

No. A22-1099

STATE OF MINNESOTA

IN COURT OF APPEALS

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

Respondent,

v.

CHARLES L. MAROHN, JR.,

Relator.

RELATOR CHARLES L. MAROHN, JR.'S REPLY BRIEF

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REPLY ARGUMENT

A. Minn. Stat. §326.02 Subd. 3(b)'s Prohibition on Unlicensed Persons Representing Themselves as Professional Engineers Applies Only to Representations Made While Practicing, Or Offering to Practice, Professional Engineering.

As Marohn set forth in his principal brief, Minn. Stat. §326.02 subd. 3(b)'s prohibition on unlicensed persons representing themselves as professional engineers only applies when the unlicensed person is practicing, or offering to practice, professional engineering – the only interpretation which would make any sense under the statute. Nonetheless, the Board argues that Minn. Stat. §326.02 subd. 3(b)'s prohibition applies in all circumstances without limit. Such a construction would lead to absurd and unconstitutional results – which violates the Minnesota canons of statutory construction. Minn. Stat. §645.17 (1) and (3). For instance, the prohibition would apply to a physical education teacher who refers to herself as a “PE.”

As set forth in Marohn's principal brief, the Minnesota Supreme Court has already held that Minn. Stat. §326.02 must be interpreted consistent with its purpose – to protect the public from unlicensed engineers performing engineering services. *Dick Weatherston's Associated Mech. Servs., Inc. v. Minnesota Mut. Life Ins. Co.*, 100 N.W.2d 819 (Minn. 1960). As *Dick Weatherston's* held:

It is our view that it comes within those numerous exceptions which hold generally that the prohibitions of the statute [§326.02] involved are no broader than its purpose in protecting the public from misrepresentation and deceit. The scope of the statute coincides with the reasons for its existence. Since those reasons have no bearing upon the transaction involved herein, the statute is without application.”

Id at 192 (citations omitted).

The Board tries to avoid *Dick Weatherston's* holding by arguing that it was a “contract” case. *Dick Weatherston's* involved an air conditioning contractor, not licensed as an engineer under §326.02, who prepared plans, specifications and estimates for the installation of air conditioning with the understanding that those plans, specifications, and estimates would be subject to approval by, and installed under the supervision of, the property owner’s architect and engineer. After the property owner failed to pay the contractor and the contractor sued, the property owner argued that the contractor’s contract was illegal because the contractor was not a licensed engineer. *Dick Weatherston's* rejected this argument holding that §326.02’s prohibition must be read in light of the purpose of the statute which the Court found was to protect the public against engineering work performed by unlicensed engineers. Because the property owner knew and understood that the contractor’s work would be reviewed and supervised by the property owner’s architect and engineering, the contractor’s work did not violate §326.02.

Dick Weatherston's holding is clear –Minn. Stat. §326.02 subd. 3(b)’s prohibition must be interpreted consistent with its purpose of protecting the public against unlicensed persons performing, or offering to perform, engineering services in Minnesota. Because the Board admits that Marohn had neither practiced, nor offered to practice, engineering services since 2012, the Board’s finding that Marohn violated Minn. Stat. §326.02 subd. 3(b) must be reversed.

B. The Standard of Review On Marohn’s Constitutional Arguments is Strict Scrutiny and the Board Bears the Burden of Proving Minn. Stat. §326.02 Subd. 3(b) is Constitutional As Applied.

The Board asserts at page 10 of its Response Brief that Marohn bears a heavy burden of demonstrating that Minn. Stat. §326.02 subd. 3(b) is unconstitutional as applied citing *Council of Indep. Tobacco Manufacturers of Am., Carolina Tobacco Co., Winner Tobacco Wholesale, Inc. v. State*, 713 N.W.2d 300, 306 (Minn. 2006). The Board’s assertion is wrong because *Council of Indep. Tobacco* did not involve a constitutional challenge to a content based speech restriction such as that contained in Minn. Stat. §326.02 subd. 3(b). As set forth in Marohn’s principal brief, unequivocal Supreme Court precedent holds that content based speech restrictions are presumptively unconstitutional and the State bears the burden of proving that the restriction is narrowly tailored to serve a compelling state interest as the Minnesota Supreme Court recently reaffirmed. *State v. Casillas*, 952 N.W.2d 629, 640 (Minn. 2020).

