No. A22-1099

STATE OF MINNESOTA

IN COURT OF APPEALS

In the Matter of the Professional Engineer License of Charles Marohn

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RESPONDENT'S BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 2

ARGUMENT 4

I. MAROHN VIOLATED SECTION 326.02 BY REFERRING TO HIMSELF AS A PROFESSIONAL ENGINEER WITHOUT A PROFESSIONAL ENGINEER LICENSE 5

A. Marohn Violated the Plain Language of Section 326.02 By Advertising Himself as a Professional Engineer Without Having a License. 6

B. Even If Section 326.02 Is Narrower Than Its Plain Language, Claiming to be a Professional Engineer Is an Advertisement Offering Professional Engineering Services. 9

II. MAROHN'S FALSE LICENSURE CLAIMS ARE NOT PROTECTED BY THE FIRST AMENDMENT 10

A. Marohn's False Licensure Claims Are Unprotected Commercial Speech. 11

B. Marohn's False Licensure Claims Are Within the Category of Historically Unprotected Speech. 17

1. The First Amendment does not protect false licensure claims. 17

2. The First Amendment does not protect statements made for a material gain. 21

III. MAROHN'S FALSE LICENSE APPLICATIONS WERE LIES TO THE GOVERNMENT UNPROTECTED BY THE FIRST AMENDMENT. 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

Accountant's Soc'y of Va. v. Bowman,
860 F.2d 602 (4th Cir. 1988) 12

Animal Legal Def. Fund v. Wasden,
878 F.3d 1184 (9th Cir. 2018) 21

Board of Trustees of the State University of New York v. Fox,
492 U.S. 469 (1989) 1, 13, 14

Bolger v. Youngs Drug Prods. Corp.,
463 U.S. 60 (1983) 15-16

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,
447 U.S. 557 (1980) 11, 16

Charles v. City of Los Angeles,
697 F.3d 1146 (9th Cir. 2012) 14, 15

Friedman v. Rogers,
440 U.S. 1 (1979) 1, 12

Handsome Brook Farm, Inc. v. Humane Farm Animal Care, Inc.,
700 F. App'x 251 (7th Cir. 2017) 11

Ina Holtzman, C.P.A. v. Turza,
728 F.3d 682 (7th Cir. 2013) 9, 10, 15

Maceluch v. Wysong,
680 F.2d 1062 (5th Cir. 1982) 12

Marohn v. Minn. Bd. of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design,
2021 WL 5868194 (D. Minn. Dec. 10, 2021) 5

National Institute of Family & Life Advocates v. Becerra,
138 S. Ct. 2361 (2018) 13

Osborne v. Grussing,
477 F.3d 1002 (8th Cir. 2007) 4

Seabolt v. Tex. Bd. of Chiropractic Exam'rs,
30 F. Supp. 2d 965 (S.D. Tex. 1998) 12

Serafine v. Branaman,
810 F.3d 354 (5th Cir. 2016) 16, 17

United States v. Alvarez,
567 U.S. 709 (2012) ..... Passim

STATE COURT CASES

Advanced Training Sys., Inc. v. Caswell Equip. Co.,
352 N.W.2d 1 (Minn. 1984) 11

Board Order, Kells (BWSR) v. City of Rochester,
597 N.W.2d 332 (Minn. Ct. App. 1999) 4

California v. Starski,
212 Cal. Rptr. 3d 622 (Cal. Ct. App. 2017) 19, 20

Council of Indep. Tobacco Mfrs. of Am. v. Minnesota,
713 N.W.2d 300 (2006) 10-11

Depositor's Ins. Co. v. Dollansky,
919 N.W.2d 684 (Minn. 2018) 6

Dick Weatherson's Associated Mechanical Services v. Minnesota Mutual Life Insurance Co,
100 N.W.2d 819 (Minn. 1960) 7, 8

Holmberg v. Holmberg,
578 N.W.2d 817 (Minn. Ct. App. 1998) 10

In re Individual 35W Bridge Litigation,
806 N.W.2d 820 (Minn. 2011) 20

In re Minn. Living Assistance, Inc.,
934 N.W.2d 300 (Minn. 2019) 6

In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils,
768 N.W.2d 112 (Minn. 2009) 4

Minn. League of Credit Unions v. Minn. Dep't of,
486 N.W.2d 399 (Minn. 1992) 11

Pomrenke v. Comm'r of Commerce,
677 N.W.2d 85 (Minn. Ct. App. 2004) 5

Scheffler v. City of Anoka,
890 N.W.2d 437 (Minn. Ct. App. 2017) 9

Van Breeman v. Dep't of Prof'l Regulation,
694 N.E.2d 688 (Ill. App. Ct. 1998) 12

