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**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FISHERIES ENGINEERS, INC., a Washington corporation; and PAUL
TAPPEL, an individual and professional engineer,

Petitioners/Appellants,

v.

THE STATE OF WASHINGTON, GOVERNOR JAY INSLEE, in his
official capacity, ATTORNEY GENERAL BOB FERGUSON, in his
official capacity, and BOARD OF REGISTRATION FOR
PROFESSIONAL ENGINEERS & LAND SURVEYORS, an agency of
the State of Washington,

Respondents.

**REPLY BRIEF OF APPELLANTS
FISHERIES ENGINEERS, INC. AND PAUL TAPPEL**

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I. ARGUMENT

Respondents' strategy on appeal appears to be avoiding the arguments presented in Appellants' Opening Brief altogether. First, Respondents devote two-thirds of their brief to procedural issues that were not decided below. The *only* issue decided by the trial court was the merits of Mr. Tappel's statutory interpretation claim. This is the only issue the Court of Appeals should resolve. If the Court of Appeals rules in favor of Appellants, the case will be remanded, and Respondents will have the opportunity to reassert these procedural defenses to the trial court.

Second, once Respondents do address the merits of Appellants' statutory interpretation argument, they focus on an earlier characterization of Appellants' argument, long since refined, that Respondents resurrected from Appellants' original petition. Unfortunately, because Respondents focus entirely on the wrong statutory-interpretation argument, Respondents effectively avoid the entire thrust of Appellants' appeal: it is unlawful for the Board and the State to allow individuals who engage in the "practice of engineering," as defined by the Act, to use the title "Engineer" without being licensed as a Professional Engineer. Because Respondents chose, presumably for strategic purposes, to focus their brief entirely on an argument that is no longer representative of Appellants' position, Respondents fail to demonstrate how Appellants' plain language interpretation is invalid.

In their brief, Respondents continue to advance their own interpretation of the Act, which cannot be squared with the Act's plain

language. They argue the Act regulates only a subset of specific types of engineer titles—Professional Engineers and Structural Engineers—and that unlicensed individuals can otherwise use any other “Engineer” title they please, so long as the “Engineer’s” work is supervised by a licensed practitioner. This interpretation is based on a fundamental misunderstanding of the Act and its “supervised work” exception under RCW 18.43.130(4). Even worse, Respondents’ interpretation of the Act means unlicensed, unqualified individuals can practice or offer to practice engineering using misleading titles, such as “Geotechnical Engineer,” “Drainage Engineer,” “Bridge Engineer,” or “Roadway Engineer,” without consequence. Respondents’ erroneous interpretation of the statute should be corrected on appeal.

A. Respondents’ alleged “absolute immunity” under RCW 18.235.190 was not raised below and should not be addressed for the first time on appeal.

Respondents’ brief to this Court is the first time Respondents have ever raised immunity under RCW 18.235.190 of the Uniform Regulation of Business and Professionals Act (“URBP”). RCW 18.235.190 is not cited anywhere in Respondents’ briefing at trial. Because this defense was not raised or decided below, it is not properly before the Court of Appeals. *Pearce v. G.R. Kirk Co.*, 92 Wn.2d 869, 875, 602 P.2d 357 (1979) (holding an issue raised for the first time on appeal will not be addressed).

Respondents admit that they did not raise this argument below. Instead, they insist that their right to assert statutory immunity under RCW

18.235.190 should not be considered waived, citing a litany of cases involving the waiver of untimely-raised defenses *at the trial court level*. See Br. of Resp't at 27-28. Respondents are conflating the issue. The issue here is not whether the defense itself is waived; the issue is whether this argument can be raised for the first time on appeal. Because Respondents did not raise this defense, the trial court never addressed this specific argument. Before the Court of Appeals can weigh in, the *trial court* must first have the opportunity to decide whether: (1) the defense has effectively been waived because Respondents did not raise it until *after* the Parties' cross-motions for summary judgment; and (2) whether this statutory immunity applies to this case.

It is well settled law that a matter "neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013). This immunity defense was not raised below, it is not properly before this Court, and it should not be addressed for the first time on appeal.

B. Even if statutory immunity under RCW 18.235.190 was an issue properly before this Court, this defense does not bar Appellants' claims under the APA.

