No. A22-1099

STATE OF MINNESOTA

IN COURT OF APPEALS

THE MINNESOTA BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING, LANDSCAPE ARCHITECTURE, GEOSCIENCE, AND INTERIOR DESIGN,

Respondent,

vs.

CHARLES L. MAROHN, JR.,

Relator.

RELATOR CHARLES L. MAROHN, JR.'S BRIEF

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- *Issue raised in proceeding:* Marohn's Motion for Summary Judgment, Marohn's Opposition to the Complaint Committee's Motion for Summary Disposition and Marohn's Objections to the ALJ's Decision.
- *Court ruling:* The Board ruled against Marohn.
- *Issues subsequently preserved:* Marohn preserved the issue by raising it before the ALJ and the Board.
- *Apposite law: Dick Weatherston's Associated Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co.*, 100 N.W.2d 819 (Minn. 1960).

II. Whether the Board's application of Minn. Stat. §326.02 subd. 3 to speech outside of engaging, or offering to engage, in the practice of engineering, violates the First Amendment free speech guarantee?

- *Issue raised proceeding:* Marohn's Motion for Summary Judgment, Marohn's Opposition to the Complaint Committee's Motion for Summary Disposition and Marohn's Objections to the ALJ's Decision.
- *Court ruling:* The Board ruled against Marohn.
- *Issues subsequently preserved:* Marohn preserved the issue by raising it before the ALJ and the Board.
- *Apposite law: Nat'l Inst. of Family Life Advocates v. Becerra* ("*NIFLA*"), 138 S.Ct. 2361, 2371 (2018).

III. Whether the Board's application of Minn. Rule §1800.0200 subps. 1(B), 2, and 4(C) which prohibit licensees from being "[un]truthful in all professional documents;" making "a false statement … in connection with an application for … renewal;" or "engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation" violates the First Amendment free speech guarantee?

- *Issue raised in proceeding:* Marohn's Motion for Summary Judgment, Marohn's Opposition to the Complaint Committee's Motion for Summary Disposition and Marohn's Objections to the ALJ's Decision.

- *Court ruling:* The Board ruled against Marohn.

- *Issues subsequently preserved:* Marohn preserved the issue by raising it before the ALJ and the Board.

- *Apposite law: United States v. Alvarez*, 567 U.S. 709 (2012).

STATEMENT OF THE CASE

Relator Charles L. Marohn ("Marohn") is a licensed professional engineer. Since 2012, Marohn has not worked as an engineer. Rather, Marohn started a non-profit corporation called Strong Towns to engage in political advocacy opposing the expenditure of public funds on public works projects. From 2018-2020, Marohn inadvertently allowed his professional engineering license to lapse. During this time period, Marohn continued to identify himself as a professional engineer. The Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design ("Board") commenced this proceeding against Marohn asserting (i) Marohn violated Minn. Stat. §326.02, subd. 3(b)'s prohibition on anyone other than a licensed professional engineer identifying themselves as a "professional engineer" and (ii) Marohn falsely answered a preprinted certification on his renewal application that he had not represented himself as a "professional engineer" without a license in violation of Minn. Rule §1800.0200 subps. 1(B), 2, and 4(C) which prohibit licensees from being "[un]truthful in all professional documents;" making "a false statement … in connection with an application for … renewal;" or "engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation." The Board fully admits Marohn neither provided, nor offered to provide, engineering services during the period his licensed lapsed and that Marohn only identified himself as a professional engineer during this when engaged in political advocacy.

Marohn commenced this appeal by writ of certiorari after the Board issued its final order disciplining Marohn following the Board's contested hearing process and

administrative review before an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings ("OAH"). ALJ James Lafave issued a non-final Report and Recommendations on May 31, 2022 recommending the Board grant summary disposition in its favor. The Board, after Marohn filed exceptions and arguments, modified the ALJ's recommendations and issued its Final Order on July 12, 2022 finding Marohn violated Minn. Stat. §326.02 subd. 3(b) and Minn. R. 1805.0200 and ordered Marohn be censured, reprimanded, required to take additional ethics credits courses and fined $1,500.

STATEMENT OF FACTS

A. Background: Marohn Background; Properly Maintains License Through 2018.

Marohn is an urbanist, land-use planner, author, public policy advocate and speaker. *First Marohn Declaration, ¶3, OAH000231.* Currently, Marohn has placed his professional engineering license in retirement status as of May 23, 2022. *ALES025.* Marohn graduated from the University of Minnesota in 1995, earning a Bachelor's in Civil Engineering and later completing a Master's of Urban and Regional Planning in 2004 from the same university. *First Marohn Declaration, ¶4, OAH000231.* On February 8, 2000, Marohn obtained his professional engineering license from the Board. *Id. at ¶5 OAH000231.*

Marohn then founded a professional planning and engineering firm, Community Growth Institute, LLC. This firm engaged in professional planning and engineering, providing services exclusively to local governments. *Id., ¶6, OAH000231-232.* During his decade of work at the firm, on numerous engineering projects, Marohn observed first-

hand that government infrastructure projects often resulted in excessive, wasteful public spending that did not positively impact the long term wellbeing of the community and, in fact, sometimes caused the opposite. *Id.*, ¶*7, OAH000232.* In 2009, deciding that reform was needed, Marohn founded Strong Towns, a Minnesota nonprofit organization that advocates for local governments to improve public spending outlooks and processes to reduce wasteful spending of taxpayer funds on public planning, engineering and infrastructure, better long-term community outcomes for public projects and many other reforms . *Id. at* ¶¶*7, 8, OAH000232.* Gradually, Marohn moved away from the practice of engineering and toward public advocacy, ultimately closing Community Growth Institute, LLC in 2012. *Id, OAH000232.*

