dissenting speech." Pet. App. 25a. These fact-sensitive considerations, the Fourth Circuit held, show that the licensing requirement "regulates professional conduct and only incidentally burdens speech." Pet. App. 25a.

Because it concluded that the licensing requirement is principally aimed at conduct, the Fourth Circuit applied intermediate scrutiny. Pet. App. 25a. Specifically, the court asked whether the licensing requirement is "sufficiently drawn" to promoting a "substantial state interest." Pet. App. 25a. The court first recognized that the State has a substantial interest in regulating unauthorized land surveying to protect property rights. Pet. App. 25a-26a. The court then held that the State's licensing requirement is sufficiently drawn to further that interest by establishing a minimum level of competence for land surveyors. Pet. App. 27a. By doing so, the licensing requirement protects "consumers from potentially harmful economic and legal consequences that could flow from mistaken land measurements." Pet. App. 27a. The court thus affirmed the district court's judgment. Pet. App. 28a.

Petitioners now seek this Court's review.

REASONS FOR DENYING THE PETITION

I. There Is No Split Of Authority.

Petitioners claim that the circuits are split on how this Court's decision in *NIFLA* applies to occupational licensing laws. But all of the cases that Petitioners cite faithfully adhere to the legal framework that this Court set out in *NIFLA*. Although the cases apply this framework to different occupational licensing regimes, that kind of factual variation does not warrant this Court's review.

To begin, Petitioners do not claim that the circuits have split over whether a licensing requirement for land surveyors is a regulation of professional conduct that affects speech only incidentally. Nor could they. Like the Fourth Circuit below, the Ninth Circuit has recently addressed a First Amendment challenge to a state law requiring a license to produce and sell "drawing[s] that provide[ ] a visual image of property by depicting property boundaries, structures, and measurements." *Crownholm*, 2024 WL 1635566, at *2 (alterations in original). And like the Fourth Circuit below, the Ninth Circuit similarly held that such a law has the "primary effect of regulating . . . unlicensed land surveying activities," imposing "only incidental burdens" on speech. *Id.* Petitioners thus acknowledge that *Crownholm* is a case "not unlike this one." Pet. 23.

To be sure, the Fifth Circuit has also confronted a First Amendment challenge to a state licensing law for land surveyors—in another "case much like this one." Pet. 16; *see Vizaline*, 949 F.3d 927. But because

the district court there—contrary to *NIFLA*—"categorically exempt[ed] occupational-licensing requirements from First Amendment scrutiny," the Fifth Circuit did not address whether the law regulated "speech as speech" or speech incidentally. *Vizaline*, 949 F.3d at 934. Instead, the Fifth Circuit remanded for the district court to rule on that question in the first instance. *Id.* And as Petitioners acknowledge, Pet. 17 n.3, the case later settled, so neither the district court nor the Fifth Circuit ever addressed the extent to which a licensing requirement for land surveyors might burden speech. Thus, the Fifth Circuit's decision in *Vizaline* in no way conflicts with the decisions of the Fourth and Ninth Circuits—decisions that, unlike the Fifth Circuit's decision in *Vizaline*, squarely confronted the question of how *NIFLA* applies to occupational licensing requirements for land surveyors.

Unable to establish a clear circuit split, Petitioners gesture at broader doctrinal confusion among the lower courts. But the cases that Petitioners cite are merely fact-specific applications of the well-established framework that *NIFLA* preserved.

Take the Fifth Circuit's decision in *Vizaline*. Petitioners argue that the Fourth Circuit below "staked out a fundamentally different standard from the Fifth's." Pet. 17. That claim cannot be squared with the Fourth Circuit's opinion, which favorably cited the Fifth Circuit's decision in *Vizaline* multiple times. Pet. App. 13a, 15a. The Fourth Circuit even framed its analysis around the rule that the Fifth Circuit instructed the district court there to apply on

remand: whether "the licensing requirements at issue 'regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct.'" Pet. App. 13a (quoting *Vizaline*, 949 F.3d at 931).

