In the
Supreme Court of Ohio

TWISM ENTERPRISES, LLC, d/b/a VALUCADD SOLUTIONS, Appellant, v. **STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND SURVEYORS,** Appellee.	Case No. On appeal from the Hamilton County Court of Appeals, First Appellate District Court of Appeals Case Nos. C-200411 & C-210125

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT TWISM ENTERPRISES, LLC

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INTRODUCTION

This case presents a critically important question: Should an executive agency's legal interpretation receive judicial deference when the agency's interpretation contradicts the statute's terms and the agency's implementing regulations?

Here, R.C. § 4733.16(D) calls for engineering firms like TWISM Enterprises to apply for a Certificate of Authorization and to designate "one or more full-time . . . managers" as "responsible for and in responsible charge of [its] professional engineering . . . activities and decisions." The State Board of Registration for Professional Engineers and Surveyors defines "full[-]time" as "working substantially all the engineering . . . hours for" a firm. Ohio Adm. Code § 4733-39-02(B). It is undisputed that TWISM designated James Cooper, an independent contractor, as its manager; that Cooper led TWISM's engineering activities and decisions; and that he worked *all* of TWISM's engineering hours. TWISM thus met the terms of § 4733.16(D).

But the Board denied TWISM's application. The Board claimed that a "manager" must be a "full-time, W-2 employee" of a firm—even though § 4733.16(D) includes no such restriction and even though the Board's own regulations (*e.g.*, Ohio Adm. Code § 4733-39-02(B)) contradict the Board's interpretation. TWISM appealed, and the Board—the opposing party in the case—defended its decision by demanding deference. The court of appeals obliged, effectively adopting the Board's rewritten version of § 4733.16(D) and rubber-stamping its denial of TWISM's application.

This case therefore brings to the fore a question of public and great general interest concerning an executive agency's authority to *add new* restrictions or requirements to statutes that establish standards for professional licenses. The case also presents substantial constitutional questions concerning whether judicial deference to an executive-branch agency, particularly an agency that is *a party to a case*, can be squared with the Ohio Constitution's separation of powers and the related guarantees afforded by due process of law. These questions are ripe for review.

Members of this Court recognize that judicial deference "to an agency's interpretation of a statute is at odds with the separation-of-powers principle that is central to our state and federal Constitutions." *State ex rel. McCann v. Del. Cty. Bd. of Elections*, 155 Ohio St. 3d 14, ¶ 30 (2018) (DeWine, J., concurring) (joined by Fischer, J.). This Court describes the separation of powers as the "first, and defining, principle of a free constitutional government." *State v. Bodyke*, 126 Ohio St. 3d 266, ¶ 39 (2010) (citations omitted). And central to this principle is the understanding that it is the judiciary's exclusive "province and duty . . . to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Therefore, "only the judiciary has ultimate authority to interpret the law." *State ex rel. Ferrara v. Trumbull Cty. Bd. of Elections*, --- Ohio St. 3d ---, 2021-Ohio-3156, ¶ 21 (citing *Marbury*, 5 U.S. at 177; *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169 (1916)).

By deferring to an agency's interpretation, courts not only "abdicate their function and responsibility to say what the law is," but—as TWISM saw first-hand—courts also

"abandon their role as an independent check on the executive branch." *In re 6011 Greenwich Windpark, L.L.C.*, 157 Ohio St. 3d 235, ¶ 74 (2019) (Kennedy, J., dissenting) (joined by DeWine & Stewart, JJ.) (cleaned up). *See also Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) ("To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment."); Philip Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. 1187, 1209 (2016) (An Article III judge "must exercise his own judgment in a case, including his own judgment about what the law is, and he therefore cannot defer to the judgment of an administrative agency without abandoning his office as a judge."); Ohio Jud. Cond. Rule 2.3(A) ("A judge shall perform the duties of judicial office . . . without bias or prejudice.").