Notwithstanding the foregoing, Respondents' alleged defense under RCW 18.235.190 suffers from several flaws. First, the statute does not immunize the Board itself (or any of the other Respondents). By its plain language, the statute confers immunity only upon the Board's individual members; it applies to the "director, members of the boards or

commissions, or individuals acting on their behalf...based on any disciplinary actions or other official acts performed in the course of their duties.” RCW 18.235.190. If the Legislature intended to immunize the entire Board as an entity, and not just its individual members, it certainly could have done so.

Respondents argue this “absolute immunity” nonetheless “extends to the Board,” by relying on a case interpreting *an entirely different statute*. Br. of Resp’t at 23 (citing *Janaszak v. State*, 173 Wn. App. 703, 711, 297 P.3d 723 (2013) (interpreting the scope of RCW 18.130.300, a statute governing the scope of immunity for board and commission members in the specific context of official acts which regulate health professionals)). Respondents offer little explanation for why the court’s holding in *Janaszak* should apply here, except that the statutory language is similar. *See* Br. of Resp’t at 26. But in *Janaszak*, the court meticulously reviewed the underlying policies of RCW 18.130.300 before determining it appropriate to expand the immunity’s scope. In fact, the *Janaszak* court even expressly admonished “against the application of an immunity decision in one context to another without an analysis of the policies implicated in each context.” *Janaszak*, 173 Wn. App. at 717. The proper analysis of an immunity statute requires that the court analyze the circumstances of that specific type of immunity and the underlying policies of the statute. *See id.* Respondents made no such effort to engage in the proper analysis.

Nor is there any precedent for expanding immunity under RCW 18.235.190 as Respondents propose; in fact, there is no caselaw interpreting the scope of RCW 18.235.190 at all. This statutory section has never been cited or invoked in *any* Washington case. Yet, Respondents ask that this Court consider applying it for the first time on appeal, without the benefit of any deliberation by the trial court, without any analysis of the statute’s legislative history, and based on a conclusory statement that the holding in *Janaszak* should apply here.

Second, it cannot be the case that this statute confers such “absolute immunity” to the Board, the Attorney General’s Office, and the entire State of Washington for *any* of its official acts.¹ This argument would be an upheaval of the entire body of Washington administrative law, which specifically allows for private suits to challenge this type of agency action. Respondents address this flaw only in passing, asserting that the purported “absolute” immunity under RCW 18.235.190 does not bar *all* challenges, but instead limits those challenges to processes set forth under the Administrative Procedures Act (“APA”). Br. of Resp’t at 28.

However, even if this interpretation was correct, Respondents neglect to acknowledge that Appellants *have* asserted their claims under the APA. In fact, Appellants consistently invoked the APA throughout

¹ Moreover, Respondents failed to address whether this statute, which confers immunity for any agency member’s “action” should apply to the *inaction* from the Board, which is the issue alleged by Appellants’ Petition.

their pleadings to the trial court.² As stated in Appellants’ briefing to the trial court, the APA expressly authorizes this type of suit for declaratory and injunctive relief sought by Appellants, pursuant to RCW 34.05.570(2) and .514. Thus, as acknowledged by Respondents in their own brief, RCW 18.235.190 does not bar Appellants’ claims.

C. Similarly, the trial court did not analyze Respondents’ standing defense, and like Respondents’ alleged immunity defense, it should not be addressed for the first time on appeal.

Respondents asserted their standing defense at trial, but the trial court “assum[ed] without deciding” all the procedural issues, including standing, in Petitioners’ favor. *See* VRP at 24:17-23. During oral argument, both Parties—including Respondents—agreed that the trial court should reach the merits first, before addressing the procedural issues. *See* VRP at 4:9-5:11. The Parties were in general agreement that whoever prevailed on the merits of the statutory interpretation argument would likely prevail on the threshold issues as well. *See id.* Thus, as made explicit in the trial court’s oral and written ruling, Respondents’ standing defense was *not* decided below.

Despite previously agreeing to waive standing for purposes of summary judgment, Respondents now argue that standing is a

² *See* CP 11 at ¶¶ 7-8; CP 27 at ¶ 81; CP 172; CP 204; CP 210; and Verbatim Report of the Proceedings (“VRP”) at 6:9-17. Given how frequently Appellants cited to and alleged its causes of action under the APA, it is baffling that Respondents now claim that Appellants “never clarified the law under which the suit was brought.” Br. of Resp’t at 22.

jurisdictional issue this Court should address prior to reaching the merits. For several reasons, the Court should not decline to reach the merits of Appellants' appeal on this basis.