Petitioners make much of the Fourth Circuit's statement that "a variety of factors may come into play" when deciding whether a law regulates speech as speech or burdens speech only incidentally. Pet. 18. But that statement merely reflects this Court's own observation that "drawing the line between speech and conduct can be difficult." *NIFLA*, 585 U.S. at 769. In keeping with this recognition, the Fourth Circuit below looked at case-specific considerations to help decide whether North Carolina's licensing requirement for land surveyors, as applied to Petitioners, directly regulates speech or burdens speech incidentally. Pet. App. 24a-25a. The Fourth Circuit's use of case-specific considerations in this way does not create a split with the Fifth Circuit. To the contrary, as discussed above, the Fifth Circuit explicitly left for the district court to assess on remand whether Mississippi's occupational licensing law for land-surveying services regulated speech as speech or burdened speech only incidentally. *Vizaline*, 949 F.3d at 931. As the Fifth Circuit made clear, its decision was therefore "cabined to reversing the district court's decision that occupational-licensing requirements are immune from First Amendment scrutiny." *Id.* at 930 n.7.

Petitioners also claim that the Eleventh Circuit's decision in *Del Castillo v. Secretary of Florida*

Department of Health, 26 F.4th 1214 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 486 (2022), splits with the decision below. In *Del Castillo*, the Eleventh Circuit held that Florida's licensing regime for dieticians and nutritionists regulated conduct while burdening speech only incidentally. *Id.* at 1225-26. Although "a dietician or nutritionist must get information from her clients and convey her advice and recommendations," the Eleventh Circuit concluded that the services regulated by the law primarily involved conduct, like assessing a patient's nutrition needs or developing a nutrition plan. *Id.*

Despite claiming that the Eleventh Circuit's decision "magnif[ies] the disarray" in this area, Pet. 19, Petitioners fail to explain how *Del Castillo* breaks with the decision below. Both decisions hold that an occupational licensing law regulated professional conduct while imposing only incidental burdens on speech. In fact, the Fourth Circuit cited *Del Castillo* with approval multiple times. Pet. App. 15a, 17a.

Petitioners assert that *Del Castillo* was wrongly decided, arguing that the Florida licensing scheme in question regulated speech as speech. Pet. 20. But that argument only reinforces the lack of a split in authority here. Petitioners merely disagree with how the Eleventh Circuit *applied* the well-established *NIFLA* framework to a particular licensing law. That plea for error correction, in a case where this Court denied certiorari just two years ago, plainly does not warrant this Court's review.

In a similar vein, Petitioners also cite a district court case that was critical of the *Del Castillo* decision. Pet. 20-21 (citing *Richwine v. Matuszak*, 707 F. Supp. 3d 782, 803 (N.D. Ind. 2023), *appeal docketed*, No. 24-1081 (7th Cir.)). As Petitioners acknowledge, however, that district court case is currently on appeal before the Seventh Circuit. Pet. 21. At most, therefore, the case shows only that this issue should percolate further in the circuit courts.

Petitioners finally contend that the Eleventh Circuit in *Del Castillo* adopted a standard that the Fifth Circuit rejected "word for word" in *Vizaline*. Pet. 19. Petitioners point out that, in *Del Castillo*, the Eleventh Circuit quoted one its prior precedents, *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011), which in turn quoted a pre-*NIFLA* Fourth Circuit decision, *Accountant's Society of Virginia v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988). Pet. 19-20. The quoted language from *Bowman* reads: "A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." 860 F.2d at 604. The Fifth Circuit in *Vizaline* cited this language as well, characterizing *Bowman* as having been rejected by *NIFLA*. 949 F.3d at 931-32.

This convoluted citation exercise gets Petitioners nowhere. In *Del Castillo*, the Eleventh Circuit explicitly recognized that this Court in *NIFLA* both rejected a categorical exemption for professional speech under the First Amendment and also

maintained that some laws may regulate professional conduct while burdening speech only incidentally. 26 F.4th at 1221-22. That is the same standard that the Fifth Circuit set out in *Vizaline* and the same standard that the Fourth Circuit set out below. 949 F.3d at 931; Pet. App. 12a-13a. Petitioners have thus fallen far short of establishing a genuine split of authority.