Relatedly, deference allows courts to deny litigants their right to due process of law. Here, because the court of appeals deferred to and adopted the Board's legal interpretation, TWISM was denied its right to independent *judicial* review and a resulting *judgment* about what the law means. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) (noting that for centuries, "due process" has "consistently referred to the guarantee of legal *judgment* in a case by an authorized *court* in accordance with settled law") (emphasis added).

At least nine other state supreme courts have abolished their deference doctrines or confirmed that deference violates the separation of powers. *See Nieto v. Clark's Mkt., Inc.*, 488 P.3d 1140, 1149 (Colo. 2021); *Myers v. Yamato Kogyo Co., Ltd.*, 597 S.W.3d 613, 617

(Ark. 2020); *Delcon Partners, L.L.C. v. Wyoming Dep't of Revenue*, 450 P.3d 682, 684 (Wyo. 2019); *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 33 (Wis. 2018); *King v. Mississippi Military Dep't*, 245 So. 3d 404, 407 (Miss. 2018); *Hughes Gen. Contrs., Inc. v. Utah Labor Comm'n*, 322 P.3d 712, 717–18 (Utah 2014); *Douglas v. Ad Astra Info. Sys., L.L.C.*, 293 P.3d 723, 728 (Kan. 2013); *In re Complaint of Rovas Against SBC Michigan*, 754 N.W.2d 259, 272 (Mich. 2008); *Pub. Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383 (Del. 1999). Two other states have eliminated this deference through a constitutional amendment and legislation, respectively. *See* FLA. CONST. art. V, § 21 (2018); Ariz. Rev. Stat. § 12-910 (2018).

This Court should accept jurisdiction and reconsider its deference jurisprudence.

STATEMENT OF THE FACTS AND CASE

The material facts are not in dispute. TWISM, a small start-up firm founded by Shawn Alexander, applied to the Board for a Certificate of Authorization. TWISM had to "designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering . . . activities and decisions, and those designated persons shall be registered in this state." R.C. § 4733.16(D). The Board defines "responsible charge" as "being in control of, accountable for and in either direct or indirect supervision of the engineering . . . activities of the business enterprise." Ohio Adm. Code § 4733-39-02(A). And the Board defines "full[-]time" as "working more than thirty hours per week or working substantially all the engineering . . . hours for a . . . limited liability company . . . that holds a certificate of authorization."

Id. § 4733-39-02(B).

TWISM designated independent-contractor James Cooper, an Ohio-registered engineer, as its manager. R. 68–72.[1] Cooper testified, during the administrative hearing, that he led TWISM's engineering activities and performed *all* of its engineering hours. R. 47–48. Further, as part of TWISM's application, Cooper completed a "Firm Affidavit of Responsibility" on the Board's form, which required Cooper to affirm that he was "in responsible charge for and in charge of" TWISM's "professional engineering . . . activities and decisions." R. 95. The Board's form-Affidavit also asked Cooper if he was "listed on multiple [Certificates of Authorization]" or had other engineering employment and, if so, to identify other firms he worked for and to describe "how [he] w[ould] manage" engineering activities for multiple firms. R. 95. Cooper stated that he performed engineering work for TWISM and two other firms, and explained how he managed them. R. 96.

The Board did not dispute these facts. Instead, it claimed that § 4733.16(D) precludes a firm from designating an independent contractor to serve as the firm's manager. Even though neither the statute nor the related regulations even mention "employee," and even though the Board's regulatory definitions provide otherwise, the Board asserted that a manager had to be a full-time, W-2 employee of a firm. Solely on that ground, the Board denied TWISM's application.

TWISM filed an administrative appeal, which was heard by a Board-appointed

[1] "R. __" refers to the Administrative Record submitted to the Common Pleas Court.

hearing officer. The hearing officer did not consider whether § 4733.16(D) was ambiguous but nonetheless agreed with the Board that he "must" defer to the Board's interpretation. R. 174. He opined that it was reasonable for the Board to require a person "to devote all of his/her professional time" to a firm "as a full-time employee." *Id*. He therefore recommended that the Board's denial be affirmed. R. 169–75. The Board adopted the hearing officer's Report and Recommendation as a final order. R. 164–68.