FEDERAL STATUTES

10 U.S.C. § 7271 20

10 U.S.C. § 8291 20

10 U.S. C. § 9271 20

14 U.S.C. § 491 20

U.S. Const. amend. I 1

STATE STATUTES

Minn. Stat. § 14.69 5

Minn. Stat. § 326.02 ..... Passim

Minn. Stat. § 645.16 7

STATE RULES AND REGULATIONS

Minn. R. Evid. 408 5

Minn. R. 1800.2500 2-3

Minn. R. 1800.2700 2-3

Minn. R. 1805.0200 22

OTHER AUTHORITIES

2 William Livingston & William Smith, *Laws of New York*, 188-89 (1762) 18

2 William Waller Hening, *Laws of Virginia,* 316 (1823) 17

Council of State Gov'ts, *Occupational Licensing Legislation in the States,* 15 (1952) 17

Colonial Laws of Massachusetts, 28 (1887) 18

Doug McGuirt, *The Professional Engineering Century,* P.E. Mag, June 2007 3

Louis G. Caldwell, *Early Legislation Regulating the Practice of Medicine,* 17 LAW. & BANKER 12 (1924) 18

Minn. Bd. Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design, *Enforcement*, https://www.mn.gov/aelslaigd/enforcement.html (2022) 5

Reginald H. Fitz, *The Legislative Control of Medical Practice,* 16 MED. COMMC'NS MASS. MED. SOC'Y 275 (1894) 19

Timothy Green, *Acts and Laws of the State of Connecticut, in America,* 161-62 (1784) 18

LEGAL ISSUES

I. Does Minn. Stat. § 326.02 prohibit Marohn from advertising himself as a professional engineer during the period when he did not perform any professional engineering services?

The Board concluded that Marohn was subject to discipline for advertising himself as a professional engineer even though he did not perform any professional engineering services.

Most apposite authorities:

Minn. Stat. § 326.02, subd. 3 (2020)

II. Does the First Amendment give Marohn the right to falsely advertise himself as a professional engineer?

Because the Board lacks authority to adjudicate constitutional claims, it did not decide this issue.

Most apposite authorities:

U.S. Const. amend. I
Friedman v. Rogers, 440 U.S. 1 (1979)
Board of Trustees of the State University of New York v. Fox, 492 U.S. 469 (1989)

III. Does the First Amendment give Marohn the right to lie on license-reinstatement applications he submits to a licensing board?

Because the Board lacks authority to adjudicate constitutional claims, it did not decide this issue.

Most apposite authorities:

U.S. Const. amend. I
United States v. Alvarez, 567 U.S. 709 (2012)

STATEMENT OF THE CASE

The Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design censured and reprimanded Relator Charles Marohn and imposed a $1,500 penalty because he falsely advertised himself as a professional engineer when he did not possess a professional-engineer license and he then falsely denied doing so when he applied to reinstate his license. Marohn appeals, arguing that the prohibition on falsely holding out as a professional engineer only applies if a person performs or contracts to perform professional engineering services. He also argues that discipline in this case would violate a purported First Amendment right to falsely claim to be a professional engineer and lie on government license applications.

STATEMENT OF FACTS

Minnesota requires a license to perform professional engineering or advertise oneself as being able to perform professional engineering. Minn. Stat. § 326.02, subd. 3 (2020). To obtain a professional engineer status, a person must complete a multi-step, multi-year process of (1) passing an eight-hour fundamentals exam, (2) completing four years of progressive experience in a particular engineering field, (3) passing another eight-hour exam testing the knowledge gained during the four-year period, and finally, (4) obtaining and maintaining state licensure, which requires obtaining sufficient continuing education over each two-year renewal period. Minn. R. 1800.2500, .2700

(2021); *see also* Doug McGuirt, *The Professional Engineering Century*, P.E. MAG., June 2007, at 28[1] (explaining history of licensure requirements for professional engineers).

The Board issued Marohn a professional engineer license in 2000. (AELS39.) Marohn's license expired in 2018 because he failed to renew it. (*Id.*) Marohn was unlicensed from June 30, 2018, to June 17, 2020. (*Id.*) Despite lacking licensure, Marohn repeatedly advertised himself as a professional engineer during that period: On his LinkedIn profile he stated that he is a "Professional Engineer (PE) licensed in the State of Minnesota." (*Id.* at 40.) On his company's website he stated he was a professional engineer on both his biography page and on pages selling training courses. (*Id.*; OAH185–92.) In a book Marohn published in 2019, he claimed in the "About the Author" that he was a professional engineer licensed in Minnesota. (AELS 40.) And in the same book's book jacket, he claimed to be a certified professional engineer. (*Id.*) Finally, in at least three online presentations in 2020, he claimed to be a professional engineer. (*Id.*)

After falsely advertising himself as a professional engineer for almost two years, one of Marohn's coworkers pointed out to him that he was not licensed. (OAH234.) Thereafter, Marohn filed license renewal applications with the Board for the 2018-2020 and 2020-2022 licensing periods. (AELS39.) Despite Marohn's false claims of being a professional engineer for the past two years, in his applications, Marohn falsely certified to the Board, "I have not represented myself as a[] . . . professional engineer . . . without

[1] Available at https://www.nspe.org/sites/default/files/resources/pdfs/pemagazine/june2007_the_professional_engineering.pdf.

proper licensure or certification, either verbally or on any printed matter, in the State of Minnesota." (*Id.* at 40–41.)[2]

Based on Marohn's false claims of licensure and dishonest answers on his license renewal applications, the Board's Complaint Committee initiated a contested case against Marohn.[3] (OAH337.) Following cross-motions for summary disposition, the administrative law judge recommended that the Board discipline Marohn. (AELS37.) The Board adopted the ALJ's recommendation, issued a public reprimand, and imposed a $1,500 civil penalty. (AELS30–32.) Marohn appeals the Board's order.

