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. MORE, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

John Pagliaro, Staff Attorney
Counsel of Record
Natalie Logan, Acting President
New England Legal Foundation
333 Washington Street, Ste. 850
Boston, Massachusetts 02108
Telephone: (617) 695-3660
JPagliaro@newenglandlegal.org

October 11, 2024

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

QUESTION PRESENTED

May a court treat speech as unprotected by the First Amendment on the grounds that the speech is really just professional conduct and thus is duly regulated by occupational licensing laws?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Other Sources

INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of business corporations, foundations, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property.

NELF appears as amicus in this case because NELF's mission is to defend economic rights and the free market, including when they are intertwined with the First Amendment, as here. For the reasons stated in this brief, NELF believes that the Ninth Circuit has made a serious constitutional error by ruling against Petitioners' First Amendment rights and their right to carry on their business. A legislative restriction on speech should not escape First Amendment scrutiny merely because it is contained in a law intended to regulate the conduct of an occupation via a licensing scheme.

As the Petition rightly observes, circuit courts are split over this interplay of state occupational licensing laws and the First Amendment. This unfortunate split should be remedied before it widens even farther, beyond the twenty states that lie within the

---

[1] Pursuant to Supreme Court Rule 37.2(a), on October 1, 2024 NELF gave ten-day notice to counsel for the parties at their respective email addresses as shown on the docket. Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

federal circuits in question so far. This case provides the Court with an excellent and timely vehicle with which to enunciate a clear, uniform rule concerning this important constitutional issue.

NELF has therefore filed this brief to assist the Court in deciding whether to grant the Petition.

SUMMARY OF REASONS FOR GRANTING REVIEW

The appeals court's decision, departing so widely from this Court's prior guidance, relied on one of its own decisions, one that this Court specifically disapproved of in 2018. This case illustrates how, by treating speech as professional conduct, courts may evade this Court's ban on treating professional speech as a special category for purposes of First Amendment analysis.

This case involves a clash between the states' power to regulate occupations and the First Amendment when the right of free speech is integral to the kind of work someone performs. The decision below deepens a serious circuit split that already involves nearly half of the states. The important legal issues involved are well developed and ripe for this Court's resolution.

REASONS FOR GRANTING REVIEW

I. The Ninth Circuit's Decision Departs Greatly From This Court's Precedents And Is A Symptom Of A Serious Circuit Split.

This Court's decisions 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), offer authoritative guidance on the legal

questions raised in this and similar "professional speech"/"professional conduct" cases. Here, the Ninth Circuit followed that guidance in a half-hearted fashion and wandered into error in reliance on its own decisions, such as *Pickup v. Brown,* 740 F.3d 1208 (2014), deepening a significant circuit split.

In *NILFA*, this Court reviewed another Ninth Circuit case. There the appeals court had affirmed a trial court ruling that the state could require certain emergency pregnancy centers to provide their clients with a "government-drafted script" on the availability of state-sponsored abortions, despite the centers' deep-seated opposition to abortion. 585 U.S. at 766. Although the state law required the clinics to alter the contents of their speech in a manner they found offensive, the appeals court declined to apply strict scrutiny when examining the law's First Amendment constitutionality. Rather, it concluded that the law permissibly regulated mere "professional speech," which the court believed enjoyed a substantially lesser degree of First Amendment protection than other types of speech. *Id*. at 766-67.

On certiorari this Court firmly rejected any such constitutionally relevant category of speech.

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different [First Amendment] rules. ****
>
> But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has been reluctant to mark off new categories of speech for diminished constitutional protection. . . . This Court's

> precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect.

Id. at 767-68 (cleaned up).

Four times in these passages the Court pointedly cited the appeals court's decision in *Pickup* as an example of what *not* to do. *See also Tingley v. Ferguson*, 144 S.Ct. 33, 35-36, 601 U.S. __ (2023) (Alito, J., dissenting from denial of certiorari) ("highly debatable" that *Pickup* "survived at least in part our decision in" *NILFA*, which "singled out *Pickup* for disapproval"). In the present case, the appeals court not only cited *Pickup* but also *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2023), which relies on *Pickup*. *See also Tingley v. Ferguson*, 57 F.4th 1072, 1073-85 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of en banc review) (extensively criticizing reliance on *Pickup* in light *NILFA* and *Holder*).

