03-22-00520-CV

CASE No. 03-22-00___-CV

In the Court of Appeals for the Third District
at Austin, Texas

In re TEXAS BOARD OF CHIROPRACTIC EXAMINERS and TEXAS CHIROPRACTIC ASSOCIATION

PETITION FOR WRIT OF MANDAMUS

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Respondent: Hon. Jan Soifer, Presiding Judge, 345th District Court, Travis County

Real Party in Interest: Texas Association of Acupuncture and Oriental Medicine

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STATEMENT OF THE CASE

Nature of the Case:	The underlying case is a rule challenge pursuant to Tex. Gov't Code § 2001.038(a). This original proceeding challenges the trial court's order refusing to limit discovery in a way that prevents the Acupuncture Association from eliciting expert testimony and obtaining information concerning matters that are patently irrelevant to the rules' validity.
Relators:	The Texas Board of Chiropractic Examiners and the Texas Chiropractic Association
Real Party in Interest:	The Texas Association of Acupuncture and Oriental Medicine
Respondent Trial Court:	The Honorable Jan Soifer, Presiding Judge, 345th District Court, Travis County.
Respondent's Action Necessitating Mandamus Relief:	On August 19, 2022, Respondent signed an order refusing to limit discovery to the facts relevant to the issues in dispute in this rule challenge as required by *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558 (Tex. 2021). In particular, Respondent failed to prevent the Acupuncture Association from conducting discovery concerning: chiropractors' qualifications to use acupuncture needles, including their education, knowledge, and training; previous and pending complaints against chiropractors who use acupuncture, including complaints about how such chiropractors advertise; enforcement of the Board's rules against chiropractors who use acupuncture; the stakeholder meetings conducted by the Board after this Court's remand of the case; and the history of interactions between the Acupuncture Association, the Board, and the Chiropractic Association.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this original proceeding pursuant to Texas Government Code section 22.221(b)(1) and Texas Rule of Appellate Procedure 53.

ISSUES PRESENTED

Issue One: Did the trial court abuse its discretion by refusing to limit discovery in this rule challenge in a manner consistent with the limited scope of review for rule challenges, as those limits are explained in *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558 (Tex. 2021) and, in doing so, authorize the discovery of patently irrelevant information?

Issue Two: Do the Board and the Chiropractic Association lack an adequate remedy by appeal?

STATEMENT OF FACTS

I. The rules the Acupuncture Association originally challenged

The Acupuncture Association filed the underlying rule-challenge suit in 2014. MR1. The suit, as filed, challenged four rules: 78.1(b)(2) (authorizing the use of needles in the performance of chiropractic, but prohibiting their use for "procedures that are incisive or surgical"); 78.1(a)(4) (defining an "incision" as "a cut or surgical wound; also a division of the soft parts made with a knife or hot laser"); 78.1(e)(2)(C) (authorizing chiropractors to use acupuncture); and 78.14 (governing chiropractors' use of acupuncture).[1] After the parties filed cross-motions for summary judgment, the trial court granted the Board's motion for summary judgment and denied the Acupuncture Association's. *See Tex. Ass'n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam'rs*, 524 S.W.3d 734, 736 (Tex. App.—Austin 2017, no pet.). The Acupuncture Association appealed that decision. *Id.*

II. In the appeal from the summary judgment, this Court validated two of the Board's rules, narrowing the issues to be decided.

On appeal, the Acupuncture Association argued that "the statutory scope of practice . . . prohibits the use of any needles in the practice of chiropractic, except for

[1] For the convenience of the Court, references to the Rules in this petition will be to the current Rules. At various points over the years, those same rules have been numbered as follows: (a) Rule 78.1(b)(2) was previously Rule 78.13(b)(2); when the Acupuncture Association filed its original petition, the Rule was 75.17(a)(3); (b) Rule 78.1(a)(4) was previously 78.13(a)(4); when the Acupuncture Association filed its original petition, it was Rule 75.17(b)(4); (c) Rule 78.1(e)(2)(C) was previously 75.17(e)(2)(C); and (d) current Rule 78.14 was previously Rule 75.21.

diagnostic blood draws, and that any penetration of the skin by a needle is 'incisive'." *Id.* at 740. After reviewing its analysis of the "incisiveness" issue in an earlier decision involving the Texas Medical Association, this Court noted that, there, the summary judgment evidence revealed that bevel-edged needles used for needle EMG would be incisive "under any 'conceivable definition of that term'." *Id.* at 741.