First, the argument that standing is “jurisdictional” is misleading. Standing is *not* a subject matter jurisdiction defense, and the Court of Appeals is not required to address standing before reaching the merits. As noted by Division One of this Court, “In federal courts, a plaintiff’s lack of standing deprives the court of subject matter jurisdiction, making it impossible to enter a judgment on the merits.” *Trinity Universal Ins. Co. of Kansas v. Ohio Ca. Ins. Co.*, 176 Wn. App. 185, 198, 312 P.3d 976 (2013) (citing *Fleck & Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1102 (9th Cir. 2006)). “By contrast, the Washington Constitution places few constraints on superior court jurisdiction.” *Id.* (citing Const. art. IV, § 6, which says, “The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court,” and *Ullery v. Fulleton*, 162 Wn. App. 596, 604, 256 P.3d 406 (2011), *review denied*, 173 Wn.2d 1003, 271 P.3d 248 (2011)). “Accordingly, **if a defendant waives the defense that a plaintiff lacks standing, a Washington court can reach the merits.**” *Id.* (emphasis added) (citing *Ullery*, 162 Wn. App. at 604).³

³ In a footnote, the *Trinity* court acknowledged that other Washington courts have characterized “standing” as a jurisdictional issue. *Id.* at 199 n.7. However, this type of unreasoned, “drive-by jurisdictional ruling” has been admonished and declined to be extended in subsequent cases. *Id.*

“Therefore, in Washington, a plaintiffs lack of standing is not a matter of subject matter jurisdiction.” *Id.*

On summary judgment, Respondents voluntarily agreed to set aside their standing defense so the trial court could reach the merits of Appellants’ claim. Now, in an about-face, Respondents argue that the Court of Appeals cannot reach the merits before standing is resolved because the Court lacks jurisdiction. If the trial court did not have the jurisdiction to rule on the merits, Respondents should not have waived that defense and allowed the court to rule. The Court of Appeals should not indulge the Respondents’ request to unnecessarily expand the scope of this appeal. The merits of Appellants’ claim is the *only* issue properly on appeal, and is the only issue that should be decided by this Court.⁴

D. Even if standing was an issue properly before this Court, Appellants fall squarely within the zone of interest contemplated by Chapter 18.43 RCW and have expressly alleged cognizable injuries.

Respondents argue Appellants lack standing to assert declaratory or injunctive relief. In Washington, standing is a low bar and Appellants have standing under both the APA and the Uniform Declaratory Judgment Act (“UDJA”). Under the UDJA, courts apply a two-prong test, analyzing

⁴ However, in the alternative, if the Court of Appeals decides it is necessary to reach the issue of “standing” prior to reaching the merits, Appellants do not oppose the Court of Appeals addressing this procedural issue on this appeal (rather than remanding this case without first resolving the merits of Appellants’ statutory interpretation claim). This issue of standing was briefed and argued below, and it would be a waste of the Parties’ limited resources to remand this case purely on procedural grounds. For the sake of judicial economy, to the extent it is necessary for this Court to reach the merits of Appellants’ claims, this procedural issue should be addressed on appeal.

(1) whether the interest sought to be protected is within the statute’s “zone of interest”; and (2) whether the plaintiff has sustained an injury in fact. *Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the Constitution*, 185 Wn.2d 97, 103, 369 P.3d 140 (2016). Any action under the APA requires a nearly identical three-prong approach to standing: (1) the agency action has prejudiced or is likely to prejudice that person; (2) that person’s asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and (3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. *See* RCW 34.05.530. However, as noted by the courts, the first and third prongs are generally called the “injury-in-fact” requirements, while the second is called the “zone of interest” prong. *See Allan v. University of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000).

The “injury-in-fact” requirement refers to whether the petitioner can show that he or she was in fact injured by the agency’s decision, or whether the agency’s decision threatens an injury that is “immediate, concrete, and specific.” *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 869, 351 P.3d 875 (2015) (quotations omitted). The “zone of interest” inquiry refers to whether the “Legislature intended the agency to protect the party’s interests when taking the action at issue.” *St. Joseph Hosp. and Health Care Ctr. v. Dep’t of Health*, 125 Wn.2d 733, 739-40, 887 P.2d 891 (1995). Appellants have plainly alleged sufficient facts in their Petition to meet both requirements to satisfy Washington’s

general standing requirements, and the specific standing requirements both under the APA and the UDJA.

