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NO. 102050-3

SUPREME COURT OF THE STATE OF WASHINGTON

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 AND LAND SURVEYORS, an agency of the State of Washington,

Respondents,

v.

FISHERIES ENGINEERS, INC., a Washington corporation, and PAUL TAPPEL, an individual and PE (professional engineer),

Appellants.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The unpublished Court of Appeals decision involves a routine application of well-settled precedent to the specific facts of the case. Paul Tappel, a licensed professional engineer, is unhappy that individuals who are not licensed professional engineers sometimes use the term "engineer" in their job titles. But Tappel failed to identify any injury from others using those titles. He identified no economic, competitive, or other type of harm to himself or his business. The Court of Appeals correctly held that Tappel does not have standing to sue to compel the State to enforce his preferred policy choice.

The Court of Appeals did not alter the law in any way. It reaffirmed that standing is a low bar and that even "an identifiable trifle should be sufficient" where "the potential injury is real." *Fisheries Engineers, Inc., et al. v. State, et al.*, No. 56285-5-II (February 7, 2023) (unpublished), Slip Op. at 9. Tappel failed to clear even that low bar, as he implicitly acknowledges in his Petition, when he appeals to abstract claims

that his professional engineering license is somehow "intrinsically diminished" and that use of the word "engineering" in certain job titles "inherently denigrates the entire profession." Pet. for Review at 17. The Court of Appeals simply and correctly held that these conclusory assertions are insufficient to establish an injury in fact, as required for standing. That fact-specific decision is consistent with this Court's precedent and does not involve a significant constitutional question or an issue of substantial public interest.

This Court should deny review.

II. COUNTER-STATEMENT OF THE CASE

A. The Board of Registration for Professional Engineers and Land Surveyors Licenses and Regulates the Engineering Profession

The Uniform Regulation of Business and Professions Act, chapter 18.235 RCW, tasks the Board of Registration for Professional Engineers and Land Surveyors with licensing and regulating professional engineers and land surveyors. RCW 18.235.020(2)(b)(iii); RCW 18.43.010.

Washington's Professional Engineers' Registration Act, chapter 18.43 RCW, itself creates the Board and obligates it to "safeguard life, health, and property, and to promote the public welfare," by registering[1] professional engineers and land surveyors and administering and maintaining minimum qualifications for them. RCW 18.43.010. The registration and qualification "requirements are focused on establishing minimum competency standards upon which the public may rely." *Martin v. TX Engineering, Inc.*, 43 Wn. App. 865, 870, 719 P.2d 1360 (1986). They "ensure that the uninformed public is not rendered services by an incompetent engineer." *Id.* The Board has the exclusive authority to discipline the profession for unprofessional conduct and other violations of the Act. RCW 18.43.105, .110.

[1] In Washington, professional engineers are "registered" by the state, but registered engineers are colloquially referred to as "licensed" to practice. RCW 18.43.040.

Washington law prohibits individuals from engaging in the practice of engineering without a license or holding themselves out to the public as being a licensed professional engineer when they are not. RCW 18.43.010, .020(8)(b), .120; RCW 18.235.130(15). The Engineering Act specifically defines three types of licensees: professional engineer, RCW 18.43.020(10); professional land surveyor, RCW 18.43.020(11); and structural engineer, which requires a specialized certificate, RCW 18.43.040(1)(a)(iii)-(iv). Use of one of those titles is a *per se* representation that the person is licensed. *See* CP2 57.[2]

To determine whether an individual who uses the term "engineer" in a job title improperly conveys licensure or

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[2] There are two volumes of Clerk's Papers: The first volume, cited as "CP1," is from the prior appeal in this matter, from case number 53614-5-II, which the Commissioner transferred to this Appeal by notation ruling on November 22, 2021. The second volume, cited as "CP2," is from the post-remand proceedings in superior court. Many of the documents in the two volumes are duplicative.

professional engineering status, the Board looks for either one of the *per se* representations or to the conduct of the individual. CP2 57, 78-80.

In Washington, agencies such as the Department of Transportation and the Department of Natural Resources employ numerous staff with "engineer" in their job titles. CP2 53-55. The State Office of Financial Management's website shows that there are 78 job classifications with the word "engineer" in the title, including such titles as "Environmental Engineer," "Natural Resource Engineer," "Stationary Engineer," and "Transportation Engineer."[3] Thousands of state employees have the word "engineer" in either the job title or job description. CP2 658, ¶ 8.