The Court next considered whether the Board's definition of the term "incision" as a "cut or surgical wound" was reasonable and consistent with the Chiropractic Act. *Id.* at 742. The Court concluded that the definition, which recognizes that some needles may be incisive while others are not, was consistent with both the technical meaning of the term "incisive" that the Board had adopted and the Legislature's recognition that "acupuncture needles are at least capable of being inserted into the body in a "nonincisive" and "nonsurgical" manner. *Id.* For that reason, the Court upheld the trial court's summary judgment in favor of the Board as to Rules 78.1(a)(4) and 78.1(b)(2) (formerly Rules 78.13(a)(4) and 78.13(b)(2)). *Id.*

As to current Rules 78.1(e)(2)(C) and 78.14, the Court concluded that neither party had established its entitlement to judgment as a matter of law, and it reversed the judgment as to those rules and remanded the cause to the trial court for further proceedings concerning the validity of those rules. *Id.* at 745-46.

III. After remand, the parties sought to defer trial in the case.

After the cause was remanded in 2017, the Acupuncture Association and the

Board jointly sought an indefinite abatement for the Board to appoint a convener "to determine whether it would be advisable to proceed with negotiated rulemaking as a means of resolving the disagreements between the Board and the [Acupuncture] Association that gave rise to this litigation." MR2. The trial court granted the abatement. MR3.

After the abatement was granted, the Board decided, instead of appointing a convener, to hold stakeholder meetings as a precursor to a rulemaking proceeding pursuant to Tex. Gov't Code §§ 2001.021 through 2001.037. MR4 at 2. In hopes of resolving the litigation through that process, the Board and the Acupuncture Association requested that the case remain abated and not be dismissed for want of prosecution. MR4. The Board then held a number of informal conferences, after which it promulgated a new rule concerning chiropractors' use of acupuncture. MR5, at 2. Because a new legislative session had just begun, the Acupuncture Association then asked that the abatement of the case continue until the end of the 2019 session, because it was "exploring a potential legislative solution to the parties' current dispute." MR5 at 3. The motion for continued abatement was granted. MR6.

At the end of December 2019, the trial court signed an agreed pretrial scheduling order and discovery control plan, setting the case for a bench trial on October 5, 2020.

MR7.[2] Because of the pandemic, an amended agreed pretrial scheduling order and discovery control plan was signed in June 2020, moving the bench trial to August 16, 2021. MR9. Finally, the parties' current pretrial scheduling order and discovery control plan was signed on July 16, 2021 again moving the bench trial, this time from August 16, 2021 to September 26, 2022. MR10. The July 16, 2021 agreed order specifically recited that one reason the parties agreed to move the bench trial to 2022 was because they had been "awaiting a Texas Supreme Court opinion that could have an impact on issues in this case." MR10 at 1.

The opinion the parties had been awaiting was *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n.* 616 S.W.3d 558 (Tex. 2021). *See* MR11. In its decision, the Supreme Court emphasized the limited nature of a court's inquiry in a § 2001.038(a) case, setting out the legal issue to be decided not once, but three times. 616 S.W.2d at 569, 570, and 571. In the course of conducting the limited review of the rules in that case, the Court gave several examples of issues a court faced with a rule challenge should NOT decide: (1) whether a health care professional is qualified to perform a procedure authorized by the challenged rule, *id.* at 569; (2) whether the rule authorizes a health care provider to engage in an activity included in the practice of health care of a type other than the type for which she is licensed, *id.* at 570; and (3) whether, as a policy matter, it would be

[2] Shortly after this scheduling order was signed, the Texas Chiropractic Association intervened in the case. MR8.

good for the health care provider to engage in a particular activity. *Id.* at 571 and 575.

IV. The Acupuncture Association signals an intent to adduce expert testimony and then propounds discovery about patently irrelevant matters.