Because the Board cannot set forth *any* interest, compelling, substantial or otherwise, to justify prohibiting persons from saying they are professional engineers when not engaged in any way in practicing engineering, Minn. Stat. §326.02 subd. 3(b) is unconstitutional if applied outside the practice of engineering.

C. The Board’s Argument That Marohn Was “Advertising” to Provide Engineering Services is Absurd on its Face.

In order to avoid Marohn’s argument that §326.02 subd. 3(b)’s prohibition on using the term professional engineer unless licensed would violate the First Amendment free speech guarantee, the Board argues that Marohn’s references to himself as a

professional engineer were made while “advertising” and thus was commercial speech not subject to the strictures of the First Amendment free speech guarantee. The Board argues that even though Marohn identified himself as a professional engineer in his political advocacy, the public could reasonably conclude that Marohn was offering to provide professional engineering services. This argument is absurd.

The Board cites in support *Ina Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013) which involved a law firm sending mass facsimiles out to potential clients of the law firm’s “newsletter.” At that time, federal law prohibited sending out such mass advertisements by facsimile. The law firm argued that the facsimile was a newsletter and not an advertisement. The Seventh Circuit properly rejected this argument finding that “[t]he plug for Turza's services was not incidental to a message that would have been sent anyway; promotion or marketing was the reason these faxes were transmitted.” *Turza*, 728 F.3d 682, 688 (7th Cir. 2013).

Turza is easily distinguishable because the law firm in *Turza* was presently providing, and offering to provide, legal services. The Board admits that Marohn has not provided, or offered to provide, engineering services, since 2012. The Board claims that Marohn and the lawyer in *Turza* are parallel fact patterns in that they respectively included their name, credentials, name and address of their organization and the type of services they could provide. However, in *Turza*, the organization listed was a law firm, a business, that could ostensibly provide the very services required for professional licensing. On the contrary, Marohn’s organization is a non-profit political advocacy organization which does not provide professional engineering services, nor does it list or

espouse that it could provide such services either implicitly or explicitly.

The Board then argues that the fact that Marohn referred to himself as a professional engineer in his political statements could lead a person to conclude that they could presently hire Marohn to perform engineering services. However, the issue under §326.02 is not whether anyone could conclude, even unreasonably, that a person who referred to themselves as a professional engineer would presently provide professional engineering services. The issue is whether the unlicensed person is presently engaged in providing, or offering to provide, engineering services. It does not matter if someone could conclude that Marohn could provide engineering services if Marohn would refuse to provide such services and belongs to an organization that does not and would not provide such services. It is undisputed that Marohn was not offering to provide engineering services in his political statements. Moreover, contrary to the Board's statement at page 10 of its Respondent's Brief that Marohn never notified people that he was no longer practicing engineering, Marohn's LinkedIn page specifically states that Marohn stopped practicing as an engineer in 2012. *OAH-000177*. For those reasons, Marohn did not "advertise", offer, or purport to offer, explicitly or implicitly, to provide professional engineering services.

D. The Board's Argument That Marohn's Political Advocacy is Not Protected by the First Amendment is Simply Unavailing.

The Board's argument that Marohn's political advocacy is unprotected by the First Amendment of the U.S. Constitution is unfounded. Content-based regulation of speech is subject to strict scrutiny. While the Supreme Court has made an exception to strict

scrutiny for content-based restrictions on commercial speech, 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)). The Board argues that Marohn’s speech here was commercial in order to avoid subjecting its content-based claims to strict scrutiny analysis.

The U.S. District Court for the District of Minnesota recently evaluated whether or not speech is commercial speech. *Dryer v. Nat'l Football League*. 55 F. Supp. 3d 1181 (D. Minn. 2014), *aff'd*, 814 F.3d 938 (8th Cir. 2016). In *Dryer*, the court adopted a three-pronged test for commercial speech set forth in *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109, 1120 (8th Cir. 1999): “whether the speech is an advertisement, whether it refers to a specific product, and the speaker's economic motivation for the speech.” *Dryer*, at 1189. “None of these factors, standing alone, renders the speech at issue commercial, but the ‘combination of all these characteristics, however, provides strong support’ for the conclusion that the speech is commercial.” *Dryer*, at 1189; quoting *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 66 (1983).

The first factor is whether or not the speech in question is an advertisement. Here, Marohn has proposed no transaction, explicitly or implicitly, by the inclusion of professional credentials next to his name, or mention of them in any form, relating to professional engineering or otherwise, and therefore has not “advertised” his professional engineering services or even alluded to such a possibility. His speech is purely of

political advocacy, by its very nature his message is available free to anyone who wishes to hear it.