TWISM appealed to the common pleas court and argued that the Board's final order was "not supported by reliable, probative, and substantial evidence and [wa]s not in accordance with law." R.C. § 119.12(D). Because the facts were undisputed and the sole question was one of legal interpretation, the magistrate applied *de novo* review. The magistrate rejected the Board's argument that an engineering manager in § 4733.16(D) had to be a full-time, W-2 employee. Indeed, the Board "ha[d] not pointed to any statute or rule whereby either the General Assembly or the Board has even arguably imposed such a requirement." *July 23, 2020 Mag. Dec.* at 5. Further, the "undisputed evidence before the Board" showed that Cooper "fully met" the "full[-]time" "requirement" in Ohio Adm. Code § 4733-39-02(B). *Id.* at 4. The magistrate therefore recommended that the trial court reverse and vacate the Board's decision. *Id*. at 5.

Upon the Board's objections, the trial court reviewed the legal questions *de novo* and concluded that the Board's purported requirements—*i.e.*, that a manager must devote all of his professional time to a company as a W-2 employee—"are not mandated by

the plain text of" § 4733.16(D). App. 16a. The court noted that § 4733.16(D) "does not put forth any requirements regarding what kind of employment, *i.e.*, 'W-2' or '1099' employment," is required, or "state that a designated manager must devote all his or her time" to a single firm. App. 16a–17a. The court also looked at the Board's form-Affidavit, which, as noted above, expressly contemplates engineers' working for multiple firms. According to the trial court, this "mandatory, state-issued form demonstrates that, contrary to the Board's interpretation, a designated manager does *not* have to 'devote[] all [of] his/her time to the company as an employee.'" App. 17a. Finally, the trial court said, the Board's interpretation "creates new, substantive requirements that are not found in" § 4733.16(D). *Id*. The court thus approved the magistrate's decision, reversed and vacated the Board's denial, and ordered the Board to issue TWISM a Certificate of Authorization.

On appeal, the appellate court noted that there were no material facts in dispute and, therefore, that its review was limited to the question whether R.C. § 4733.16(D) and Ohio Adm. Code § 4733-39-02(B) allow an independent contractor to serve as a "full-time manager." App. 6a, ¶ 14. Initially, the court disagreed with the Board's contention that deference was required so long as the Board's interpretation was reasonable. Rather, the court held, deference is appropriate only if a statute or rule is ambiguous. App. 6a–7a, ¶¶ 15–17. But the court found ambiguity because, it said, both parties' interpretations were reasonable. As a result, the court declared that it "must defer to the Board's interpretation," and it upheld the Board's decision. App. 10a–11a, 12a, ¶¶ 28–29, 35.

REASONS FOR ACCEPTING JURISDICTION

Proposition of Law No. 1: *Under the Ohio Constitution's separation of powers and related guarantees of due process, it is exclusively the judiciary's province and duty to say what the law is; and, therefore, Ohio courts may consider but must not defer to executive agencies' legal interpretations.*

The proceedings below show the need for this Court's review. The administrative hearing officer and the court of appeals both granted deference to the Board's interpretations—though only the appellate court first found ambiguity—and both adopted the Board's interpretations. At the court of common pleas, however, both the magistrate and the trial court applied *de novo* review, and they both concluded that TWISM's interpretation was the best reading of the law. Only the last analysis—a *de novo* review and *judgment* of "what the law is" (*Marbury*)—is consistent with the Constitution's exclusive grant of judicial power to the judicial branch. *See Norwood v. Horney*, 110 Ohio St. 3d 353, ¶ 117 (2006) ("There can be no debate that pursuant to [OHIO CONST. art. IV, § 1], the judicial power resides exclusively in the judicial branch.") (citations omitted).

