

CAUSE NO. D-1-GN-14-000355

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| TEXAS ASSOCIATION OF | § | IN THE DISTRICT COURT OF |
| ACUPUNCTURE AND ORIENTAL | § | |
| MEDICINE, | § | |
| PLAINTIFF | § | |
| | § | |
| v. | § | |
| | § | |
| TEXAS BOARD OF CHIROPRACTIC | § | |
| EXAMINERS, | § | TRAVIS COUNTY, TEXAS |
| DEFENDANT | § | |
| | § | |
| v. | § | |
| | § | |
| TEXAS CHIROPRACTICE | § | |
| ASSOCIATION, | § | |
| INTERVENOR | § | 201ST JUDICIAL DISTRICT |

PLAINTIFF’S FOURTH AMENDED PETITION FOR DECLARATORY RELIEF

TO THE HONORABLE JUDGE OF THE DISTRICT COURT:

Plaintiff Texas Association of Acupuncture and Oriental Medicine (“Acupuncture Association”) files this Fourth Amended Petition for Declaratory Relief against Defendant Texas Board of Chiropractic Examiners (“Chiropractic Board”), and as grounds for this lawsuit will show the following:

I. DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.4, except as modified by the Second Amended Agreed Pretrial Scheduling Order and Discovery Control Plan.

II. PARTIES AND SERVICE OF PROCESS

2. Plaintiff Acupuncture Association is the largest professional organization of licensed acupuncturists and practitioners of Oriental medicine in Texas. It files this suit through

its attorneys of record, Shelby O'Brien, Amy Prueger, and the firm of Enoch Kever PLLC, 7600 N. Capital of Texas Hwy, Building B, Suite 200, Austin, Texas 78731.

3. Defendant Texas Board of Chiropractic Examiners is sued. It has been served and has answered.

4. On January 27, 2020, the Texas Chiropractic Association intervened in this suit as a defendant and filed a general denial.

III. JURISDICTION AND VENUE

5. This suit is brought as a rule challenge under Texas Government Code, Section 2001.038. Thus, the Acupuncture Association may only bring suit in a Travis County district court. Additionally, Section 2001.038 waives the Chiropractic Board's immunity from suit.

IV. STANDING

6. The Chiropractic Board did not challenge the Acupuncture Association's standing when this case was litigated to final judgment before remand by the court of appeals. The Chiropractic Board's standing challenge is brand new on remand. The Acupuncture Association has standing to bring its claims.

7. The doctrine of standing requires that there be a real controversy between the parties, which will be actually determined by the judicial declaration sought. *Texas Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993). For a person to have standing, he or she must have a concrete injury. *See Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013). Under Texas Government Code, Section 2001.038, a plaintiff has standing to bring a declaratory judgment action if a rule interferes with or impairs a legal right or privilege of the plaintiff. The Section 2001.038 standing requirements are no greater than, and are simply another expression of, the general doctrine of standing. *See id.* at 582 n.83; *see also Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 567 (Tex. 2021).

8. An association like the Acupuncture Association has standing if (1) its members would otherwise have standing to sue in their own right, (2) the interests the organization seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor relief requested requires the participation of individual members in the lawsuit. *See Texas Ass'n of Bus.*, 852 S.W.2d at 447. Under each of these elements, the Acupuncture Association has standing to challenge the Chiropractic Board's acupuncture rules as being beyond the statutory scope of chiropractic and thus invalid.

9. Acupuncturists who are members of the Acupuncture Association are licensed to practice acupuncture in the State of Texas under Texas Occupations Code, Chapter 205 ("Acupuncture Chapter"). With a sole exception for acudetox specialists, the chapter provides that "a person may not practice acupuncture in this state unless the person holds a license to practice acupuncture issued by the acupuncture board under this chapter." TEX. OCC. CODE §§ 205.201, 205.303. The chapter does not apply to a health care professional licensed under another statute of this state and acting within the scope of the license. *Id.* § 205.003. Thus, if chiropractors are not acting within the scope of their license in practicing acupuncture, then they are engaging in the unauthorized practice of acupuncture under the Acupuncture Chapter.

10. Individual acupuncturists who are members of the Acupuncture Association would have standing to sue in their own right because the Chiropractic Board's rules interfere with their legal rights and privileges as licensed acupuncturists. As discussed below, the Acupuncture Chapter sets forth specific intensive education and training requirements to safeguard patients who receive acupuncture and a license issued by the Texas State Board of Acupuncture Examiners

(“Acupuncture Board”) is required to practice the profession.¹ The Chiropractic Board is allowing chiropractors to practice acupuncture without completing the significant hours of training the legislature has determined are needed for a person to competently and safely perform the procedure and without obtaining a license from the Acupuncture Board.