First, Appellants allege clear instances of actual harm caused by the inaction of the Board and the actions of the State agencies in violating the engineering licensing statute. *See* CP 11-12 at ¶¶ 10-12. Over thirty years ago, Mr. Tappel undertook all the requirements to earn his Engineer title; he completed the requisite curriculum, took the exams, and paid (and continues to pay) the fees to maintain his license. Mr. Tappel's rights and privileges to bear this earned professional title are intrinsically diminished when unlicensed individuals are permitted to hold themselves out with the same title. Allowing unlicensed or unqualified individuals to use this professional title inherently denigrates the entire profession, harming those who are duly licensed and have obtained that privilege to practice.

Additionally, the confusion and distrust that these policies engender in the public results in direct and tangible harm to Appellants. One incident is particularly illustrative: in 2017, Appellants submitted a culvert design to the Washington Department of Natural Resources ("DNR") for the agency's approval. Mr. Tappel knew that his tried and true culvert design was optimal for the conditions. However, an unlicensed and unqualified DNR "Forest Practices Engineer" rejected the designs without providing any technically justified comments. *See* CP 197 at ¶ 3. The Appellants' client was understandably disappointed, but mistakenly believed Mr. Tappel's designs were flawed because they were rejected by the State's "Engineer." This misused title conveyed the

impression that the DNR employee stood on equal footing with Mr. Tappel, in terms of education, knowledge and experience. In turn, the rejection by the DNR “Engineer” effectively eroded the client’s trust and confidence in Appellants’ work, leading the client to terminate their \$12,000 contract with Appellants. *Id.* at ¶¶ 4-5. There can be little dispute that the confusion over title has resulted in substantial harm to Mr. Tappel and his business.

Further, at trial, Respondents asserted their standing defense on a Motion to Dismiss under CR 12(c). *See* CP 177. Thus, at this procedural posture of the case, the Court must accept all factual allegations as stated in the pleadings, along with any other hypothetical set of facts that may support the Petitioners’ claim. *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 189, 252 P.3d 914 (2011) (A dismissal on the pleadings is appropriate only if it appears beyond doubt that plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.). Accordingly, Appellants’ allegations regarding their factual injuries must be taken as true.

Second, Appellants (and Mr. Tappel in particular) fall squarely within the “zone of interest” contemplated by the statute, *both* as members of the public and Professional Engineers. The zone of interest test “[r]esult[s] from concerns that not every person ‘potentially affected by agency action in a complex interdependent society’ should be permitted to have judicial review,” and it “serves as a filter to limit review to those for whom it is most appropriate.” *Seattle Bldg. and Const. Trades Council v.*

Apprenticeship and Training Council, 129 Wn.2d 787, 797-98, 920 P.2d 581 (1996) (citing William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L.Rev. 781, 824–25 (1989)). “[A]lthough the zone of interest test serves as an additional filter limiting the group which can obtain judicial review of an agency decision, the **‘test is not meant to be especially demanding.’**” *Id.* (emphasis added) (quoting *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399, 107 S.Ct. 750 (1987)). “The test focuses on whether the Legislature intended the agency to protect the party’s interests when taking the action at issue.” *St. Joseph Hosp. and Health Care Ctr.*, 125 Wn.2d at 739-40 (1995).

This zone of interest is broader than just those individuals specifically identified by the statute. For example, in *St. Josephs Hosp.*, the Hospital challenged a set of healthcare regulations intended to curb anti-competitive behavior among providers. The State argued that the Hospital was outside the zone of interest, because according to the public policy statement of the statute, its intent was to protect the general public, not the hospitals themselves. *Id.* at 740. The Hospital responded that the cost controls throughout the regulations required that its economic interests be considered. The court agreed that the zone of interest should not be construed so narrowly and that the zone of interest extends beyond just those identified in the statute’s “purpose” statement. *Id.* at 741.

