No. 102050-3
SUPREME COURT
OF THE STATE OF WASHINGTON

No. 56285-5-II
COURT OF APPEALS, DIVISION II
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)

Petitioners.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Fisheries Engineers, Inc. and Paul Tappel are the petitioners before this Court and were the respondents before the Court of Appeals below (herein referred to as "Petitioners").

B. COURT OF APPEALS DECISION

Petitioners ask this Court to accept review of a Court of Appeals decision, issued on February 7, 2023, reversing the trial court's grant of summary judgment in Petitioners' favor and directing the trial court to instead grant Respondents' cross-summary judgment motion and to dismiss Petitioners' case with prejudice on the basis of lack of standing. *See Tappel v. State of Wash.*, No. 56285-5-II (Feb. 7, 2023) (attached as Appendix A). Specifically, the Court of Appeals held that Petitioners failed to demonstrate a sufficient "injury-in-fact" under the Administrative Procedures Act ("APA") and the Uniform Declaratory Judgment Act ("UDJA"). The Court of Appeals denied Petitioners' Motion to Publish on April 27, 2023. *See* Appendix B.

C. STATEMENT OF THE CASE

This case involves the proper interpretation of Washington's professional engineer licensing statute, RCW Chapter 18.43 (the "Act") and whether Petitioners have standing to challenge the State's erroneous interpretation, application, and enforcement of its requirements. Specifically, Petitioners challenge the State's de facto policy that any unlicensed person can lawfully use the professional title "Engineer", as long as they do not specifically use the titles "Professional Engineer" or "Structural Engineer." This interpretation of the Act is inconsistent with the Act's plain language, which expressly and repeatedly states that it is unlawful to convey the impression or imply one is a professional engineer without being licensed. RCW 18.43.010, .020. Respondents' errant interpretation of the Act has resulted in thousands of unlicensed persons publicly using versions of the title "Engineer"—such as "Bridge Engineer" or "Traffic Engineer"—in contexts that are facially misleading to the

public, and thus injurious to Petitioners' profession and right to use this earned professional title. Petitioners' standing to bring this challenge is well-settled. As set forth herein, the Washington Supreme Court has recognized that professionals, like Petitioners, suffer "actual and substantial injury" when others fail to comply by the same professional requirements, and that they have standing to redress such injury. *See Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 416–17, 456 P.2d 1011 (1969).

Yet the Court of Appeals ignored key portions of this Supreme Court ruling in rendering its decision in this case. Given the Court of Appeals' contradictory ruling, the constitutional issues involved in this case, and the thousands of unlicensed and licensed "Engineers" across the State who are likely to be impacted by this decision, this Court should accept review under RAP 13.4(b)(1), (3), and (4).

1. History of the Parties

Petitioner Paul Tappel, a licensed professional engineer, filed his original Petition in 2018 on behalf of himself and his engineering firm, Fisheries Engineers, Inc., against the State of Washington, the Attorney General, and the Board of Registration for Professional Engineers and Land Surveyors (the "Board"),[1] (collectively, "Respondents").

Petitioner Paul Tappel has worked in Washington state as a licensed professional engineer since 1987. *See* CP2 254, ¶ 2. As part of his licensing, Mr. Tappel was required to satisfy rigorous academic and experience requirements, matriculate through an "engineer in training" phase, undergo Board examinations, and pay registration fees. *See* RCW 18.43.040 *et seq*. As a licensed engineer, Mr. Tappel is required to continuously observe the profession's ethical code, and annually pay to renew his license. *See* RCW 18.43.080, .105.

[1] Petitioners also initially filed suit against Governor Jay Inslee, in his official capacity as Governor. However, Petitioners dropped their request for relief against the Governor prior to summary judgment.

In 2017, Mr. Tappel filed a complaint with the Board regarding, in part, an unlicensed Washington Department of Natural Resources ("WDNR") employee's use of the title "Forest Practices Engineer." CP2 265, ¶ 14. Although this individual was not duly licensed as an engineer, his title wrongfully implied licensure. Mr. Tappel correctly pointed out that the Act makes it unlawful for anyone "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…unless such a person has been duly registered under the provisions of this chapter." RCW 18.43.010. The Act also defines "Engineer" as "a professional engineer as defined in this section." RCW 18.43.020.

The Board closed its investigation into Mr. Tappel's complaint without action, noting, irrelevantly, that "there is no clear, cogent, and convincing evidence that [the individual] violated any of the Board's rules or regulations. [He] appears to have followed the supervisory structure of his organization

which is outside the Board's authority." CP2 256–257, ¶ 15, CP2 289–290. The Board went on to note "[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." *Id*.

The Board provided no explanation as to why only these two specific engineering titles warranted protection under the statute, when no other titles would be regulated. This arbitrary subset captures only a fraction of the engineer titles in use. The Board itself administers "engineer exams" for "Engineers" under 16 different "engineering disciplines," which often are used as titles. *See* CP2 383, ¶ 5; CP2 420–436; CP2 258–258, ¶ 26; CP2 336–354. These disciplines/titles range widely including chemical, environmental, industrial, and naval engineers among others. Fourteen of these disciplines are expressly included in the Washington State Department of Licensing's List of *Licenses*, along with 19 other different engineer licenses (including, *e.g.*,

Agricultural, Electrical, Mining, and Petroleum) with links to the Board's website. *See id*. Yet, according to the Board's interpretation, none of these titles are governed by the Act. Senior Counsel from the Attorney General's Office reviewed Mr. Tappel's complaint and essentially agreed with the Board's conclusion. CP2 257, ¶ 18; CP2 292–297.