ARGUMENT

Courts presume an agency's decision is correct and defer to the agency's conclusions in the area of its expertise. *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils*, 768 N.W.2d 112, 119 (Minn. 2009). Courts view agency factual findings in the light most favorable to the agency's decision and do not reverse them if the evidence reasonably sustains them. *Board Order, Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332, 336 (Minn. Ct. App. 1999). The Court may reverse only if the Board violated Marohn's constitutional rights; exceeded its statutory authority; used an

[2] Although Marohn claims he completed his applications online, the record shows that Marohn completed the applications by hand. (*Compare* Rel.'s Br. 25, *with* OAH201–02.)

[3] Marohn ascribes a retaliatory intent to both the individual who initially filed a complaint against Marohn and to the Board. (Rel.'s Br. 6, 10.) But courts do not impute complainant's motives, retaliatory or otherwise, to government actors. *Osborne v. Grussing*, 477 F.3d 1002, 1007 (8th Cir. 2007). And there is no evidence of a retaliatory motive by the Board; instead, the quotes Marohn relies upon establish that the Committee was concerned with Marohn falsely representing his qualifications without any indication that the Committee cared about the substance of his speech beyond the false licensure claims. (OAH240–41.)

unlawful procedure; committed another error of law; reached a decision unsupported by substantial evidence; or made an arbitrary and capricious decision. Minn. Stat. § 14.69 (2020). "If an agency engaged in reasoned decision-making, a reviewing court will affirm, even though it may have reached a different conclusion than the agency." *Pomrenke v. Comm'r of Commerce*, 677 N.W.2d 85, 94 (Minn. Ct. App. 2004).

Here, Marohn challenges only whether the Board may impose discipline at all, not whether the type of discipline imposed was appropriate.[4] The Court should affirm the Board's decision because the Board properly applied the law. Marohn falsely advertised himself as a professional engineer while unlicensed and then lied about it on his license renewal applications, and the First Amendment does not give Marohn the right to do so.

I. MAROHN VIOLATED SECTION 326.02 BY REFERRING TO HIMSELF AS A PROFESSIONAL ENGINEER WITHOUT A PROFESSIONAL ENGINEER LICENSE.

Minnesota prohibits people from using the term "professional engineer," using the abbreviation "P.E.," or making any other representation that would lead the public to

[4] Marohn incorrectly asserts that the Board's discipline required him to take an ethics class. (Rel.'s Br. 2.) That class was a proposed term in one of the Committee's settlement offers to Marohn, but it was not included in the Board's final order. (*Compare* OAH275, *with* AELS31.) The Board notes that in almost all cases it first attempts to resolve matters with a proposed consent order before initiating a contested case. *See generally* Minn. Bd. Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design, *Enforcement*, https://www.mn.gov/aelslagid/enforcement.html (last visited October 24, 2022) (listing enforcement orders, the majority of which are stipulations and consent orders). Here, after the Committee made several offers to Marohn, Marohn responded by suing the Board in an effort to enjoin any discipline. *Marohn v. Minn. Bd. of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience and Interior Design*, No. 21-1241, 2021 WL 5868194 (D. Minn. Dec. 10, 2021). Moreover, settlement discussions are not proper evidence for presentation to the Court. Minn. R. Evid. 408.

believe the person is a professional engineer if the person lacks a license. Minn. Stat. § 326.02, subd. 3(b) (2020). The record clearly supports the Board's conclusion that Marohn referred to himself as a professional engineer and P.E. in violation of the statute's plain language.

A. Marohn Violated the Plain Language of Section 326.02 By Advertising Himself as a Professional Engineer Without Having a License.

"No person other than one licensed . . . as a professional engineer may . . . use the term 'professional engineer'; use . . . the initials 'P.E.' or 'PE' . . . 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). When interpreting a statute like this one, the Court first looks to see if it is clear or ambiguous on its face. *In re Minn. Living Assistance, Inc.*, 934 N.W.2d 300, 306 (Minn. 2019). If a statute is unambiguous, the Court applies the statute's plain meaning. *Depositor's Ins. Co. v. Dollansky*, 919 N.W.2d 684, 687 (Minn. 2018). Here, Marohn's conduct clearly violated this prohibition; Marohn said he was a professional engineer and a P.E. while unlicensed.

The thrust of Marohn's statutory argument is that such conduct is not in fact prohibited in Minnesota. (Rel.'s Br. 13–19.) Specifically, Marohn argues that the statute covers only practicing or offering to practice professional engineering without a license based on two arguments: first, the structure and purpose of the statute and second, a breach of contract case from the Minnesota Supreme Court. Neither argument is availing.