Outside of State government, there are at least 100,000 individuals in the state of Washington whose job title includes

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[3] Classified Job Listing, Office of Financial Management (last visited July 31, 2023), https://ofm.wa.gov/state-human-resources/compensation-job-classes/ClassifiedJobListing?jobclasstitle=engineer&jobclasscode=&jobdescription=&salaryrangenumber=&jobcategory=All&items_per_page=250.

"engineer" but who are not registered professional engineers. CP2 661, ¶¶ 10, 11. "Indeed, many job descriptions contain the word 'engineer' even though they do not require any professional engineering expertise or licensure." *Jarlstrom v. Alridge*, 366 F. Supp. 3d 1205, 1220 (D. Oregon 2018).

B. Paul Tappel Complained to the Board About a State Employee's Job Title, but Has Not Himself Been Subject to Investigation or Discipline

Paul Tappel is a licensed professional engineer. CP2 254. It is undisputed that at no time relevant to these proceedings have Paul Tappel or his company, Fisheries Engineers, Inc., been subject to discipline by the Board, the Governor, or the Attorney General.

In 2017, Tappel submitted a complaint to the Board about a Department of Natural Resources employee whose job title was "Natural Resource Engineer 3." CP2 57, 61, 256. This person assists private landowners with their forest practices permit applications; he does not provide professional engineering services. CP2 61. A licensed professional engineer oversaw his

work. CP2 61-64. Tappel's complaint asserted the Board had a duty to stop him and others from using the title "engineer" unless they are licensed "professional engineers." CP2 57, 256, 309. Tappel has never claimed that any state employees are improperly engaged in *conduct* that meets the definition of "practice of engineering" or that they use one of the three *per se* job titles that represent that the person is licensed.

After receiving additional information about the employee's duties from the Department of Natural Resources and the Attorney General's Office, the Board determined that disciplining the employee was not warranted. CP2 57, 60-65, 69-71. It explained that it would "not pursue investigations against the use of titles unless the titles used are professional engineer, structural engineer or professional land surveyor." CP2 57. The Board's approach is consistent with the fact that today, "the term 'engineer' has a generic meaning separate from 'professional engineer,' and . . . the term has enjoyed 'widespread usage in job titles in our society to describe positions which require no

professional training.'" *Jarlstrom*, 366 F. Supp. 3d at 1220 (quoting *N.C. State Bd. of Registration for Pro. Eng'rs & Land Surveyors v. Int'l Bus. Mach. Corp.*, 230 S.E.2d 552, 556 (1976)).

C. Tappel Sued to Compel the State to Prohibit Individuals Who Are Not Licensed Professional Engineers from Using the Word "Engineer" in Their Job Titles

After the Board rejected his complaint, Tappel filed a Petition for Declaratory Judgment and Other Relief in superior court, asking the court to declare that it is impermissible for any person who is not a licensed professional engineer to use the word "engineer" in an occupational title; to direct the Board and Attorney General to prosecute any individual using the word "engineer" in their occupational title who is not a licensed professional engineer; and to bar every state agency from using the word "engineer" in the title of any employee who is not a licensed professional engineer. CP2 104-23.

D. The Superior Court Ruled for the State on the Merits, and the Court of Appeals Remanded for the Trial Court to Consider Whether Tappel Had Standing

On cross-motions for summary judgement, the superior court acknowledged that there were "significant standing and other threshold concerns." RP1 at 24.[4] However, it assumed without deciding that Tappel had standing to bring the suit and then granted summary judgment for the State Defendants on the merits. RP1 at 24; CP1 507-09.

Tappel appealed. On appeal, the State Defendants raised standing again, and all parties agreed the appellate court could address this threshold issue. In an unpublished decision, the Court of Appeals concluded that the trial court should address standing first and remanded to the superior court. *Fisheries Engineers, Inc., et al. v. State, et al.*, No. 53614-5-II (Wash. Ct. App., Nov. 10, 2020) (unpublished).

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[4] Volume 1 of the Report of Proceedings, cited as "RP1," is from the pre-remand hearing in front of Judge Lanese on April 26, 2019. Volume 2 of the Report of Proceedings, cited as "RP2," is from two post-remand hearings, both in front of Judge Amamilo on July 23, 2021 and September 17, 2021.

E. On Remand, Tappel Offered No Evidence of any Injury, and Prevailed

On remand, the case was assigned to a different judge, and the parties once again cross-moved for summary judgment. Tappel offered no new evidence or declarations to support a purported injury from the Board's interpretation of the engineering laws and by its exercise of prosecutorial discretion not to sanction all Washingtonians using the word "engineer" in their job titles. He continued to rely on a claimed "inherent injury" to his title from others calling themselves some form of the term "engineer" when they are unlicensed. CP2 641-42.