Strong Towns promotes a philosophy of urbanism that avoids unnecessary infrastructure, overspending and lowering long-term maintenance costs. *Id.*, ¶*8, OAH000232.* Strong Towns seeks to educate and inform the American public in becoming more sophisticated advocates for more beneficial and cost effective infrastructure projects in their local communities. *Id.*, ¶*9, OAH000232.* Strong Towns website, www.strongtowns.org, provides a wealth of information and insights on the topics of urbanism, urban planning, land-use planning, and infrastructure projects. *Id.*, ¶*10, OAH000232.* Marohn has written two books, including: *Strong Towns: A Bottom-Up Revolution to Rebuild American Prosperity* and *Confessions of a Recovering Engineer: A Strong Towns Approach to Transportation*, to provide further information and insight in the public interest. *Id.*, ¶¶*11, 12, OAH000232.* Marohn is widely known, well-respected and often cited in the fields of urbanism, planning and engineering. *Id.*,

¶*13, OAH000232-233*. Marohn was voted one of the ten "most influential urbanists of all time" in 2017, by the urbanist website Planetizen. *Id, OAH000232-233*.

Marohn has not practiced or offered to practice engineering since 2012. *Id*, ¶*14, OAH000233.* Since 2012, Marohn has not signed any engineering documents, prepared any plans or specifications requiring licensure, overseen anyone who practices engineering, worked on any engineering projects, or undertaken any professional action that created any threat to the health, safety, and welfare of the public. *Id, OAH000233.* Since 2012, Marohn has not worked, applied for work, or even used his credentials to seek work or suggest he was open to work as a licensed professional engineer. *Id OAH000233.*

B. Marohn Inadvertently Forgets to Renew His License and Subsequently Renews Immediately Upon Discovery of Error.

Despite not practicing as a professional engineer since 2012, Marohn maintained his active license status from 2012 to 2018. *Id.,* ¶¶*14-18, OAH000233-234.* Minn. Stat. §326.10 requires professional engineers to renew their license by June 30 of every even number year, with the new license period beginning on July 1. *Id.,* ¶*15, OAH000233.* In addition, professional engineers must complete 24 hours of continuing learning credits, including 2 ethics credit hours for each license period. *Id, OAH000233*.

Marohn did not receive a notice of renewal in the mail prior to his renewal deadline of June 30, 2018. *Id.,* ¶*17, OAH000233-234.* This lack of notice, coupled with his work outside the practice of engineering, caused Marohn to inadvertently fail to timely renew his license. *Id,* ¶*17, OAH000233-234.* Almost two years later, one of Strong Towns' employees

discovered Marohn's failure to renew his license on June 9, 2020 and Marohn immediately filed for reinstatement that day. *Id., ¶18, OAH000234.* Reinstatement of a license is done online subject to satisfying all other requirements of licensure and payment of a late fee. Minn. Stat. §326.10 subd. 9; *Id.* at ¶19. Marohn had already fulfilled all his continuing education requirements for the period his license lapsed because Marohn believed his license was active. *Id., ¶20, OAH000234-235.* Therefore, Marohn filled out the reinstatement application, submitted all fees including any late fees, and the Board subsequently renewed his license for the 2020-2022 licensing period. *Id, OAH000234-235.* Since 2012 to the present, Marohn has not practiced, nor offered to engage in the practice of, engineering at any time or in any manner. *Id., ¶21, OAH000235.*

C. David Dixon Files Complaint with the Board After He Reads a Public and Political Advocacy Article He Disagrees with, Written by Marohn on Strong Towns' Website.

David Dixon, an engineer from South Dakota, read an article authored by Marohn, prior to March 5, 2020. *Id., ¶¶22, 25, OAH000235-236.* After reading the article on Marohn's Strong Towns' website, "Four Ways Traffic Engineers Thwart Public Will", an article that may have elicited adverse reaction owing to its public and political advocacy, Dixon decided to further research Marohn. *Id., ¶25, OAH000236.* It was during this research that Dixon discovered Marohn's license had expired in 2018. *Id, OAH000236.* Dixon then filed a complaint with the Board on March 5, 2020. *Id.* at ¶22; *Exhibit 2, OAH000245-266.* Marohn had reinstated his license after the complaint was filed, but a full month prior to being aware made aware of the complaint via formal notification by the Board on July 24, 2020. *Id., ¶¶23, 24, OAH000235.*

Dixon made a number of allegations in his complaint, stating the impetus arose from disagreement with Marohn's public political advocacy, a form of free speech protected under the 1st Amendment of the U.S. Constitution, and additionally accused Marohn of fraudulent use of his credentials and desired to have an example made of him. *Id.*, ¶¶*24, 25, OAH000235-236; Exhibit 2, OAH000245-266.* Dixon's complaint did not identify any evidence suggesting that Marohn was aware of his expired license status, had acted fraudulently or that he engaged or offered to engage in the practice of engineering; simply that he had uttered the words "professional engineer" in his writings and speeches. *Id.*

The following list is a summary of specific assertions and allegations Dixon made in his complaint:

1. Dixon states Marohn asserted that his professional engineering license had been challenged because of Marohn's political advocacy;

2. Dixon states he was "curious" about Marohn's assertion and, as a result, undertook an investigation of Marohn's licensure history on the Board's website;

3. Dixon states that "Marohn talks about being a policy expert, the type that reads law and ordinances," and that Marohn must thus have known that describing himself as a professional engineer was illegal; and

4. Dixon asks Board "to send a clear message that frauds of this sort will not be tolerated."

Id., ¶*25 OAH235-236; Exhibit 2, OAH000245-266.*

Dixon's sole focus and basis was that Marohn had identified himself as a "professional engineer" on Strong Towns' website, in print and in public interest and political advocacy speeches. *Id.*, ¶*25, OAH000235-236; Exhibit 2, OAH000245-266.*