Marohn first argues that the structure and purpose of the statute show that it is only intended to cover practicing or offering to practice professional engineering without a

license. But these intent arguments ignore the plain language of the statute. Indeed, Marohn's brief is bereft of any analysis of the plain language of subdivision 3(b), instead focusing on the alleged goals of the law, and statements made during committee hearings on amendments to the statute. (Rel.'s Br. 14–16.) But "[w]hen 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." Minn. Stat. § 645.16 (2020). Accordingly, Marohn's legislative intent arguments fail.

Marohn also argues that the Supreme Court has previously interpreted section 326.02 to reach only practicing or offering to practice professional engineering. (Rel.'s Br. 16–17.) Specifically, Marohn relies on *Dick Weatherson's Associated Mechanical Services v. Minnesota Mutual Life Insurance Co*, 100 N.W.2d 819 (Minn. 1960). But *Dick Weatherson's* did not limit the statute in the way Marohn describes; instead it is a breach-of-contract case of minimal relevance here.

In *Dick Weatherson's*, the plaintiff performed professional-engineering services for the defendant, notwithstanding that the plaintiff lacked a professional-engineer license. *Id.* at 823. The plaintiff had conditioned preparation of the engineering plans on being hired to perform the installation, but after the plaintiff prepared the plans, the defendants hired a different company, causing the plaintiff to sue. *Id.* at 822. In seeking to avoid liability, the defendant argued that because the plaintiff was not licensed, their agreement was illegal and therefore the plaintiff could not recover. *Id.* at 823.

The court rejected the defendant's argument, reasoning that the professional engineering work was "incidental to and part of a contract for an entire job which was

approved and accepted by architects and engineers responsible for the supervision of such construction." *Id.* at 825. Marohn particularly notes the court's statement that "[j]ustice and sound policy do not always require the literal and arbitrary enforcement of a licensing statute." *See id.* at 824. But this observation was in the context of assessing the equities of whether to entirely preclude recovery for breach of contract despite the plaintiff having provided services to the defendant. *See id*. Indeed, the court preceded that statement by discussing the need to consider "the transaction as a whole" and the court then discussed the agreement as understood by the parties. And the authority cited by the court is a treatise on contract—not licensure—law. *See id.* at 823–24. In short, *Dick Weatherson's* is not an invitation for Minnesotans to violate the plain language of licensure laws; instead, it is a case about the equities of voiding contracts that contemplate transactions prohibited by law. Consequently, the court did not limit the scope of section 326.02 as applied to licensing enforcement actions like this one.

Based on this interpretation, it is clear Marohn violated the statue. Indeed, other than two sentences in his brief alleging that the Board has no evidence as to the timing of the statements, Marohn does not seriously contest that he made statements that would lead the public to believe he was a professional engineer while unlicensed. (Rel.'s Br. 18–19.) And the evidence demonstrates Marohn made the statements in question while unlicensed. The screenshot of Marohn's LinkedIn page, taken in March 2020, states that he published he book in September 2019. (OAH178.) This proves that both the statements on Marohn's LinkedIn and his book were made while Marohn was unlicensed. Additionally, the posting dates of the three YouTube videos (as well as the fact that several of them mention the

COVID-19 pandemic) show that they were made while Marohn was unlicensed. (OAH173–74.)

B. Even If Section 326.02 Is Narrower Than Its Plain Language, Claiming to be a Professional Engineer Is an Advertisement Offering Professional Engineering Services.

For the foregoing reasons, section 326.02 is not limited to prohibiting individuals from referring to themselves as professional engineers only if they actually perform professional engineering or offer to do so. But even if the Court disagrees (or believes a narrowing construction to that effect is necessary in light of Marohn's constitutional arguments), Marohn's conduct is still covered by the statute.[5] Statements that would lead the public to believe a person could be hired as a professional engineer are themselves advertisements offering professional engineering services, and are therefore still covered even under Marohn's proposed narrowing.

Statements may constitute advertisements even if they do not explicitly provide a price for particular services or explicitly encourage the purchase of the service. For example, in *Ina Holtzman, C.P.A. v. Turza*, the Seventh Circuit considered whether a faxed newsletter that largely contained mundane advice but at the end listed an attorney's "name, address, logo, and specialties" constituted an advertisement. 728 F.3d 682, 686 (7th Cir. 2013). The newsletter did not give any information about legal rates or make any statement encouraging readers to hire the attorney in question. *Id.* at 685. The court nevertheless

[5] The Court may affirm the Board's decision on any basis supported by the record, even if that basis was not the basis of the Board's decision below. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 450 (Minn. Ct. App. 2017).

agreed with the district court's conclusion that "it [is] impossible for any reasonable juror to doubt that this fax plugs the commercial availability of [the attorney's] services." *Id.* at 686.

Marohn's statements parallel the statements in *Holtzman*. They included his name, the web address of his organization (or in some instances were posted on that website), and stated the type of services Marohn could perform—professional engineering services. Indeed, despite Marohn's averments in various pleadings that he has not performed or offered to perform professional engineering services since 2012, that disclaimer appears nowhere in any of Marohn's statements. Instead, they say (for example) that Marohn is "a professional engineer licensed in the State of Minnesota . . . with two decades of experience." (AELS195.) Any reasonable person reading such statements would believe that the person could hire Marohn to perform professional engineering services. Thus, even under Marohn's constrained interpretation of the statute, Marohn still violated it because he offered to perform professional engineering services.