The superior court granted summary judgment for Tappel, ruling in Tappel's favor on every issue. CP2 757-62. The court found Tappel had common law, APA, and UDJA standing. CP2 759 (Findings/Conclusions 2-3). It further ordered declaratory and injunctive relief, "enjoining the State from allowing its employees to use the title 'Engineer'" if they work in an agency that otherwise engages in engineering. CP2 762 (Order & Judgment ¶ 2(c)).

F. On Further Appeal, the Court of Appeals Held Tappel Did Not Have Standing

The State defendants appealed. On the second appeal, the Court of Appeals held, in an unpublished opinion, Tappel lacked standing because he did not show he suffered an injury in fact. Slip Op. at 2. The Court acknowledged that "the injury in fact test is not meant to be a demanding requirement," *id.* at 8, and agreed that even "an identifiable trifle should be sufficient" if a potential injury is "real." *Id.* at 9. But Tappel "offer[ed] only a conclusory statement that he is deprived of his competitive advantage." *Id.* at 10. He presented "no proof that he suffered an economic loss as a result of the Board's actions, or that there has been any confusion among his constituency by an unauthorized actor." *Id.* at 11.

Thus, even under the minimal standard, Tappel lacked standing because he "provided no evidence of how he was deprived of the privileges and competitive advantage that his title confers, or how he was placed on even footing with unlicensed and unqualified individuals." *Id.* The Court of Appeals directed

the superior court to enter a judgment of dismissal in favor of the State defendants. *Id.* at 12. Tappel seeks review of this decision.

III. COUNTER-STATEMENT OF THE ISSUE

Are conclusory assertions that one's license is "intrinsically diminished" or that one's profession is "inherently denigrated" sufficient to establish an injury in fact for standing?

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Court of Appeals properly applied well-established Washington precedent holding that all plaintiffs—including professional licensees—must offer more than conclusory statements that they are inherently injured, or intrinsically deprived of some ill-defined competitive advantage, before they can obtain judicial relief. The Court's decision did not modify or narrow the test for standing; it did not establish a novel test for an injury; and it did not change the rules for standing depending on the litigants, as Tappel suggests. It merely applied several of the already-existing Washington precedents outlining the minimal requirements to establish an injury for standing and

found that, under the facts of this case, Tappel did not meet those minimum requirements.

The Court of Appeals decision is consistent with this Court's precedent, and it does not involve any constitutional questions or issues of substantial public interest. RAP 13.4(b)(1), (3), and (4). The Court should deny review.

A. Tappel Did Not Establish an Injury for Standing

The Court of Appeals properly rejected Tappel's attempt to excuse himself from showing an actual injury, a necessary element for standing.

Standing is a jurisdictional issue. *Knight v. City of Yelm*, 173 Wn.2d 325, 336, 267 P.3d 973 (2011). While couched differently, the UDJA and APA standing tests are much the same. *City of Burlington v. Wash. State Liquor Control Bd.*, 187 Wn. App. 853, 873 n.16, 351 P.3d 875 (2015) ("[T]he two-part standing test under the UDJA is nearly identical to the APA two-part standing est."). Both require a plaintiff to establish an "injury in fact" and that they are within the "zone of interests"

protected by the statute. *Branson v. Port of Seattle*, 152 Wn.2d 862, 876, 101 P.3d 67 (2004); *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000).

To show an injury in fact, Tappel had to demonstrate that he was "specifically and perceptibly harmed" by the action. *Freedom Found. v. Bethel School Dist.*, 14 Wn. App. 2d 75, 86, 469 P.3d 364 (2020). Conjectural or hypothetical injuries are insufficient for standing. *Id.* In addition, Tappel had to demonstrate that the relief he seeks will redress the alleged harm. *KS Tacoma Holdings, LLC, v. Shorelines Hearings Bd.*, 166 Wn. App. 117, 129, 272 P.3d 876 (2012).

Tappel largely agrees with the Court of Appeals' articulation of the injury-in-fact requirements. His petition for review quotes the same passage from the same case that the Court of Appeals relied on. *Compare* Pet. for Rev. at 16 (quoting *City of Burlington*, 187 Wn. App. at 869), *with* Slip Op. at 9 (same). At bottom, Tappel simply disagrees with the Court of Appeals' application of that standard. A party's disagreement

with the application of a legal standard is not a sufficient basis for review under RAP 13.4(b).