On May 20, 2022, all parties designated experts. MR12 at 12-29 (the Acupuncture Association's designation); and MR13 at 29-53 (Board's conditional designation) and 55-129 (the Chiropractic Association's designation). The Acupuncture Association designated experts to testify about:

- how acupuncture became a regulated profession in Texas;
- whether chiropractors who lack acupuncture licenses have the expertise, training, and knowledge to practice acupuncture safely;
- the cost of attending acupuncture school;
- continuing education requirements for licensed acupuncturists;
- whether there is overlap between training to perform acupuncture and chiropractic training;
- alleged instances of misrepresentations (presumably by chiropractors) regarding training and standards for performing acupuncture;
- alleged instances of misleading advertisements by chiropractors who practice acupuncture;
- the Board's good faith (or lack of same) during informal stakeholder meetings that took place before the promulgation of Rule 78.14; and
- how "acupuncture, as provided by chiropractors marginally trained in acupuncture, is directly equivalent to spinal adjustments delivered by acupuncturists marginally trained in biomechanical manipulation of the spine" and is a threat to public safety.

MR12 at 12-21. All four of the Acupuncture Association's experts were also designated to testify about whether acupuncture needles – and the practice of acupuncture – is incisive or non-incisive. MR12 at 13 (Levy), 14 (Howlett), 16 (Doggett), and 21 (Schnyer).

After receiving and reviewing these designations, counsel for the Board and for the Chiropractic Association conferred with counsel for the Acupuncture Association on June 2, 2022, about limiting the scope of discovery in accordance with *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n.* MR12 at 10. Counsel for the Acupuncture Association asserted that *Tex. Bd. of Chiropractic Exam'rs* does not require any limitations on discovery and refused to agree to the requested limits. *Id.* The following day, the Board and the Chiropractic Association filed a joint motion to limit discovery and the issues to be decided. MR12.

Five days later, the Acupuncture Association served the Board with a second set of requests for production and a second set of interrogatories. MR13 at 131-143.[3] Among other things, the Acupuncture Association sought the production of:

- complaints about chiropractors using acupuncture or solid filiform needles and advertising by chiropractors who use acupuncture;
- information about the Board's enforcement proceedings against chiropractors who use acupuncture or solid filiform needles or who

[3] On the same day, the Acupuncture Association served the Chiropractic Association with a set of discovery requests seeking the same types of information. MR13 at 145-154.

advertise their use of acupuncture;

- all communications from either Parker University or Texas Chiropractic College regarding: the rulemaking preceding adoption of Rule 78.14; the practice of acupuncture by chiropractors; or chiropractors' use of acupuncture needles;

- "all documents or communications supporting or referencing [the Board's] decision to reduce acupuncture training requirements from 200 hours in its proposed Rule 78.14 to 100 hours in the adopted Rule 78.14";

- "all documents or communications supporting, referencing, or arguing that 100 hours of training in acupuncture is sufficient for the safe and effective practice of acupuncture";

- all documents or communications "supporting, referencing, or arguing that chiropractors are capable of practicing acupuncture in a manner that is within the scope of practice set forth in Texas Occupations Code, Chapter 21";

- "all documents or communications concerning any situation or case TBCE is aware of in which a patient has been injured by a chiropractor performing acupuncture."

MR13 at 139-141. The Acupuncture Association also asked that the Board respond to interrogatories inquiring about:

- the extent of acupuncture-specific training and education completed by each chiropractor performing acupuncture since the promulgation of Rule 78.14;

- the number of hours of meridian and point location training chiropractors must complete to practice acupuncture in Texas;

- the number of hours of supervised patient treatment in acupuncture chiropractors must complete to practice acupuncture in Texas;

- the curriculum in acupuncture chiropractors must complete to obtain a

permit to practice acupuncture in Texas;

- the "specific clinical training required for a chiropractor to practice acupuncture" in Texas;
- the specific training Texas chiropractic schools require regarding chiropractors' use of acupuncture needles or solid filiform needles;
- the number and type of enforcement actions the Board has initiated against chiropractors based on the chiropractors' advertising that they practice acupuncture or "chiropractic acupuncture";
- "the accredited chiropractic curriculum specific to acupuncture or the use of solid filiform needles" taught at Texas chiropractic schools; and
- any situation or case the Board is aware of in which a patient has been injured by a chiropractor performing acupuncture.

MR13 at 141-143. The Board and the Chiropractic Association objected to these requests and interrogatories as exceeding the permissible scope of discovery in a rule challenge, specifically referencing *Tex. Bd. of Chiropractic Exam'rs*. MR13 at 156-172; 176-197.