Petitioners are left to argue that the decision below conflicts with one side of an alleged intra-circuit split in the Ninth Circuit. But this kind of intra-circuit division does not warrant this Court's review. And even if it could, neither Ninth Circuit case that Petitioners cite is contrary to the Fourth Circuit's decision below.

Petitioners first cite *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020). Pet. 21. In that case, a California law required post-secondary vocational schools to reject a student's application if the student lacked specific education credentials. *Pacific Coast*, 961 F.3d at 1066. But the law imposed this requirement only on certain types of post-secondary schools based on what courses and programs the schools offered. *Id.* Thus, the court ruled that the law regulated pure speech—the "kind of educational programs different institutions can offer to different students." *Id.* at 1069. And because the court held that the California law regulated speech as speech in a content-based fashion, the court remanded for the district court to decide "whether California must satisfy strict or intermediate scrutiny." *Id.* at 1074. Yet in addressing California's content-based

licensing law, the Ninth Circuit asked the same question as the Fourth Circuit below: whether the law regulated speech as speech, or speech incidentally. *Id.* at 1070-71. The Ninth Circuit merely reached a different conclusion based on the different facts of the California "education licensing" regime at issue. *Id.* at 1069.

On the other side of Petitioners' alleged intra-circuit split is *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023). Pet. 22. In *Tingley*, the Ninth Circuit held that a Washington law banning conversion therapy was primarily aimed at conduct—using a certain type of mental-health counseling to treat minors—even though the therapy was delivered through speech. 47 F.4th at 1081-82. Petitioners do not allege that *Tingley* splits with the decision below, however. And whether *Tingley* conflicts with the Ninth Circuit's earlier decision in *Pacific Coast* is an issue for the Ninth Circuit—not this Court—to resolve in the first instance. After all, this Court "usually allow[s] the courts of appeals to clean up intra-circuit divisions on their own, in part because their doing so may eliminate any conflict with other courts of appeals." *Joseph v. United States*, 574 U.S. 1038, 1040 (2014) (Kagan, J., respecting the denial of certiorari).

To be sure, last Term, two Justices dissented from denial of certiorari in *Tingley*. But they did so on the ground that there was a split among the circuits specifically on whether a conversion-therapy ban directly regulates speech. *Tingley*, 47 F.4th 1055, *cert. denied*, 144 S. Ct. at 34 (Thomas, J., dissenting from

the denial of certiorari); *id.* at 35 (Alito, J., dissenting from the denial of certiorari). Petitioners can identify no comparable split on the constitutionality of state licensing requirements for the practice of land surveying. *See supra* pp. 12-13. To the contrary, as discussed above, the Ninth Circuit has aligned with the Fourth Circuit by holding that California's licensing regime for land surveyors principally regulates conduct while burdening speech incidentally. *Crownholm*, 2024 WL 1635566, at *2.

II. Any Split Of Authority In This Area Is Not Implicated By Petitioners' Question Presented.

In their petition in this case, Petitioners chose to limit their question presented to a single, "threshold" issue: the framework for distinguishing between speech and conduct in First Amendment challenges to occupational licensing laws. Pet. 1. As discussed above, however, the circuits are not split on this issue.

Petitioners are correct that the circuits have used different verbal formulations to describe the level of scrutiny that applies *after* a court concludes that a law primarily regulates professional conduct and burdens speech only incidentally. Pet. 19-20, 28, 32-33. But again, Petitioners have not sought review on that question.[1]

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[1] By contrast, the pending petition in *Crownholm v. Moore* seeks review on the following question: "What level of constitutional scrutiny applies to speech regulated by an occupational licensing law?" Pet. i, No. 24-276 (Sept. 9, 2024).

Nor is the level of scrutiny that should apply in this context fairly included within Petitioners' question presented. S. Ct. R. 14.1(a). An argument is "fairly included" only if it raises a "*prior* question." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995) (emphasis in original). In other words, resolving the argument must be "a predicate to an intelligent resolution of the question presented." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996).

