

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR BOARD OF ARCHITECTURE, ENGINEERING, LAND SURVEYING,  
LANDSCAPE ARCHITECTURE, GEOSCIENCE, AND INTERIOR DESIGN**

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In the Matter of Professional Engineer  
License of Charles Marohn

**RESPONDENT’S MOTION FOR  
SUMMARY JUDGMENT**

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**INTRODUCTION**

Plaintiff Charles L. Marohn, Jr. (“Marohn”) is a Minnesota licensed professional engineer. In 2009, Marohn founded Strong Towns, a Minnesota non-profit corporation dedicated to educating the public regarding local government decisions on land use, capital investment, and community development and how those decisions can result in insolvency or fiscal pressure on local government. Marohn ceased practicing as an engineer 2012. Since 2012, Marohn has exclusively engaged in political speech advocating local governments spend less tax monies on engineering projects—political advocacy which is directly contrary to the economic interests of professional engineers. Not surprisingly, Marohn’s work with Strong Towns has not made him popular with many professional engineering businesses and related trade associations.

Despite no working as an engineer, Marohn continued to maintain his biennial license as a professional engineer under Minn. Stat. §326.02 with the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design (“Board”). In 2016, Marohn moved to a new address and did not receive the biennial notice from the Board to renew his license prior to the July 1, 2016 deadline. As a result, Marohn did not renew his biennial registration by July 1, 2018. Nonetheless, Marohn continued to attend and

pay for 24 hours of continuing education classes required under Minn. Stat. §326.107 from July 1, 2016 through June 30, 2018 in order to maintain his now lapsed license. When Marohn learned his license had lapsed on June 9, 2020, Marohn immediately submitted his registration materials online to the Board to reinstate his license pursuant to the Board's rules. The Board reinstated Marohn's professional engineering license on June 19, 2020.

One month after reinstating Marohn's license, the Board notified Marohn that a complaint had been filed against him by a professional engineer from South Dakota. The complaint claimed that while Marohn was engaged in politically advocating that local governments reduce their expenditures on engineering projects, Marohn had referred to himself as a "professional engineer" on the Strong Towns website, during speaking engagements and in Strong Town publications. Minn. Stat. §326.02, subd. 3 had been amended in 2014 to provide it was unlawful for anyone other than a currently licensed professional engineer to describe themselves as "professional engineer" under any circumstances. Despite the fact the Board admitted Marohn had not engaged in providing any engineering services to anyone during the period in which his license had lapsed, the Board threatened to sanction Marohn unless Marohn stipulated he had violated Minnesota law and had engaged in dishonesty by describing himself as a professional engineer even though the Board admitted Marohn had not engaged in any engineering practice during those two years. In fact, the Board members who authorized the commencement of this contested case specifically stated that the reason for doing so was based on Marohn describing himself as a "professional engineer" while engaged in political advocacy.

The Board claims Marohn committed two violations in this contested case:

- (i) Marohn said he was a "professional engineer" during the period his license lapsed in violation of Minn. Stat. §326.02 subd. 3(b); 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.”

Marohn moves to dismiss this contested case because the Board’s claims violate Marohn’s rights under the First Amendment of the U.S. Constitution and Article I, §3 of the Minnesota Constitution. More specifically, §326.02 subd. 3(b)’s prohibition on referring to oneself as “professional engineer” applies in all circumstances – including social gatherings and most egregiously in this case, political advocacy. In *Nat’l Inst. of Family Life Advocates v. Becerra* (“*NIFLA*”), 138 S.Ct. 2361, 2371 (2018), the Supreme Court unequivocally held that professional regulations banning speech are subject to strict scrutiny. Simply put, the Board cannot establish a “compelling state interest” to in banning individuals from stating they are a “professional engineer” when the individual is not engaged in professional engineering work. The Board’s Complaint must be dismissed.