In any event, the Court of Appeals properly concluded that Tappel failed to establish either actual harm or that the requested relief would remedy any such harm. As the Court noted, all Tappel ever alleged was that:

> his "right to bear this earned professional title is intrinsically diminished when unlicensed individuals are permitted to hold themselves out with the same title," and that by "failing to properly enforce the Act against violators who misappropriate the Engineering title, [the Board] ha[s] deprived [Tappel] of the privileges and competitive advantage that [his] professional title confer[s]."

Slip Op. at 8. These alleged, abstract professional harms were both too generalized and unsupported by evidence to establish a concrete injury for standing.

To be sure, a competitive injury can be sufficient to establish standing, if there is evidence of such an injury. For example, in *Seattle Building and Construction Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787,

920 P.2d 581 (1996), the plaintiff labor organizations showed that they faced alteration of competitive conditions, such as a "deplet[ion] of work opportunities of apprentices," difficulty "attracting qualified apprentices" due to increased competition, and an effect on "job opportunities for members." *Seattle Building*, 129 Wn.2d at 796. These were the "probable economic injuries" the labor organization had standing to vindicate. Slip Op. at 9.

But here, Tappel offered no evidence of the actual value of his license, nor did he provide any evidence that the value of his license had somehow been diminished either as a result of less demand for professional engineers' services in general or for his services in particular. *See* CP2 254-59; Slip Op. at 10. Tappel continued to enjoy all of the privileges of a registered, professional engineer.

Tappel offered no evidence in his declaration showing how others using the word "engineer" in their occupational titles actually impacts him. CP2 254-59. Nor did he identify any

instance in which he or anyone else had been misled by state employees' use of the job titles he objects to. *Id.* There is only one, conclusory statement that the Board's failure to take action on his various complaints "degrades the integrity of my profession and engenders public confusion." CP2 257. The Court of Appeals properly concluded Tappel did not offer enough support for his claimed injuries. Slip Op. at 10-12. There was, in short, "a failure of proof." *Id.* at 10.

In his Petition for Review, Tappel continues to insist that an "inherent" injury suffices—because there is no evidence that he suffered any actual or probable economic or competitive injury, let alone a concrete one. And, because Tappel failed to show any particular diminishment of the value in his license in the first place, he did not and cannot show how prohibiting others from using the term "engineer" in their occupational titles would enhance or restore the "inherent" or "intrinsic" value of his license. Thus he cannot show that his claimed injury is "fairly traceable to the challenged conduct and likely to be redressed by

the requested relief." *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986).

Finally, it is worth noting that Tappel does not challenge the actual *work* of the people whose titles he objects to; he complains only about the appearance of the word "engineer" in their job titles. But Tappel has never explained or established how the use of that word causes him any competitive harm. His claim that the "injury lies with the violation of the Act itself" assumes the merits of his claim. Pet. at 21. It does not show how—even if proved—any purported violation harms Tappel. Thus the Court of Appeals easily and properly concluded that Tappel did not demonstrate even a *de minimis* injury to be able to seek judicial relief. The Court should deny review.

B. The Court of Appeals Opinion Is Consistent with *Day v. Inland Empire Optical, Inc.*

The Court of Appeals opinion is entirely consistent with *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.3d 1011 (1969). *Day* focused on the standing of licensed professionals to ensure a level playing field among competitors

and ultimately recognized a licensed ophthalmologist's standing to sue competitors under the anti-rebate statutes. *Id*. at 416-17; *see also Hous. Fin. Comm'n v. Nat'l Homebuyers Fund, Inc.*, 193 Wn.2d 704, 713-14, 445 P.3d 533 (2019) (citing *Day* in the context of standing to challenge actions "against competitors" and in relation to "competing in that area"). The Court of Appeals specifically addressed and correctly distinguished *Day*. Slip Op. at 10.

Tappel's claim that the Court of Appeals somehow "abrogated" or "substantially limited" *Day* misreads the case and this Court's recent description of it. Pet. at 14, 19-20. The precise language from *Day* that Tappel relies on underscores that *Day*'s holding concerns actions "against licensed or unlicensed persons practicing the profession," which implicates competitive harms. *Day*, 76 Wn.2d at 417. And this Court later described *Day* as "reaffirm[ing] our precedent holding that members of a licensed profession have a legal and equitable right to seek injunctive relief *against competitors* operating without a license."

Hous. Fin. Comm'n, 193 Wn.2d at 713-14 (emphasis added). Tappel's contention that *Day* does away with the injury-in-fact requirement for members of licensed professions is rejected by both *Day* itself and this Court's decision in *Housing Finance Commission*.