II. MAROHN'S FALSE LICENSURE CLAIMS ARE NOT PROTECTED BY THE FIRST AMENDMENT.

Marohn argues that the First Amendment allowed him to advertise himself as a professional engineer, despite not being licensed at the time. Neither the ALJ nor the Board reached the merits of this claim because they lack the authority to adjudicate constitutional claims. *E.g.*, *Holmberg v. Holmberg*, 578 N.W.2d 817, 820 (Minn. Ct. App. 1998), *aff'd*, 588 N.W.2d 720 (Minn. 1999). Marohn faces a "heavy burden" in seeking to challenge a statute as unconstitutional. *Council of Indep. Tobacco Mfrs. of Am. v. Minnesota*, 713

N.W.2d 300, 305 (2006). The Court must "invoke every presumption in favor of the constitutionality of the statute" and declare a statue unconstitutional only when absolutely necessary and with extreme caution. *Id.* Here, the Court should reject Marohn's arguments because his false claims are commercial speech unprotected by the First Amendment or are otherwise unprotected as speech traditionally subject to state regulation.

A. Marohn's False Licensure Claims Are Unprotected Commercial Speech.

While the First Amendment protects free speech and this prohibition extends to cover at least some falsehoods, the precise contours of that prohibition are not clearly established. *Compare United States v. Alvarez*, 567 U.S. 709, 718 (2012) (plurality opinion), *with id.* at 731–33 (Breyer, J., concurring in judgment). What is clear, however, is that some falsehoods are not protected by the First Amendment, including falsehoods that are commercial speech. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980). Instead, "false or misleading 'commercial speech' may be forbidden." *Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984).

The Supreme Court has not "issued any determinative standard by which to assess if a message is commercial speech." *Handsome Brook Farm, Inc. v. Humane Farm Animal Care, Inc.*, 700 F. App'x 251, 257 (7th Cir. 2017). Nor has the Minnesota Supreme Court, which instead uses "common sense" in determining whether a rule regulates commercial speech as opposed to other protected forms of speech. *Minn. League of Credit Unions v. Minn. Dep't of Comm.*, 486 N.W.2d 399, 403 (Minn. 1992).

Lacking a brightline test for commercial speech, past cases are instructive. Particularly instructive here is *Friedman v. Rogers*, 440 U.S. 1 (1979). In that case, the Court addressed a statute that prohibited optometrists from using trade names like "Texas State Optical." *Id*. at 3, 21. The Court first concluded that using a trade name was a form of commercial speech because once the name came to be known in the community it conveyed information about the "type . . . and quality" of services the business could perform. *Id*. at 11. More specifically, the Court noted that such names had the potential to mislead the public because a trade name could imply a quality that simply was not present. *Id*. at 12. The Court then upheld the prohibition because the statute merely ensured that information would be communicated "fully and accurately" and did no more than require information "appear in such a form as is necessary to prevent its being deceptive." *Id* at 16.

Post-*Friedman*, courts across the country have applied its and its progeny to uphold laws prohibiting the use of false or misleading professional titles. *See, e.g.*, *Maceluch v. Wysong*, 680 F.2d 1062, 1068–70 (5th Cir. 1982) (use of "M.D."); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 605–06 (4th Cir. 1988) (use of "public accountant"); *Seabolt v. Tex. Bd. of Chiropractic Exam'rs*, 30 F. Supp. 2d 965, 967–69 (S.D. Tex. 1998) (use of "chiropractic physician"); *Van Breeman v. Dep't of Prof'l Regulation*, 694 N.E.2d 688, 691–92 (Ill. App. Ct. 1998) (use of "professional engineer").

Marohn's falsely advertising himself as a professional engineer closely parallels the statements in *Friedman* and these other cases. First, like the tradenames in *Friedman*, the title "professional engineer" is a recognized credential in the industry that conveys a particular level of skill. Second, an unlicensed person's use of "professional engineer"

similarly has potential to mislead the public by implying a quality or credential that is not present. Third, a prohibition on falsely using the title has only the "most incidental effect" on Marohn's speech because he remains free to express whatever substantive points he wishes to make; he simply cannot falsely hold himself out as a person capable of doing professional engineering work before doing so.

Marohn attempts to distinguish *Friedman* by arguing that it concerned using tradenames to propose a business transaction, while Marohn falsely used a professional title before proceeding to engage in political advocacy.[6] (Rel.'s Br. 24.) This argument misses the mark of *Friedman*—that the use of the tradename (or in this case the professional title) alone is itself an advertisement that the person can perform the services in question. Indeed, as noted in the discussion of *Holtzman* above, the use of the title in conjunction with his name is itself an advertisement.