D. Marohn Belatedly Receives Notice of Complaint and Attempts to Amicably Resolve with Board.

The Complaint Committee of the Board ("Committee"), as authorized by Minn. Stat. §§326.111, 214.10 and the Board, opened an inquiry after receiving Dixon's complaint. *Id., ¶26, OAH000236.* Well after Dixon filed the complaint, and at least a month after reinstating Marohn's expired license, the Committee finally notified Marohn of Dixon's complaint. *Id., ¶23, OAH000235; Exhibit 2, OAH000245-266.* The Committee requested information from Marohn, chiefly documents or other evidence showing positions he held, projects he worked on and plans he signed from July 1, 2018 to June 17, 2020. *Id., ¶26, OAH000236-237; Exhibit 2, OAH000245-266.* Additionally, the Committee inquired as to what measures Marohn took to rectify his license status upon his discovery of its lapse. *Id.* From the language of the letter, the Committee's concern, rightfully so under Minn. Stat. §§326.02-.15, was in investigating whether Marohn had engaged or offered to engage in any work as a professional engineer without a valid, current license. *Id.*

On July 28, 2020, Marohn sent a reply letter to the Committee, both to provide the information that the Committee requested and to explain his position. *Id., ¶¶27, 28, OAH000237; Exhibit 3, OAH000267-270.* Marohn's response confirmed he had not practiced engineering during the period in question. *Id., ¶28, OAH000237.* Marohn further explains the nature of his oversight in failing to timely renew, given his change in address and consequently, the renewal notice not being mailed to the correct address. *Id.; Exhibit 3, OAH000267-270.*

E. Despite Marohn Providing Ample, Satisfactory Evidence of Neither Practicing Nor Offering to Practice as a Professional Engineer, the Committee and Board Change The Nature of the Inquiry.

The Committee responded to Marohn's letter in a November 3, 2020 letter which included a proposed stipulation and order. *Id., ¶29, OAH000237; Exhibit 4, OAH000271-279.* The Committee no longer spoke of whether Marohn had practiced or offered to practice as a professional engineer, but rather whether he had ever referred to himself as a professional engineer at all. *Id., ¶30, OAH000237-238; Exhibit 4, OAH000271-279.* The Committee stated it had "determined" Marohn to be in violation of Minn. Stat. §326.02 and Minn. R. 1805.0200, and placed him on notice that the Committee intended to recommend disciplinary action to the Board. *Id*. The Committee stated that Marohn had violated the same regulations, but this time because he had been "using the title of professional engineer" on his website, in his writings and in speech. *Id., ¶32, OAH000238.* The Committee also alleged that Marohn had fraudulently or dishonestly completed his reinstatement and application for licensure, when he certified on the application that he had not represented himself as a professional engineer. *Id., ¶¶32, 33, OAH000238-239.* This was despite the fact that Marohn neither engaged, nor offered to engage in any professional engineering related work during the lapse and concurrently being unaware that it had lapsed. *Id.*

The Committee's proposed stipulation and order, if signed by Marohn, would require him to admit the Committee's determination of violations and admit to making a knowingly false statement when he certified his representations on his reinstatement and application. *Id., ¶¶32, 33, OAH000238-239.* The stipulation also required Marohn agree

to a reprimand, censure, two hours of ethics classes and pay a $1,500 civil penalty. *Id.*, ¶*34, OAH000239.* Marohn responded to the Committee on November 17, 2020 reiterating that he had not engaged or offered to engage in any professional engineering work and had not been aware of his lapsed license until he applied for its reinstatement. *Id. at ¶35; Exhibit 5, OAH000280-283.* He further noted that he had rectified his licensure prior to his knowledge of Dixon's complaint. *Id.*

The Committee replied to Marohn on December 17, 2020 enclosing a revised proposed stipulation and order that called for Marohn to stipulate to engaging in dishonest or misrepresentative conduct regarding his license status in addition to the stipulations provided for by the previous version. *Id.*, ¶*36, OAH000239-240; Exhibit 6, OAH000284-291.*

At this point, Marohn sought legal counsel who sent the Committee a letter noting the non-existence of any fraud or dishonest conduct, due to lack of knowledge and intent, and highlighting that prior Board disciplinary actions in similar circumstances did not require stipulation to intentional misconduct, even in instances where the person had actively practiced their licensed profession during a license lapse. *Id.*, ¶*37, OAH000240; Exhibit 7, OAH000292-298*. Both Marohn and counsel were subsequently invited to appear in a remote video conference with the Committee on March 10, 2021. *Id.*, ¶*38, OAH000240-241; Exhibit 8, OAH000299-305.*

F. Conference with Committee Reveals Board's Motivation Against Marohn for Political Rather Than Professional Reasons.

At the March 10, 2021 conference, the Committee aired its concerns over Marohn's conduct and asked questions. *Id., ¶38, OAH000240-241*. The Committee's chief concern was Marohn's public and political advocacy. *Id.* The Committee asserted that Marohn identifying himself as a "professional engineer" even outside of either providing, or offering to provide, engineering services, may cause the public to lend more credibility to his public and political advocacy than they thought warranted, specifically mentioning appearances on "Tedx", "The American Conservative" and "Talks on Google." During the conference, there were no accusations, discussions or evidence presented that alleged that Marohn engaged or offered to engage in professional engineering work. *Id., ¶39, OAH000241*.