V. Respondent denies the requested relief.

The trial court heard the motion to limit discovery and issues to be decided on July 28, 2022. On August 19, 2022, the court signed an order denying the motion without providing reasons for the denial. *See* Appendix A to this Petition.

ARGUMENT

In *Texas Board of Chiropractic Examiners v. Texas Medical Association*, the Supreme Court of Texas emphasized the limited nature of a court's inquiry in a rule-challenge,

stating that the inquiry had to be narrow "**[t]o prevent expensive and time-consuming usurpations of administrative agencies' policymaking work.**" 616 S.W.3d at 571 (emphasis added).

In this case, the Acupuncture Association describes its extensive discovery as limited, MR 13 at 3, 5, and 6, and says that the information it seeks is "necessary to evaluate . . . whether the [Board's] acupuncture rules are reasonable." MR13 at 9. It also contends that, "[a]t a minimum, [the discovery sought] will provide background on the practice of acupuncture by chiropractors, which will aid [the] Court's decision." MR13 at 9. In other words:

- the Acupuncture Association contends that, despite the clear language of *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n,* the court should evaluate the reasonableness of the rules; and

- although whether a particular procedure "*should* be used by chiropractors is a policy judgment for the Legislature and the Board, not for the courts," 616 S.W.3d at 575, the Acupuncture Association intends to adduce evidence directed to that very issue under the guise of providing "background" for the court.

If the court's inquiry in a rule challenge is limited to a textual analysis of the statutes delegating authority to the agency and the agency's rules, then discovery ***must be*** limited, as well. Because Respondent failed to recognize that fact, Respondent abused her discretion by denying the Board and Chiropractic Association's motion, and mandamus is the appropriate remedy to prevent the harm the Board and the Chiropractic Association would otherwise suffer.

I. Denial of the Motion to Limit Discovery Allows the Acupuncture Association to Conduct Discovery – and Requires the Board and the Chiropractic Association to Conduct Discovery – of Patently Irrelevant Matters.

A. The Court's earlier decision in this case defines the issues to be decided in the trial court.

As noted in Statement of Facts section I., above, the summary judgment affirming the validity of the challenged rules was previously appealed in this case. *Tex. Ass'n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Ass'n*, 524 S.W.3d 734 (Tex. App.—Austin 2017, no pet.). This Court affirmed the summary judgment rendered for the Board on two rules, the current rules 78.1(a)(4) and 78.1(b)(2). *Id.* at 742-43. Rule 78.1(a)(4) defines the term "incision," and rule 78.1(b)(2) authorizes the use of needles in chiropractic unless the procedure is incisive or surgical. 22 Tex. Admin. Code §§ 78.1(a)(4) and 78.1(b)(2).

On the other hand, this Court reversed the earlier summary judgment deciding that current Rules 78.14 and 78.1(e)(2)(C) were valid as a matter of law. *Id.* at 743. In reversing that portion of the summary judgment, this Court held that neither party had established its right to judgment as a matter of law on the validity challenges. As a result, the Court remanded the challenges to the trial court "for further proceedings on this issue." *Id.* at 746. As the Acupuncture Association seemed to agree, *see* MR13 at 11, the issue on remand was whether Rules 78.1(e)(2)(C) and 78.14 are valid.

There is now no doubt that, to determine whether the rules are valid, the trial

court must answer the legal question: Has the Acupuncture Association shown that either: (a) Rules 78.1(e)(2)(C) and 78.14 contravene specific statutory language in the Chiropractic Act; or (b) those rules run counter to the general objectives of the Chiropractic Act, as those objectives are determined from the Act's language? The answer to this question turns on whether acupuncture needles are incisive or nonincisive. *See Tex. Ass'n of Acupuncture & Oriental Med.*, 524 S.W.3d at 739-745. This is the disputed issue of fact to be resolved by the court.

B. The discovery requests seek patently irrelevant information, and the expert disclosures indicate an intent to adduce evidence concerning patently irrelevant information at trial.