Briefly, in *Holder* this Court cautioned against sidestepping the First Amendment by treating speech as merely readily regulable professional conduct. 561 U.S. at 28. The Court emphasized that courts must determine whether a law that may be generally applicable to conduct was, as applied in any given case, actually "trigger[ed]" by a party's speech. *Id*. ("as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message").

What use did the Ninth Circuit make of *NILFA* and *Holder* when deciding the present case? The answer seems to be as little as possible.

Finding itself foreclosed from deciding the case as one of "professional speech," the appeals court, without missing a beat, simply reverted to the logically antecedent distinction between conduct and speech. Categorizing Petitioners' relevant acts as professional conduct rather than as speech, the court concluded, "By citing Plaintiffs, the Board [for Professional Engineers, Land Surveyors, and Geologists] has simply penalized unlicensed land surveying conduct." *Crownholm v. Moore*, 2024 WL 1635566, at *2 (9th Cir. April 16, 2024). The truth is that, by accepting the state's view that Petitioners' speech is actually professional surveying conduct, the court "simply" revivified the professional speech exception in a different guise, six years after this Court had laid it to rest in *NILFA*. The appeals court then gave only a perfunctory analysis of relevant First Amendment issues.

In nearly every step of its analysis, the Ninth Circuit erred. Notably, *Holder* had anticipated the framing of a speech restriction wrongly as a benign restriction on professional conduct: "The law here may be described as directed at conduct, but *as applied* to plaintiffs the conduct *triggering coverage under the statute consists of communicating a message*." 561 U.S. at 28.

From the board's own words in the citation it issued to Petitioners, it is perfectly apparent that the contents of the site plans formed the "triggering" communications for which Petitioners were cited. The Board laid out its grievances as follows:

> Specifically, you have offered and practiced land surveying, without legal authorization, as evidenced by a review of your business website by Board staff between March 2021 and

> December 2021. Preparing site plans *which depict the location of property lines, fixed works, and the geographical relationship* thereto falls within the definition of land surveying, pursuant to Business and Professions Code section(s) 8726(a) and (g). Offering to prepare subdivision maps and site plans *which show the location of property lines, fixed works, and the geographical relationship thereto*, falls within the definition of land surveying pursuant to Business and Professions Code section 8726(i).

Petitioners' Appendix at 149a-150a (emphasis added). As relevant here, then, the alleged unlawful practice of surveying consists in offering and preparing site plans with certain given content.

The citation echoes the restrictions placed by the licensing scheme on speech such as the Petitioners' site plans, even though the plans are based on public, non-proprietary data and are accompanied by disclaimers. *See* Petitioners' Appendix 151a-152a; Petition at 2, 8, 9. *See also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (use, "creation and dissemination of information are speech within the meaning of the First Amendment"); *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (speech includes drawing pictures).

The board's focus on the site plans and their informational content scarcely supports a ruling that Petitioners' conduct, rather than their speech, triggered the citation, and yet the court so ruled, echoing the board. In upholding the dismissal of the as-applied First Amendment challenge Petitioners raised, the appeals court recited the offending *contents* of the site plans as proof that the licensing law is concerned only with *conduct* and not *speech*.

Crownholm, 2024 WL 1635566, at *2. That reasoning is deeply flawed, for the facts of this case signal content-based regulation of speech unambiguously.

In *McCullen v. Coakley*, this Court wrote that the law in question there "would be content based if it required enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." 573 U.S. 464, 479 (2014) (cleaned up). "[E]xamine the content of the message," of course, is exactly what the board and the court did with Petitioners' site plans. *See also Reed v. Town of Gilbert*, 576 U.S. 155, 163-164 (2015) (regulation is based on speech content if it "cannot be justified without reference to the content of the regulated speech"). The occupational licensing law, as applied by the board and as upheld by the appeals court, openly "target[s] speech based on its communicative content." *Vidal v. Elster*, 602 U.S. 286, 292–93 (2024) (cleaned up).

"As a general matter, such laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *NIFLA*, 585 U.S. at 766 (cleaned up). The appeals court, however, did not apply that level of scrutiny to the California licensing law because it believed that only professional conduct is being regulated.

As this Court has stated, "it is no answer to the constitutional claims asserted by petitioner to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *National Ass'n for*

Advancement of Colored People v. Button, 371 U.S. 415, 438–39 (1963).