After the conference, the Committee sent a new proposed stipulation and order. *Id., ¶40, OAH000241, Exhibit 9, OAH000306-313.* The proposed stipulation and order included findings that Marohn had made untruthful or false statements and had engaged in misrepresentation of his professional status. *Id.* Marohn responded reiterating that Marohn had not engaged in any dishonesty or misrepresentation, engaged or offered to engage in any professional engineering work. *Id., ¶41, OAH000241, Exhibit 10, OAH000314-316.* Marohn attempted, again, to resolve the case by offering to stipulate to use of the term "professional engineer" in his biography during lapse of licensure, during which he was unaware of that lapse, a reprimand and $500 civil penalty in exchange for removing the proposed stipulations

and claims that he had made untruthful, false or misrepresentative statements or engaged in any corresponding conduct. *Id.*

The Committee rejected Marohn's counter-proposals in an April 20, 2021 letter and threatened further disciplinary action if Marohn did not agree to the stipulation and order as proposed by the Committee in March. *Id., ¶42, OAH000241-242, Exhibit 11, OAH000317-325.* Several proposed stipulation and order letters were sent back and forth between parties, up through late April, but the Board remained insistent upon Marohn stipulating to knowing or intentionally misleading, misrepresentative or fraudulent conduct, which Marohn refused to do. *Id.*

G. The Board Continued to Move Forward to Commence Contested Proceeding, Despite Marohn's Efforts to Resolve the Matter.

As a result of the Committee's unwillingness to mutually resolve the matter with Marohn, the Committee forwarded its recommendations for disciplinary action and a contested proceeding to the Board. *Order Granting Summary Disposition, AELS029-47.* This contested proceeding took the form of a non-binding administrative review before ALJ James Lafave of the OAH. *Id.*

Prior to the OAH proceeding each party filed motions for summary disposition in. *See generally, AELS029-47.* A hearing on these motions was heard on March 2, 2022. After hearing arguments by both parties, the ALJ issued his recommendations on May 31, 2022. *Addendum p. 1.* The ALJ recommended that the Board grant summary disposition in its own favor and determine discipline in line with the Board's earlier determination. *Id.* The constitutional aspect of Marohn's arguments and factual

contentions were not addressed or definitively addressed by either the ALJ or the Board. *Id.* After the OAH proceeding, both the Board and Marohn filed exceptions and argument before the final Board proceeding, at which Marohn arguments, again, were rejected in favor of summary disposition in favor of the Board's position. Many of Marohn's constitutional, legal and factual arguments were not fully examined or decided on the full merits and the Board imposed its Final Order on July 12, 2022. *Addendum p. 12.* Following the issuance of the Final Order, Marohn filed this Petition For Writ of Certiorari, issued on August 5, 2022.

ARGUMENT

A. Standard of Review.

The standard of review for appealing an agency decision following a contested case, under the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §14.001-.69, provides that the court may affirm, remand, reverse, or modify the agency's decision if the substantial rights of the relator may have been prejudiced, where the decision violates federal or state constitutional law; exceeds statutory authority or agency jurisdiction; rendered as a result of "unlawful procedure"; by error of law; lack of supporting substantial evidence; or is arbitrary or capricious. Minn. Stat. §14.69; *see also* Minn. Stat. §326.111, subd. 1(c) (stating that hearings concerning the unauthorized practice of architecture shall be conducted in accordance with MAPA).

B. Binding Minnesota Supreme Court Precedent Requires Minn. Stat. §326.02, Subd. 3(b)'s Prohibition on Unlicensed Persons Representing Themselves as Professional Engineers Apply Only to Representations Made While Practicing, Or Offering to Practice, Professional Engineering.

Marohn argues the Board's legal claims against have no merit based on two legal arguments: (i) statutory interpretation and (ii) constitutional violation. Before addressing Marohn's constitutional arguments, a statutory analysis of Minn. Stat. §326.02 subd. 3(b)'s prohibition on using the term "professional engineer" demonstrates that subdivision only applies when the person is engaged in, or offers to engage in, the practice of professional engineering.

Minn. Stat. §326.02, subd. 3, which was amended in 2014 to add subd. 3(b), and is entitled "Practice of Professional Engineering," states:

> (b) No person other than one licensed under sections 326.02 to 326.15 as a professional engineer may:
>
> (1) use the term "professional engineer";
>
> (2) use any other abbreviation or term, including the initials "P.E." or "PE" by signature, verbal claim, sign, advertisement, letterhead, card, or similar means that would lead the public to believe that the person was a professional engineer; or
>
> (3) use any means or in any other way make a representation that would lead the public to believe that the person was a professional engineer.

Minn. Stat. §326.02 subd. 3(b) is contained in Chapter 326 of the Minnesota Statutes entitled "Employments Licensed by State." Chapter 326 is part of Chapters 324-341 entitled "Trade Regulations; Consumer Protection." The titles of these chapters and sections demonstrate that these statutes govern business conduct – "employments" – and

do not extend beyond business conduct and certainly do not extend to political conduct.

Moreover, Minn. Stat. §362.02 subd. 1 states, in relevant part:

> In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity *practicing, or offering to practice, ... professional engineering*, … either as an individual, a copartner, or as agent of another, shall be licensed or certified as hereinafter provided. It shall be unlawful for any person to practice, or to offer to practice, in this state, … professional engineering, … or to solicit or to contract to furnish work within the terms of sections 326.02 to 326.15, or to use in connection with the person's name, or to otherwise assume, use or advertise any title or description tending to convey the impression that the person is an architect, professional engineer (hereinafter called engineer), land surveyor, landscape architect, professional geoscientist (hereinafter called geoscientist), or certified interior designer, unless such person is qualified by licensure or certification under sections 326.02 to 326.15. (emphasis added).

The focus in subdivision 1 is on the practice, or offer to practice, of professional engineering without a license. Subdivision 1 also bars soliciting or contracting to work as an engineer, or advertising one's services as an engineer without a license. In context, the focus is on unlicensed persons providing professional engineer services, or offering to do so through solicitation or advertising.

Minnesota statutes Chapter 646 governs the interpretation of statutes. Minn. Stat. §645.16, entitled "Legislative Intent Controls," provides the following rules for interpreting Minnesota statutes:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.
>
> When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

(1) the occasion and necessity for the law;
(2) the circumstances under which it was enacted;
(3) the mischief to be remedied;
(4) the object to be attained;
(5) the former law, if any, including other laws upon the same or similar subjects;
(6) the consequences of a particular interpretation;
(7) the contemporaneous legislative history; and
(8) legislative and administrative interpretations of the statute.