The proximity of Marohn's false claims to political speech is similarly irrelevant to whether they can be regulated as commercial speech. This precise argument was rejected by the Supreme Court in *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989). In that case, students challenged a restriction on dormitory Tupperware parties, which contained both commercial speech (e.g., promoting products) and noncommercial speech (e.g., discussing how to be financially responsible and run an

[6] Marohn also initially devotes considerable discussion to arguing why the "professional speech" doctrine does not allow the Board to discipline Marohn. (Rel.'s Br. 20–23.) The Board does not argue that doctrine would permit discipline; thus, Marohn's arguments under *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), are inapposite.

efficient home). *Id.* at 473–74. The Court rejected the students' argument that the types of speech were so inextricably intertwined that they must be considered noncommercial in its entirety; instead, the Court reasoned that "[n]o law of man or nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." *Id.* at 474. Consequently, the state could prohibit the commercial speech, notwithstanding the surrounding noncommercial speech. Likewise, here Marohn could have advertised himself as a professional engineer without engaging in political advocacy, or he could have engaged in political advocacy without advertising as a professional engineer. The Board may thus prohibit Marohn from falsely advertising himself as a professional engineer, notwithstanding that those false claims were made in proximity to policy advocacy.

Even more on point (though nonbinding in Minnesota) is *Charles v. City of Los Angeles*, 697 F.3d 1146 (9th Cir. 2012). In that case, the plaintiff argued that a billboard advertising a television show was not commercial speech because it "promoted the ideas, expression, and content" in the show being advertised. *Id.* at 1152. Like this case, the court recognized that messages might contain both an offer to engage in a commercial transaction and noncommercial expression. *Id.* The court nevertheless held that, because nothing prevented the speaker from communicating the noncommercial message independent of the commercial message, the government could "permissibly restrict the commercial message regardless of its proximity to noncommercial speech." *Id.* The court rejected the argument that the First Amendment protection afforded to the underlying show prevented the city from regulating the advertisement; speech inviting people to watch the show is not

inherently identical to the speech constituting the program itself. *Id.* Similarly here, the Court should hold that the First Amendment protection afforded to Marohn's policy advocacy does not extend to his false claims that attempt to induce people to purchase the books or courses containing that advocacy.

Turning to how Marohn seeks to define commercial speech, Marohn seeks to define that scope narrowly, arguing that the speech must propose a transaction. (Rel.'s Br. 23.) As an initial matter, even under this narrow definition of commercial speech, Marohn's false licensure claims still fall within the category for two independent reasons. First, as previously discussed, using the professional engineer title alone constituted an advertisement of Marohn's availability to perform professional-engineering services. *Holtzman*, 728 F.3d at 686. Second, Marohn made his false licensure claims as part of efforts to get people to engage in commercial transactions: Marohn touted his purported status as a professional engineer in the book jacket of his book to encourage its sales, and he touted that credential on his organization's website to get people to purchase his courses. These are unquestionably instances of Marohn using the title to promote the quality of the goods or services he was selling. Thus, even if the Court agrees that the scope of commercial speech is as narrow as Marohn suggests, the speech at issue in this case still is within the category.

Moreover, the commercial speech doctrine is not as narrow as Marohn describes. Indeed, even Marohn recognizes that the doctrine is not so limited. (Rel.'s Br. 23.) On the contrary, speech may be commercial speech notwithstanding that it does not propose a transaction or it "contains discussion of important public issues." *Bolger v. Youngs Drug*

Prods. Corp., 463 U.S. 60, 67–68 (1983). For example, the Court has applied a commercial-speech analysis to a restriction on flyers encouraging consumers to use more electricity, holding that it "restrict[ed] only commercial speech." *Cent. Hudson*, 447 U.S. at 561. Such flyers clearly did not propose a transaction; the electric company already had a monopoly, and its consumers were already obligated to pay for however much electricity they used. *Id.* at 566–67. Similarly in *Bolger*, the Court held that pamphlets promoting the availability and desirability of contraceptives could not "be characterized merely as proposals to engage in commercial transactions"; yet the court held that the pamphlets were commercial speech. 463 U.S. at 67.

Marohn relies upon a Fifth Circuit case where a candidate for elected office falsely described herself as a psychologist on her campaign website and the court prohibited the state from imposing discipline. *Serafine v. Branaman*, 810 F.3d 354, 358 (5th Cir. 2016). But *Serafine* was both poorly reasoned and is readily distinguishable. Although *Serafine* cited *Friedman* for the proposition that states can regulate titles and tradenames, it then ignored *Friedman*'s central holding that the associations that arise over time with a tradename (or professional credential) can lead to the use of the name or title itself being an advertisement for the associated services. *See id.* at 360–61. *Serafine* also ignored—without any discussion or justification—*Fox*'s clear direction that commercial speech can be separated from noncommercial speech and regulated, even if they are made in the same setting. Moreover, even if the Court believes *Serafine* was correctly decided, it is also readily distinguishable. *Serafine* rested on the observation that the plaintiff was a political

candidate "seeking votes, not clients." 810 F.3d at 361. Marohn, in contrast, was seeking book and course purchasers, that is to say, commercial transactions.