As a direct result of Respondents' failure to properly interpret and enforce the Act, there are over 800 employees at multiple state agencies with professional engineering job titles, such as "Bridge Engineer," "Civil Engineer," "Environmental Engineer," and "Transportation Engineer." *Id.* at ¶ 18; CP2 292–297. None of these jobs require professional engineering licenses even though the job descriptions indicate professional level engineering work. Even worse, the Board itself estimates that over ***100,000 unlicensed*** engineers practice across the State. *See* CP2 661, ¶ 10.

Given the Respondents' unequivocal position in direct conflict with the statute, and the State's own widespread abuse

of Petitioners' professional title, Petitioners sought relief by filing a Petition in Thurston County Superior Court.

2. Petitioners' Challenge in Thurston County Superior Court

Petitioners filed their Petition in Thurston County Superior Court in 2018, seeking injunctive and declaratory relief under the UDJA and APA related to Respondents' misinterpretation, misapplication, and widespread violations of the Act. CP 9–28. On cross-motions for summary judgment in 2019, the trial court originally dismissed Petitioners' claims, ruling on the merits of the Parties' respective statutory interpretation arguments, but the trial court did not reach the procedural issues before it. Petitioners appealed, and the Court of Appeals remanded the matter, directing the trial court to first address standing and immunity, before reaching the merits of the claim. *See Fisheries Engineers, Inc. v. State*, 15 Wn. App. 1020, 2020 WL 6581848 (2020).

On remand, Petitioners and Respondents again filed cross-motions for summary judgment. Petitioners sought affirmative summary judgment on their claims for: (1) declaratory judgment, to invalidate the Respondents' errant enforcement policy, and (2) an injunction enjoining the State from continuing to use this professional title for its unlicensed employees. Respondents moved to dismiss Petitioners' claims on summary judgment based upon lack of standing (among other affirmative defenses).

The trial court entered summary judgment in favor of Petitioners, correctly holding that: (1) the Petitioners had standing to bring this suit—given their manifest interest in protecting their professional title from misuse by unqualified individuals—and (2) entering appropriately tailored injunctive and declaratory relief to correct the Respondents' misapplication of the Act. Specifically, the trial court held in relevant part:

As a licensed professional engineer, Petitioners Paul Tappel and his engineering firm Fisheries Engineers, Inc. have a recognized interest in ensuring that others in their profession abide by the same rules and requirements. *See Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 416–17 (1969)… Petitioners have also sustained an injury-in-fact as a result of Respondents' undisputed actions as set forth herein. Accordingly, this Court finds that Petitioners have standing under common law, the APA, and the UDJA to bring this challenge against the Board and the State of Washington, and Petitioners have standing under common law and the UDJA to bring this challenge against the Attorney General.

…

…[P]er the plain language of the statute, it is unlawful for an unlicensed person to use the title 'Engineer' when doing so 'tend[s] to convey the impression' or 'implies' that he or she is a professional engineer. *See* RCW 18.43.010, .020.

…[T]his Court finds that the use of the title "Engineer," or any variation thereof, necessarily tends to convey the impression of licensure when it is used by someone who either engages in the practice of engineering (as it is defined under RCW 18.43.020(8)(a)), or who works within an agency, organization, or business that engages in or offers engineering services and is not a registered professional engineer. Under those circumstances, there is no meaningful way to distinguish between the licensed engineers and the

> unlicensed individuals who work under them, if both are permitted to use the professional title "Engineer."

See CP2 760–761, Findings of Fact and Conclusions of Law Nos. 2, 9, and 10.

The trial court then entered declaratory judgment in favor of Petitioners, adjudging that the Respondents' enforcement policy was invalid under the Act "because under such circumstances, the title necessarily tends to convey the impression of licensure, which is prohibited under the Act." *See id*. Order No. 2.b. The trial court entered injunctive relief enjoining the State from allowing its employees to use the title "Engineer" in a manner that violates the Act's requirements as set forth above. *See id*. at No. 2.c.

3. Respondents' Appeal to Division II Court of Appeals

Respondents timely appealed to Division II of the Court of Appeals, alleging that: (1) Petitioners lacked standing, (2) that Respondents were immune from suit under RCW 18.235.190, (3) that the trial court's ruling violated the First

Amendment, and (4) that the trial court's interpretation of the Act was in error.

On appeal, the appellate panel reversed the superior court's decision and held that Petitioners failed to identify sufficient evidence of an "injury in fact" on summary judgment. The panel explained that Petitioners failed to provide evidence of actual or probable economic harm to be afforded relief, and that the Supreme Court's decision in *Day v. Inland Empire*—wherein the Supreme Court recognized a licensed ophthalmologist's inherent injury and standing to enforce the same licensing requirements against others—should not apply to these facts. The appellate panel distinguished *Day* from Petitioners' case on the basis that Day challenged the competitors themselves, not the government agencies responsible for regulating the competition. *See* Appendix A at 11. The panel then remanded the case to the superior court with instructions that Petitioners' entire case be dismissed with prejudice.