"Discovery is a tool to make the trial process more focused, not a weapon to make it more expensive." *In re Allstate Cty. Mut. Ins. Co.*, 227 S.W.3d 667, 668 (Tex. 2007) (orig. proceeding). Discovery requests "must show a reasonable expectation of obtaining information that will aid the dispute's resolution." *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (orig. proceeding). Stated differently, discovery requests must be "reasonably tailored" to seek discovery of only relevant matters. *Id.* To be relevant, evidence must tend to make a consequential fact more or less probable than it would be without the evidence. Tex. R. Evid. 401. In this case, that means that discovery should be narrowly tailored to seek only information that will make it more or less likely that acupuncture needles are incisive.

The Acupuncture Association does not need information about chiropractors'

education, training, and knowledge with respect to the use of acupuncture needles or solid filiform needles. Discovery about a chiropractor's coursework, clinical experience, or knowledge, the Board's enforcement proceedings against particular chiropractors, or the Board's actions during the rulemaking proceeding that resulted in Rule 78.14 would not make it more or less probable that acupuncture needles are incisive.[4] Furthermore, evidence showing the qualifications of chiropractors to practice acupuncture would not be admissible at trial. *See Tex. Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 511 S.W.3d 28, 33 (Tex. 2017) ("[W]e must decide this case based on the relevant Texas statutes, not on whether MFTs are qualified to make DSM diagnoses or whether the DSM or other states' laws allow them to."). The Supreme Court's decision in *Tex. Bd. of Chiropractic Exam'rs* also strongly suggests that evidence about complaints to the Board and Board enforcement proceedings concerning chiropractors' use of acupuncture or chiropractors' advertising that they use acupuncture would be inadmissible at trial. *See* 616 S.W.3d at 575 ("Whether [acupuncture] *should* be used by chiropractors is a policy judgment for the Legislature and the Board, not for the courts.") (emphasis in original).

Because none of this information would make it more or less likely that

[4] The Acupuncture Association has not alleged that there were procedural irregularities in the process of the rule adoption itself, MR14, and the deadline for amending pleadings in the case has passed. MR 10 at ¶ 4.

acupuncture needles are incisive, it is patently irrelevant to the pending claims.

C. The requested discovery and significant amounts of the intended expert testimony has no bearing on whether the Board's rule is consistent with the Chiropractic Act's language and objectives.

The extent of a chiropractor's education and training in the use of needles has no bearing on whether acupuncture needles are incisive. The existence (or not) of complaints or enforcement proceedings against chiropractors who use acupuncture to treat patients or who advertise that they use acupuncture to treat patients sheds no light on whether there are non-incisive acupuncture needles. The legal question the trial court must answer is not whether chiropractors' use of acupuncture needles in accordance with Rule 78.14 is a danger to the public. It is, instead, whether the language of the Rule contravenes specific language in the Chiropractic Act or the general objectives of that Act, as determined from the text of the Act. *Id.* at 570.

Evidence of chiropractors' qualifications to use acupuncture is only relevant to one issue: whether chiropractors *should* be allowed to treat their patients using acupuncture. Evidence of the existence (or non-existence) of complaints against chiropractors who use acupuncture is only relevant to one issue: whether chiropractors *should* be allowed to treat their patients using acupuncture. Evidence of Board enforcement actions against chiropractors who use or advertise that they use acupuncture to treat their patients is only relevant to one issue: whether chiropractors *should* be allowed to treat their patients using acupuncture. However, as the Supreme

Court has clearly said, whether a chiropractor *should* perform a particular procedure is not a question for the court. *Id.* at 575. It is, instead a policy judgment to be made by the Legislature and the Board. *Id.* As a result, any evidence offered to convince the court that the Board made the wrong policy decision when it authorized chiropractors to use acupuncture is patently irrelevant.

The Acupuncture Association contends that the information it seeks and the expert testimony it intends to offer would "provide background on the practice of acupuncture by chiropractors." MR13 at 9. The Supreme Court observed that "it was not improper for the trial court to allow evidence to be offered as background describing medical and chiropractic practice and placing the case in context." 616 S.W.3d at 568. Yet, for the Supreme Court's limit on the analysis a trial court may perform in a rule challenge to have meaning, there must be some corresponding effect on the types of evidence a trial court can consider. A challenger cannot discover and offer the same types of evidence the Supreme Court has said a trial court may not consider, simply by pretending to offer it for a different reason. Trial courts that allow rule-challengers to discover and offer improper types of evidence as "background" or "context" are essentially thwarting the Supreme Court's purpose in limiting the trial court's review: "prevent[ing] expensive and time-consuming usurpations of administrative agencies' policymaking work." *Id.* at 571.

