No. 23-15138

In the United States Court of Appeals for the Ninth Circuit

Ryan Crownholm; and Crown Capital Adventures, Inc.,
d/b/a MySitePlan.com,
Plaintiffs-Appellants,
v.
Richard Moore, in his official capacity as Executive Officer of the California Board for Professional Engineers, Land Surveyors, and Geologists, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
The Honorable Dale A. Drozd
Case No. 2:22-cv-01720-DAD-CKD

Brief of *Amicus Curiae* Yes In My Back Yard (YIMBY) in Support of Plaintiffs-Appellants Ryan Crownholm et al.

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* Counsel would like to thank Ian Levy, Katarina Rusinas, and Asim Zaidi, UCLA School of Law students who worked on the brief.

Rule 26.1 Disclosure Statement

Amicus Curiae Yes In My Back Yard is a nonprofit corporation that has no parent corporation, and is not owned in any part by any publicly held corporation.

All parties have consented to the filing of this *amicus* brief.

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Interest of *Amicus Curiae*[1]

Yes In My Back Yard (YIMBY) is a 501(c)(3) nonprofit organization. YIMBY Law (YIMBY's litigation project) and its network of volunteer housing advocates have an interest in the free depiction of lines on satellite images, as well as in the preparation of rudimentary site plans in connection with a preliminary entitlement procedure that state law provides for by-right affordable housing. This interest is threatened by the decision below, and YIMBY submits this brief to show that the restriction at issue here imperils both public participation in local planning and the expedited provision of affordable housing.

Summary of Argument

The challenged provisions of Cal. Bus. & Prof. Code § 8726(a) are overbroad, because they restrict a substantial amount of activity protected by the First Amendment: creating crude maps to determine the value of real estate properties, capturing images to monitor construction progress, drawing historical maps of how a town changed over time, and more. "The

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief.

creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011); *see, e.g.*, *Animal Legal Def. Fund v. Wasden,* 878 F.3d 1184, 1203 (9th Cir. 2018) (holding that the recording of agricultural production practices was protected speech because to argue otherwise "is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not").

The statute also cannot be defended as a restriction on professional-client speech or professional conduct. And in any event, § 8726(a) is not limited to a professional's communications to a particular client; rather, it also covers speech directed to the public at large. *See Lowe v. SEC,* 472 U.S. 181, 232-33 (1985) (White, J., concurring in the judgment).

Section 8726(a) is also facially content-based, because a violation of the law depends entirely on the content of the illustrations, such as on whether a drawing "[l]ocates, relocates . . . or retraces any property line or boundary." *See* Cal. Bus. & Prof. Code § 8726(a)(1). And § 8726(a) is a speaker-based speech restriction: The challenged provisions unconstitutionally allow surveyors to compile and present speech that non-surveyors cannot.

Argument

I. The challenged sections of § 8726(a) restrict a substantial amount of speech, and are thus substantially overbroad

A statute is unconstitutionally overbroad if it "penaliz[es] a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). That is so whether or not the statute has been previously enforced against protected speech: An unconstitutionally overbroad statute cannot be upheld "merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Section 8726(a)(7) restricts speech (by everyone except licensed surveyors) that "[d]etermin[es] the information shown . . . on any map or document" "in connection with," for instance, "locat[ing]" any building, highway, or property line. Cal. Bus. & Prof. Code §§ 6731, 8726(a)(1), (3), (7). Yet such creation of maps is a normal part of a wide range of protected speech. A map, like a picture, is worth a thousand words: When one is trying to explain where things are—whether for political reasons, personal reasons, or business reasons—drawing a map is the best way of communicating that information.

For example, a newspaper article about a planned land development may well include an annotated map of the area in question. See Kristen Grind et al., *Elon Musk Is Planning a Texas Utopia—His Own Town*, Wall St. J. (Mar. 9, 2023, 10:22 AM). Such a map would likely include labels, retrace and highlight boundaries, and locate key areas of interest. But the statute forbids anyone except licensed surveyors from "locat[ing], relocat[ing], establish[ing], reestablish[ing], or retrac[ing] any property line or boundary" or locating a building or highway. Cal. Bus. & Prof. Code §§ 6731, 8726(a)(1), (3), (7).