To resolve whether an occupational licensing law regulates speech or conduct, however, the Court need not decide the level of scrutiny that might apply *after* that threshold question is decided. To the contrary, the level of scrutiny is a subsequent issue that courts would confront only if the threshold question were resolved in a certain way. Thus, the appropriate level of scrutiny that applies here clearly falls outside the question presented.

Regardless, this case would be a poor vehicle for resolving any split on the level-of-scrutiny issue. As the Fourth Circuit noted, its application of intermediate scrutiny in this context "is *more* rigorous for legislatures to satisfy than it is in other circuits," some of which apply rational-basis review. Pet. App. 21a (emphasis added). There can therefore be no serious question that the Fourth Circuit would have reached the same outcome here whether it applied intermediate scrutiny or the lower form of rational-basis review.

Petitioners argue that the Fourth Circuit applied a "loosened" form of intermediate scrutiny that is

different from the type of intermediate scrutiny that the Fourth Circuit has applied in other First Amendment cases. Pet. 28; *see* Pet. App. 21a (citing *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015)). But any variation *within* the Fourth Circuit on the precise forms of intermediate scrutiny that it applies to different kinds of First Amendment disputes is not worthy of this Court's review. *See Joseph*, 574 U.S. at 1040 (Kagan, J., respecting the denial of certiorari). The Court should follow its ordinary practice and allow the Fourth Circuit to resolve any intra-circuit divisions in the first instance.

III. The Fourth Circuit Correctly Applied This Court's Precedent.

The petition should be denied for another reason as well: the decision below was rightly decided. Specifically, the Fourth Circuit correctly applied this Court's decision in *NIFLA* to hold that North Carolina's licensing requirement for land surveyors targets conduct—the practice of land surveying—and burdens speech only incidentally.

In *NIFLA*, this Court held that the First Amendment "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule." 585 U.S. at 769. Following this guidance, the Fourth Circuit correctly recognized that the North Carolina Engineering and Land Surveying Act, as applied to Petitioners, is directed at professional conduct, even if it imposes incidental speech burdens. The Act is a generally applicable licensing regime that

regulates the centuries-old practice of land surveying. It does so in part by barring unauthorized individuals from conducting themselves as land surveyors. The text of the Act itself makes clear that the North Carolina legislature seeks to regulate "the *practice* of land surveying" by making it unlawful "to *practice* or to offer to practice . . . land surveying" unless a person "has been duly licensed." N.C. Gen. Stat. § 89C-2 (emphasis added).

In other words, the Act targets *who* may practice land surveying and *how* they may go about doing so—not *what* land surveyors say. By entering a client's property, flying a drone, taking pictures, and preparing a survey with computer software, Petitioners seek to help clients measure property dimensions like distance, area, and volume. *See supra* p. 6. That conduct is simply what land surveyors *do*. The Act regulates this conduct by seeking to prevent untrained and inexperienced individuals from using flawed techniques to generate land surveys that could harm consumers. *See, e.g.*, N.C. Gen. Stat. §§ 89C-2, -13, -23. In this way, the Act aims to protect the public from the well-established harms to property and safety that can flow from untrained individuals operating in the land-surveying profession. Pet. App. 24a. The Fourth Circuit thus correctly held that the Act falls in the heartland of "conduct-focused" laws that seek to prevent "public-safety-related consequences" from unauthorized practice. Pet. App. 17a. The court below was right that nothing in the First Amendment requires the State to take a "caveat-emptor view of regulating surveying." Pet. App. 27a.

To the contrary, a State may use licensing regulations to prevent "potentially harmful economic and legal consequences that could flow from mistaken land measurements" *before* those consequences occur. Pet. App. 27a; *cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 454 (2015) ("[T]he First Amendment does not confine a State to addressing evils in their most acute form.").

Petitioners are wrong to suggest that this modest conclusion somehow categorically exempts occupational licensing laws from First Amendment review or otherwise violates this Court's decision in *NIFLA*. Pet. 24-26. The Fourth Circuit made clear that "States do not have a constitutional blank check when it comes to licensing regimes." Pet. App. 28a. And it correctly acknowledged that Petitioners' proposed course of conduct has both "communicative and non-communicative aspects," and is therefore subject to constitutional review. Pet. App. 25a. Consistent with this Court's decision in *NIFLA*, however, "States may regulate professional conduct, even though that conduct incidentally involves speech," so long as the regulation passes the relevant level of scrutiny. 585 U.S. at 768 (holding that although speech in these circumstances receives "less protection," it is not categorically exempt from the First Amendment's scope).