The trial court's denial of the motion to limit allows the Acupuncture Association

to impose a significant burden on the Board and the Chiropractic Association by requiring them to respond to discovery requests and depose experts about patently irrelevant information. Because it does, the trial court abused its discretion by denying the Board's motion.

D. The Board and the Chiropractic Association have participated in and will continue to participate in discovery about the incisiveness of acupuncture needles.[5]

Although the Acupuncture Association argued that the motion to limit discovery was, in essence, a motion to strike its experts, MR13 at 12-13, it was not. The Board and the Chiropractic Association did not move to strike or exclude the Acupuncture Association's experts because all four have been designated to offer the opinion that acupuncture needles are incisive. See MR12 at 13 (Levy), 14 (Howlett), 16 (Doggett), and 21 (Schnyer). Relators intend to depose these experts about those opinions.

Relators have also responded to requests for production and interrogatories concerning acupuncture needles and whether they are incisive. *See, e.g.,* MR13 at 164, 169, and MR14 at 16. That there are so few pages of the responses that relate to the incisiveness of acupuncture needles demonstrates that the bulk of the discovery the Acupuncture Association seeks is patently irrelevant.

[5] As of the filing of this Petition, counsel for all parties to the case are discussing whether to agree to a stay of all proceedings during the pendency of this original proceeding.

II. Mandamus Relief Is The Only Available Remedy.

Mandamus relief is appropriate to correct an order authorizing the discovery of patently irrelevant information. *See In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998) (orig. proceeding). Mandamus is also the appropriate remedy for a discovery order that compels production well outside the bounds of proper discovery. *See In re Contract Freighters, Inc.*, 646 S.W.3d 810, 814 (Tex. 2022).

Here, the trial court's denial of the motion to limit discovery inflicts an injury on the Board, in particular, that cannot be remedied on appeal. If trial courts refuse to limit discovery as Respondent has in this case, the Board will likely be required to budget for additional manpower and technology to enable it to conduct extensive searches of its documents every time a rule challenger contends that it needs sweeping discovery to provide a trial court with "background" or "context." The same will likely be true for every other agency that defends a rule challenge, with larger agencies having to seek larger budgets.

In the meantime, if the Respondent's denial of the motion to limit stands, the Board will have to respond to broad discovery requests and depose numerous experts on topics that are patently irrelevant to whether its Rules 78.1(e)(2)(C) and 78.14 are valid. Then, if the Board successfully defends its Rules at trial, it will not have an appeal in which to seek relief. If the Rules are determined to be invalid in the trial court, and the Relators prevail in an appeal of that judgment, the appellate court cannot give them

back the time and money they have spent responding to discovery about patently irrelevant matters. Once the harm is inflicted, it cannot be remedied.

Because the Acupuncture Association seeks the discovery of patently irrelevant information that, in this rule challenge, is well outside the bounds of proper discovery, the Board and the Chiropractic Association have no adequate remedy by appeal and are entitled to have Respondent's abuse of discretion corrected by issuance of this Court's writ of mandamus.

CONCLUSION AND PRAYER

The Supreme Court has recognized that the Legislature delegated to the Board the task of "clarifying what activities are included within the scope of practice of chiropractic and what activities are outside of that scope." 616 S.W.3d at 571. The Court clearly stated that decisions about what activities lie within that scope are policy judgments. *Id.* at 575. If those who challenge an agency's rules are allowed to discover significant amounts of information relevant only to a rehashing of the Board's policy judgments – and offer that information as evidence of "background" or "context" at trial – then the Supreme Court's effort to prevent "expensive and time-consuming usurpations of agencies' policymaking work" will fail.

Because the Respondent abused her discretion by refusing to place appropriate limits on discovery in the underlying rule challenge, and because Relators have no adequate remedy at law, Relators, the Texas Board of Chiropractic Examiners and the

Texas Chiropractic Association, respectfully request that this honorable Court issue a writ of mandamus directing the Respondent to vacate her August 19, 2022, order denying the Board's motion to limit discovery and issues to be decided and, instead, grant the motion to limit discovery – including the presentation of expert opinion testimony – to prevent discovery of the following types of information:

- the qualifications of chiropractors to practice acupuncture;
- comparisons of the qualifications of chiropractors and acupuncturists to perform acupuncture;
- the training, education, and knowledge of chiropractors who perform acupuncture;
- the existence (or non-existence) of complaints to the Board about chiropractors who perform acupuncture or advertise that they perform acupuncture; and
- Board enforcement actions (or lack of enforcement actions) against chiropractors who perform acupuncture or advertise that they perform acupuncture.