Or say a group of neighbors believe a construction company is violating the terms of its permit. To communicate their grievances, the neighbors photograph the site to show what the company is doing (for instance, to show that it is encroaching on public land outside the property). Under Sections 8726(a)(3) and (7), the neighbors would be restricted from "establish[ing] . . . the boundary" of the construction zone unless they hired someone with a land surveyor license. *See* Cal. Bus. & Prof. Code § 6731(b) (defining "civil engineering" to include "[t]he supervision of the construction of engineering structures").

Similarly, under §§ 8726(a)(1) and (7), property owners would be restricted from "trac[ing] . . . the alignment" of their own properties. *See, e.g.*, *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 929 (5th Cir. 2020) (holding that a similar land surveying statute was subject to First Amendment scrutiny, where plaintiffs used digital geospatial visualization tools to convert existing descriptions of real property into computer generated drawings to be used by banks to value properties for collateral).

Indeed, *amicus* YIMBY's experience illustrates how mapmaking is important to political action. YIMBY Law's mission, which originated in California and is expanding nationwide, is to end the housing shortage and achieve affordable, sustainable, and equitable housing for all. YIMBY Law actively educates the public about local and state housing laws—which, in California, means helping advocates engage their local governments in complying with the Housing Element Law, Cal. Gov. Code §§ 65580 *et seq.*, which creates a statutory duty to plan for housing. And when local governments violate this statute, YIMBY Law litigates and publicizes a statutory "builder's remedy" that bypasses local zoning

standards for affordable housing projects upon submission of a standardized preliminary application with a site plan. *See id.* §§ 65589.5(d)(5) (bypassing local zoning), 65941.1 (standardizing preliminary application).

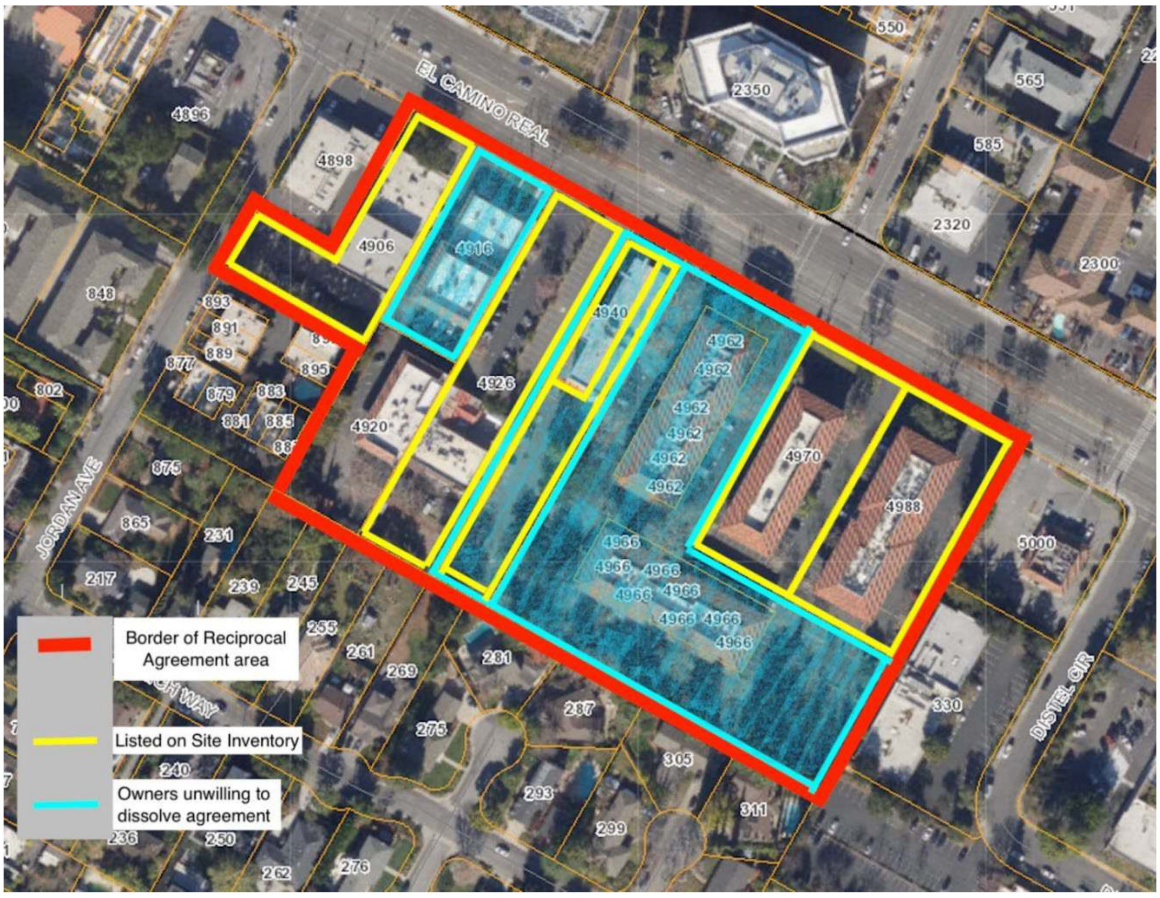
Landowners need not be big-box developers to rely on the builder's remedy. All that is required is a standardized preliminary application, including a "site plan" that calls for rudimentary information but no particular license or experience. *Id.* § 65941.1 (preliminary application criteria); § 65589.5(o)(1) (linking builder's remedy to preliminary application under § 65941.1); § 65941.1(d)(1) (final plan requirements).