B. Marohn's False Licensure Claims Are Within the Category of Historically Unprotected Speech.

Marohn's false licensure claims are commercial speech not protected by the First Amendment. But even if the Court disagrees, the Court should still affirm because Marohn's false claims still fall within "historic and traditional categories of expression" that are not subject to First Amendment protection. *Alvarez*, 567 U.S. at 717. More specifically, occupational licensing and limits on who may hold themselves out as a particular professional are traditional police powers that predate the United States. And *Alvarez* also recognized that the First Amendment does not categorically protect false statements made for material gain. *Id.* at 723. Marohn's false licensure claims fall into both of these categories.

1. The First Amendment does not protect false licensure claims.

Professional regulation has a long history in the United States that predates the country's founding. For example, in 1639 Virginia enacted the first medical practice regulation prohibiting excessive charges. Council of State Gov'ts, *Occupational Licensing Legislation in the States* 15 (1952); *see also* 2 William Waller Hening, *Laws of Virginia* 316 (1823).[7] By 1649, Massachusetts prohibited physicians, surgeons, and midwifes from engaging in any "act contrary to the known[] rules of the art[]," or exercising "any force,

[7] Available at https://archive.org/details/statutesatlargeb01virg/page/316/mode/2up.

violence, or cruelty" without the advice and consent of a person skilled in the art. Louis G. Caldwell, *Early Legislation Regulating the Practice of Medicine*, 17 LAW. & BANKER 12, 18 (1924); *see also Colonial Laws of Massachusetts* 28 (1887).[8]

The first American medical practice act was enacted in 1760. Caldwell at 19. Based on concerns that many victims were "persuaded to become . . . patients" of "ignorant and unskilful [sic]" people, New York created a testimonial (i.e. a statement of qualification) that could only be used by people approved by the city government. 2 William Livingston & William Smith, *Laws of New York* 188–89 (1762).[9] New Jersey enacted a very similar act in 1772. Caldwell at 19. And in 1773, Connecticut enacted an act for the "Suppressing of Mountebacks" (sellers of quack medicine). *Id.* at 19; *see also* Timothy Green, *Acts and Laws of the State of Connecticut, in America* 161–62 (1784).[10] Notably, this act was intended not just to prevent the selling of quack medicine itself, but also to address concerns about mountebanks "publicly advertising and giving notice of their skill and ability." Green at 161. By 1894, Massachusetts and New Hampshire were the only two states in the country that did not have medical practice acts.[11] Caldwell at 21. In addition to seeking to ensure that people practiced medicine safely, such laws are also motivated by desires to ensure that unqualified individuals were not advertising with credentials they lacked in the first

[8] Available at https://books.google.com/books?id=Vzno-EGGVcoC.
[9] Available at https://books.google.com/books?id=vN41AQAAMAAJ.
[10] Available at https://babel.hathitrust.org/cgi/pt?id=osu.32437121663724&view=1up&seq=181.
[11] Between the country's founding and this time, there was substantial period of medical deregulation, but these repeals were driven by a push of public opinion supporting non-traditional medicine (such as homeopathy), not any First Amendment concerns. *See* Caldwell at 22–24.

place. *See* Reginald H. Fitz, *The Legislative Control of Medical Practice*, 16 MED. COMMC'NS MASS. MED. SOC'Y 275, 279, 292 (1894) (raising concerns about false licensure claims and limitations on recovery in tort for malpractice by unlicensed individuals after the fact).[12]

This history demonstrates that false licensure prohibitions have a long history of acceptance, including before, around, and after the time that the First Amendment was adopted. It is thus a category of speech that has "been historically unprotected." *See Alvarez*, 567 U.S. at 722 (recognizing existence of such categories). Pursuant to *Alvarez*, the state may therefore prohibit individuals from falsely claiming to hold a professional credential that they lack. Accordingly, the First Amendment is no impediment to the Board disciplining Marohn for falsely claiming to be a professional engineer.

At least one court has upheld prohibitions on false licensure claims post-*Alvarez* under this reasoning. In *California v. Starski*, the criminal defendant argued that the false statement "I am a lawyer" is protected by the First Amendment, and cannot be prosecuted unless "tied to a fraudulent claim or representation that one is authorized to perform services in a court of law." 212 Cal. Rptr. 3d 622, 633 (Cal. Ct. App. 2017). The court rejected this argument, recognizing the states' historic police power to protect the public through the regulation of the practice of professions. *Id.* at 634. In its analysis, the court specifically recognized the acceptance of "prophylactic regulation" that protects the lay

[12] Available at https://archive.org/details/medicalcommunica16mass/page/n285/mode/2up.

public. *Id.* Based on that reasoning, the court sustained a conviction for falsely holding out as being licensed to practice law. *Id.*

Such a holding is also consistent with the policy motivating historical medical-practice laws. Just as waiting to discipline the mountebanks of the 1700s until after they have prescribed a dangerous medicine does nothing to protect patients, waiting to discipline an unlicensed professional engineer until after a bridge collapses does nothing to prevent the collapse. *Cf. In re Individual 35W Bridge Litigation*, 806 N.W.2d 820, 825 (Minn. 2011) (describing significant amount of litigation arising from bridge collapse). States can reduce the likelihood of such individuals being hired by preventing them from falsely claiming to have credentials in the first place. Conversely, allowing individuals to falsely claim professional credentials so long as they are not seeking specific clients would subject the public to significant harms. For example, a non-physician might publish dangerous medical advice and lend it an air of credibility by falsely claiming to be a licensed doctor; or a person could impersonate an attorney to visit a coconspirator in prison.

