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Via Email – kay.weiss@state.mn.us

Ms. Kay Weiss
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Engineering, Land Surveying, Landscape
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("AELSLAGID")
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Re: Charles Marohn; Board File No. 2020-0043

Dear Ms. Weiss:

I am counsel to Charles L. Marohn, Jr. This letter constitutes Mr. Marohn's objections to the decision of Hearing Officer James E. LaFave of the Office of Administrative Hearings ("OAH") in the above referenced matter. Pursuant to your June 14, 2022 letter, Mr. Marohn requests oral argument on these issues at the July 12, 2022 Board meeting.

1. The OAH Decision Did Not Analyze Mr. Marohn's Arguments That Minn. Stat. §326.02 Is Unconstitutional As Applied To Mr. Marohn's Speech Outside Performing, Or Offering To Perform, Engineering Services.

The OAH decision found that Minn. Stat. §326.02 prohibits anyone in Minnesota from identifying themselves as a "professional engineer" *in any situation* unless the person is licensed by the Board. The OAH decision acknowledged, and the State admitted, that Mr. Marohn had not been engaged in either providing, or offering to provide, engineering services in Minnesota or elsewhere since 2012. Rather, Mr. Marohn had been engaged in political advocacy challenging wasteful government spending on public engineering projects. Thus, the OAH decision acknowledged that Mr. Marohn had described himself as a professional engineer only when engaged in political advocacy. In his papers to the OAH, Mr. Marohn provided an extensive analysis that Minn. Stat. §326.02 only applies when the person is engaged in either providing or offering to provide engineering services. The OAH decision failed to address any of these arguments in his decision.

In Mr. Marohn's memorandum in opposition to the Board's Motion for Summary

Disposition, Mr. Marohn engaged in an extensive analysis of Minn. Stat. §326.02. This analysis demonstrated that Minn. Stat. §326.02 subd. 3(b)'s prohibition on using the term "professional engineer" 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.

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.

Finally, and most importantly, a 1960 Minnesota Supreme Court decision interpreting Minn. Stat. §326.02 specifically held 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) (emphasis supplied).

Under *Dick Weatherston's*, the Board is bound to interpret Minn. Stat. §326.02 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 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 such as Marohn’s political advocacy, the statute is unequivocally unconstitutional as applied to such speech under *Nat’l Inst. of Family Life Advocates v. Becerra* (“NIFLA”), 138 S.Ct. 2361 (2018).

Thus, under the rules of statutory construction, Minn. Stat. §326.02 3(b) does not apply to Mr. 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 identify themselves as “professional engineer” only when engaged in providing, or offering to provide, professional engineering services.

The Board’s interpretation, which is inconsistent with the statutory canons the legislature adopted set forth above, 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 motion to the OAH, the Board did not present evidence in its motion that Mr. 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 Mr. Marohn did not make these statements when they were accurate and truthful. If Mr. 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 Mr. Marohn to discipline under the statute. This absurd result in no way furthers the stated aims of the legislature.

2. The OAH Decision Finding Mr. Marohn Misrepresented Himself In His Renewal Application By Stating He Did Not Describe Himself As A Professional Engineer While Unlicensed Also Failed To Address Marohn’s Arguments That This Provision Only Applies When Marohn Was Engaged In Practicing, Or Offering To Practice, Professional Engineering.

The OAH decision also found that Mr. Marohn misrepresented in his renewal application that he had not identified himself as a professional engineer while unlicensed. Once again, the OAH decision failed to address Mr. Marohn’s arguments that this Rule only applies when Mr. Marohn was engaged in practicing, or offering to practice, engineering. Moreover, the OAH decision failed to analyze whether Mr. Marohn represented he had not described himself as a professional engineer while not licensed but not engaged in providing, or offering to provide, engineering services. In addition, the OAH decision made no findings regarding intent. Mr. Marohn made very clear in his submissions that he did not know he was not licensed at the time he represented himself as a professional engineer while engaged in political advocacy. Finally, many of the representations the OAH decision referred to were made while Mr. Marohn was licensed.

3. The OAH Judge Failed To Address Mr. Marohn’s Arguments That The Board Was Unconstitutionally Applying Minn. Stat. §326.02 To Mr. Marohn.