The second factor, offering a specific product or service, is not present. Marohn's speech refers to no products or services relating to providing engineering services. Rather, Marohn only refers to his political advocacy and his non-profit organization. Marohn's political message, in effect, is his "product", albeit one of a political and expressive non-commercial nature and not an actual product or service, much less anything involving the actual practice of engineering. Marohn's ideas and advocacy are not products to be bought or sold in the economic sense, but are to be exchanged in the marketplace of political and social discourse, just as any preacher or politician might espouse their own beliefs.

Finally, to the third factor, the speaker's economic motivation, Marohn's speech represents expressive speech of inherent value. In essence, his political advocacy itself is of independent value and of interest to the public. In *Dryer*, the court found that NFL highlight film at issue was not commercial speech, in part, because the films were of independent value and public interest, in and of themselves, such that the NFL's economic motivations could not alone convert them into commercial speech. While there is an economic interest in the incidental sense that Marohn is selling books, this interest is by far subordinate to his public and political advocacy message and only serve to directly augment his advocacy. As *Dryer* noted, "[t]his proposition is self-evident: that movies, books, or other expressive works 'are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.'

This is not commercial speech; it is capitalism.” *Id.* at 1193 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952)).

Based on the Board’s argument, if public policy books are sold for profit, the content of the material in the books could be regulated because the book is “commercial speech.” This is of course absurd. To hold that Marohn’s speech is commercial is to invite absurdity into jurisprudence, as essentially anything a professional engineer does in the public sphere, related to his professional capacity or not, would be subject to commercial speech regulation.

The Board nonetheless argues that Marohn was engaged in commercial speech when he referred to himself as a professional engineer while engaged in political advocacy criticizing the expenditure of public funds on public engineering projects. Before reviewing the cases the Board cites, Marohn cites one overarching difference between these cases and Marohn’s case: in each of the cases the Board cites, the person the state sought to regulate was engaged for profit in the professional or commercial activity the state sought to regulate.

The Board first relies on *Friedman v. Rogers*, 440 U.S. 1 (1979) for the proposition that a state may regulate the use of a tradename. However, *Friedman* involved the use of a tradename to promote an optometry practice (and thus a business), not the use of a professional title in political speech. 440 U.S. at 3-6, 8, 11, n.10. Indeed, *Friedman* itself used the proposes-a-business-transaction test to determine that use of a tradename was commercial speech and thus entitled to reduced First Amendment protection: “the trade name is used as part of a proposal of a commercial transaction.” *Id.*

at 11; *see also id.* at 11 n.10 (distinguishing an advertisement that ““did more than simply propose a commercial transaction”” (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975))), from “the mere solicitation of patronage implicit in a trade name”). Any reliance by the Board on *Friedman* without acknowledgment of the test that *Friedman* actually used is, to put things mildly, less than entirely forthright.

Even if relying on the Board’s interpretation of *Friedman*, Marohn’s speech still does not meet the threshold of commercial speech. As the Board noted itself, *Friedman* held that a tradename could be regulated as commercial speech where the tradename conveyed information about the “type and quality” of services the *business* could provide. *Id.* at 12; *Respondent’s Brief*, p. 12. Here, Marohn is not offering *any* engineering services – he is engaged *exclusively* in political advocacy.

Next, the Board cites a number of cases in the wake of *Friedman* in order to bolster their argument under *Friedman*. *Maceluch v. Wysong*, 680 F.2d 1062 (5th Cir. 1982)(“M.D.”); *Accountant’s Soc’y of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988)(“public accountant”); *Seabolt v. Tex. Bd. Of Chiropractic Exam’rs*, 30 F. Supp. 2d 965 (S.D. Tex. 1998)(“chiropractic physician”); *Van Breeman v. Dep’t of Prof’l Regulation*, 694 N.E.2d 688 (Ill. App. Ct. 1998)(“professional engineer”); *Respondent’s Brief*, p. 12. In each case, however, the persons claiming the purported professional title actually practiced or offered to practice the same profession in which they claimed a professional title. By stark contrast, Marohn did not and does not perform, offer, or even appear to offer *any* professional engineering services whatsoever.