The appeals court's two additional defenses of its ruling are equally flawed. First, the court declared the law to be "content neutral" because its application is not confined to site plans depicting only certain types of property. *Crownholm*, 2024 WL 1635566, at *2. To be clear, content-neutral speech restrictions are those that "are justified *without reference to the content*" of speech. *Boos v. Barry*, 485 U.S. 312, 320 (1988) (cleaned up; emphasis added)). Here, instead of pursuing an irrelevant question about what kinds of property the law applies to—an issue which is not present in this case—the court should have focused its analysis on the actual facts. Had it done so, it would have had to acknowledge that, in order to "justif[y]" application of the licensing restrictions the board sought to impose on Petitioners, the contents of their site plans were in fact "reference[d]" repeatedly in the citation. *See supra* pp. 5-6. Obviously, the law was not applied neutrally to Petitioners' speech.

The court also claimed that, even assuming that Petitioners' "activity" has some "expressive component," "the Act's effect on this component is *merely incidental* to its primary effect of regulating Plaintiffs' unlicensed land surveying activities."[2] *Crownholm*, 2024 WL 1635566, at *2 (emphasis added).

Not only did the court depart from the usual meaning of the speech/conduct distinction, it did the

[2] Whatever the court may have meant by its vague reference to a possible "expressive component" in Petitioners' site plans, we note again that data, information, and depictions are protected speech. *See Sorrell*, 564 U.S. at 570; *303 Creative*, 600 U.S. at 587.

same with the meaning of the key word "incidental." Black's Law Dictionary (12th ed. 2024) defines "incidental" to mean "Subordinate to something of greater importance; having a minor role." The American Heritage Dictionary defines it as "Occurring or likely to occur as an unpredictable or minor consequence."[3] The Oxford and the Cambridge dictionaries are to very much the same effect.[4]

Surely, if anything is certain in this case, it is that neither the board nor the appeals court treated the supposedly "incidental" site plans and their contents as playing a legally "minor role" or as of legally "minor consequence" in the application of the licensing law to Petitioners. As we have seen, quite the contrary is true. For both, everything Petitioners did, or supposedly did, in the way of alleged "surveying" leads up to the culminating fact of their producing and marketing site plans with certain very particular contents—contents that both the board and the court treated as constituting Petitioners' principal offense against the licensing laws.

Commonsense and the First Amendment say that there is simply nothing "merely incidental" about the decisive legal significance given to the contents of the site plans by the board and court. As the law was applied, it was the contents of the site plans that "trigger[ed]" the enforcement action, *Holder*, 561 U.S.

---

[3] https://ahdictionary.com/word/search.html?q=incidental

[4] *See* Oxford English Dictionary ("Occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual"), https://www.oed.com/search/dictionary/?scope=Entries&q=incidental; Cambridge Dictionary ("less important than the thing something is connected with or part of"), https://dictionary.cambridge.org/dictionary/english/incidental.

at 28; as applied here, the licensing law "target[s] speech based on its communicative content," *Vidal*, 602 U.S. at 292-93. More rigorous scrutiny than the mere rational basis review used here is required.[5] *See Holder*, 561 U.S. at 28.

II. The Issues Are Of National Importance And This Case Is An Excellent Vehicle For Deciding Them.

Above, NELF has revealed the many flaws and missteps found in the appeals court's decision. That decision illustrates in so many ways the error and confusion still current even after *NIFLA* and *Holder*. As Petitioners argue cogently, the scale of the problem put before this Court by the Petition, as well as by that in *360 Virtual Drone Services LLC v. Ritter* (No. 24-279), goes beyond a single wayward decision. So far four circuits, encompassing fully twenty states, have managed to take such a variety of approaches to the legal issues raised in cases like this that not only do the circuits go wrong in different, albeit sometimes imaginative ways (e.g., the Fourth Circuit's homebrewed "non-exhaustive list of factors" in *360 Virtual Drone Services LLC v. Ritter*, 102 F.4th 263 (2024)), but even panels *within the same circuit* cannot agree, even when one of them does get it right.

---

[5] Even were the appeals court correct about the law's having a merely incidental effect on Petitioners' speech, a greater degree of scrutiny would be required. *See Holder*, 561 U.S. at 26-27 (when restriction on conduct burdens speech incidentally, court applies intermediate scrutiny and will sustain content-neutral regulation if it advances important governmental interests unrelated to speech and does not burden substantially more speech than necessary to further those interests).