Notably, *Day* long pre-dates the three-pronged standing requirements of the modern APA, and the *Housing Finance Commission* case is the only Washington case to cite *Day* for any standing principle in the 54 years since the case was decided. The Court of Appeals merely distinguished it from Tappel's action and lack of competitive injury here; it did not narrow or modify it. And it certainly did not "abrogate" it. Pet. at 31. Rather, it appropriately read *Day* as limited to its particular facts, rather than reading it as setting aside the now well-established injury requirement for standing, as Tappel effectively proposes.

Tappel's reading of *Day* would relieve him—and any other licensed professional—from having to prove an injury so long as they merely allege that others are engaged in unlicensed

practice. Under Tappel's theory, any licensee would have automatic standing to challenge each and every agency disciplinary decision, even when an enforcement decision does not impact the licensee. No case—*Day* or any other—has adopted such a dramatic departure from traditional standing principles. Instead, a person must be actually injured—an "aggrieved party"—in order to sue the Board. RCW 34.05.530.

The Court properly rejected Tappel's invitation to effectively eliminate the injury requirement for standing. That decision does not conflict with this Court's precedent. Review is unwarranted under RAP 13.4(b)(1).

C. This Case Does Not Involve a Significant Constitutional Question

Tappel claims that because the case was resolved on standing, it raises "a critical constitutional issue." Pet. at 24. This strains the meaning of "significant question of law under the Constitution of the State of Washington or of the United States[.]" RAP 13.4(b)(3). According to Tappel, *any* time a case is resolved on standing, it presents a significant constitutional

question. Not so. Standing is a long established, threshold requirement. A case-specific determination that a plaintiff has not suffered an injury in fact is not a question of constitutional magnitude.

Moreover, in suing the State defendants, Tappel does not even seek to vindicate a constitutional right. He does not contend that the Washington or United States Constitutions protect his professional title or prohibit state employees from using the word "engineer" in their job titles. His desire to shield his professional title from its use by others does not present a constitutional question.

Finally, the Court of Appeals decision does not involve a First Amendment issue. Because the Court of Appeals resolved this case on standing grounds, it did not reach the State's alternative, constitutional avoidance argument regarding the merits. There is no First Amendment issue presented for this Court's review.

D. This Case Does Not Involve an Issue of Substantial Public Interest

Last, while this case may be important to Tappel, it does not involve "an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court of Appeals decision did not break new legal ground. It applied well-established standing jurisprudence to the specific facts of this case. And it maintains liberal access to judicial review when a party establishes any form of real injury. Despite multiple opportunities, Tappel simply failed to identify any evidence of such injury and instead relied exclusively on conclusory allegations of abstract, "intrinsic" harms. Tappel's failure to identify any evidence of harm is not an issue of substantial public interest.

Despite Tappel's obvious lack of injury, he claims the Court of Appeals decision "will govern the standard of proof that trial courts impose when evaluating whether a member of the public is sufficiently injured to see their day in court." Pet. at 28. But there already exist dozens of decisions that advise trial courts

how to analyze the threshold showing required to establish a sufficient injury in fact for standing. The Court's opinion here applies a few of those cases to the facts of this particular case. There is no issue of substantial public interest warranting further review. RAP 13.4(b)(4).

Moreover, simply because amici filed a brief supporting Tappel does not signify that this case is one of substantial public interest. *See* Pet. at 28-29. Amici were professional organizations that advocate for laws to both limit entry to the profession and restrict others from using the word "engineer" if they are not licensed. *See* Appellants' Resp. to Br. of Amici Curiae 4-5. They, too, made the conclusory assertion that "creative 'engineer' job titles confuse professional engineers with unlicensed technicians." Br. of Amici Curiae 15-16. Yet like Tappel, they cited no evidence of any actual confusion or harm. Amici's self-interested support for Tappel's case should not be confused for substantial public interest.

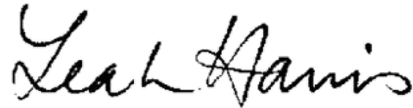
V. CONCLUSION

The Court should deny the Petition for Review.

This document contains 3,975 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 31st day of July, 2023.

ROBERT W. FERGUSON
Attorney General



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I, Leah Harris, certify that I caused to be served a copy of **Answer to Petition for Review** on all parties or their counsel of record on the date below as follows:

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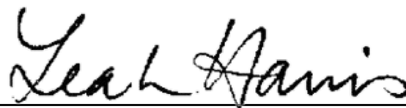
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 31st day of July 2023, in Seattle, Washington.



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