

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

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 CHIROPRACTIC	§	
ASSOCIATION,	§	
INTERVENOR.	§	201ST JUDICIAL DISTRICT

**PLAINTIFF TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL
MEDICINE’S CLOSING STATEMENT¹**

The Acupuncture Association challenges the Chiropractic Board’s rules authorizing chiropractors to perform acupuncture (the Acupuncture Rules). *See* TEX. GOV’T CODE § 2001.038. The Acupuncture Rules—found at 22 TEX. ADMIN. CODE § 78.1(e)(2)(C) and § 78.14—exceed the statutory scope of chiropractic set forth in Texas Occupations Code section 201.002, which prohibits chiropractors from performing incisive procedures and limits chiropractors to practicing chiropractic. Acupuncture is (1) an incisive procedure and (2) a separately regulated profession that is not chiropractic. The Acupuncture Association urges this Court to render a final judgment declaring the Acupuncture Rules invalid and void.

¹ “Acupuncture Association” means Texas Association of Acupuncture and Oriental Medicine. “Chiropractic Board” means Texas Board of Chiropractic Examiners. “Chiropractic Association” means Texas Chiropractic Association. “Chiropractic Defendants” collectively refers to the Chiropractic Board and Chiropractic Association.

OVERVIEW

This is not your typical scope-of-practice rule challenge where trade associations squabble about which profession can perform a particular procedure. The Chiropractic Board's rules authorize chiropractors to perform not an isolated technique, but the entirely separate profession of acupuncture. Though overlap can exist among professions, one would search the Texas Administrative Code in vain to find a single example of a state agency adopting a rule authorizing its licensees to practice a separately regulated profession. Some states have enacted statutes authorizing chiropractors to perform acupuncture, but not so in Texas. Instead, the statutory scope of chiropractic in Texas does not include acupuncture. Indeed, the Texas Legislature has repeatedly rejected attempts to amend the Chiropractic Chapter to include acupuncture, and the Chiropractic Chapter prohibits chiropractors from performing incisive procedures such as acupuncture.

Acupuncture involves inserting needles into the human body and is a hands-on, physical healthcare practice. Yet the Chiropractic Board's acupuncture rule only requires chiropractors to complete 100-hours of training with no clinical component—a fraction of the training required by the Legislature for acupuncturists. The Acupuncture Rules are akin to the Texas State Board of Plumbing Examiners adopting a rule authorizing plumbers to perform electrical work with virtually none of the training the Legislature requires for electricians. This Court should find the Acupuncture Rules invalid.

ARGUMENT

A. Recap of legal standard: The Chiropractic Board is not entitled to deference in regard to acupuncture.

An agency's power to make law is dependent on a valid statutory grant. *Pub. Util. Comm'n of Tex. v. City of Pub. Serv. Bd. of San Antonio*, 53 S.W.3d 310, 315 (Tex. 2001). This Court must determine whether the Chiropractic Board adopted its rules within its statutory grant by

considering whether the Acupuncture Rules (1) contravene specific statutory language, or (2) run counter to the objectives of the underlying statute. *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 616 S.W.3d 558, 569 (Tex. 2021). Agency rules are presumed valid, but a challenger meets its burden of proving the rules are invalid by establishing either factor. *Id.* at 568-69.

Though courts give great weight to an agency's interpretation of a statute, this deferential standard of review only applies if the language of a statute is ambiguous. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011); *In re Smith*, 333 S.W.3d 582, 587-88 (Tex. 2011) (orig. proceeding). Additionally, an agency's construction of a statute must be reasonable and alternative, unreasonable constructions do not render a statute ambiguous. *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 625.

But if an agency attempts to regulate activities outside the scope of its statutory grant, the rule is void regardless of how reasonable it may be. *Pruett v. Harris Cnty. Bail Bond Bd.*, 249 S.W.3d 447, 452 (Tex. 2008). And even if a statute is ambiguous, a court grants no deference to an agency's interpretation in regard to issues that do not lie within the agency's expertise. *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 475 (Tex. App.—Austin 2012, pet. denied); *Rogers v. Tex. Bd. of Architectural Exam'rs*, 390 S.W.3d 377, 384 (Tex. App.—Austin 2011, no pet.); *Rylander v. Fisher Controls Int'l, Inc.*, 45 S.W.3d 291, 302 (Tex. App.—Austin 2001, no pet.).

B. The Acupuncture Rules are invalid because acupuncture is an incisive procedure.

The scope of chiropractic is set forth in Texas Occupations Code, section 201.002. The section provides:

(a) In this section:

(3) “Incisive or surgical procedure” **includes** making an incision into **any** tissue, cavity, or organ by **any** person or implement. The term does not include the **use of a needle** for the purpose of drawing blood for diagnostic testing.

(b) A person practices chiropractic under this chapter if the person:

(1) uses objective or subjective means to diagnose, analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body;

(2) performs nonsurgical, nonincisive procedures, including adjustment and manipulation, to improve the subluxation complex or the biomechanics of the musculoskeletal system;

(c) The practice of chiropractic does not include:

(1) incisive or surgical procedures;...

TEX. OCC. CODE § 201.002(a)-(c) (emphasis added). Because acupuncture is an incisive procedure, it is statutorily prohibited.