## **MATERIAL FACTS NOT IN DISPUTE**

### **A. Background.**

1. Marohn is a Minnesota licensed professional engineer, an urbanist, a land-use planner, an author, and a public speaker. *Marohn Declaration*, ¶3. Marohn earned a bachelor’s degree in civil engineering from the University of Minnesota in 1995 and a Masters of Urban and Regional Planning in 2004 from the University of Minnesota. *Marohn Dec.*, ¶4. Marohn obtained his Minnesota professional engineering license on February 8, 2000. *Marohn Dec.*, ¶5.
2. Shortly after licensure in 2000, Marohn started his own professional planning and engineering firm, Community Growth Institute, LLC. Community Growth Institute, LLC engaged in both professional planning and engineering working exclusively on behalf of local governments. *Marohn Dec.*, ¶6. During the next ten years, Marohn found that local

governments were spending monies on infrastructure projects that were a waste of money and were making the communities those local governments represented poorer. *Marohn Dec.*, ¶6. As a result, in 2009, after experiencing frustration with the amount of taxpayer monies local governments wasted on engineering projects, Marohn founded Strong Towns, a nonprofit corporation based in Minnesota that advocates for, among other reforms, local governments to spend less taxpayer dollars on engineering projects. *Marohn Dec.*, ¶7. Marohn phased out his private practice and closed Community Growth Institute, LLC in 2012. *Id.*

3. Strong Towns advocates an approach to urbanism that avoids construction of unnecessary infrastructure and the costs of building and maintaining unnecessary infrastructure. *Marohn Dec.*, ¶8. Strong Towns provides education and information to the public nationwide to assist taxpayers in being better advocates for appropriate infrastructure projects in their localities. *Marohn Dec.*, ¶9. Strong Towns maintains a website containing information on urbanism, urban planning, land-use planning, and infrastructure projects. *Marohn Dec.*, ¶10. Marohn is also the author of *Strong Towns: A Bottom-Up Revolution to Rebuild American Prosperity* and *Confessions of a Recovering Engineer: A Strong Towns Approach to Transportation*. *Marohn Dec.*, ¶¶11-12. Marohn is well known and broadly respected in the fields of urbanism, planning, and engineering and his work is broadly cited. In 2017, Marohn was voted one of the ten “most influential urbanists of all time” by the urbanist website Planetizen. *Marohn Dec.*, ¶13.

4. Marohn has not been a practicing engineer since 2012. *Marohn Dec.*, ¶14. 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.* Since 2012, Marohn has neither applied for any work as an engineer nor used his credentials to seek work as a professional engineer. Simply put, since 2012, Marohn has not engaged in any acts requiring a professional engineering license. *Id.*

**B. Marohn's Minnesota Professional Engineering License Expires in 2018; When Marohn Becomes Aware of This, He Renews His License.**

5. Professional-engineering licenses are issued for a two year period expiring on June 30 in each even year. Minn. Stat. §326.10. By June 30 of each even year, licensed professional engineers must submit a renewal application and a \$120 renewal fee to the Board. *Marohn Dec.*, ¶15. During this two-year period, the licensed professional engineer must complete 24 hours of certified continuing education classes including at least two hours in ethics in order to renew the professional engineering license. *Id.*; see also Minn. Stat. §326.107.

6. Before June 30, 2016, Marohn applied for renewal of his professional-engineering license, and the Board issued Marohn a two-year professional-engineering license effective July 1, 2016. *Marohn Dec.*, ¶16. Because Marohn did not receive the Board's notice reminding Marohn to renew his license before June 30, 2018, coupled with Marohn no longer practicing as a professional engineer, Marohn did not remember to renew his professional-engineering license on June 30, 2018. *Marohn Dec.*, ¶17. As a result, unbeknownst to Marohn, Marohn's professional-engineering license expired on July 1, 2018. *Id.*

7. Presumably because licensed professional engineers frequently fail to renew their professional-engineering licenses in a timely manner, the Minnesota State Legislature enacted a specific statutory provision providing for professional engineers to reinstate their licenses:

A licensee or certificate holder whose license or certificate has expired may reinstate the expired license or certificate by satisfying all prior continuing education requirements to a maximum of 48 professional development hours, by paying all of the renewal fees due for all prior renewal periods that the license or certificate was expired and the current renewal period, and paying a delayed renewal fee in the amount set by the board.