The OAH Judge stated in his decision that Marohn argued that Marohn had challenged the constitutionality of Minn. Stat. §326.02 as facially overbroad. This is not accurate. In the pretrial conference, Mr. Marohn argued that he would be challenging the application of Minn. Stat. §326.02 to the specific facts related to Mr. Marohn. In Mr. Marohn’s memorandum in opposition to the State’s Motion for Summary Disposition, Mr. Marohn specifically argued that Minn. Stat. §326.02 was unconstitutional *as applied to the facts in this case*. In fact, this was the only argument Mr. Marohn made. Finally, Mr. Marohn argued that Minn. Stat. §326.02 was unconstitutional as applied to the facts here during the oral arguments on the motions.

4. If the Board Finds That Mr. Marohn Violated Minn. Stat. §326.02 or Minnesota Rule 1800.0200 subps. 1(B), 2, and 4(C), No Sanction Should Be Imposed.

As set forth above, the purpose of Minn. Stat. §326.02 and Minnesota Rule 1800.0200 subps. 1(B), 2, and 4(C) is to protect the public from engineering work performed by unlicensed engineers. Both sides agreed that Mr. Marohn was not engaged in either providing, or offering to provide, engineering services during the period he was not licensed. Further, Mr. Marohn reasonably assumed that the certification on the renewal application was directed to whether Mr. Marohn referred to himself as a professional engineer while engaged in either providing or offering to provide engineering services. There is no dispute that Mr. Marohn was not engaged

in either providing or offering to provide engineering services while unlicensed. Therefore, Mr. Marohn was not threatening any of the reasons for which Minn. Stat. §326.02 and Minnesota Rule 1800.0200 subs. 1(B), 2, and 4(C) were adopted.

The Board requested that Mr. Marohn address the factors for sanctions under Minn. Stat. §14.045 subd. 3:

Subd. 3. Factors. (a) If a statute or rule gives an agency discretion over the amount of a fine, the agency must take the following factors into account in determining the amount of the fine:

- (1) the willfulness of the violation;
- (2) the gravity of the violation, including damage to humans, animals, and the natural resources of the state;
- (3) the history of past violations;
- (4) the number of violations;
- (5) the economic benefit gained by the person by allowing or committing the violation;
- and
- (6) other factors that justice may require.

Minn. Stat. § 14.045.

Under these factors, Mr. Marohn should not be fined even if the Board finds a violation. Under Subd. 3 (a)(1), there is no evidence in the record, or in logic, that Mr. Marohn committed a willful violation. Under Subd. 3 (a)(2), there is no gravity to Mr. Marohn's alleged violation. Most notably, there is no evidence Mr. Marohn was engaged in the practice of engineering while unlicensed – i.e., no one was threatened with any harm. Under Subd. 3 (a)(3), there is no history of past violations. Under Subd. 3 (a)(4), with regard to the certification, there is only one violation. Moreover, with respect to Mr. Marohn identifying himself as a professional engineer, there is no evidence Mr. Marohn identified himself as a professional engineer while engaged in professional engineering.

Under Subd. 3 (a)(5), the Board argued to the OAH Mr. Marohn gained economic benefits by identifying himself as a professional engineer in books he sold and during speeches. Once again, there is no logic to this assertion. Presumably, the argument is that Mr. Marohn gained credibility by identifying himself as a professional engineer when engaged in his political advocacy and that credibility led individuals to purchase his books and financially support his political advocacy. This argument fails for two reasons. First, Mr. Marohn's credibility in engaging in political advocacy regarding public engineering projects is enhanced because he worked as professional engineer while properly licensed for numerous years. Whether Mr. Marohn was presently licensed in 2018, six years after he ceased practicing as a professional engineer, would not enhance his credibility beyond the credibility he established while properly licensed and working over six years earlier. Second, there is no evidence, or logic, which supports the argument that individuals purchased Mr. Marohn's books or attended

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his conferences *because* Mr. Marohn was *presently* licensed as a professional engineer. Subd. 3 (a)(5) is directed at situations where an unlicensed engineer earned money from working on engineering projects for which the unlicensed engineer had to be licensed.

Finally, under Subd. 3 (a)(6), there are no other factors which *justice* would require to be examined as applied to Mr. Marohns.

For the reasons set forth above, Mr. Marohn requests that the Board dismiss the complaint. In the event that the Board decides to find a violation, Mr. Marohn requests that the Board impose no sanction.

Very truly yours,

s/William F. Mohrman

William F. Mohrman

CC: Mr. Charles L. Marohn, Jr.