Nonetheless, each of the analyses applied below can find support among this Court's cases. *See, e.g.*, *State ex rel. Lucas Cty. Republican Party Executive Comm. v. Brunner*, 125 Ohio St. 3d 427, ¶ 23 (2010) (stating, without discussing ambiguity, "at a minimum, the secretary's interpretation of the pertinent [statutes] is a reasonable one and is thus entitled to judicial deference.") (citation omitted); *Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals*, 141 Ohio St. 3d 318, ¶ 29 (2014) ("A court owes no duty of deference to an administrative interpretation unless it finds the ordinance ambiguous."); *Ceccarelli v.*

Levin, 127 Ohio St. 3d 231, ¶ 8 (2010) ("This question of statutory construction presents an issue of law that we determine de novo on appeal.") (citation omitted).

This Court's review is thus necessary to prevent these conflicts in the future. But even if there were no conflict, this case presents an ideal vehicle for the Court to reconsider a doctrine that violates the separation of powers—the "first, and defining, principle of a free constitutional government," *Bodyke*, 126 Ohio St. 3d 266, ¶ 39 (citations omitted).

1. Separation of Powers. In Ohio "[a]ll political power is inherent in the people." OHIO CONST. art. I, § 2. *See Cincinnati, Wilmington & Zanesville R.R. Co. v. Clinton Cty. Commr's*, 1 Ohio St. 77, 85 (1852) (same). The people delegated some of their political power to the government, distributing it among three—and only three—branches. *Hale v. State*, 55 Ohio St. 210, 214 (1896). The people vested the state's law-making power in the General Assembly (OHIO CONST. art. II, § 1), the executive power in the Governor (*id*. art. III, § 5), and the judicial power in the courts (*id*. art. IV, § 1). "[A]ny encroachment by one upon the other is a step in the direction of arbitrary power." *State ex rel. Bray v. Russell*, 89 Ohio St. 3d 132, 135 (2000) (cleaned up). And the people entrusted *the judiciary* with "both the power and the solemn duty" "to ensure that the boundaries between branches remain intact." *Bodyke*, 126 Ohio St. 3d 266, ¶ 46 (citation omitted).

Deference threatens these boundaries because, as the Michigan Supreme Court explained, deference "allow[s] the agency to [1] usurp the judiciary's constitutional authority to construe the law and [2] infringe on the Legislature's lawmaking authority." *Rovas*,

754 N.W.2d at 267. This case proves the point. Deference to the Board's interpretation allowed the Board (1) to usurp the judiciary's authority (and duty) to say what the law is and (2) to add requirements to § 4733.16(D) that the General Assembly did not include.

Accordingly, to fulfill its "solemn duty" "to ensure that the boundaries between branches remain intact," *Bodyke*, 126 Ohio St. 3d 266, ¶ 46 (citations omitted), courts "must" not only "'jealously guard the judicial power against encroachment from the other two branches of government,'" courts must also refrain from delegating judicial power to the other branches, *Norwood*, 110 Ohio St. 3d 353, ¶ 117 (citation omitted). A judicial deference/delegation jurisprudence runs afoul of both *general* constitutional principles and the judiciary's *specific* role within the Constitution.

Generally, because the people delegated powers to three independent branches, each branch is precluded from exceeding or further delegating its powers, unless the people so provided in the constitution. *See Village of Lucas v. Lucas Loc. Sch. Dist.*, 2 Ohio St. 3d 13, 14 (1982) ("'[W]hat the sovereign people *do* by their *constitution,* their subordinate, the legislature, may not *undo* by *statute,* else the agent in government is more powerful than his principal.'") (citation omitted); *Cincinnati, Wilmington & Zanesville R.R.*, 1 Ohio St. at 85 (discussing people's "undoubted right to delegate just as much, or just as little" of their powers through constitution, an "instrument" or "letter of attorney" by which, "alone," each branch is "authorized to act at all"). *See also* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L.

REV. 821, 854–55 (2019) (describing constitution as agency instrument, and explaining that delegated discretionary powers cannot be further delegated without specific authorization in that instrument); THOMAS JEFFERSON, WRITINGS 253 (Library of Am. 1984) ("Our antient laws expressly declare, that those who are but delegates themselves shall not delegate to others powers which require judgment and integrity in their exercise.").