The Housing Element Law also explicitly demands "public participation" in a technical process. *Id.* § 65583(c)(9). Every five to eight years, on a rolling basis, the state assigns each of its 539 local governments a numerical mandate known as the Regional Housing Need Allocation, or "RHNA." *See id.* §§ 65584 *et seq.* A local government's RHNA is the number of homes, designated across four household-income categories, for which the local government must produce "[a]n inventory of land" meeting statutory criteria for zoned and real-world capacity "to meet the locality's housing need for [each] income level." *Id.* § 65583(a)(3); *see id.*

§ 65583.2 (detailed statutory criteria). This inventory becomes the centerpiece of a general-plan document called a "housing element," *id.* § 65582(f), which must be reviewed by a state agency, *id.* § 65585, and which triggers by-right approval for affordable housing projects on designated sites. *See id.* §§ 65583.2(c), 65589.5(d)(5)(A).

YIMBY Law helps citizens participate in this process by coordinating a multiorganizational, volunteer-driven campaign to participate in the housing-element process. YIMBY Law and its volunteers routinely depict property lines and site-specific features on satellite images in publicly commenting on housing elements. This is because the law requires consideration of a wide range of evidence about the "realistic development capacity" of sites designated for housing. *Id.* § 65583.2(c)(2). YIMBY Law has recruited over 600 volunteer watchdogs to participate in the "6th RHNA Cycle" housing-element updates that began in 2019. *See* Cal. Dep't Hous. & Cmty. Dev., *Housing Element Update Schedule* (June 15, 2021), https://www.hcd.ca.gov/community-development/housing-element/docs/6th-web-he-duedate.pdf [https://perma.cc/6KET-U6S9]. As men-

tioned above, such participation often entails superimposing lines on satellite images. The example below, submitted by a volunteer watchdog to the City of Los Altos last summer, is emblematic:



YIMBY Law publicizes volunteer-submitted site plans on a website it maintains to promote the builder's remedy. *See* YIMBY Law et al., *Missing Middle Housing Designs*, https://zoningholiday.com/designs/ [https://perma.cc/3FQT-H9CQ]. And at least one YIMBY Law watchdog, who describes himself as a "random homeowner dude" with no development ex-

perience, has submitted a preliminary application to build deed-restricted affordable housing onsite at his own home in the City of Los Altos Hills. J.K. Dineen, *This Bay Area Man Has Become the Face of California's Latest Housing Drama*, S.F. Chron. (Feb. 18, 2023).