D. ISSUES PRESENTED FOR REVIEW

1. Should this Court accept review pursuant to RAP 13.4(b)(1), where the Court of Appeals' decision and analysis conflict with, and materially limit, the Washington State Supreme Court's decision in *Day v. Inland Empire*? **Yes.**

2. Should this Court accept review pursuant to RAP 13.4(b)(3), when this case involves fundamental constitutional issues, such as standing and limitations on commercial freedom of speech? **Yes.**

3. Should this Court accept review pursuant to RAP 13.4(b)(4), when this case involves not only the widespread misuse of the Engineer professional title across the State, thus implicating public safety and confidence in the profession, but the very availability of legal recourse for professionals to protect the privileges of their license? **Yes.**

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case involves one of the most fundamental concepts of the legal system: a person's ability to access the courts to

protect their interests against infringement. In this case, Petitioners' interest is their earned professional title, "Engineer." Through rigorous study, examination, compliance with ethical rules, and annual payments to sustain licensure, Petitioners have earned the privilege of using this title to convey their expertise to the public. They have a judicially recognized right, under this Court's decision in *Day*, to protect that privilege.

But by its decision, the Court of Appeals substantially limited that window for relief by imposing a standing and "injury in fact" criteria that is both pragmatically impossible to meet and inconsistent with this Court's prior holding. And by shutting the door on these Petitioners, the Court of Appeals' decision will allow the thousands of unlicensed "Engineers" across the state to continue using misleading engineer job titles in derogation of the law and to the detriment of not only licensed engineers like Mr. Tappel and his firm, but to public

safety and the public's confidence in the engineering profession.

This Court should take the opportunity to clarify its standing principles, reverse a Court of Appeals decision that conflicts with existing Supreme Court precedent, and rectify a widespread wrong that afflicts the State and an entire profession. For the foregoing reasons, this Court should accept review under RAP 13.4.

1. Review is warranted under RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with existing Supreme Court precedent, *Day v. Inland Empire*.

First, this Court should accept review because the Court of Appeals' decision regarding Petitioners' failure to establish an "injury in fact" directly conflicts with existing caselaw.

In Washington, standing is recognized as a low bar, and Petitioners had clear standing under both the statutory and common law frameworks. Both the common law and APA tests require that plaintiff demonstrate an injury in fact. *See Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend the*

Constitution, 185 Wn.2d 97, 103, 369 P.3d 140 (2016) and *Allan v. University of Wash*., 140 Wn.2d 323, 327, 997 P.2d 360 (2000). "Courts take a more liberal approach to standing for questions of major public importance." *See Bass v. City of Edmonds*, 199 Wn.2d 403, 409, 508 P.3d 172 (2022) (citations omitted).

An "injury-in-fact" 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). This is intended to be a *de minimis* rule; "even an identifiable trifle should be sufficient." *Id*. (internal quotations omitted) (quoting Williams R. Anderson, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 824 (Oct. 1989)).

Here, Petitioners suffered actual, substantial harm due to the inaction of the Board and Attorney General, **and** the actions

of the State's agencies, in providing their unlicensed employees with misleading Engineer titles in violation of the Act. *See* CP2 257, ¶ 21. Over thirty years ago, Mr. Tappel undertook all the requirements to earn his Engineer title; he completed the requisite curriculum, gained the required minimum experience, took the exam to become an Engineer-in-training, gained four more years' experience, and paid (and continues to pay) the fees to maintain his license. Mr. Tappel's right to bear this earned professional title, which Mr. Tappel pays annual fees to sustain, is intrinsically diminished when unlicensed individuals are permitted to use 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.

This, in and of itself, is sufficient to establish injury-in-fact as established by this Court in its *Day v. Inland Empire* decision. In *Day*, licensed ophthalmologists and a licensed optician sought to enjoin fellow ophthalmologists from

practicing medicine and simultaneously operating a prescription optical business. The defendants moved to dismiss the claim, arguing that the plaintiffs failed to show that they suffered any pecuniary injury, and were therefore without remedy in law or equity. *See* 76 Wn.2d at 416. However, this Court quickly disposed of this argument. This Court observed that the plaintiff's injury did ***not*** lie solely in the potential economic impacts caused by unfair competition from these other professionals, but rather, their injury "rest[ed] on more precise grounds." *Id*. As licensed members of a profession, subject to reasonable regulation by the state, "each plaintiff could properly resort to the courts to require others so licensed to abide by the laws and regulations governing the practice…" *Id*. This Court observed "[A] **breach of ethics or violations of the laws by either licensed or unlicensed persons practicing the profession *constitutes actual and substantial injury* to others in the profession for which the courts will provide redress**." *Id.* at 417 (emphasis added) (citing *Port of Seattle v. Int'l*

Longshoremen's & Warehousemen's Union, 52 Wn.2d 317 (1958)). Under such circumstances, plaintiffs may "utilize the courts to prevent unlicensed persons from engaging in the licensed profession, trade or calling." *Id*. (citations omitted).

Therefore, regardless of whether Petitioners submitted evidence into the record that they suffered actual or probable economic injury, the widespread, unlicensed use of their professional title is an invasion of the Petitioners' rights and constitutes an "actual and substantial injury" under *Day*.

In this respect, the Court of Appeals' decision directly conflicts with this Court's holding in *Day.* The Court of Appeals erroneously concluded Petitioners' claims should fail because Mr. Tappel "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 people." *See Tappel*, No. 56285-5-II (Appendix A hereto) at 10. The Court of Appeals then attempted to distinguish *Day* by claiming that its holding was

limited only to suits involving private competitors, to ensure a level playing field, and that it did not apply to challenges against the State. *See id*.