Specifically, because deference compels courts to delegate judicial power to the Executive Branch, deference "forces the judiciary to abandon the exercise of its independent judgment in favor of an agency's construction." *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan of Ohio Edison Co.*, 162 Ohio St. 3d 651, ¶ 71 (2020) (DeWine, J., concurring in judgment only) (citations omitted). This abandonment cannot be squared with the Constitution's delegation of judicial power to the courts. *See, e.g.*, *State ex rel. Cleveland Tel. Co. v. Court of Common Pleas of Cuyahoga Cty.*, 98 Ohio St. 164, 170 (1918) (The "orderly administration of justice, under the Constitution and laws of this state, absolutely requires that *each* court in our judicial system should in turn exercise its *independent judgment* in each particular case.") (emphasis added).

The Board unwittingly highlighted the doctrinal error caused by administrative deference, when it complained to the court of appeals that the trial court had "substituted its [the trial court's] *judgment* for that of the Board's." Apr. 23, 2021 Op. Br. at 1 (emphasis added). And, indeed, it had—since issuing *judgments* about "what the law is" is a duty belonging to the courts alone. The Board, as an Executive Branch agency, has no authority

to pronounce a judgment about the meaning of a statute in the first place. Thus, while parties to a case, including government agencies, "may espouse arguments regarding the meaning of a statute, . . . in the end, it is the courts that have the authority and the duty to 'say what the law is.'" *In re Determination of Existence of Significantly Excessive Earnings*, 162 Ohio St. 3d 651, ¶ 105 (Kennedy, J., concurring in judgment only in part and dissenting in part) (quoting *Marbury*, 5 U.S. at 177). And the "separation-of-powers doctrine prohibits the executive branch of government from overriding a court's judgment about what the law requires in a particular case—even if the court errs in its judgment and even if the error was fairly obvious." *State v. Henderson*, 161 Ohio St. 3d 285, ¶ 42 (2020).

2. Due Process of Law. A *court's* duty of *independent* judgment raises another, closely related principle—due process of law. A basic requirement of due process is a "'fair trial in a fair tribunal.'" *State v. Clinkscale*, 122 Ohio St. 3d 351, ¶ 15 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Due process thus requires a "neutral and detached judge." *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). Indeed, it is axiomatic that a "judge shall perform the duties of judicial office . . . without bias or prejudice." Ohio Jud. Cond. Rule 2.3(A). And, therefore, in "a criminal case, the judge cannot defer to the prosecutor's interpretation of the law. In a civil case between a corporation and an individual, the judge cannot defer to the corporation's interpretation of the law. Nor can a judge defer to the interpretation put forward by an employer in an employment dispute." Hamburger, Chevron *Bias*, 84 GEO. WASH. L. REV. at 1209. But when a court defers

to an agency, *a party to the case*, the court necessarily *depends* on that party and thereby abdicates its duty to make an *independent* judgment—and denies the other party its right to a basic requirement of due process, a neutral and detached judge.

Nor is a judge's power and duty to make an independent judgment excused when she faces an ambiguous statute. To the contrary, it remains the judiciary's obligation—not the executive's—to say what the law is. As this Court said, it is "elementary that the authority of *courts* [is invoked] to interpret a duly enacted statute . . . when there is some apparent ambiguity in its terms." *Watson v. Tax Comm'n*, 135 Ohio St. 377, 380 (1939) (emphasis added) (citation omitted); *see also Dana Corp. v. Testa, Tax Comm'r*, 152 Ohio St. 3d 602, ¶ 23 (2018) ("Given the ambiguity, *we* must interpret the statute.") (emphasis added) (no deference applied). Thus, even if § 4733.16(D) and the related regulations were ambiguous, the court of appeals improperly abdicated its duty to say what they mean.