Moreover, courts have repeatedly recognized that the individual professionals are within the zone of interest of the laws that regulate their

profession. For example, in *Reagles v. Simpson*, 72 Wn.2d 577, 434 P.2d 559 (1967), the court held that the Washington Osteopathic Medical Association and its president had standing as “beneficially interested” parties to initiate suit to review action of state board of medical examiners in accrediting colleges designed to convert osteopathic physicians into medical doctors. The appellants argued the board’s decision resulted in a detriment to osteopathic profession, which the court held was sufficient to create a basis for standing under the APA. In so holding, the court agreed that the medical professionals fell squarely within the zone of interest that this licensing statute sought to regulate.⁵ See also, *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960 (2000) (wherein the State took the opposite position it takes today, arguing “only a person who is subject to the licensing requirement has standing to sue” despite the purpose statement of the statute declaring its purpose to “promote the public interest and the public welfare”); *Wash. Beauty College, Inc v. Huse*, 195 Wash. 160, 165, 80 P.2d 403 (1938) (holding that the beauty school lacked standing to challenge the beauty license requirements, but that the license statute is “directed essentially to students, who desire to qualify so as to secure a license to act as a hairdresser”).

⁵ In *Allan* the court noted that *Reagles* was decided prior to the 1988 adoption of the more “exacting” three-prong statutory standing test, and therefore rejected the petitioner’s argument that the case stood generally for a liberalization of statutory standing requirements under the APA. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 329 n.1, 997 P.2d 360 (2000). Even so, the “zone of interest” prong of the test remains unchanged between both versions, as the 1988 amendment merely added a third, additional prong requiring a stronger showing of an injury in fact. *Reagles* remains good law with respect to the “zone of interest” inquiry.

Thus, it is difficult to imagine petitioners who more squarely fall within the zone of interest of the “Engineers and Land Surveyors” licensing statute than Appellants, who are interested members of the public *and* whose profession is expressly regulated by this statute, *and* who themselves are properly licensed members in good standing of the profession governed by the Act. Chapter 18.43 RCW contemplates the interests of Engineers and the general public, by providing specific licensing prerequisites, regulating the use of title and practice of engineering to qualified licensed individuals, stating fundamental canons and professional standards, and other protections. *See e.g.*, RCW 18.43.070 (providing for registrant certificates and benefits); RCW 18.43.105 (prohibiting anti-competitive behavior among engineer professionals). At the very least, these licensed Professional Engineers’ interests are parallel to the public’s interest in ensuring the integrity of engineering services and the engineering profession.

Respondents do not cite any authority for their argument that the “zone of interest” standing requirement should be construed so narrowly to exclude the very professionals the statute purports to regulate. Instead, they rely on *Martin v. TX Engineering, Inc.*, 43 Wn. App. 865, 870, 719 P.2d 1360 (1986) for this argument, which is not even a case about standing. The *Martin* court analyzed Chapter 18.48 RCW only for purposes of assessing whether electrical engineering employers are permitted to grade employees’ competence by their own standards; it is an assessment of “negligence” requirements and inapposite for standing

purposes. The “zone of interest” test was never intended to be so stringent or “especially demanding.” *Seattle Bldg.*, 129 Wn.2d at 797-98.

E. Appellants’ interpretation of the Act is correct, and the Court of Appeals should reverse the trial court’s erroneous conclusion that the Act protects only a small, arbitrary subset of “Engineer” titles.

Finally, turning to the only issue properly before this Court on appeal, Respondents fail to confront the legitimacy of Appellants’ statutory-interpretation arguments, in large part, because they misstate Appellants’ requested relief and, in remaining part, because they misunderstand, misinterpret, or misapply the Act.⁶ Appellants’ position is straight-forward: Washington’s engineer licensing statute prohibits unlicensed individuals who practice or offer to practice engineering from using the title “Engineer,” as doing so conveys the impression of licensure and is also by definition the unlawful “Practice of Engineering.” Appellants’ interpretation aligns with the plain text of the statute, conforms with First Amendment requirements, and preserves the Board’s authority to continue exercising its prosecutorial discretion within the confines of the statute. Appellants should have been granted summary judgment in their favor on this interpretation of the Act.

⁶ At this time, without discovery, it is not clear whether Respondents misunderstand or misinterpret the Act or misapply the Act intentionally to avoid having to deal with the consequences of not properly precluding the use of the Engineer title by unlicensed individuals since at least 1996 when the Board adopted Policy No. 32.

1. Appellants' interpretation of the Act is correct and constitutional; Respondents premise their challenges to Appellants' interpretation on a fundamental misunderstanding of Appellants' requested relief.

Appellants' position has been consistent since the filing of its Motion for Summary Judgment: unlicensed individuals, who practice or offer to practice engineering, should not be permitted to use the title "Engineer" because the use of that professional title, in that context, inherently conveys the impression that the individual is duly licensed to perform the work they were engaged in.