11. Because the rules in question grant chiropractors the right to perform a procedure that is outside the statutory scope of chiropractic and in which chiropractors are not competently trained, the privilege of practicing acupuncture is diminished in quality and standards. As a result, acupuncturists’ legal rights and privileges are interfered with and impaired. It is well-established that physicians have standing to complain of an agency’s rule that infringes on the practice of medicine. *See Texas Bd. of Chiropractic Exam’rs v. Tex. Med. Bd.*, 270 S.W.3d 777, 782 & n.6 (Tex. App.—Austin 2008, no pet.); *Texas State Bd. of Podiatric Med. Exam’rs v. Tex. Orthopaedic Ass’n*, No. 03-04-00253-CV, 2004 WL 2556917, at *3 (Tex. App.—Austin 2004, no pet.) (mem. op.). Indeed, the Texas Supreme Court recently confirmed the standing of the Texas Medical Association to bring claims challenging Chiropractic Board rules that were alleged to infringe on the practice of medicine. *See Texas Bd. of Chiropractic Exam’rs*, 616 S.W.3d at 567. Likewise, acupuncturists have standing to complain of a Board rule that infringes on the practice of acupuncture.

12. Further, acupuncturists are economically injured by the disparate training requirements between chiropractors and acupuncturists. As compared to chiropractors, acupuncturists are required to complete significantly more hours of training—at a much greater cost and on an ongoing basis—in order to practice acupuncture.

¹ The Acupuncture Board does not operate independently from the Texas Medical Board. The Texas Medical Board adopts all rules governing acupuncture. Additionally, the Acupuncture Board generally operates “[s]ubject to the advice and approval of the [Texas Medical Board]....” *See* TEX. OCC. CODE §§ 205.101-.102.

13. The interests the Acupuncture Association seeks to protect through this lawsuit are also germane to its organizational purpose. One of the Acupuncture Association's primary purposes is to protect and promote the practice of acupuncture and oriental medicine in Texas by promoting high standards of education and patient care. Acupuncturists who are members of the Acupuncture Association are licensed to practice acupuncture in Texas only so long as they comply with the requirements and regulations of the Acupuncture Chapter and obtain a license from the Acupuncture Board. In this lawsuit, the Acupuncture Association seeks to protect the value of its members' right to practice acupuncture. The question of who has the right to practice acupuncture is directly related to the quality of the care provided.

14. Finally, neither the claims asserted in this lawsuit nor the relief requested requires the participation of the Acupuncture Association's individual members. The Acupuncture Association questions the validity of Chiropractic Board rules allowing chiropractors to practice acupuncture. These issues are generally questions of law, and the relief sought is a declaratory ruling that would be applied uniformly to acupuncturists and chiropractors.

15. For all of these reasons, the Acupuncture Association has standing to bring this lawsuit.

IV. BACKGROUND

16. Texas Occupations Code, Chapter 201 governs the practice of chiropractic ("Chiropractic Chapter"), and Texas Occupations Code, Chapter 205 governs the practice of acupuncture.

17. A chiropractor may only perform procedures that are within the statutory scope of the practice of chiropractic. *See* TEX. OCC. CODE § 201.002. All incisive and surgical procedures are expressly identified as outside the scope of chiropractic practice. *See id.* § 201.002(a)(3), (b)(2).

The provision prohibiting incisive procedures identifies only one exception: “the use of a needle for the purpose of drawing blood for diagnostic testing.” *Id.* § 201.002(a)(3).

18. The Chiropractic Chapter further limits the practice of chiropractic to diagnosing, analyzing, examining, or evaluating the biomechanical condition of the spine and musculoskeletal system, and performing nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system. *Id.* § 201.002(b)(1)-(2).

19. With a sole exception for acudetox specialists, the Acupuncture Chapter provides that “a person may not practice acupuncture in this state unless the person holds a license to practice acupuncture issued by the acupuncture board under this chapter.” *Id.* §§ 205.201, 205.303. The chapter does not apply to a health care professional licensed under another statute of this state and acting within the scope of the license. *Id.* § 205.003. Thus, if chiropractors are not acting within the scope of their license in practicing acupuncture, then they are engaging in the unauthorized practice of acupuncture under the Acupuncture Chapter.