More importantly, Minn. Stat. §646.17, entitled "Presumptions in Ascertaining Legislative Intent," provides:

> In ascertaining the intention of the legislature the courts may be guided by the following presumptions:
>
> (1) the legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
> (2) the legislature intends the entire statute to be effective and certain;
> (3) the legislature does not intend to violate the Constitution of the United States or of this state;
> (4) when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
> (5) the legislature intends to favor the public interest as against any private interest.

Under these canons of statutory construction, the legislature enacted Minn. Stat. §326.02 subd. 3(b) to prohibit individuals from identifying themselves as a professional engineer only when engaged in the practice of professional engineering. In fact, the Board, in testifying before the legislature in seeking the 2014 amendment to Minn. Stat. §326.02 subd. 3(b), told the legislature the reason they were seeking the amendment was to:

> …. Strengthen[] and clarify[y] the practice act by limiting the use of the designation 'P.E.' only by professional engineers. This is the standard designation

> and use of 'P.E.' across the country. This rule will serve the public welfare by eliminating confusion that can arise by those that use 'P.E.' to mean project engineer or principal engineer."

Magnuson Declaration, at ¶ 5, Exhibit 4 – OAH000097.

Thus, the Board sought the amendment to "strengthen the *practice* act" to only allow licensed engineers to use the label "professional engineer" or "P.E." while practicing engineering because individuals who were not licensed professional engineers were calling themselves "project engineers" and using the initials "P.E." to describe themselves. Because licensed professional engineers use the initials "P.E." to describe themselves, unlicensed "project engineers" were seeking to confuse clients and potential clients that these project engineers were actually licensed "professional engineers." Nothing in the legislative history suggests that the Board or the legislature sought to extend the reach of the statute beyond the practicing, or offering to practice, of professional engineering.

The Minnesota Supreme Court issued a decision on the scope of Minn. Stat. §326.02 in 1960 specifically holding that licensing statutes should not be interpreted in a literal or arbitrary manner which would extend the statute beyond the statute's purpose of protecting against the unlicensed practice of engineering. In *Dick Weatherston's Associated Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co.,* 100 N.W.2d 819 (Minn. 1960), the Court analyzed whether a contractor who was assisting engineers licensed under Minn. Stat. §326.02 was also required to be licensed. In interpreting §326.02, the Court first noted that "[j]ustice and sound public policy do not always require the literal and arbitrary enforcement of a licensing statute." *Dick Weatherston's* then held that the

purpose of Minn. Stat. §326.02 was to ensure that engineering projects protected the "life, health, property, or public welfare" and were "free from any element of fraud, incompetence, or misrepresentation." *Id.* As a result, *Dick Weatherston's* held in interpreting Minn. Stat. §326.02:

> It is our view that it comes within those numerous exceptions which hold generally that the prohibitions of the statute involved are no broader than its purpose in protecting the public from misrepresentation and deceit. The scope of the statute coincides with the reasons for its existence. Since those reasons have no bearing upon the transaction involved herein, the statute is without application."

Id at 192 (citations omitted).

Under *Dick Weatherston's,* Minn. Stat. §326.02 must be interpreted consistent with the reasons for its existence – i.e., ensuring that engineering projects were "free from any element of fraud, incompetence, or misrepresentation."

Minn. Stat. §326.02 states that the purpose of the licensing scheme is to "safeguard" the "public welfare" and "its life, health and property." The "public welfare" and "its life, health and property" only needs to be "safeguarded" from unlicensed persons practicing, or offering to practice, engineering. In order to ensure this interest is protected, the legislature further "safeguards" the public by prohibiting persons from saying they are professional engineers when engaged in, or offering to engage in, the practice of professional engineering if those persons are not licensed.

More importantly, Minn. Stat. §646.17 specifically provides that the legislature never intends for a statute to have an unconstitutional or absurd result. In fact, the Supreme Court requires that statutes be construed to avoid constitutional problems. *Matter of Welfare of A. J. B.*, 929 N.W.2d 840, 848 (Minn. 2019). If Minn. Stat. §326.02

subd. 3(b) is interpreted to extend beyond prohibiting persons from identifying themselves as professional engineers when not engaged in the practice of engineering, such an interpretation will begin to intrude into constitutionally protected speech and lead to absurd results. More importantly here, if the interpretation is applied as the Board seeks to apply it, to core political speech, the statute is unequivocally unconstitutional under *Nat'l Inst. of Family Life Advocates v. Becerra* ("*NIFLA*"), 138 S.Ct. 2361, 2371 (2018).

Thus, under the rules of statutory construction, Minn. Stat. §326.02 3(b) does not apply to Marohn's identifying himself as a professional engineer when engaged in political speech – period – full stop. Based on the case law, and a proper reading of the statutes, persons may not use the term professional engineer to describe themselves *only when engaging in, or offering to engage in, providing engineering services.*

The Board's interpretation, which is inconsistent with the statutory canons the legislature adopted, leads to absurd results. According to the Board, subd. 3. prohibits anyone in Minnesota from ever using the term "professional engineer" or "P.E." to describe themselves anytime and anywhere. For instance, an actor calling him or herself a "professional engineer" in a play would violate the statute. A gym teacher stating on the gym teacher's resume that the gym teacher is a "P.E." would violate the statute.

Finally, Minn. Stat. §326.02 subd. 3(b) bars affirmative use of terminology. In its papers to the ALJ and the Board, the Board did not present evidence that Marohn reviewed his credentials on his website, nor his LinkedIn profile, nor even the biography on his book jacket during the time period his licensure was expired. In other words, there

is no evidence to suggest that Marohn did not make these statements when they were accurate and truthful. If Marohn's license were to lapse again in the future, and he were not to immediately hunt down every reference to himself in books he authored and published, online, from youtube videos, to social media posts, to websites, that used the term "professional engineer" or "P.E." would subject Marohn to discipline under the statute. This absurd result in no way furthers the stated aims of the legislature.