Relators also seek such other and further relief to which they have shown themselves to be entitled, either at law or in equity.

Respectfully submitted,

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RULE 52.3(j) CERTIFICATION

In compliance with Rule 52.3(j) of the Texas Rules of Appellate Procedure, I certify that I have reviewed the petition for writ of mandamus and have concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

/s/ Karen L. Watkins
Karen L. Watkins
Dated: August 23, 2022

CERTIFICATE OF COMPLIANCE

I certify that the Petition for Writ of Mandamus submitted complies with Texas Rules of Appellate Procedure 9 and the word count of this document is 4,319. The word processing software used to prepare this filing and calculate the word count of the document is Word. I also certify that I have reviewed this petition and that every factual statement in it is supported by competent evidence included in the appendix or record.

/s/Karen L. Watkins
KAREN L. WATKINS
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that the above Petition for Writ of Mandamus has been served on this the 23rd day of August 2022, on the following counsel of record and on Respondent via electronic service:

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Hon. Jan Soifer
Judge Presiding, 345th District Court
1000 Guadalupe, 5th Floor
Austin, Texas 78701
Email: 345.Submission@traviscountytx.gov
Respondent

/s/ Karen L. Watkins
KAREN L. WATKINS
Assistant Attorney General

APPENDIX

Appendix A – A true and complete copy of Respondent's August 19, 2022 Order

APPENDIX A

08/19/2022

ORDER DENYING JOINT MOTION TO LIMIT DISCOVERY AND ISSUES FOR DECISION

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

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

ORDER DENYING DEFENDANT AND INTERVENOR'S JOINT MOTION TO LIMIT DISCOVERY AND ISSUES FOR DECISION

Came on for hearing on July 28, 2022,in the above-styled and number cause was Defendant Texas Board of Chiropractic Examiners and Intervenor Texas Chiropractic Association's (collectively, "Chiropractic Defendants") Joint Motion to Limit Discovery and Issues for Decisions ("Motion"). The Court, having carefully considered the Motion, Plaintiff's Response to the Motion, the arguments of counsel, and the evidence and pleadings properly before it, is of the opinion that the Motion should be **DENIED**.

IT IS THEREFORE ORDERED that the Chiropractic Defendants' Joint Motion to Limit Discovery and Issues for Decisions is hereby in all respects **DENIED**.

SIGNED this 19th day of August, 2022.

Jan Soifer

THE HONORABLE JAN SOIFER
345TH DISTRICT COURT JUDGE

AGREED AS TO FORM AND SUBSTANCE:

By: /s/ *Shelby O'Brien*

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AGREED AS TO FORM:

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Automated Certificate of eService

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Status as of 8/23/2022 12:30 PM CST
Associated Case Party: Texas Board of Chiropractic Examiners

Name	BarNumber	Email	TimestampSubmitted	Status
Karen Watkins		karen.watkins@oag.texas.gov	8/23/2022 11:52:18 AM	SENT

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Jeff Lutz on behalf of Karen Watkins
Bar No. 20927425
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Envelope ID: 67560283
Status as of 8/23/2022 12:30 PM CST
Associated Case Party: Texas Association of Acupuncture and Oriental Medicine

Name	BarNumber	Email	TimestampSubmitted	Status
Shelby Leigh O'Brien	24037203	sobrien@enochkever.com	8/23/2022 11:52:18 AM	SENT
Amy Prueger	24041842	aprueger@enochkever.com	8/23/2022 11:52:18 AM	SENT

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Jeff Lutz on behalf of Karen Watkins
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Jeff Lutz		jeff.lutz@oag.texas.gov	8/23/2022 11:52:18 AM	SENT

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Status as of 8/23/2022 12:30 PM CST
Associated Case Party: Hon. Jan Soifer

Name	BarNumber	Email	TimestampSubmitted	Status
Hon. Jan Soifer		345.Submission@traviscountytx.gov	8/23/2022 11:52:18 AM	SENT