20. Since the early 1990s, the Chiropractic Board has controversially asserted that acupuncture and other procedures involving needles, such as needle electromyography, are within the scope of the practice of chiropractic. The legislature responded to this controversy by enacting the current statutory language in the Chiropractic Chapter prohibiting chiropractors from making an incision into any tissue, cavity, or organ by any person or implement, except for the use of a needle for the purpose of drawing blood for diagnostic testing. Soon after, the attorney general issued an opinion declaring that acupuncture is outside the scope of the practice of chiropractic. Tex. Att’y Gen. Op. No. DM-415 (1996).

21. In 1997, in the course of the Acupuncture Board’s sunset review, the legislature amended the Acupuncture Chapter to redefine acupuncture as the “nonincisive, nonsurgical”

insertion of acupuncture needles. The legislature did not amend the Chiropractic Chapter to allow chiropractors to practice acupuncture, despite attempts to do so during that legislative session and subsequent legislative sessions (as recently as the 2021 legislative session). *See, e.g.*, Tex. H.B. 943, 87th Leg., R.S. (2021). Because of this change to the Acupuncture Chapter, however, the attorney general issued a new opinion. Reading the Acupuncture Chapter and Chiropractic Chapter *in pari materia*, the attorney general stated that chiropractors could practice acupuncture. Tex. Att’y Gen. Op. No. DM-471 (1998).

22. During the 2005 legislative session, the legislature enacted legislation requiring the Chiropractic Board to adopt rules clarifying which specific activities are included in the scope of the practice of chiropractic. The Chiropractic Board responded by promulgating rules authorizing chiropractors to perform acupuncture and needle electromyography.

23. The Texas Medical Association challenged rules allowing chiropractors to perform needle electromyography on grounds that it was an incisive procedure involving a needle and thus was outside the statutory scope of chiropractic. The district court agreed and invalidated the rules authorizing chiropractors to perform needle electromyography. The Austin Court of Appeals affirmed this portion of the district court’s judgment because evidence in the record indicated that some needles used for needle electromyography are incisive, as defined by Chiropractic Board rules. *See Texas Bd. of Chiropractic Exam’rs v. Tex. Med. Ass’n*, 375 S.W.3d 464, 497 (Tex. App.—Austin 2012, pet. denied).

24. The Acupuncture Association filed this suit challenging the Chiropractic Board’s rules authorizing chiropractors to practice acupuncture and, more generally, use needles. The parties filed competing motions for summary judgment. This Court granted the Chiropractic Board’s motion and denied the Acupuncture Association’s competing motion.

25. The Acupuncture Association appealed. The Austin Court of Appeals reversed and remanded in part and affirmed in part. Specifically:

- The court of appeals concluded that the Chiropractic Board’s rules defining “incision” as a “cut or surgical wound” and providing that “needles may be used in the practice of chiropractic under standards set forth by the Board but may not be used for procedures that are incisive or surgical” are valid. *See* former 22 TEX. ADMIN. CODE §§ 78.13(a)(4), 78.13(b)(2) (renumbered 22 TEX. ADMIN. CODE §§ 78.1(a)(4), (b)(2)). Thus, the court affirmed this portion of the summary judgment.
- The court of appeals rejected the Chiropractic Board’s argument that because the Acupuncture Chapter defines acupuncture as the “nonsurgical, nonincisive insertion of an acupuncture needle,” acupuncture needles are nonincisive as a matter of law. The court reasoned that it is improper to read the Acupuncture Chapter and Chiropractic Chapter *in pari materia* so that a definition in the Acupuncture Chapter can inform the prohibition on incisive procedures in the Chiropractic Chapter.
- Because the court of appeals believed the record did not establish that either party was entitled to judgment as a matter of law on whether acupuncture is within the scope of the practice of chiropractic, the court reversed and remanded the Acupuncture Association’s challenge to the Chiropractic Board’s rules authorizing chiropractors to practice acupuncture. *See* former 22 TEX. ADMIN. CODE § 78.13(e)(2)(C) (renumbered as 22 TEX. ADMIN. CODE § 78.1(e)(2)(C)); *id.* § 78.14 (repealed, adopted as new rule, and subsequently amended).

See Texas Ass’n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam’rs, 524 S.W.3d 734 (Tex. App.—Austin 2017, no pet.).

26. After the mandate issued, in July 2017, the parties filed a joint motion to abate this proceeding so that the Chiropractic Board could engage in a negotiated rulemaking proceeding that would potentially resolve the issues in this lawsuit. The case remained abated until late May 2019. During the abatement, the Chiropractic Board elected not to pursue a negotiated rulemaking and instead to hold informal stakeholder meetings.