C. Minn. Stat. §326.02, Subd. 3(b)'s Prohibition on Using the Term "Professional Engineer" Is a Content-Based Speech Restriction Subject to Strict Scrutiny.

If this Court does not limit the application of the statute as set forth above, then Minn. Stat. §326.02 subd. 3 is a content-based speech regulation. Content-based speech regulations—laws that "'target speech based on its communicative content'"—are subject to strict scrutiny. *NIFLA*, 138 S.Ct. 2361, 2371 (2018) (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). A speech regulation is content-based if the "law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

Laws that are subject to strict scrutiny are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id*. Narrow tailoring is a demanding standard:

> A narrowly tailored regulation is one that actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).

281 Care Committee v. Arneson, 766 F.3d 774, 787 (8th Cir. 2014) (quoting *Republican*

Party of Minnesota v. White, 416 F.3d 738, 751 (8th Cir. 2005) (en banc)).

In *NIFLA*, the Supreme Court held that "professional speech" is not an exception to the First Amendment free speech guarantee. 138 S.Ct. at 2371-75. The Court affirmed that "[s]peech is not unprotected merely because it is uttered by 'professionals'" and explained why professional speech is not an exception to the rule subjecting content-based restrictions to strict scrutiny. *Id*. at 2371-72.

Before *NIFLA*, two courts had struck down under the First Amendment state restrictions on the use of professional titles. *Serafine v. Branaman*, 810 F.3d 354, 357-62 (5th Cir. 2016) (holding unconstitutional, as applied, a provision of a psychologist-licensing scheme that restricted the use of the title "psychologist" by unlicensed persons); *Järlström v. Aldridge*, 366 F.Supp.3d 1205 (D. Ore. 2018) (holding unconstitutionally overbroad and thus facially unconstitutional a provision of an engineer-licensing scheme that restricted the use of the title "engineer" by unlicensed persons).

The only interest the State of Minnesota has in licensing engineers is to ensure persons practicing engineering are competent and ethical while performing or offering to perform engineering services – what other interest could the State have? Minnesota does not have an important interest - or even a legitimate interest and certainly not a compelling one - in controlling the speech of professional engineers when those engineers are not engaged in performing or offering to perform engineering services.

The Board sanctioned Marohn for saying he was a "professional engineer" outside of practicing engineering or soliciting work as an engineer. In fact, Marohn identified himself as a professional engineer while engaged in public advocacy - he

identified himself as a professional engineer only when engaged in political speech. Moreover, the statements were themselves speech—specifically, fully protected political speech—and not conduct. This type of speech lies at the core of First Amendment protection:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.

Mills v. State of Ala., 384 U.S. 214, 218 (1966).

To understand just how strongly protected speech by licensed professionals is after *NIFLA* requires examining the pre- *NIFLA* state of First Amendment caselaw. In an influential concurrence in *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985), Justice Byron White urged a distinction between speech that a licensed professional utters as a professional, i.e., in the course of providing client-tailored advice, and the licensed professional's other speech, such as political advocacy. According to Justice White's approach, the former received little or no First Amendment protection, whereas the latter was as fully protected as a non-professional's speech:

> Where the personal nexus between the professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with those circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law … abridging the freedom of speech, or of the press."

Id.

Based on Justice White's concurrence, several circuit courts developed the "professional speech doctrine" holding that states could not regulate the speech of

professionals, except when the professional is engaged in professional conduct. *Wollschlaeger v. Governor of Florida,* 848 F.3d 1293, 1310 (11th Cir. 2017) (*en banc*); *King v. Governor of New Jersey,* 767 F.3d 216, 232 (3d Cir. 2014) ("when a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment"); *Pickup v. Brown,* 740 F.3d 1208, 1227 (9th Cir. 2014) ("where a professional is engaged in a public dialogue, First Amendment protection is at its greatest"); *Moore–King v. County of Chesterfield,* 708 F.3d 560, 569 (4th Cir. 2013) ("the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary").

In *NIFLA*, the Supreme Court rejected the "professional speech" doctrine and abrogated these circuit-court cases on the ground that they wrongly applied ***diminished*** protection to a professional's speech *within the professional-client relationship*. 138 S.Ct. at 2371-75. In other words, *NIFLA* held that a professional's speech was entitled to full First Amendment protection even when the professional was engaged in professional conduct and subjected any content-based restriction, such as those contained in Minn. Stat. §326.02 subd. 3(b), to strict scrutiny.

The Board's interest in regulating the titles that state licensees use is thus patently unconstitutional as applied to Marohn. First, the alleged existence of that interest is, strictly speaking, nonsensical here because the Board's contention is that Marohn used the title "professional engineer" *when he was not licensed or even working as an*

engineer. More importantly, although the State has an important interest in regulating the use of professional titles in attempts to solicit business or in actually practicing a regulated profession, the State does not have an important interest—or even a legitimate interest—in controlling the use of titles in other contexts.

D. Any Claim That Marohn's Speech Constituted "Commercial Speech" Is Absurd – Marohn's Speech Was Political Speech.

The Supreme Court has made an exception to strict scrutiny for content-based restrictions on commercial speech, but the exception is narrow: for purposes of the exception, what "defines commercial speech"—and thus distinguishes it from fully protected speech—is speech that "*proposes* a commercial transaction." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976)). Presumably, the Board will argue that Marohn's speech here was commercial in order to avoid subjecting its content based claims to strict scrutiny analysis.