The text of the statute supports this interpretation. First, as stated in Appellants' opening brief, the plain language of the Act provides that the title "Engineer" means a "Professional Engineer," which means an individual who "is qualified to practice engineering as defined in this section" and demonstrated by their "legal registration as a professional engineer." RCW 18.43.020. The Act prohibits unlicensed individuals from using any title that conveys the impression that the individual is a "Professional Engineer." RCW 18.43.010.

When an individual is engaged in the "Practice of Engineering" as it is defined by the statute (*i.e.* providing professional design services involving structures, buildings, and similar projects), it is impossible to understand how he or she can use the title "Engineer," without tending to convey the impression or implying they are duly licensed to engage in the services they are performing. Nor do Respondents explain how it is that under the Act, the title "Engineer-in-Training" requires certain minimum

levels of education, experience and testing to receive credentials, but “Engineer” remains wholly unregulated.

Respondents avoid addressing this central argument by instead reviving an old argument, long since refined, contained in Appellants’ original Petition.⁷ Consequently, the focal argument in Respondents’ Brief is that the “engineering registration act does not bar every use of the word ‘engineer’ in occupational titles.” Br. of Resp’t at 29. But Appellants are not advancing this position; as previously stated, Appellants agree that the use of “Engineer” is not inherently misleading in every context. *See e.g.*, Opening Br. of App’t at 27-28 (discussing how the title “Engineer” is not inherently misleading in non-engineering contexts, such as “Software Engineer” or “Locomotive Engineer.”) Thus, several pages of Respondents’ Brief have absolutely no bearing on Appellants’ actual arguments on appeal. *See* Br. of Resp’t at 29-32.

Similarly, because Respondents ignore Appellants’ *actual* statutory interpretation argument, their analysis under the First Amendment is misplaced. *See* Br. of Resp’t at 36. In arguing that it would be a violation

⁷ Respondents also accuse Appellants of shifting their interpretation of the Act, but this is inaccurate. *See* Br. of Resp’t at 30 n.12. Respondents advanced this same interpretation since it first filed its Motion for Summary Judgment and have consistently reiterated it in every subsequent filing.

See CP 325-326 (Petitioner’s summary judgment briefing, clarifying that the use of “Engineer” is inherently confusing *only* when used by individuals actually engaged in or offering engineering services, as defined by the statute); CP 450 (Petitioner’s supplemental briefing, specifying again that they seek to enjoin the use of “the professional title ‘Engineer’ for unlicensed state employees *who offer and perform engineering services*” (emphasis added)); and CP 475 (Petitioner’s supplemental briefing, again clarifying that the use of the title “Engineer” is inherently misleading when the “individual engages in the practice of engineering (as defined by the statute)...”).

of the First Amendment for the Board to “prosecute every individual who used the word ‘engineer’ to describe themselves or their position[.]” Respondents’ challenge the constitutionality of an interpretation that none of the Parties are advancing. It is *not* Appellants’ position that the statute requires the prosecution of every generic use of the title “Engineer,” particularly where its use is not misleading or confusing. Thus, the cases cited by Respondents involving the unconstitutional prosecution of “Tire Engineers” and “Customer Engineers” are inapposite. Br. of Resp’t at 38 (citing *Express Oil Change, LLC v. Miss. Bd. Of Licensure for Prof’l Eng’rs & Surveyors*, 916 F.3d 483 (5th Cir. 2019) and *N.C. State Bd. Of Registration for Prof’l Eng’rs & Land Surveyors v. Int’l Bus. Machs. Corp.*, 31 N.C. App. 599 (N.C. Ct. App. 1976)). The Parties are in agreement that the constitution protects the generic use of the title “Engineer,” as long as the use of that title does not “convey the impression that he or she is a professional engineer.” See RCW 18.43.010.

However, the First Amendment does *not* protect commercial speech that is inherently misleading. In the *Express Oil Change* case cited by the Respondents, the court explains: “In order for commercial speech to be protected under the First Amendment, it must at least concern lawful activity and not be misleading.” *Express Oil Change*, 916 F.3d at 488 (internal quotations omitted). “Commercial statements that are actually *or inherently misleading* do not enjoy the protections of the First Amendment.” *Id.* (emphasis added). Respondents offer no caselaw indicating that the First Amendment prohibits the prosecution of

individuals who use the “Engineer” title in contexts that tend to falsely convey the impression they are professional engineers, *i.e.* when an unlicensed individual utilizes the title “Engineer” while simultaneously offering services that qualify as the “Practice of engineering.” It is precisely this type of misleading use of commercial speech that Appellants seek to correct, and none of the cases cited by Respondents implicate the constitutionality of Appellants’ interpretation of the statute. *See generally*, Br. of Resp’t at 37-38.