Minn. Stat. §326.10, subd. 9; *see also Marohn Dec.*, ¶19. Marohn did not become aware that his professional-engineering license had lapsed until June 9, 2020 when another employee of Strong Towns, Michelle Erfurt, alerted Marohn that the Board’s website indicated that Marohn’s license had expired. *Marohn Dec.*, ¶18. On that day, Marohn submitted an application to reinstate his license along with the required fees. *Id.* Because Marohn believed he was still a licensed professional engineer from July, 2018-July, 2020, Marohn had completed all of the 24 continuing professional development hours during that time in order to maintain and renew his license. *Marohn Dec.*, ¶20. In addition, because Marohn would have to renew his professional-engineering license for 2020-2022 by June 30, 2020, Marohn simultaneously submitted his renewal application for the years 2020-2022. *Id.* As a result, the Board reinstated Marohn’s professional-engineering license for 2018-2020 and issued a renewal license for 2020-2022 on or about June 19, 2020. *Id.*

8. From July 1, 2018 to today, Marohn has not worked or solicited work as a professional engineer, has not overseen anyone working as a professional engineer, has not signed any documents or been involved in any project requiring licensure and has not represented himself as a professional engineer in order to gain employment or practice engineering. *Marohn Dec.*, ¶21.

**C. A South Dakota Engineer Files a Complaint Against Marohn with the Board.**

9. On March 5, 2020, David D. Dixon filed a complaint with the Board against Marohn based exclusively on Marohn not having a license from July 1, 2018 through March 5, 2020. *Marohn Dec.*, ¶22. Dixon is an engineer living in Box Elder, South Dakota. *Id.* Marohn has given talks in South Dakota on behalf of Strong Towns making arguments some professional engineers may perceive as against engineers’ economic interests. *Id.*

10. Despite the Board receiving notification of Dixon’s complaint on March 5, 2020, the Board did not notify Marohn of the complaint until July 24, 2020 – more than one month after the Board had renewed Marohn’s professional-engineering license. *Marohn Dec.*, ¶24 and a copy of David Dixon’s complaint with the accompanying documents attached as Exhibit 2. Dixon’s complaint specifically states that it was submitted as retaliation for Marohn’s political advocacy—and thus for protected First Amendment activity:

- a. Dixon explained that he became interested in Marohn’s licensure history as a result of reading an article Marohn authored and posted on Strong Towns website entitled “Four Ways Traffic Engineers Thwart Public Will”;
- b. Dixon states Marohn asserted that his professional engineering license had been challenged because of Marohn’s political advocacy;
- c. 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;
- d. 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
- e. Dixon concludes by asking the Board “to send a clear message that frauds of this sort will not be tolerated.”

11. Dixon’s sole focus was that Marohn had identified himself as a “professional engineer” on Strong Towns website, in publications and at speaking engagements. *Marohn Dec.*, ¶25.

**D. Marohn Attempts to Resolve the Complaint with the Board.**

12. Pursuant to Minn. Stat. §326.111, the Board’s complaint committee investigates complaints made to the Board (“Complaint Committee”). *Marohn Dec.*, ¶26. In their July 24, 2020 letter, the Complaint Committee requested Marohn: (i) produce documents showing positions Marohn held in Minnesota from July 1, 2018 to June 17, 2020; (ii) list all Minnesota projects Marohn worked on, along with the total hours worked, from July 1, 2018 to June 17, 2020; (iii) list all plans Marohn signed as a Minnesota professional engineer from July 1, 2018 to

June 17, 2020; and (iv) state all steps Marohn took to “rectify the matter” once he became aware that his license had expired. *Id.* The Complaint Committee’s letter thus properly focused where it should - whether Marohn engaged in professional-engineering services while unlicensed.