As explained above, the commercial speech doctrine applies to only "'speech proposing a commercial transaction.'" *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980) (quoting *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-56 (1978)). The Supreme Court might not have limited the doctrine to "concrete offers" that constitute an offer in the law-school offer-and-acceptance sense, but the Court has limited the doctrine to speech advertising or marketing a good or service. *E.g.*, *Fox*, 492 U.S. at 482; *Cent. Hudson*, 447 U.S. at 562. Indeed, the term "commercial speech" is something of a misnomer: the doctrine is really

an advertising-speech or marketing-speech doctrine. *See, e.g.*, *Fox*, 492 U.S. at 482; *Cent. Hudson*, 447 U.S. at 562; *Seabolt v. Texas Bd. of Chiropractic Examiners*, 30 F. Supp. 2d 965, 967 (S.D. Tex. 1998) (characterizing *Central Hudson* as "announc[ing] a four-part framework for analyzing *advertising restrictions* under the First Amendment" (emphasis added)).

Marohn suspects the Board will rely on *Friedman v. Rogers*, 440 U.S. 1 (1979) for the proposition that a state may regulate the use of a tradename. However, *Friedman* involved the use of a tradename to promote an optometry practice (and thus a business), not the use of a professional title in political speech. 440 U.S. at 3-6, 8, 11, n.10. Indeed, *Friedman* itself used the proposes-a-business-transaction test to determine that use of a tradename was commercial speech and thus entitled to reduced First Amendment protection: "the trade name is used as part of a proposal of a commercial transaction." *Id.* at 11; *see also id*. at 11 n.10 (distinguishing an advertisement that "'did more than simply propose a commercial transaction'" (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975)), from "the mere solicitation of patronage implicit in a trade name"). Any reliance by the Board on *Friedman* without acknowledgment of the test that *Friedman* actually used is, to put things mildly, less than entirely forthright.

Instead of *Friedman*, this Court should rely on *Serafine*. In *Serafine*, the plaintiff had been a candidate for public elected office who "described herself as a 'psychologist' on her campaign website." 810 F.3d at 357. The Texas State Board of Examiners of Psychologists ordered to her to stop describing herself as a "psychologist" and to stop "offering or providing psychological services" because she was not a licensed

psychologist. *Id*. The *Serafine* plaintiff sued in federal court to challenge the provisions that she was ordered to comply with. *Id*. The Fifth Circuit held that the prohibition on using the title "psychologist" without being licensed was unconstitutional as applied to the plaintiff because she used it in political speech, not commercial speech. *Id*. at 360-62. Minnesota's restriction on the use of the title "professional engineer" is, for the same reason, unconstitutional as applied to Marohn.

When Marohn made the statements characterizing himself as a professional engineer, he did so outside of any effort to market or perform his engineering services—indeed, he made them in the course of political advocacy. The statements were thus fully protected. *See, e.g.*, *Serafine*, 810 F.3d at 360 (use of a professional title in political speech is fully protected by the First Amendment); *281 Care Comm.*, 766 F.3d at 784 (false political speech is fully protected). As applied to Marohn's speech, therefore, §326.02, subd. 3(b) is subject to strict scrutiny and is unconstitutional.

E. The Board's Claim Based on Marohn "Lied" on his Reinstatement Application is Prohibited Under *United States v. Alvarez*, 567 U.S. 709, 716-22, 724 (2012).

Even if the Board cannot regulate professional engineers identifying themselves as professional engineers when not engaged in providing or offering to provide engineering services, the Board nonetheless claims that Marohn engaged in professional misconduct because Marohn signed an online certification as part of Marohn's reinstatement application certifying that Marohn had not "represented" himself "as a professional engineer" when he was unlicensed. However, as set forth above, the Board's claim is not based on Marohn making such representations while engaged in providing or offering to

provide engineering services. Rather, the Board's claim is based exclusively on Marohn identifying himself as a professional engineer while engaged exclusively in political advocacy. Similarly to the Board's efforts to regulate Marohn's use of the term "professional engineer," the Board attempts to get around this First Amendment problem by compelling engineers such as Marohn to make certifications regarding identifying themselves as professional engineers when not engaged in providing or offering to provide engineering services. For all of the reasons set forth in the statutory interpretation and First Amendment arguments above, the Board's claim that Marohn's certification was false is likewise unconstitutional because it is an attempt to regulate Marohn's speech when not engaged in providing or offering to provide engineering services.

Nonetheless, even if the Board attempts to argue that false speech, misrepresentations and lies are not covered by the First Amendment, the Supreme Court in 2012 held they are protected and, identically to the First Amendment analysis set forth above, the Board's claim in subject to strict scrutiny. The Board must provide a compelling state interest why persons filing a reinstatement application to renew a professional engineering license must state they did not identify themselves as professional engineers even when not engaged in providing or offering to provide engineering services.

In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court held that false speech—even knowingly false speech—is generally protected and subject to strict scrutiny outside narrow exceptions such as defamation and fraud. In *Alvarez*, the

Supreme Court struck down the Stolen Valor Act, a law prohibiting falsely claiming to have won a military decoration. *Id*. at 716, 730. The person challenging the law, a candidate for public office, had been convicted of falsely claiming during a political campaign to have won the Congressional Medal of Honor. *Id*. at 713-14. The defendant did not deny that he flat-out lied about having won the medal. *Id*. at 714, 715. Nonetheless, the Court reversed his conviction and struck down the law as a content-based speech restriction. *See id*. at 716-18, 722, 729-30. *Alvarez* refused to recognize a new exception to the application of strict scrutiny and affirmed that, outside of narrow exceptions such as fraud and defamation, a prohibition on speech because of its falsity is just another content-based speech restriction subject to strict scrutiny:

> Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.

Id. at 718. The Eight Circuit, relying on *Alvarez,* held that strict scrutiny applies to prohibitions on false *political* speech. *281 Care Comm*., 766 F.3d at 784.