Requiring a license in order to "[l]ocate . . . property line[s]" on satellite images, Cal. Bus. & Prof. Code § 8726(a)(3), or to "prepar[e] and submi[t] plans, designs, and specifications," *id.* § 6731(e), thus restricts housing organizations' and volunteers' freedom of speech. As shown above, the Housing Element Law calls for "public participation" in which advocates often "[l]ocate . . . property line[s]" in their written public comments—and when local governments fail to plan for housing, the law preliminarily authorizes the construction of affordable housing upon "submission" of a site "plan." *See* Cal. Bus. & Prof. Code §§ 6731(e), 8726(a)(3); Cal. Gov. Code §§ 65583(c)(9), 65583.2, 65589.5(d)(5), 65941.1.

But few housing advocates are licensed land surveyors. Housing elements are meant to be civic documents created for and by the community. Both advocates' First Amendment rights and the explicit statutory goal of "public participation" in the housing element development process would be defeated if—as is the Board's position here—certain aspects of

public participation were restricted to licensed land surveyors. *See* Cal. Gov. Code § 65583(c)(9).

II. Collecting publicly available mapping information to create new drawings and disseminate those drawings is protected speech

The overbreadth analysis in this case is not affected by the statute's targeting of information rather than opinion. "The creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell*, 564 U.S. at 570. "[F]acts, after all, are the beginning point for much of the speech that is the most essential to advance human knowledge and to conduct human affairs." *Id.* Thus, "[a]n individual's right to speak is implicated" when the government seeks to restrict the "way in which . . . information might be used or disseminated." *Id.* at 568. And this is equally true as to nonpolitical matters, whether they involve "factual information about horseshoeing," *Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062, 1071 (9th Cir. 2020), "communication about golf," *id.*, or visual communication about the locations of buildings, highways, and the like.

The creation of such expression is also as protected as its communication. To hold otherwise would be "akin to saying that even though a book

is protected by the First Amendment, the process of writing the book is not." *Animal Legal Defense Fund v. Wasden,* 878 F.3d 1184, 1203 (9th Cir. 2018). Just as there is a right to "creat[e] a video," *id.*, so there is a right to create a map. "If the act of making a photograph or recording is to facilitate speech that will follow, the act is a step in the 'speech process,' and thus qualifies itself as speech protected by the First Amendment." *Ness v. City of Bloomington*, 11 F.4th 914, 923 (8th Cir. 2021) (so holding as to photography and filming in a public park). And what is true for photographs or recordings is equally true for maps: The creation of speech is itself constitutionally protected expression, and not constitutionally unprotected conduct.

Nor can § 8726(a) be saved by the theory that it regulates professional speech. The Supreme Court in *Nat'l Inst. of Fam. & Life Advocs. v. Becerra,* 138 S. Ct. 2361 (2018) (*NIFLA*), "abrogated . . . the 'professional speech' doctrine." *Tingley v. Ferguson*, 47 F.4th 1055, 1073 (9th Cir 2022). And while *NIFLA* recognized that "States may regulate professional conduct, even though that conduct incidentally involves speech," *id.* at 1074 (cleaned up), the statute here goes far beyond professional conduct: Section 8726(a) extends to speech not just when a professional "takes the

affairs of a client personally in hand," *Lowe v. SEC,* 472 U.S. 181, 232-33 (1985) (White, J., concurring in the judgment), but also to speech directed to the public at large or to the government, as the examples in Part I show. As Justice White noted in *Lowe*, such speech outside the professional-client relationship generally constitutes fully protected speech.