Ostensibly the Board's most related case to Marohn's case is *Van Breeman v. Dep't. of Prof'l. Regulation*, 694 N.E.2d 688 (Ill. App. Ct. 1998). *Van Breeman* involved a professional engineer accused of having violated a regulation barring the practice or offer to practice professional engineering by unlicensed persons. *Respondent's Brief*, p. 12. The Board claims *Van Breeman* "closely parallels" Marohn. *Id.* Once again, unlike Marohn, Van Breeman was engaged in providing engineering services. More specifically, Van Breeman worked as a forensic engineer who offered his services testifying as an expert witness on engineering issues. Van Breeman argued that because he was not working on actually designing building projects, he did not need to be licensed. *Van Breeman* easily disagreed because the Illinois licensing statute specifically defined "forensic engineering," which involves a review of building construction to determine if the building was built consistent with engineering standards, as a type of work which would require licensure. By contrast, Marohn works for a non-profit public and political advocacy organization that does not perform any engineering services, does not have "engineer" in his job title or organization's name and his job history, in word and print, repeatedly and consistently pronounces that he stopped practicing engineering in 2012, in order to pursue his political and public advocacy. Therefore, even under *Van Breeman*, Marohn does not meet the threshold, as he did not provide, offer or appear to offer, professional engineering services at any time since 2012, whether licensed or not.

The Board then returns to reliance on *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989), for the proposition that where speech is non-commercial in nature, but contains elements of commercial speech, that the two may be

distinguished if they are not “inextricably intertwined”. *Id.* at 473-74. *Fox* reached this conclusion by separating the speech regarding the sale of Tupperware (the proposed transaction) and the accompanying speech regarding financial literacy and home economics (the non-commercial speech) that occurred during a “Tupperware party”. *Id.* However, Marohn’s speech never proposed any such transaction for any service related to his professional engineering license. There is simply no commercial speech to be extricated from his public and political advocacy speech.

The Board then cites *Charles v. City of Los Angeles*, 697 F.3d 1146 (9th Cir. 2012) as another example of commercial and non-commercial speech being separable and therefore subject to regulation. *Charles* involved a city ordinance restricting billboards that were commercial in nature. The billboard at issue in *Charles* contained photographs of television hosts and a logo of the television channel on which those television hosts appeared. *Id.* at 1150. The city argued the billboard was an advertisement to the public to watch the television channel represented by television channel logo. The billboard operator argued that the billboard was some form of art because most the billboard contained photographs of the television hosts. The *Charles* court easily found this absurd because the billboard contained the logo of the television channel and thus held the billboard was an advertisement to viewers to watch the television channel on which the television hosts appeared. *Id.* at 1153. Simply put, Marohn never provided or offered to provide engineering services when he referred to himself as a professional engineer in his political advocacy – i.e., there was no advertisement for engineering services.

Charles however cites two cases that more closely mirror Marohn's circumstances. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Jamison v. Texas*, 318 U.S. 413 (1943). *Id.* at 1152. *Murdock* and *Jamison* involved members of the Jehovah Witness religion who while engaged in religious preaching also solicited donations and the sale of religious literature. *Charles* noted that the government cannot use "a mechanical application of the test for commercial speech" to regulate "political, religious or other protected noncommercial speech." *Charles* at 1152. The Court in those cases recognized the otherwise "commercial" speech (sales of books and donations) as protected non-commercial speech because those activities were part and parcel of protected religious activity and speech itself. *Id.* at 1153.

This is precisely the point with Marohn. Marohn is a preacher of sorts, not religious, but a political preacher of how cities, infrastructure and societies ought to be structured. Marohn belongs to a non-profit organization that is spreading this same message, much like a preacher belongs to a church. Marohn speaks, writes, broadcasts and spreads his message of political advocacy far and wide to anyone that wishes to listen. At the same time, Marohn and his non-profit organization, like many other political or public interest groups, solicit and accept donations, sell books and other materials that relate to their core mission of advocacy. These activities are the lifeblood of public discourse in a free and democratic society:

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

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

To be clear – Marohn’s position is that he is not engaged in any “commercial activity” which would convert his political advocacy into “commercial speech” as the Board argues. Nonetheless, because the “commercial” activity the Board alleges Marohn engaged in is part and parcel of Marohn’s protected political activity, they are “inextricably intertwined” and cannot be considered commercial speech, and therefore must be afforded full First Amendment protection.