27. Ultimately, in November 2018, the Chiropractic Board repealed Rule 78.14 authorizing chiropractors to practice acupuncture and adopted a new, substantively different rule, also numbered Rule 78.14. The Acupuncture Association believes the Chiropractic Board did not

negotiate in good faith. For instance, many of the features of the old rule, including the paltry 100 hours of training set forth under that rule, remain. New Rule 78.14 (as amended in 2019 and 2020) continues to authorize chiropractors to practice acupuncture in violation of the Chiropractic Chapter and the Acupuncture Chapter. *See* 43 TEX. REG. 7763 (Nov. 30, 2018). The Chiropractic Board lacked statutory authority to adopt this new rule.

28. The Chiropractic Board also renumbered its scope of practice rule, which includes the provision previously numbered as Rule 78.13(e)(2)(C) that was remanded by the court of appeals, to become Rule 78.1. New Rule 78.1(e)(2)(C) states that acupuncture is within the scope of the practice of chiropractic. Like Rule 78.14, Rule 78.1(e)(2)(C) is also invalid.

V. CAUSE OF ACTION

Request for Declaratory Relief under Texas Government Code, Section 2001.038

29. The preceding paragraphs are incorporated here by reference.

30. The Acupuncture Association brings this suit for declaratory judgment under Texas Government Code, section 2001.038.

31. The Acupuncture Association seeks a declaration that 22 Texas Administrative Code, Section 78.1(e)(2)(C) (including acupuncture in the chiropractic scope of practice), and Section 78.14 (governing the practice of acupuncture by chiropractors) are invalid because (1) the Chiropractic Board lacked statutory authority to adopt these rules as they unlawfully authorize chiropractors to perform acupuncture in violation of the Chiropractic Chapter, and, consequently, (2) the rules unlawfully authorize chiropractors to engage in the practice of acupuncture in violation of the Acupuncture Chapter and Chiropractic Chapter. The Chiropractic Board's rules both contravene specific statutory language in these chapters and run counter to the general objectives and purposes of these chapters.

32. To practice acupuncture in this state, a person must hold a license to practice acupuncture issued by the Acupuncture Board under the Acupuncture Chapter. *See* TEX. OCC. CODE § 205.201. The only exception is for acudetox specialists. *Id.* §§ 205.201, 205.303. The Acupuncture Chapter provides that the chapter does not apply to health care professionals licensed under another statute of this state and acting within the scope of the license. *See id.* § 205.003(a). But because the Chiropractic Chapter does not authorize chiropractors to practice acupuncture, chiropractors are not exempted from the licensure requirements of the Acupuncture Chapter. As such, the challenged rules are invalid because they unlawfully authorize chiropractors to practice acupuncture in violation of the Acupuncture Chapter.

33. For several reasons, the Chiropractic Chapter does not authorize chiropractors to practice acupuncture.

34. First, chiropractors may not practice acupuncture because it is legally and factually an incisive procedure. The Chiropractic Chapter prohibits incisive procedures, with one limited exception for diagnostic blood draws. *See* TEX. OCC. CODE § 201.002(c). The Chiropractic Chapter defines “incisive or surgical procedure” broadly as “making an incision into *any* tissue, cavity, or organ by *any* person or implement.” *Id.* § 201.002(a)(3) (emphasis added). The legislature has never excluded acupuncture from the prohibition on incisive procedures. In fact, the legislature has repeatedly refused to amend the Chiropractic Chapter to allow chiropractors to practice acupuncture, including as recently as the 2021 legislative session. *See, e.g.*, Tex. H.B. 943, 87th Leg., R.S. (2021).

35. In the past, the Chiropractic Board justified its adoption of rules authorizing chiropractors to practice acupuncture by latching onto the definition of acupuncture in the Acupuncture Chapter, which is “the nonsurgical, nonincisive insertion of an acupuncture needle.” TEX. OCC. CODE § 205.001(2)(A). But as the Austin Court of Appeals has now concluded, nothing

in the Chiropractic Chapter authorizes the Board to import a definition from an entirely different chapter in order to determine—and indeed exceed—its governing chapter’s statutory scope. *Texas Ass’n of Acupuncture & Oriental Med.*, 524 S.W.3d at 743-45. The statutory scope of chiropractic is established by the Chiropractic Chapter, not by any other chapter of the Occupations Code. *See Texas Bd. of Chiropractic Exam’rs*, 375 S.W.3d at 467; *Tex. Ass’n of Acupuncture & Oriental Med.*, 524 S.W.3d at 743-45. It is, in short, impermissible to read the two chapters *in pari materia*, as the Austin Court of Appeals has now concluded. The Chiropractic Board may not rely on the Acupuncture Chapter in claiming acupuncture is a nonincisive procedure. And statutorily, under the Chiropractic Chapter, needle use is considered incisive.