But the Court of Appeals' short analysis of *Day* cannot be squared with the actual language provided in the opinion. In *Day*, this Court expressly rejected the notion that standing was predicated upon economic injury or ensuring a level competitive playing field among private entities; to the contrary, the Court expressly stated, "Although the stated position of the plaintiffs concerning the claims of unfair and destructive competition if amplified would probably suffice to afford them standing on that basis alone, their right to bring this action, we think, rests on more precise grounds." *Id*. at 417. The Court explained, "we are of the opinion that one lawfully engaged in the practice of a licensed profession **has a legal and equitable right to insist** that others practicing abide by the ethical standards and comply with the laws of the practice; **that violations…amount to an invasion of that right**…" *Id*. at 417

(emphasis added). The breach into that right "by unlicensed persons practicing the profession **constitutes actual and substantial injury** to others in the profession for which the courts will provide redress." *Id*. In other words, this Court expressly rejected the notion that standing rests solely upon preservation of competitive advantage or providing a level competitive playing field among private entities. The Court made clear that the violation of the Act *itself* constituted actual injury to petitioners, since they themselves are bound to comply with the Act. This Court clearly and unequivocally stated in *Day* that, as licensed professionals, Petitioners have a judicially recognized right to insist that others comply with the same rules and seek redress when others violate the licensing Act. The Court makes no distinction between private and public entities, and expressly rejected the Court of Appeals' conclusion that standing requires some form of probable economic injury. The injury lies within the violation of the Act itself.

Additionally, the Court of Appeals' conclusion that Petitioners failed to demonstrate an invasion of their rights is facially incorrect. On cross-motions for summary judgment, Petitioners offered evidence of over 800 unlicensed public State employees in just three agencies who were violating the Act by using misleading Engineer titles. Petitioners provided evidence that the Board and Attorney General—the two enforcement bodies statutorily charged[2] with enforcing the Act's title requirements—unequivocally refused to enforce the Act against those who were violating the Act by using Petitioners' professional title without a license. As a result of this position, Board itself estimated that over ***100,000 unlicensed*** engineers practice across the State. CP2 661, ¶ 10. Under *Day*, these violations of the Act by the State and others constitute an invasion of Petitioners' own rights and privileges and constitutes an "actual and substantial injury … for which the

[2] *See* RCW 18.235.150(1) and (2) and .020(2)(b)(iii) (specifically identifying the Board as the governmental body responsible for interpreting and enforcing the Act); and RCW 18.43.120 (the Attorney General shall render assistance as necessary to carry out the Act).

court will provide redress." *See* 76 Wn.2d at 417. Regardless of whether the Respondents are public or private entities, the widespread unlicensed use of the title "Engineer" is an invasion into Petitioners' rights.

Thus, the Court of Appeals' decision that Petitioners failed to provide any evidence of any "injury in fact," or any invasion of any "right" or "privilege," is fundamentally inconsistent with this Court's holding in *Day*. This Court should accept review to address this conflict between the Court of Appeals holding and the existing Washington State Supreme Court caselaw on this critical standing issue.

2. This Court should use this opportunity to clarify its criteria for "standing" and reach the merits of the important First Amendment issues involved in this case, pursuant to RAP 13.4(b)(3).

Review is also justified under RAP 13.4(b)(3), which provides that review may be granted if "a significant question of law under the Constitution of the State of Washington or of the United States is involved[.]"

First, the Court of Appeals' decision to reject Petitioners' relief on the basis of standing presents a critical constitutional issue. Standing principles reflect a party's ability to access the courts to redress injury. Access to the courts is rooted in the Washington State Constitution's guarantee of access to justice. *See* Const. art. I, § 1 ("All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual right."). This right of access to the courts is fundamental and has been affirmed and reaffirmed throughout the course of the nation's and Washington State's history. Chief Justice John Marshall observed in the landmark case of *Marbury v. Madison* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." 5 U.S. 137, 163, 2 L. Ed. 60 (1803).

In Washington State, it means that "[j]ustice in all cases shall be administered openly and without unnecessary delay." Const. art. I, § 10. This Section of the Washington Constitution "confirms and renders enforceable the fundamental right of 'meaningful access' to the courts in cases where significant interests are implicated and where the court is the forum within which such rights are adjudicated." James A. Bamberger, *Confirming the Constitutional Right of Meaningful Access to the Courts in Non-Criminal Cases in Washington State*, 4 Seattle J. for Soc. Just. 383, 396 (2005). Who has the right to seek redress in courts, and the threshold standard by which the courts will bar citizens from accessing justice, implicates these fundamental principles under the Washington Constitution.

Thus, the Court of Appeals' articulation of standing requirements, and the criteria upon which it instructs that trial courts should deny citizens access to the courts in the future, presents a fundamental constitutional issue that warrants this Court's review.