Marohn argues that prohibitions of false licensure claims are foreclosed by *Alvarez*'s holding that the government could not prohibit people from falsely claiming to be war heroes. (Rel.'s Br. 26.) But licensure claims are distinguishable from the military honors claims at issue in *Alvarez*. Although the Medal of Honor is eminently laudable, unlike licensure it does not imply an exceptional level of training or qualification in a particular profession. *See* 10 U.S.C. §§ 7271, 8291, 9271 (2018); 14 U.S.C. § 491 (2018) (establishing criteria for Medal of Honor for Army, Navy, Air Force, and Coast Guard, respectively). No one is more likely to believe medical advice from Alvarez simply because

he lied about receiving the Medal of Honor. *Alvarez*, 567 U.S. at 713. But if Alvarez had falsely claimed to be a physician, that false claim would make it more likely for people to follow Alvarez's dubious medical advice.

2. The First Amendment does not protect statements made for a material gain.

False claims of licensure are not the only category of statements historically unprotected by the First Amendment. In *Alvarez*, the Court recognized that statements made for material gain are also unprotected. *See Alvarez*, 567 U.S. at 703; *see also Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184, 1194 (9th Cir. 2018). Even if the Court concludes that Marohn's false licensure statements were not commercial speech, they still fit into this broader category.

Marohn made his false licensure claims on his organization's website, in his book, on his LinkedIn page, and in presentations. The website and book are most obviously within the scope of seeking a material gain. Marohn's website solicits donations. (OAH186 (containing "Donate" link in webpage footer).) And the book is available for sale. But Marohn's LinkedIn and presentations also fall within this category because they in turn promote the book or the organization's website. (*Id.* at 175 (LinkedIn); OAH197 at 2:00–:30 (March 24, 2020 presentation); OAH198 at 0:35–1:50 (April 8, 2020 presentation); OAH200 at 2:55–5:25 (April 23, 2020 presentation).) Indeed, the April 8 presentation specifically encouraged viewers to go to the website and sign up for a paid course subscription. (OAH200 at 2:55–5:25.) Marohn's use of the professional-engineer credential serves to increase his credibility and in turn make people more likely to buy his

books, donate to his organization, or purchase a course subscription. These are all material gains, and accordingly, false statements made in pursuit of them (such as Marohn's false licensure claims) are appropriately subject to regulation. [13]

III. MAROHN'S FALSE LICENSE APPLICATIONS WERE LIES TO THE GOVERNMENT UNPROTECTED BY THE FIRST AMENDMENT.

Minnesota prohibits providing false information on a professional-engineer license application. Minn. R. 1805.0200, subps. 1(B), 2, 4(C) (2021). On appeal, Marohn does not deny that he falsely told the Board that he had not represented himself as professional engineer while unlicensed when he had done so. (Rel.'s Br. 25–26.) Instead, he argues that the First Amendment allows people to lie on government license applications. But the case Marohn cites for this position says precisely the opposite: the state may prohibit lies to the government, and accordingly the First Amendment does not excuse Marohn's falsehoods.

In addition to the categories previously discussed, *Alvarez* recognized the constitutionality of "the criminal prohibition of a false statement made to a Government official." 567 U.S. at 720 (plurality opinion). It also recognized the "unquestioned constitutionality of perjury statutes." *Id.* Both are fatal to Marohn's defense.

[13] Because Marohn's false statements are entirely unprotected by the First Amendment, the Court need not reach Marohn's arguments regarding the state's interest furthered by the prohibition. Moreover, as noted in the discussion of the history of licensure regulation, the state has an interest in prohibiting individuals from advertising as professional engineers even if they never get as a far as performing professional-engineering work because otherwise it may be too late to prevent harm from occurring.

Marohn's false license applications were false statements made to the government. Certainly, if criminal consequences for such statements are constitutional, then administrative discipline with a civil penalty is also constitutional. The *Alvarez* Court also approved perjury statutes reasoning that "testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action." *Id.* at 721. Marohn's license application statements similarly had such formality. They were contained under a section labeled "Affidavit" and immediately followed by the statement "I swear/affirm I have read the foregoing renewal application and that the statements are true and accurate," followed by Marohn's signature. This certainly has the "formality and gravity necessary to remind [Marohn] that his . . . statements will be the basis for official government action." *Alvarez* thus precludes Marohn's First Amendment defense to making false statements on his license application.

CONCLUSION

Marohn falsely advertised himself as professional engineer and then lied about doing so on his license renewal applications. Neither falsehood is protected by the First Amendment because his licensure claims are commercial speech, even under Marohn's

definition of commercial speech, and because lies to the government are not protected by the First Amendment. The Court should affirm the Board's order in a precedential opinion holding that such falsehoods are not protected by the First Amendment.

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