As set forth above, before *NIFLA,* circuit courts had held that professional licensing boards may only regulate a professional's speech when the professional is engaged in offering to provide or providing the professional services the licensing board seeks to regulate. *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014); *Moore–King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013); *Wollschlaeger v. Governor, Florida*, 848 F.3d 1293 (11th Cir. 2017).

If the representation on the reinstatement application had asked whether Marohn had described himself as a "professional engineer" while engaging or offering to engage in providing engineering services while unlicensed (as Marohn quite reasonably interpreted it), the Board may have an argument that it has an important or compelling state interest in sanctioning Marohn for that false statement. However, if the Board has no interest in prohibiting individuals from using the term "professional engineer" to describe themselves when not engaging or offering to engage in providing engineering services while unlicensed, the Board likewise does not have an interest in compelling Marohn to represent in a reinstatement application that he did not describe himself as a professional engineer in circumstances outside engaging or offering to engage in providing engineering services while unlicensed.

As explained above, Marohn signed the representation because he believed – correctly – that the Board could only regulate his speech when Marohn was engaged in providing or offering to provide engineering services while unlicensed. As a result, the Board's efforts to discipline Marohn based on his representation fails under *NIFLA* and *Alvarez.*

F. Minn. Stat. §326.02, Subd. 3(b)'s Prohibition on Using the Term "Professional Engineer" Either (i) Fails Strict Scrutiny for Lack of a Compelling State Interest if Applied to Political Speech, or (ii) Is Facially Overbroad Because it Would Prohibit Persons From Referring to Themselves as a Professional Engineer in Social Settings.

The Board is on the horns of a dilemma in this case. On the one hand, the Board is seeking to apply Minn. Stat. §326.02, subd. 3(b) to political speech for which the Board cannot assert a compelling state interest. On the other hand, if the Board asserts

that Minn. Stat. §326.02, subd. 3(b) applies in all circumstances – which by its terms it plainly does – the provision is facially overbroad. The only purpose to the prohibition the Board could identify is to prevent deceiving the public about one's qualifications. But that can only be a compelling purpose where the title is used to solicit business as an engineer. Outside of commercial speech, a person may, under *Alvarez*, lie through one's teeth about one's qualifications. Furthermore, the restriction is not narrowly tailored because it is not limited to attempts to solicit business as an engineer.

In fact, Minn. Stat. §326.02, subd. 3(b) is facially overbroad:

> In the First Amendment context, however, we have recognized "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States* v. *Stevens*, 559 U. S. 460, 473 (2010) (internal quotation marks omitted).

Americans for Prosperity Found. Bonta Thomas More Law Ctr. v. Bonta, No. 19-251, 2021 WL 2690268, at *11 (U.S. July 1, 2021). "An ordinance prohibiting a broad range of protected expression may be facially challenged as overbroad." *Ways v. City of Lincoln, Neb.*, 274 F.3d 514, 518 (8th Cir. 2001). One Court has applied the overbreadth doctrine to a regulation prohibiting the use of the term "engineer." *Järlström*, 366 F. Supp. 3d at 1222.

Minn. Stat. §326.02, subd. 3(b) is unconstitutionally overbroad. It prohibits anyone in Minnesota from describing themselves as a professional engineer at all times and in all places – including social settings and political speech unconnected to engaging the practice of engineering. In fact, here, the Board is attempting to prohibit a person from describing himself as a professional engineer when engaged in political

advocacy. As a result, Minn. Stat. §326.02, subd. 3(b) is facially overbroad and "patently unconstitutional."

G. Marohn Argued That Minn. Stat. §326.02, subd. 3(b) Is Unconstitutional As Applied to Marohn.

In the ALJ's Opinion, the ALJ held that Marohn only argued that Minn. Stat. 326.02 subd. 3(b) was facially unconstitutional and not as applied to Marohn. This is not close to being accurate. Marohn specifically argued that Minn. Stat. 326.02 subd. 3(b) was unconstitutional as applied to Marohn in his Memorandum in Support of Summary Disposition:

> The Board's interest in regulating the titles that state licensees use is thus patently unconstitutional as applied to Marohn.

OAH-000222.

> Minnesota's restriction on the use of the title "professional engineer" is, for the same reason, unconstitutional as applied to Marohn.

OAH-000227.

Marohn specifically argued that Minn. Stat. 326.02 subd. 3(b) is unconstitutional as applied to Marohn in his Memorandum in Opposition to the Board's Motion Support of Summary Disposition. *OAH-00065-66.* Marohn specifically argued that Minn. Stat. 326.02 subd. 3(b) is unconstitutional as applied to Marohn in his Reply Memorandum in Support of Summary Disposition. *OAH-000017-19.* Finally, Marohn specifically argued to the Board that Minn. Stat. 326.02 subd. 3(b) is unconstitutional as applied to Marohn, *ALE-004-7.*

CONCLUSION

For the reasons set forth above, this Court should find that Marohn Board's discipline of Marohn should be reversed.

Dated: September 29, 2022.

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Certificate of Compliance with Minn. R. App. P. 132.01

I certify that this brief contains 8,354 words and thus complies with Minn. R. App. P. 132.01 subd. 3 (a)(1) authorizing the filing of a principal brief with no more than 14,000 words. In making this certificate, I relied on the word-count function of Microsoft Word 2016, which is the word-processing software that I used to prepare this brief.

This brief was produced with a proportional typeface and complies with Minn. R. App. P. 132.01's typeface requirements.

Dated: September 29, 2022.

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Certificate of Service

I hereby certify that I served a copy of the following Relator's Brief on the following parties, by using the Court's e-filing and e-service function. :

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I also state that I did not serve a paper copy of the brief on Respondent's counsel as the Minnesota Supreme Court Order foregoing the requirement to serve and file appellate briefs is still suspended due to Covid-19.

/s/ William F. Mohrman
William F. Mohrman

Subscribed and affirmed before me
this 29th day of September, 2022.

/s/Mary Gynild, comm. expires 1/31/2025
Notary Public