Additionally, to the extent this Court decides to reach the underlying merits of Petitioners' claim and the trial court's ruling, Petitioners' claims also involve important freedom of speech issues under the First Amendment of the Washington and U.S. Constitutions. On appeal, Respondents challenged the constitutionality of the trial court's ruling, arguing that the trial court's order infringed upon individuals' First Amendment speech rights by limiting their ability to use the title "Engineer." *See* App. Br., 59. This argument presents several important constitutional questions, such as: (1) whether governmental entities, like Respondents, even have speech rights under the U.S. Constitution, *see Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009); (2) whether this type of restriction constitutes a permissible restriction of commercial speech, *see Nat'l Fed'n of Retired Persons v. Ins. Com'r*, 120 Wn.2d 101, 117, 838 P.2d 680 (1992) (upholding insurance licensing requirement, holding that the state may regulate and limit misleading commercial

speech); and (3) whether the generic iterations of the title "Engineer" may be lawfully restricted when they are being used in inherently misleading contexts, such as by someone who works with a firm that offers professional engineering services, *see Van Breemen v. Dep't of Pro. Regul*., 296 Ill. App. 3d 363, 367, 694 N.E.2d 688 (1998) (holding that an individual's use of the generic title "engineer" was misleading under the circumstances and could therefore be constitutionally restricted). This Court should accept review and use the opportunity to address these important constitutional standing and free speech principles.

3. This petition involves both the widespread misuse of the professional Engineer title, and the availability of vital legal recourse to address resulting injuries, and thus warrants review under RAP 13.4(b)(4).

Finally, "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." *See* RAP 13.4(b)(4). As stated above, this case involves the right of the people to access the courts and the threshold

legal requirements for the public to challenge governmental action and inaction. This standing issue is of the utmost public import. The panel's 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. By narrowing the standing requirements for governmental challenges to pure economic injuries and suits only against direct competitors, the panel's decision will severely limit future challenges to governmental misconduct.

Moreover, the broad impact of this case is undeniable. On appeal, the Washington Society of Professional Engineers ("WSPE"), the National Society of Professional Engineers ("NSPE") and the American Counsel of Engineering Companies ("ACEC") filed an Amicus Brief with the Court of Appeals, explaining the potential consequences of reversing the trial court's decision. Together, WSPE, NSPE, and ACEC represent tens of thousands of engineers nationwide, with the collective goal of furthering the interests of licensed engineers,

protecting engineers and the public from unqualified practitioners, building public recognition for the profession, and standing against unethical practices.

As set forth in more detail in the Amicus Brief, the United States Supreme Court recognized long ago that professional licensing is necessary "to provide for the general welfare" by ensuring that practitioners demonstrate "a certain degree of skill and learning upon which the community may confidently rely," thus protecting against "the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent v. State of W. Va*., 129 U.S. 114, 122, 9 S. Ct. 231, 32 L. Ed. 623 (1889). In this State, the Legislature enacted Washington's professional engineer licensing statute to protect the public from dangerous, substandard work and deceptive practitioners by limiting those entitled to hold themselves out as members of the engineering profession to those with the requisite qualifications. Yet, "[t]he Board's refusal to require State agencies to follow the statutory mandate disrupts the

integrity of the licensing regime altogether, harming the public interest and undermining the reputation and standing of the profession and the individuals who have adhered to the rigorous standards imposed by the Legislature." *See* Amicus Brief at 15. The trial court's ruling below provided the necessary guidance to stop unlicensed individuals from misleading uses of this title and to fully enforce the Legislature's intent. The trial court's decision promoted and protected the engineering profession, public safety, and public confidence in the profession by regulating the thousands of both licensed and unlicensed individuals who call themselves "engineers" in this State. The Court of Appeals' decision reversing that crucial ruling stands to impact not only thousands of engineers across the state, but also public safety and public confidence more generally.

The Court of Appeals' decision to reverse the trial court, and deny Petitioners' relief on the basis of standing, involves precisely the type of "issue of substantial public interest" that warrants this Court's review. RAP 13.4(b)(4).

F. CONCLUSION

By its decision, the Court of Appeals has abrogated *Day* and substantially altered the standards for citizens to access the Court to challenge governmental misconduct. The Court of Appeals' focus on probable economic impact is fundamentally flawed and out of line with established caselaw. Washington law accords its citizens the right to challenge invasions into their rights and privileges established by the professional licensing statutes, regardless of economic injury or the type of entity invading the right. The Court of Appeals erred by reading such a requirement into *Day*. Petitioners had standing to challenge the State's violations of the Act and prevent the widespread misuse of their professional title across the State.

As such, this Court should take the opportunity to clarify its standing principles, reverse a Court of Appeals decision that conflicts with existing Supreme Court precedent, and reinstate a trial court order that the protects the citizens of this State and

the dignity of the engineering profession. For the foregoing reasons, this Court should accept review under RAP 13.4.

This document contains 4,995 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 30th day of May, 2023.

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Certificate of Service

I, Kacie Coselman, certify under penalty of perjury of the laws of the State of Washington that on May 30, 2023, I electronically filed this document entitled PETITION FOR REVIEW using the CM/ECF system which will send notification of such filing to the following persons:

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FISHERIES ENGINEERS, INC., a Washington corporation; PAUL TAPPEL, an individual and professional engineer, Respondents, 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, Appellants.	No. 56285-5-II UNPUBLISHED OPINION

VELJACIC, J. — Fisheries Engineers, Inc. and Paul Tappel (collectively Tappel) filed a complaint with the Board of Registration for Professional Engineers and Land Surveyors objecting to use of the title "Forest Practice Engineer" by an employee of the Washington State Department of Natural Resources who was not a licensed engineer. The Board found no violations and did not pursue the complaint further.

Tappel sought injunctive and declaratory relief under the Administrative Procedures Act (APA)[1] and the Uniform Declaratory Judgment Act (UDJA)[2] challenging the Board's refusal to enforce the licensing statute. The Thurston County Superior Court granted relief and enjoined the

[1] Ch. 34.05 RCW.