Indeed, the Fifth Circuit has recognized this very point to a similar statute in *Vizaline*, where the plaintiff was sued by the state Board of Licensure for Professional Engineers and Surveyors for operating without a surveyor's license, 949 F.3d at 929, based on its selling computer generated drawings made using digital geospatial visualization tools and existing descriptions of real property, *id.* In reversing the district court opinion, the Fifth Circuit made clear that "occupational-licensing regulations are [not] exempt from First Amendment scrutiny." *Id.* at 928.

III. Section 8726(a) is content based because the statute requires authorities to examine the content of speech

A law is content based if it requires authorities to "examine the content[] of the message to see if a violation has occurred." *Kirchmeyer*, 961 F.3d at 1073. In *Kirchmeyer*, this Court held that a California law was content based because it restricted students without a high school diploma or GED from enrolling in certain kinds of vocational courses, but

exempted "solely avocational or recreational" courses. *Id.* at 1071. Because enforcement was dependent on the message being conveyed by a given course—whether the message was on a vocational topic—this Court found that the statutory scheme "engage[d] in content discrimination." *Id.* at 1073.

Here, enforcement likewise depends on the message being conveyed. Whether § 8726(a)(7) is violated depends entirely on whether an unlicensed person "locates, relocates, . . . or retraces any property line or boundary of any parcel of land, right-of-way, easement." Cal. Bus. & Prof. Code §§ 8726(a)(3), (7). For example, a journalist who writes an article about a development project and includes images that show the approximate boundary lines faces a penalty, because the article locates property lines. A journalist who uses images that do not include the same content faces no penalty.

Nor would the statute's purpose of protecting the public (*see* ER 11 (cleaned up) (justifying § 8726(a)(1) as a means to "protect the people from ignorant pretenders")) make it content-neutral. "[A] law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive," and courts must consider whether a law is

"content neutral on its face *before* turning to the law's justification or purpose." *Reed v. Town of Gilbert*, 576 U.S. 155, 165 (2015). Indeed, even an ostensibly content neutral regulation must satisfy strict scrutiny if it cannot be "justified without reference to the content of the regulated speech." *Id.* at 164. And it is the supposedly unreliable content of unlicensed speech that is being used to justify the restriction.

Because the restriction is content-based, it is therefore subject to strict scrutiny, which it cannot pass for reasons given in Appellants' Brief at 34-37.

IV. Section 8726(a) is a speaker-based restriction that is subject to strict scrutiny

"A regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy' is plainly" an abridgement of the freedom of speech. *See FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984). A ban on mapmaking by people who lack a surveyor's license is one such regulation.

Consider, for example, concerned neighbors who believe that a construction company is exceeding its permit, or who want to participate in an affordable housing development process such as the ones discussed in Part I. If none of the neighbors is licensed, §§ 8726(a)(3) and (7) would

restrict them from drawing up maps and presenting them to the local City Council or zoning board. Thus, they would be denied the right to gather information and discuss an important local controversy. But if one member of their group were a licensed land surveyor, the neighbors would then be able to lawfully compile evidence and present their political argument against the construction company.

To be sure, any neighbors could pay money to get a map made by a licensed surveyor. But the right to speak should not turn on whether one can afford to hire expensive expert. This speaker discrimination thus independently triggers strict scrutiny, which it likewise cannot pass for the reasons given at Appellants' Brief at 34-37.

Conclusion

Section 8726(a) restricts a substantial amount of constitutionally protected speech, including the creation of speech. It does so in a content-based way, because it targets a particular kind of information. And it is a speaker-based restriction, because it prevents non-surveyors from speaking on important community issues. The decision below should therefore be reversed.

Respectfully Submitted,

s/ Eugene Volokh

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: May 15, 2023

s/ Eugene Volokh

Attorney for *Amicus Curiae*

Certificate of Service

I hereby certify that I electronically filed the foregoing Brief *Amicus Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 15, 2023.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: May 15, 2023

s/ Eugene Volokh

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