Indeed, the court of appeals' opinion is perhaps a perfect example of the judicial abdication that deference requires. After finding ambiguity, the court's *entire* "analysis" concerning the dispositive question on the meaning of the law ran as follows: "Because there are different, reasonable readings of 'full-time manager,' we find that the term is ambiguous. As such, this court must defer to the Board's interpretation." App. 11a, ¶ 29. The court thus made no independent judgment about "what the law is." Instead, the court granted outcome-determinative deference to one of the parties in the case.

This Court should accept jurisdiction to confirm that it is the exclusive duty of the judiciary to say what the law is.

* * *

Proposition of Law No. 2: *R.C. § 4733.16(D) does not preclude an engineering firm from designating an independent contractor as its professional-engineering manager.*

Deference to the Board's interpretation was particularly inappropriate here because *the statute is not ambiguous*. Section 4733.16(D) required TWISM to "designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in responsible charge of the professional engineering . . . activities and decisions." The Board demanded deference to its contention that § 4733.16(D) included an additional requirement, that the designated manager (or partner or officer, etc.) be a full-time, W-2 employee—even though the statute itself says no such thing. The Board also demanded deference to its interpretation of related regulations, even though the regulations plainly contradict the Board's interpretation of § 4733.16(D). As noted above, Ohio Adm. Code § 4733-39-02(B) defines "full[-]time" as working "substantially all" of a firm's engineering hours.[2] And it is undisputed that Cooper worked all of TWISM's engineering hours. Thus, the undisputed facts and the Board's own, official regulatory definition support

[2] *Compare* Ga. Comp. R. & Regs. 180-10-.01(2) ("In order to be considered eligible for a certificate of authorization, any individual who is in responsible charge of the practice of professional engineering for" a firm "shall be *a full-time employee* of" of the firm "regularly engaged in the practice of professional engineering.") (emphasis added).

TWISM's interpretation, not the Board's. In these circumstances, deference shouldn't even be considered—much less reflexively applied. *See OfficeMax, Inc. v. U.S.*, 428 F.3d 583, 598 (6th Cir. 2005) ("*Skidmore* deference does not apply to a line of reasoning that an agency could have, but has not yet, adopted.").

The Court should accept jurisdiction and hold that § 4733.16(D) does not require a firm to designate a "full-time, W-2 employee" as its manager.

* * *

Proposition of Law No. 3: *If this Court adopts Propositions of Law 1 and 2, the case should be remanded only for consideration of appellant's assignment of error concerning attorney's fees.*

The court of appeals held that because it reversed the trial court's decision, TWISM's assignment of error concerning its motion for attorney's fees was moot. App. 11a, ¶ 33. TWISM therefore submits that if the Court reverses the court of appeals' decision, the Court should remand only for the purpose of considering TWISM's assignment of error concerning its motion for attorney's fees.

* * *

CONCLUSION

The Court should accept jurisdiction.

Dated: November 29, 2021

Respectfully submitted,

s/ Oliver J. Dunford

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by e-mail this 29th day of November, 2021 upon the following counsel:

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Kiren Mathews

From: Oliver J. Dunford
Sent: Monday, November 29, 2021 8:08 AM
To: Incoming Lit
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Attachments: 2021.11.29 - TWISM Notice of Appeal.pdf; 2021.11.29 - TWISM Memo in Support of Jurisdiction.pdf; 2021.11.29 - TWISM Memo in Support of Jurisdiction--Appendix.pdf

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From: Efilingportal [mailto:Efilingportal@sc.ohio.gov]
Sent: Monday, November 29, 2021 11:02 AM
To: Oliver J. Dunford
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Dear Oliver Dunford:

The status of the documents you submitted through the Supreme Court of Ohio's E-Filing Portal is listed below.

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Memorandum in support of jurisdiction	FILED	11/29/2021
Lower court decision	FILED	11/29/2021

The above-listed documents have been filed into 2021-1440 TWISM Enterprises, LLC, d/b/a valuCadd Solutions v. State Board of Registration for Professional Engineers and Surveyors.

The documents may be accessed via the online docket at: 2021-1440

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