[2] Ch. 7.24 RCW.

State from using the professional job title and description of "Engineer" for its employees who are not licensed engineers. The State of Washington, Governor Jay Inslee, Attorney General Bob Ferguson, and the Board (collectively the Board) seek review of the trial court's order granting Tappel's motion for summary judgment and denying the Board's motion for summary judgment. Amici[3] argue that the State's practice of allowing unqualified individuals to use the title "Engineer" undermines the integrity of the licensing regime, thereby delegitimizing the profession and endangering the public interest, which the Professional Engineers' Registration Act (PERA)[4] attempts to protect by imposing rigorous qualification requirements.

We hold that Tappel does not have standing to bring this action because he fails to show he has suffered an injury in fact. We reverse and remand for the trial court to enter judgment of dismissal in the Board's favor.

FACTS

This is the second appeal of this matter. Paul Tappel is a professional engineer, licensed to practice in Washington. He is also the owner of Fisheries Engineers, Inc. Fisheries Engineers creates designs for fisheries improvement projects, such as fish passage, fish hatcheries, salmon rearing ponds, and other similar projects. Tappel filed a complaint with the Board regarding a State employee who used the title "Forest Practices Engineer," even though the employee was not registered as a licensed professional engineer. Clerk's Papers (CP) at 43. The Board sent Tappel a letter dismissing his complaint, and stated it would only pursue investigations when an

[3] We received amicus briefing from the Washington Society of Professional Engineers, National Society of Professional Engineers, and American Council of Engineering Companies.

[4] Ch. 18.43 RCW.

unregistered person was using the titles "professional engineer," "structural engineer," or "professional land surveyor." CP at 57. The letter also noted:

> The filing of a complaint does not bind or compel this Board to open an investigation or file charges following a completed investigation. State law . . . vests the Board with the sole and final authority to decide if and how to handle any given complaint. Any Board or committee decision on a complaint is the result of their thorough review of all materials provided to and/or collected by Board staff. Because these decisions are only reached through careful and balanced evaluation, these decisions are considered final and are not subject to appeal to the Board.

CP at 57.

Tappel subsequently filed a lawsuit against the Board, seeking a declaration under the APA and UDJA, that the PERA prohibited any person who was not a licensed professional engineer from using the title "Engineer." CP (July 22, 2019) at 9. Tappel based his claim on RCW 18.43.010, which requires that all persons who practice engineering be qualified and registered as a professional engineer and prohibits an unregistered person from using "any title or description tending to convey the impression that he or she is a professional engineer."

Tappel filed a motion for summary judgment, requesting that the trial court grant his request for injunctive and declaratory relief because the plain language of PERA states that use of the title "Engineer" tends to convey the impression that the person using the title is a licensed professional engineer. The Board subsequently filed a motion to dismiss on the pleadings under CR 12(c) on multiple grounds, including lack of standing.

In ruling on the motions, the trial court bypassed the threshold issue of standing and other procedural issues and directly addressed the statutory construction issue. The court granted summary judgment in the State's favor on the merits and dismissed Tappel's petition.

Tappel appealed the trial court's summary judgment order to this court. *Fisheries Engineers, Inc. v. State*, No. 53614-5-II (Wash. Ct. App., Nov. 10, 2020) (unpublished), https://www.courts.wa.gov/opinions/. In that appeal, this court decided that it would not address standing for the first time on appeal, and remanded the case back to the trial court to determine whether Tappel had standing to bring the lawsuit. *Id*. slip op. at 6-7. This court reasoned that "[w]hether Tappel has standing may depend on factual issues, particularly with regard to the 'injury in fact' requirement. The trial court is in a better position to resolve these issues." *Id*.

On remand, the trial court concluded Tappel had standing and granted summary judgment in his favor. The court also concluded that the Board was not immune from suit, and that the plain language of RCW 18.43.010 prohibits the use of the title "Engineer" when it is "used by someone who engages in the practice of engineering (as it is defined under RCW 18.43.020(8)(a))" or used by someone "who works within an agency, organization, or business that engages in or offers engineering services if that person is not a registered professional engineer" because "the title necessarily tends to convey the impression of licensure, which is prohibited under [PERA]." CP at 761. The court then enjoined the State from allowing its employees to use the title "Engineer" in a manner that violates PERA's requirements.

The Board appeals, seeking review of the trial court's order granting Tappel's motion for summary judgment, denying the Board's motion for summary judgment, entering declaratory judgment in Tappel's favor, and enjoining the State from using the title "Engineer" to describe those who are not licensed engineers under the statute.

ANALYSIS

I. STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 200 Wn.2d 208, 217, 515 P.3d 525 (2022). Summary judgment is proper if, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Id.* A genuine issue of material fact exists if reasonable minds could differ regarding the facts controlling the outcome of the litigation. *Janaszak v. State*, 173 Wn. App. 703, 711, 297 P.3d 723 (2013). The party opposing summary judgment "'may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.'" *Woods View II, LLC v. Kitsap County*, 188 Wn. App. 1, 18, 352 P.3d 807 (2015) (quoting CR 56(e)).[5]

II. BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS

The Uniform Regulation of Business and Professions Act (URBP), chapter 18.235 RCW, authorizes the Department of Licensing and assorted boards to regulate their respective professions and discipline individuals and businesses who violate the law. *See* RCW 18.235.005; RCW 18.235.020. The URBP authorizes the disciplinary authorities to investigate and discipline individuals and businesses that engage in "unprofessional conduct," which includes "engaging in [the] unlicensed practice" of a profession regulated under the chapter. RCW 18.235.130(15) (definition of "unprofessional conduct," which includes unlicensed practice); RCW 18.235.150(1)

[5] Because we hold that Tappel lacks standing, we need not review the trial court's grant of declaratory and injunctive relief.