13. Marohn responded to the Complaint Committee’s letter in a July 28, 2020 letter. *Marohn Dec.*, ¶27 and *Marohn’s July 28, 2020 letter attached as Exhibit 3.* In his July 28, 2020 response, Marohn responded to the Complaint Committee’s requests and confirmed Marohn did engage in any engineering work from July 1, 2018 to June 17, 2020. *Marohn Dec.*, ¶28.

14. The Complaint Committee responded in a November 3, 2020 letter along with a proposed stipulation and order. *Marohn Dec.*, ¶29 and *the Complaint Committee’s November 3, 2020 letter attached as Exhibit 4.* In its November 3, 2020 letter and stipulation, the Complaint Committee had now shifted its focus from any professional-engineering work Marohn had performed to simply whether Marohn had referred to himself as a professional engineer in any circumstances. *Marohn Dec.*, ¶30. The Complaint Committee asserted that it had “determined” Marohn violated Minn. Stat. §326.02, subds. 1 and 3 and Minnesota Rules 1805.0200, subps. 1(B), 2, and 4(C) and the Complaint Committee would recommend disciplinary action by the Board. *Id.* Minn. Stat. §326.02, subd. 1 and 3 prohibit a person from providing professional-engineering services in Minnesota without a professional-engineering license. *Id.* Minn. Stat. §326.02, subd. 3, which was amended in 2014 to add subd. 3(b), 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.

15. In its November 3, 2020 letter, the Complaint Committee interpreted these provisions as prohibiting a person from referring to himself as a professional engineer to the public in any circumstances – even those unrelated to professional engineering. In other words, according to the Complaint Committee, a person would violate subdivision 3(b) if a person referred to himself as a professional engineer at a public gathering completely unrelated to providing any engineering services. *Id.* Moreover, Minnesota Rule §1800.0200 subps. 1(B), 2, and 4(C) prohibit licensees from being “[un]truthful in all professional documents;” making “a false statement or fail to disclose a material fact requested in connection with an application for certification, licensure, or renewal in this state or any other state;” or “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation.” As explained in the November 3, 2020 letter, the Complaint Committee proposed that Marohn sign - and agree to - the proposed stipulation and order as an alternative to the Board issuing an Order against Marohn. *Marohn Dec.*, ¶31.

16. In its proposed stipulation, the Complaint Committee demanded that Marohn agree that he violated Minn. Stat. §326.02, subds. 1 and 3 solely by “using the title professional engineer on his website, in publications, and in biographies for speaking engagements.” *Marohn Dec.*, ¶32. Furthermore, the Complaint Committee demanded that Marohn stipulate that he violated Minnesota Rules 1805.0200, subps. 1(B), 2, and 4(C) by “engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation” when Marohn completed his reinstatement and renewal applications. *Id.* These applications required Marohn to certify:

I have not represented myself as an architect, professional engineer, land surveyor, landscape architect, professional geologist, professional soil scientist, or certified interior designer, without proper licensure or certification, either verbally or on any printed

matter, in the State of Minnesota, nor will I do so until such time as my license or certificate has been issued by the Minnesota Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design.

*Id.*

17. Marohn interpreted this certification to mean that Marohn had not represented himself as a professional engineer in connection with providing, or offering to provide, professional-engineering services in Minnesota as opposed to engaging in public advocacy speech. *Marohn Dec.*, ¶33. However, the Complaint Committee asserted that this certification encompasses references as a professional engineer *anywhere* including on the website of the non-profit corporation Marohn founded, Strong Towns. *Id.*

18. Finally, the stipulation specifically provided Marohn would agree that he had made a false statement of fact on the renewal application and Marohn would agree to a reprimand and censure, pay a \$1,500 civil penalty, and agree to take two hours of ethics classes. *Marohn Dec.*, ¶34.