Moreover, there is no dispute that the government can regulate its own speech without being subject to the same First Amendment analysis. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467, 129 S. Ct. 1125, 172 L.Ed.2d 853 (2009) (“A government entity has the right to speak for itself” and “is entitled to say what it wishes.”). Accordingly, even if the First Amendment limited the Act’s application to individual speech, the First Amendment hardly justifies permitting the State to violate the Act by employing non-licensed individuals and providing them the State-sanctioned title “Engineer.”

2. Respondents’ competing interpretation of the statute is incorrect and inconsistent with the text of the statute.

In resisting Appellants’ plain language interpretation of the Act, Respondents rely on inconsistent arguments about the Act’s requirements and the Board’s actual enforcement practices. On one hand, Respondents argue that the “Board looks, on an individual basis, to the alleged conduct

and title together to determine if a person is improperly conveying the impression they are licensed...” Br. of Resp’t at 31. On the other hand, the Board has also taken the unequivocal position that “it will not pursue investigations against the use of titles unless the titles used are professional engineer, structural engineer, or professional land surveyor. It will provide the same response to all future complaints on this issue.” CP 57.⁸

Regardless of the Respondents’ recent insistence that they intend to evaluate cases individually, it is undisputed that the Board has broadly declined to enforce the Act’s title restrictions against *any* unlicensed Washington State employees. This is because Respondents incorrectly believe that the Act generally *allows* unlicensed individuals to use the Engineer title, even if its use is misleading. This fact is made plain by Respondents’ own appellate briefing. On appeal, Respondents argue that individuals, like Mr. Warner, an unlicensed Forest Practice Engineer, and other State employees, who utilize titles such as Transportation or Environmental Engineer, are not engaging in the unlawful practice of engineering because RCW 18.43.130(4) (“Excepted Services”) allows unlicensed individuals to perform engineering activities under the supervision of a licensed engineer. *See* Br. of Resp’t at 32-33.

This interpretation is incorrect. The Act contains two *separate* prohibitions: one against the practice of engineering unless duly registered

⁸ In fact, it is ironic that Respondents accuse Appellants of changing their interpretation, since Respondents have changed their interpretation of the Act at nearly every stage of this case. *See* CP 478-79 (Appellants’ Reply on its Supplemental Briefing, summarizing the Respondents’ evolving interpretation of the Act and the Board’s *five* different conflicting interpretations).

under the Act, and one against the use of any title or description tending to convey the impression one is a professional engineer unless duly registered under the Act:

and it shall be unlawful for any person to practice or to offer to practice in this state, engineering or land surveying, as defined in the provisions of this chapter, or to use in connection with his or her name or otherwise assume, use, or advertise any title or description tending to convey the impression that he or she is a professional engineer or a land surveyor, unless such a person has been duly registered under the provisions of this chapter.

RCW 18.43.010 (emphasis added).

Thus, because of the exception in RCW 18.43.130(4), Respondents are correct that individuals such as Mr. Warner can perform engineering services without violating the first separate prohibition against practicing engineering without being duly registered. However, the exception in RCW 18.43.130(4) has no impact on the second separate prohibition against using any title or description tending to convey the impression one is a professional engineer. Which, again, use of such a title necessarily conveys one is a professional engineer because the Act defines “Engineer” as “Professional Engineer” and an “Engineer-in-Training” requires minimum levels of education, experience, and testing before you can use that title.

Moreover, the Act also expressly indicates that anyone “who, by verbal claim, sign, or advertisement, letterhead, card, or in any other way represents himself or herself to be a professional engineer, or **through the use of some other title implies that he or she is a professional**

engineer...” also engages in the “Practice of Engineering.” RCW 18.43.020(8)(b). Thus, if an unlicensed individual uses the title “Professional Engineer” or “some other title [that] implies that he or she is a professional engineer” they are unlawfully engaging in the “Practice of Engineering” without a license regardless of who is supervising their work. *Id.* This misuse of the Engineer title is a separate and distinct form of engaging in the unlicensed “Practice of Engineering” and yet another basis upon which to hold the use of such a title is unlawful.