See Petition at 19-29. Only this Court can dispel such confusion.

Moreover, cases like these straddle especially crucial sets of rights—i.e., First Amendment rights and economic rights directly touching on earning one's livelihood—and for that reason this Court's review is especially urgent. The right to earn an honest living by working a lawful job is an essential attribute of responsible citizenship in a free society. Like other economic rights, however, it receives less constitutional protection than do some non-economic rights. Perhaps as a result, over the past several decades there has been a veritable explosion of state licensing laws applied to ever more varied forms of work, especially to what we would ordinarily consider to be non-professional ways of earning a livelihood. As an important survey of this national problem notes:

> Millions of Americans in low- and middle-income jobs like barber, landscape contractor, interior designer and many others need a government permission slip—known as an occupational license—to work. Securing one can take months or even years of training, one or more exams, hefty fees, and more. Proponents claim these licenses are necessary to protect consumers from unsafe or otherwise poor service. Yet most evidence indicates licenses do no such thing and instead impose heavy costs on workers, consumers, and the economy and society at large.

Institute for Justice, *License To Work: A National Study of Burdens from Occupational Licensing* (3rd ed. 2022) at 4.[6]

The present case illustrates the point well. States such as California and North Carolina pursue with even criminal sanctions those who, like Petitioners, earn a living using public data to make avowedly non-authoritative site plans that their purchasers judge to be perfectly satisfactory for their particular purposes. The National Council of Examiners for Engineering and Surveying (NCEES) understands the importance of professional surveying licensure, if anyone does. Yet NCEES recognizes practical limits to the necessity of licensure. Its *Model Law*, last revised in August 2024, is "designed to assist legislative counsels, legislators, and NCEES members in preparing new or amendatory legislation."[7] At 1. "By vote, the majority of NCEES member boards have agreed that the language in the *Model Law* and *Model Rules* represents the *gold standard for engineering and surveying licensure requirements* in the United States." *Id*. (emphasis added). So it is of interest to find that in Section 210.25 of the *Model Rules* (rev. August 2024) NCEES makes the commonsense distinction between, on the one hand, using electronic systems to make the "original measurements" found in "surveying deliverables," which are intended to be "authoritative" and which for that reason must be produced by or under the supervision of a "professional surveyor," and, on the other hand, other measurements, such as those based on the public

---

[6] Available at https://ij.org/wp-content/uploads/2022/09/LTW3-11-22-2022.pdf.

[7] Available at https://ncees.org/wp-content/uploads/2024/09/Model-Law_August-2024_web-1.pdf.

Geographical Information System (GIS), when they are used as a non-authoritative "reference for planning, infrastructure management, and general information."[8] At 2-3. Yet, under the law of some states, apparently merely collecting public GIS data in return for compensation skirts, or may actually incur, criminal prosecution on the grounds that in doing so one is unlawfully engaged in the "practice of surveying."

The collision of overzealous occupational licensing laws with the First Amendment powerfully throws into doubt the excesses of these laws as perhaps no other conflict could. As the Court has observed, their readiness to recharacterize speech as professional conduct "gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 585 U.S. at 773. No less significant is that it also may eliminate one's ability to earn a living.

Resolution of these important issues turns on questions of law viewed against an already well-developed legal background provided by this Court's decisions in *NILFA* and *Holder* and numerous lower court decisions seeking to apply the guidance given in those two cases. This case is therefore an excellent and timely vehicle for the Court to clarify what the correct method is for analyzing the clash of a state's power to regulate occupations and an individual's right to earn a living in the free exercise of the First Amendment.

---

[8] Available at https://ncees.org/wp-content/uploads/2024/09/Model-Rules_August-2024_web.pdf.

CONCLUSION

For the reasons given here and in the Petition itself, the Petition should be granted.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,
By its attorneys,

/s/ *John Pagliaro*

John Pagliaro, Staff Attorney
Counsel of Record
Natalie Logan, Acting President
New England Legal Foundation
333 Washington St., Ste. 850
Boston, Massachusetts 02108
Telephone: (617) 695-3660
JPagliaro@newenglandlegal.org

Dated: Oct. 11, 2024