19. Marohn responded to the Complaint Committee in a November 17, 2020 letter. *Marohn Dec.*, ¶35 and *Marohn's November 17, 2020 letter attached as Exhibit 5*. In his November 17, 2020, Marohn again acknowledged that his professional engineering license had lapsed. *Id.* However, Marohn would not agree to any stipulation finding he engaged in any type of fraud, dishonesty, or misrepresentation based on Marohn stating that he was a professional engineer in situations that did not involve providing or offering to provide professional-engineering services. *Id.* Marohn proposed modifications to the findings of fact to show that Marohn renewed his lapsed license before being made aware of Dixon's complaint. *Id.*

20. The Complaint Committee responded to Marohn's November 17, 2020 letter by a December 17, 2020 letter. *Marohn Dec.*, ¶36 and *the Complaint Committee's December 17,*

2020 letter attached as Exhibit 6. Along with the December 17, 2020 letter, the Complaint Committee enclosed a revised stipulation in which the Complaint Committee increased the sanctions on Marohn by now demanding Marohn stipulate that he engaged in “conduct involving dishonesty or misrepresentation by claiming to be a licensed professional engineer while his license was expired.” *Id.* Once again, the Complaint Committee demanded that Marohn agree to a reprimand and censure and a \$1,500 civil penalty. *Id.*

21. At this point, Marohn hired an attorney, Kristine Kubes, to represent him. *Marohn Dec.*, ¶37. Ms. Kubes sent a December 31, 2020 letter to the Complaint Committee requesting until January 19, 2021 to respond to the Complaint Committee’s December 17, 2020 letter. *Id.* On January 19, 2021, Ms. Kubes sent the Complaint Committee a January 19, 2021 letter responding to the Complaint Committee’s December 17, 2020 letter. *Id. and Ms. Kubes January 19, 2021 letter attached as Exhibit 7.* In her letter, Ms. Kubes analyzes the issues and explains to that under Minnesota law, Marohn did not commit any type of “fraud” or “dishonesty” because there was no intent – i.e.. Marohn did not intend to engage in the fraud or dishonesty. *Id.* Ms. Kubes’s letter further cited other disciplinary actions that the Board has taken when professionals fail to timely renewal their license applications. *Id.* In those instances, the Board did not demand that the professionals stipulate that they engaged in fraud, even though those professionals were practicing in their licensed profession and their actions did potentially threaten the public health safety and welfare. *Id.*

22. In response to Ms. Kubes’s January 19, 2021 letter, the Complaint Committee sent Ms. Kubes a February 17, 2021 letter inviting Marohn and Ms. Kubes to attend a conference before the Complaint Committee on March 10, 2021 via a remote video due to Covid. *Marohn Dec.* ¶38 and the Board’s February 17, 2021 attached as Exhibit 8. During this conference:

- a. The Complaint Committee chair, Keith Rapp, stated he was concerned over Marohn referring to his engineering credentials during Marohn's public speaking appearances at "Tedx," "The American Conservative," and "Talks on Google."
- b. Paul Vogel, a member of the Complaint Committee, stated his concern that people listening to Marohn speak during his public advocacy listeners may rely more on what Marohn is advocating based on Marohn stating he is a professional engineer.
- c. Eric Friske, a member of the Complaint Committee, questioned Marohn about how credentials are represented in a spoken podcast format.