North Carolina's licensing law also finds independent support in history and tradition. *See Vidal v. Elster*, 602 U.S. 286, 295, 299 (2024) (history and tradition may "inform[ ]" First Amendment analysis of "longstanding" regulations); *NIFLA*, 585 U.S. at 767 (categories of speech belonging to a "long

. . . tradition" of restriction may be subject to lesser scrutiny). From "time immemorial" States have established standards for licensing practitioners and prohibited the unauthorized practice of professions. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). North Carolina has regulated land surveying since before the Founding. *See supra* p. 3. And it has maintained a land-surveyor licensing regime for more than a century. *See supra* p. 3. In fact, all fifty States currently require land surveyors to be licensed. *See supra* p. 4. North Carolina's law is no outlier. *Cf. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 79 (2022) (Kavanaugh, J., concurring) (emphasizing that an "outlier" and "unusual" licensing regime had been adopted in only six States).

This history and tradition sharply distinguishes the land-surveyor licensing regime here from the hypothetical laws purporting to regulate "the practice of journalism" or "the practice of composing" that Petitioners imagine. Pet. 20-21 (quoting *Richwine*, 707 F. Supp. 3d at 803). Those hypothetical laws would obviously lack any historical foundation. And they would also be unmoored from the kind of public health and safety concerns that are the hallmark of traditional professional-conduct regulation. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("[A]s part of their power to protect the public health, safety, and other valid interests [States] have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

Accepting Petitioners' arguments here would threaten to upend the longstanding history and tradition of state regulation of professions—with unpredictable, and potentially dangerous, consequences. Most professional regulations to some degree turn on the content of "speech" within the everyday meaning of that word. For example, laws regulate how lawyers speak with their clients, how doctors counsel their patients, how engineers draw up their blueprints, and so on. Petitioners seek a rule that could subject many of these ordinary professional regulations to strict scrutiny. *But 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."). Granting review here could thus jeopardize not only the land-surveyor licensing laws in place across all fifty States, but also professional regulations in a variety of other occupations.

Petitioners try to downplay the potentially destabilizing consequences of the rule that they seek. Pet. 31-32. Their efforts to do so only underscore how untenable their arguments are. Petitioners offer assurances that States may still regulate land surveying, for example, by requiring that plats be recorded only under the seal of a licensed surveyor. Pet. 32. But Petitioners have no explanation for why, under their theory, a law requiring a seal from a licensed surveyor to record a plat passes constitutional muster while a law requiring a license

to make orthomosaic maps and 3D digital models does not.

Nor have Petitioners shown how their rule would leave undisturbed other ordinary professional regulations far outside the land-surveying context. Petitioners insist, for example, that "performing medical procedures" qualifies as "nonspeech conduct." Pet. 31. But performing a medical procedure—just like performing a land survey—generates all kinds of information and data that a professional then shares with a client. After all, an x-ray is not so different from a map—it too involves "data" "communicated" in a "photograph[ ]." Pet. 2. Yet Petitioners offer no principled reason why laws regulating medical procedures would be exempt from First Amendment review under their theory.

Before granting review on a question with such potentially dramatic sweep, this Court should at least allow the lower courts to further develop doctrine in this area. This Court decided *NIFLA* just six years ago. Additional post-*NIFLA* decisions are continuing to percolate in courts across the country. Indeed, Petitioners themselves identify at least two similar appeals pending in the Second and Seventh Circuits. Pet. 21 (citing *Richwine*, 707 F. Supp. 3d 782, *appeal docketed*, No. 24-1081 (7th Cir.)); Pet. 31 (citing *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022), *appeal docketed*, No. 22-1345 (2d Cir.)). In light of this active percolation, any intervention by this Court would be woefully premature.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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