This distinction is critical because RCW 18.43.130(4) offers no exception to the Act’s engineer title restriction. Rather, RCW 18.43.130 states “This chapter shall not be construed to prevent or affect: (4) *The work of an employee* or subordinate of person holding a certificate of registration under this chapter, or an employee of a person practicing lawfully under provisions of this section...” This provision allows for the unlicensed engineering “work” of an employee, but not the use of the “Engineer” title, which by definition is the “Practice of Engineering” and thus unlawful under the Act. *See* RCW 18.43.020(8)(b) and .010. Attorneys may recognize the parallel between this statute and Admission to Practice Rule 9; Rule 9 allows law students to practice law under the supervision of a licensed attorney, but it does not allow law students to represent themselves as “attorneys” to the public or to the court. The title restriction is separate from the Act’s work restriction.

By refusing to acknowledge the Act’s title restrictions, the Board has effectively allowed scores of unlicensed individuals to unlawfully utilize the “Engineer” title. *See e.g.*, CP 97-116 (showing the listings for

public agency positions for unlicensed “Environmental Engineers” and “Transportation Engineers”). The State’s use of these titles is in patent violation of the law.

3. The Court can correct the Respondents’ erroneous interpretation of the statute without impugning the Respondents’ ability to exercise discretion in making case-by-case disciplinary decisions.

Finally, Respondents argue that Appellants’ interpretation of the statute and requested relief unlawfully abrogates the Board’s discretionary authority to make disciplinary decisions. But Appellants are not challenging the Respondents’ decision to exercise disciplinary judgment in any one case. Rather, Respondents have announced a clear policy decision—they will not enforce the statute against an entire segment of unlicensed engineers—that is incompatible with the legal requirements under the statute. For example, the Respondents have consistently maintained that the Board has “appropriately exercised its discretion **not to prosecute individuals who use the word ‘engineer’ in their job title, but who are not performing work that requires a professional engineering license.**” Br. of Resp’t at 41 (emphasis added). This is not an individual prosecutorial decision that involves the Board’s discretion. This is a broad, arbitrary and capricious policy that Respondents have embraced based on a misinterpretation of the Act that patently results in a violation of the Act. Respondents are correct that the Act permits individuals who are not licensed to engage in work, when properly

supervised by a licensed Professional Engineer, that would otherwise amount to the practice of engineering. But what Respondents' position fails to account for is that while an unlicensed individual performing such work is permitted as an "excepted service[]" under the Act, that same individual's use of the title "Engineer" still amounts to the unlawful practice of engineering.

Appellants' claims for declaratory and injunctive relief are specifically aimed to correct these overarching illegal policy statements embraced by the Board and State, which conflict with the plain language of the statute. By correcting Respondents' error and clarifying that the Act *does* prohibit the use of misleading engineering titles, the Court ensures the Board exercises its disciplinary authority within the bounds of the Act. Appellants' requested injunctive and declaratory relief do not impugn the Board's ability to exercise discretion and evaluate disciplinary decisions on a case-by-case basis within the confines of the statute itself. Rather, it ensures that the statute is correctly applied during the exercise of that discretion. Presently, the Board is improperly exercising its discretion by allowing non-licensed individuals to engage in the practice of engineering (for example by permitting State employees to use the title "Engineer" without licensure) and to violate the Act's prohibition against use of titles tending to convey the impression the individual is duly registered under the provisions of the Act. Respondents have made it eminently clear that they will continue to incorrectly apply the Act without court intervention.

II. CONCLUSION

While the Board has the discretionary authority to evaluate cases on an individual basis, its incorrect interpretation of the licensing statute requires judicial review. Without such review, the Board cannot properly exercise its conferred discretion. Without such review, Respondents will continue to permit unlicensed individuals to use the earned professional title Engineer in violation of the Act and engage in the unlawful practice of engineering. And without such review, Respondents' arbitrary interpretation of "Engineer" under the Act will denigrate the profession, cause public confusion about the qualifications of purported "engineers," and threaten public safety. Respondents' position requires a legislative revision of the Act, while Appellants simply ask that the Act be enforced according to its plain language. Accordingly, Appellants respectfully request that this Court apply the statute as written and reverse the ruling below.

Dated this 21st day of January, 2020.

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I, Kelsey M. Doyle, certify under penalty of perjury of the laws of the State of Washington that on January 21, 2020, I caused a copy of the document to which this is attached to be served on the following individual(s) via email:

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