*Id.*

23. At this remote conference, there were no representations or allegations of Marohn engaged in any engineering work or offered to engage in any engineering work during the period Marohn's professional-engineering license had lapsed. *Marohn Dec.*, ¶39. After the conference, the Complaint Committee sent Ms. Kubes a March 17, 2021 letter with another draft stipulation. *Marohn Dec.*, ¶40 and the Complaint Committee's March 17, 2021 letter attached as Exhibit 9. The updated stipulated order contained findings that omitted key facts in a way that is prejudicial to Marohn and maintains assertions that Marohn made an "untruthful statement," a "false statement," and engaged in "conduct involving misrepresentation." *Id.*

24. Ms. Kubes responded to the Complaint Committee in a March 23, 2021 letter. *Marohn Dec.*, ¶41 and Ms. Kubes' March 23, 2021 letter attached as Exhibit 10. Ms. Kubes once again reiterated that Marohn would not agree to any stipulation stating that Marohn engaged in any type of dishonesty or misrepresentation. *Id.* Ms. Kubes stated Marohn will sign a stipulated order acknowledging the use of the term "professional engineer" in Marohn's biography during the lapse in licensure and agree to a reprimand and a \$500 civil penalty if the Board will remove assertions that Marohn made an "untruthful statement," a "false statement," and engaged in "conduct involving misrepresentation" and if the Board will update the findings of fact to

indicate that Marohn applied for and received renewal of his professional-engineering license prior to being notified of the complaint from Dixon. *Id.*

25. The Complaint Committee responded in an April 20, 2021 letter. *Marohn Dec.*, ¶42 and the Complaint Committee’s April 20, 2021 letter attached as Exhibit 11. In the April 20, 2021 letter, the Complaint Committee rejected all of Marohn’s requested changes. *Id.* The letter also threatened the further action against Marohn if he did not agree to sign the stipulated order. *Id.*

## ARGUMENT

### **A. 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.**

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 is seeking to sanction Marohn for saying he was a “professional engineer” outside of practicing engineering or soliciting work as an engineer. *Marohn Dec.* ¶ 29. In fact, Maohn identified himself as a professional engineer while engaged in public advocacy - he made them in the course of 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, 86 S. Ct. 1434, 1437 (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.

**B. 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 on 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 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 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 2021 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 commercial 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*.

**C. The Board Will Presumably Argue Marohn’s Speech Was “Commercial” and Therefore Not Entitled to First Amendment Protection.**

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, the *Friedman* Court 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 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 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 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.

Outside of advertising or marketing, the commercial-speech doctrine does not control—*Alvarez* controls, allowing people to tell big whopping lies about their credentials. And because the false speech in *Alvarez* was protected, Marohn’s speech is protected a fortiori. Unlike the defendant in *Alvarez*, Marohn did not knowingly misrepresent his credentials, but was just honestly mistaken. Marohn had been licensed as a professional engineer and did not realize that his license had lapsed because of a failure to renew it. This honest mistake was a far cry from lying about having won the Medal of Honor in *Alvarez*, and even that lie was protected.

The Board does not even assert that Marohn characterized himself as a “professional engineer” in an attempt to market his services as a professional engineer, or, indeed, to market *anything*. The Board thus fails to present even a colorable argument that Marohn’s speech was commercial.

Minnesota Statutes §326.02, subd. 3(b), the provision that Marohn is accused of violating, is a content-based speech restriction because, on its face, it limits what a person is allowed to say; indeed, the paragraph explicitly limits what words a person may use to describe themselves:

(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) (emphasis added). Courts have already recognized that restrictions on the use of professional titles are content-based speech restrictions. *See, e.g., Serafine*, 810 F.3d at 357-60 (Texas’s prohibition on the unlicensed use of the title “psychologist” was, as applied to political speech, subject to strict scrutiny); *Järlström*, 366 F.Supp.3d at 1217-18 (provisions of Oregon law restricting the use of the titles “engineer,” “professional engineer,” and “registered professional engineer” were content-based speech restrictions under *Reed*, 576 U.S. at 163). In fact, the engineering title laws that were struck down as unconstitutionally overbroad in *Järlström* were virtually identical to Minn. Stat. §326.02, subd. 3(b). 366 F.Supp.3d at 1215.

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.

**D. 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.”

## CONCLUSION

Marohn's Motion for Summary Judgment should be granted.

DATED: January 21, 2022

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