(investigative authority), RCW 18.235.150(2) (sanction authority); RCW 18.235.110 (sanction authority).

PERA contains regulatory provisions regarding engineers in chapter 18.43 RCW. RCW 18.43.010 states:

> In order to safeguard life, health, and property, and to promote the public welfare, any person in either public or private capacity practicing or offering to practice engineering or land surveying, shall hereafter be required to submit evidence that he or she is qualified so to practice and shall be registered as hereinafter provided; 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.

To that end, the Board administers a test of minimum competency and reviews and approves or denies the registration applications of potential professional engineers. RCW 18.43.040. The Board also has the authority to discipline members of the profession for unprofessional conduct and other violations of PERA. RCW 18.43.105, .110.

III. TAPPEL LACKS STANDING

Tappel sought declaratory relief "against the Board and Attorney General's Office, to invalidate their unlawful enforcement policy and interpretation of the Act," and injunctive relief "against the State of Washington, enjoining the State from unlawfully using the 'Engineer' title for its unlicensed employees." CP at 367, 371. He suggests that both types of relief could be afforded under either the APA, the UDJA, or both. We hold that Tappel lacks standing because he fails to demonstrate an injury in fact.[6]

[6] The State notes that there may be other procedural bars to Tappel's claims and requests for relief, but because we conclude Tappel lack standing, we need not address these arguments.

A. Legal Principles

Standing is reviewed de novo. *City of Burlington v. Liquor Control Bd.*, 187 Wn. App. 853, 861, 351 P.3d 875 (2015). Under the APA, a person has standing to obtain judicial review of an agency action if that person is aggrieved or adversely affected by the agency action. RCW 34.05.530. A person is aggrieved or adversely affected only when three conditions are present:

> (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.

RCW 34.05.530.

The first and third prongs are the "injury-in-fact" requirements, and the second prong is the "zone of interest" requirement. *Allan v. Univ. of Wash.*, 140 Wn.2d 323, 327, 997 P.2d 360 (2000). All three requirements must be established for a person to have standing under the APA. *Id*. at 326. The person or entity challenging the agency action has the burden to prove standing. *KS Tacoma Holdings, LLC v. Shorelines Hr'gs Bd.*, 166 Wn. App. 117, 127, 272 P.3d 876 (2012).

The test for determining standing under the UDJA also contains an injury in fact and zone of interest requirement. The UDJA applies a two-part test to determine whether a party has standing to bring a suit: first, the court inquires whether the interests asserted by the plaintiff are within the "zone of interests" protected by the statute; second, the party bringing the suit must have "suffered from an injury in fact, economic or otherwise." *Branson v. Port of Seattle*, 152 Wn.2d 862, 875-76, 101 P.3d 67 (2004). "Both tests must be met by the party seeking standing." *Id*. at 876.

Therefore, in order to have standing to bring this action under either the APA or UDJA, Tappel must satisfy both requirements: his asserted interest must be within the zone of interests protected by the statute or contemplated by the agency, and he must have suffered or be likely to suffer an injury in fact that is redressable by the remedy sought.

B. Tappel has Not Demonstrated an Injury in Fact or Redressability Sufficient to Confer Standing

Tappel asserts 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 Engineer title, [the Board] ha[s] deprived [Tappel] of the privileges and competitive advantage that [his] professional title confer[s]." Br. of Resp't at 36-37. We disagree.

To show an injury in fact, Tappel must demonstrate that he has been or will be "'specifically and perceptibly harmed'" by the Board's action. *Freedom Found. v. Bethel Sch. Dist.*, 14 Wn. App. 2d 75, 86, 469 P.3d 364 (2020) (internal quotation marks omitted) (quoting *Patterson v. Segale*, 171 Wn. App. 251, 259, 289 P.3d 657 (2012)). However,"[w]hen a person alleges a threatened injury, as opposed to an existing injury, the person must demonstrate an 'immediate, concrete, and specific injury to him or herself.'" *Segale*, 171 Wn. App. at 259 (quoting *Trepanier v. City of Everett*, 64 Wn. App. 380, 383, 824 P.2d 524 (1992)). Conjectural or hypothetical injuries are insufficient to confer standing. *Freedom Found.*, 14 Wn. App. 2d at 86. Thus, Tappel is required to show an invasion of a legally protected interest to establish an injury in fact. *Id.*

While an injury must be concrete and specific, the injury in fact test is not meant to be a demanding requirement. The court in *City of Burlington* described the requirement as "'merely a *de minimis* rule: . . . a judicial appraisal of the *extent* of harm is not contemplated. . . . Thus, a

person should be able to meet this condition if he or she can show that the potential injury is real, not that it is substantial, . . . an identifiable trifle should be sufficient.'" 187 Wn. App. at 869 (internal quotation marks omitted) (quoting Williams R. Anderson, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev.781, 824 (Oct. 1989)).