36. Acupuncture is also an incisive procedure as a matter of practice. Acupuncture needles are sharp objects that vary in length and size. All acupuncture needles penetrate the skin, dividing tissue and creating the risk of bleeding and infection. There is no such thing as an “incisive” or “nonincisive” needle. All needles, by their nature, are incisive. All needles (acupuncture or otherwise) break, open, or separate the skin—it is just a matter of the degree to which they are incisive.

37. Second, acupuncture and chiropractic are entirely separate healthcare practices and professions with entirely separate educational and training requirements. The purpose and science behind these two healthcare practices are fundamentally different. There is no overlap between these professions, which are statutorily regulated by separate regulatory boards. The legislature chose to create two separate regulatory regimes governing these separate practices and professions.

38. Third, the Chiropractic Chapter defines chiropractic as the performance of procedures involving the spine and musculoskeletal system. In comparison, acupuncture treats and mitigates a variety of “human conditions” in various parts of the human body, not just those involving the spine and musculoskeletal system. *See* TEX. OCC. CODE §§ 201.002, 205.001(2).

Thus, acupuncture treats conditions that chiropractors are not permitted to treat under the Chiropractic Chapter. And the Chiropractic Board's acupuncture rule is also not limited to the musculoskeletal system.

39. In sum, because the challenged rules authorize chiropractors to treat conditions in contravention of the Chiropractic Chapter and Acupuncture Chapter and run counter to the general objectives of these chapters, they are invalid. *See Texas Orthopaedic Ass'n v. Tex. State Bd. of Podiatric Exam'rs*, 254 S.W.3d 714, 721 (Tex. App.—Austin 2008, pet. denied); *Texas Bd. of Chiropractic Exam'rs*, 616 S.W.3d at 569.

40. The result of the Board's adoption of the challenged rules is a threat to public health and safety. "An acupuncture needle in unskilled hands can cause serious damage." *Andrews v. Ballard*, 498 F. Supp. 1038, 1054 (S.D. Tex. 1980). Acupuncturists licensed by the Acupuncture Board are statutorily required to complete an intensive course of study in order to lawfully practice acupuncture. The legislature prescribed this intensive course of study to protect public health. The Chiropractic Board's rules thwart these public health concerns by allowing unskilled chiropractors to engage in the practice of acupuncture. *See Texas State Bd. of Chiropractic Exam'rs*, 391 S.W.3d 343 at 347 (observing that a court must "consider the consequences of a particular construction"). The 100 hours of training in acupuncture authorized by Rule 78.14 for chiropractors to practice acupuncture is fundamentally inadequate. In comparison, acupuncturists must complete 2,625 hours of initial training with a significant clinical component.

41. Finally, Rule 78.14 is fundamentally unfair, anticompetitive, and misleading to the public. Acupuncturists must complete extensive and expensive educational and training requirements at an acupuncture school in order to become licensed to practice acupuncture. In contrast, under Rule 78.14, chiropractors may obtain a "permit" to practice acupuncture with a mere 100 hours of training. Rule 78.14 places acupuncturists at an economic disadvantage by

authorizing chiropractors to practice the profession with nowhere near the training and educational requirements required for acupuncturists. Additionally, Rule 78.14 authorizes chiropractors to advertise they are “Board Certified” or “Board Certified in Chiropractic Acupuncture.” This is misleading to the public when chiropractors in fact are not licensed acupuncturists. In fact, terms like “Board Certified” could lead the public to believe chiropractors possess greater credentials than licensed acupuncturists.

42. For these reasons, the Chiropractic Board’s rules authorizing chiropractors to engage in the practice of acupuncture should be declared invalid.

PRAYER

Plaintiff Texas Association of Acupuncture and Oriental Medicine prays that on final hearing, the Court grant the following relief:

- (1) A declaratory judgment under Texas Government Code, Section 2001.038 that 22 Texas Administrative Code, Sections 78.1(e)(2)(C) and 78.14 are invalid; and
- (2) Any further relief to which Plaintiff may be justly entitled, at law or in equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 26, 2022, a true and correct copy of the above and foregoing has been served by electronic filing service on the following:

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