E. The Board’s Argument that Marohn’s Licensure Claim is Unprotected and that He “Lied” on his Reinstatement Application is Barred Under *United States v. Alvarez*, 567 U.S. 709 (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, the Board’s claim is not based on Marohn making such representations while engaged in providing or offering to provide engineering services. Rather, the Board’s claim is based exclusively on Marohn identifying himself as a professional engineer while engaged exclusively in protected, non-commercial political speech. Similarly, to the Board’s efforts to regulate Marohn’s use of the term “professional engineer,” the Board attempts to get around this First Amendment problem by compelling engineers such as Marohn to make certifications regarding identifying themselves as professional engineers when not engaged in

providing or offering to provide engineering services. 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.

In *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court held that false speech—even knowingly false speech—is generally protected and subject to strict scrutiny outside narrow exceptions such as defamation and fraud. In *Alvarez*, the Supreme Court struck down the Stolen Valor Act, a law prohibiting falsely claiming to have won a military decoration. *Id.* at 716, 730. The person challenging the law, a candidate for public office, had been convicted of falsely claiming during a political campaign to have won the Congressional Medal of Honor. *Id.* at 713-14. The defendant did not deny that he flat-out lied about having won the medal. *Id.* at 714, 715. Nonetheless, the Court reversed his conviction and struck down the law as a content-based speech restriction. *See id.* at 716-18, 722, 729-30. *Alvarez* refused to recognize a new exception to the application of strict scrutiny and affirmed that, outside of narrow exceptions such as fraud and defamation, a prohibition on speech because of its falsity is just another content-based speech restriction subject to strict scrutiny.

The Board attempts to counter the clear holding in *Alvarez* to say that “historically unprotected” categories of speech are an exception. *Respondent’s Brief*, p. 17. The Board presents this exception amidst a history lesson of colonial regulations, traditional state police powers and misanthropic ne’er-do-wells – none of which have anything to do with Marohn for the essential reason that Marohn never provided, offered or even appeared to

offer, professional engineering services since 2012.

The Board cites *People v. Starski*, 7 Cal. App. 5th 215, 221, 212 Cal. Rptr. 3d 622, 626 (2017) in support of its arguments. *Starski* involved an unlicensed attorney charged with the crime of the unlicensed practice of law. The unlicensed attorney was engaged in drafting transactional documents for clients. The unlicensed attorney defended himself arguing that he could only commit the crime of the unlicensed practice of law if he was representing a client in court. *Starski* easily disposed of this argument. What is noteworthy here is that *Starski* discussed the trial judge's analysis of the jury instructions:

Judge Behnke conscientiously crafted instructions that correctly recognized that violating section 6126 requires more than simply holding oneself out as an attorney, that "practicing law" entails use of that purported status. . . . As Judge Behnke put it: "the fact that the documents that he drafted were used in a transaction or attempted transaction with [another] party ... is what makes the difference.... [¶] *If the jury finds that he held himself out to be a lawyer, but it didn't involve a transaction or dealing with somebody else, I don't think we would care.*"

Starski at p. 624 (emphasis supplied).

Thus, *Starski* supports Marohn. *Starski* hinged on the fact that the criminal defendant actually made use of his purported status as an attorney to engage in legal work. Moreover, *Starski* cited with approval the trial court judge's statement if the criminal defendant Starski had called himself an attorney but never offered or provided legal services to anyone, Starski would not have violated the statute. Similarly, Marohn has never made use of his professional status at any time to provide, offer or even appear to offer any professional engineering services, since 2012.

Finally, we turn to “lie” itself. What is a lie? A lie is an “assertion of something known or believed by the speaker or writer to be untrue with intent to deceive.” “Lie.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/lie>. Accessed 16 Nov. 2022. Marohn signed the representation because he interpreted the representation to apply only if Marohn was engaged in providing or offering to provide engineering services while unlicensed. Marohn therefore did not lie in his representations of himself as a professional engineer. He also did not lie when he filled out the certification. As a result, the Board’s efforts to discipline Marohn based on his representations and certification fails.

CONCLUSION

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

Dated: November 18, 2022.

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

I certify that this brief contains 4,194 words and thus complies with Minn. R. App. P. 132.01 subd. 3 (a)(1) authorizing the filing of a reply brief with no more than 7,000 words. In making this certificate, I relied on the word-count function of Microsoft Word 2016, which is the word-processing software that I used to prepare this brief.

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

Dated: November 18, 2022.

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Certificate of Service

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

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

/s/ William F. Mohrman
William F. Mohrman

Subscribed and affirmed before me
this 18th day of November, 2022
Hennepin County, Minnesota.

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