If an economic injury is not immediate, the injury in fact requirement can still be satisfied. In *Seattle Building and Construction Trade Council v. Apprenticeship and Training Council*, a union apprenticeship group sought judicial review of a decision by the state apprenticeship council to approve an apprenticeship training program, and the court considered whether the union appellants had standing to seek review of a decision of the council in regard to the apprenticeship program. 129 Wn.2d 787, 793, 920 P.2d 581 (1996). The court decided that the injury in fact element was present because the Council decision altered competitive conditions. *Id*. at 797. The court reasoned that approval of the construction industry training council's programs were "likely to affect job opportunities" and the governing statute gave "a competitive advantage to Apprenticeship Council approved apprenticeship programs," because employers of apprentices in those programs could submit bids reflecting lower wages under the statute, which thereby altered competitive conditions. *Id*. at 797. The court concluded that, although no injury had yet been suffered by the appellants, "probable economic injury resulting from agency actions that alter competitive conditions [is] sufficient to satisfy the injury in fact requirement." *Id*. at 795.

Tappel argues that he suffered "actual, substantial harm due to the inaction of the Board and Attorney General, and the actions of the State's agencies, in violating the engineering licensing statute." Br. of Resp't at 36. According to Tappel, failure to properly enforce PERA, has "deprived [him] of the privileges and competitive advantage that [his] professional title confer[s], and unfairly placed [him] on even footing with unlicensed and unqualified individuals." Br. of

Resp't at 37. In support of this notion, Tappel references the principle from *Seattle Building and Construction Trade Council* that "probable economic injury resulting from agency actions that alter competitive conditions are sufficient to satisfy the injury in fact requirement." 129 Wn.2d at 795. But here we have a failure of proof. Tappel has 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. Tappel's specific complaint to the Board was that the Department of Natural Resources uses the title "Forest Practices Engineer" in a job title for someone who was not certified as a professional engineer, but he offers no explanation of how Department forest practices engineers would compete with him in the marketplace. Instead, he offers only a conclusory statement that he is deprived of his competitive advantage. Conclusory statements are insufficient to support summary judgment. *See Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002).

Tappel also argues that *Day v. Inland Empire Optical, Inc*., 76 Wn.2d 407, 456 P.2d 1011 (1969), controls on the standing question. But *Day* cannot be read to provide standing to Tappel here because *Day* recognized a licensed ophthalmologist's standing to sue competitors to ensure a level playing field. 76 Wn.2d at 416-17. Tappel is suing the Board and the Attorney General, not a competitor. *Day* does not stand for the proposition that a professional can sue the Board for its interpretation of statutes that regulate a profession and resulting decision not to act on a complaint. Accordingly, Tappel's reliance on *Day* is misplaced.

In his statement of additional authorities, filed with this court on December 1, 2022, Tappel refers us to *Washington State Housing Finance Commission v. National Homebuyers Fund, Inc.*, 193 Wn.2d 704, 445 P.3d 533 (2019), but that case is unhelpful for Tappel. In it, Washington State Housing Finance Commission (the Commission) brought a declaratory judgment action

challenging the authority of a California nonprofit to provide down payment assistance to Washington residents in conjunction with federally insured mortgages, and sought to enjoin it from any further provision of homeownership financing services in Washington. *Id*. at 705.

The Commission provided evidence that funds were diverted from the Commission, resulting in economic loss and allowing for an inference of actual injury. *Id*. at 717. In addition, the Commission demonstrated that the conduct of the California nonprofit was unauthorized competition, and had confused the Commission's constituency. *Id*. at 17-18. The court wrote:

> In an open market, responding to disruptions and confusion caused by competitors is part and parcel of doing business. There is no actionable injury because there is no interest against competition. Here, on the other hand, the Commission asserts an interest as an authorized participant in a restricted area in being free from unauthorized competition. And confusion caused by an unauthorized actor is an injury related to that interest.

Id.

Tappel's conclusory assertion of harm stands in stark relief. Tappel presents 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. He does not establish that forest practices engineers who work for the Department of Natural Resources serve the same constituency that he does. And again, Tappel has not sued competitors; he has sued the Board, the Attorney General, and the State because he disagrees with their application of PERA. The *Housing Finance Commission* case does not support Tappel's standing argument.

Tappel fails to demonstrate he has sustained an injury in fact. Accordingly, we need not further address the redressability or zone of interest standing factors. We hold that Tappel has not met the injury in fact requirement to establish standing.

CONCLUSION

The trial court erred in granting summary judgment. We reverse and remand for the trial court to enter judgment of dismissal in favor of the Board and other defendants.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Maxa, J.

Glasgow, C.J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

April 27, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FISHERIES ENGINEERS, INC., a Washington corporation; PAUL TAPPEL, an individual and professional engineer, Respondents, 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, Appellants.	No. 56285-5-II ORDER DENYING MOTION FOR PUBLICATION

Respondents, Fisheries Engineers, Inc. and Paul Tappel, move the court to publish its February 7, 2023 opinion. Appellants', Governor Jay Inslee, Attorney General Bob Ferguson, and the Board of Registration for Professional Engineers & Land Surveyors, responded in opposition to Respondents' motion. After consideration, we deny Respondents' motion for publication. It is

SO ORDERED.

Panel: Jj. Maxa, Glasgow, Veljacic.

FOR THE COURT:

Veljacic, J.

CAIRNCROSS & HEMPELMANN

May 30, 2023 - 3:10 PM

Transmittal Information

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