1. Everyone has acknowledged that acupuncture is an incisive procedure.

The original basis for the Chiropractic Board’s argument that acupuncture is “nonincisive” was unequivocally rejected by the court of appeals in this case. Before the appeal and remand, the Chiropractic Board claimed that because the Acupuncture Chapter defines acupuncture as “nonincisive,” acupuncture is also “nonincisive” under the Chiropractic Chapter. *See* TEX. OCC. CODE § 205.001(2). The Chiropractic Board relied on the principle of *in pari materia*, under which two separate statutes are construed together so that one informs the meaning of the other.

The Third Court of Appeals pulled the rug out from under that argument. The Third Court explained:

There is no textual indication that the Legislature intended to incorporate the Acupuncture Act’s definition of “acupuncture” into the Chiropractic Act. And because each statute serves the purpose of defining and regulating a separate health-care field, we cannot conclude that the acts were clearly written to achieve the same objective, despite the fact that they utilize similar terminology. Consequently, we cannot conclude that the Legislature necessarily intended for the respective regulatory authorities over these two, separate health-care fields to apply the same

meaning to the term “incisive,” and accordingly, we will not construe the Chiropractic Act as if it includes the Acupuncture Act’s definition of “acupuncture.”

Tex. Ass’n of Acupuncture & Oriental Med. v. Tex. Bd. of Chiropractic Exam’rs, 524 S.W.3d 734, 744-45 (Tex. App.—Austin 2017, no pet.) (citations omitted) (*TAAOM*).

Again, the Chiropractic Defendants only believed acupuncture was “nonincisive” because of the Acupuncture Chapter’s definition of acupuncture. But the Chiropractic Board’s executive director **and** the Chiropractic Association both publicly stated that acupuncture is, in fact, an incisive procedure. *See* Exhibit P-077 at approximately 1:45:48 to 1:46:37 (Yvette Yarbrough, then-executive director of the Chiropractic Board, stating at the Chiropractic Board’s open meeting that while acupuncture is in practice an incisive procedure, it is defined in the Acupuncture Chapter as nonincisive); Exhibit P-078 at 8 (the Chiropractic Association judicially admitting that “[c]ommon sense tells us that all needles are, by their nature, incisive, but the Texas Legislature has expressly carved out an exception for acupuncture needles”).

Confirming the Chiropractic Defendants’ previous statements, the Acupuncture Association’s expert witnesses also testified that acupuncture is an incisive procedure.² Acupuncture is an incisive procedure when acupuncture needles penetrate the body. Acupuncture needles come in different sizes, gauges (i.e., width or diameter), and lengths. *See, e.g.*, Doggett Demonstrative 1. All needles penetrate the skin and, in doing so, cut and puncture the skin. As such, some acupuncture needles create larger cuts than others—nonetheless, all are incisive, varying only in degree. The Acupuncture Association’s experts each testified that there is no meaningful distinction between a needle with a beveled tip penetrating the skin and a needle with

² These experts are Dr. Bruce Levy (a medical doctor), Dr. Rosa Schnyer (a doctoral-level acupuncturist, researcher, and professor at the University of Texas School of Nursing), Dr. Beth Howlett (a doctoral-level acupuncturist and Vice President of Academics at AOMA Graduate School of Integrative Medicine), and Wally Doggett (an acupuncturist and president of the Acupuncture Association).

a non-beveled tip penetrating the skin—again, it is just a matter of degree. All acupuncture needles can cause bleeding, bruising, and other complications associated with an incisive procedure, as the testimony by **all** witnesses demonstrated at trial.

The Texas State Board of Acupuncture Examiners (“Acupuncture Board”)—the agency charged with and experienced in regulating and licensing acupuncture—has likewise pronounced that acupuncture is an incisive procedure. Exhibit P-128. The Acupuncture Board has stated that defining acupuncture as “nonincisive” in the Acupuncture Chapter is a source of confusion. *Id.* Acupuncture can result in bleeding and bruising, and the needle is applied subcutaneously. *Id.* Similarly, Dr. Levy and the other experts for the Acupuncture Association all testified that the definition of acupuncture in the Acupuncture Chapter makes no sense given that acupuncture, by its nature, is an incisive procedure.

2. The absurdity of the Chiropractic Defendants’ claim that needles with “beveled” tips are incisive while needles with “pointed” tips are nonincisive was apparent at trial.

The Chiropractic Defendants argued that only “beveled tip” acupuncture needles are incisive while “pointed tip” acupuncture needles are “nonincisive.” They claimed that only a needle with a beveled tip “cuts” through the skin, while a needle with a pointed tip (such as some acupuncture needles) “slip” between skin cells without cutting the skin. This argument was quickly revealed as absurd. Only Dr. Mark Bronson (president of the Chiropractic Board) and Dr. Mark Hanson (a dual licensed acupuncturist and chiropractor who served as the Chiropractic Association’s expert) testified in support of this theory. But Dr. Bronson did not testify as an expert—he merely stated his personal, lay-witness belief that acupuncture needles with pointed tips somehow slip between cells (though he never observed this phenomena). But lay opinion is no evidence on this issue, which obviously requires technical, scientific, or specialized knowledge. *See* TEX. R. EVID. 701-702.

Dr. Hanson testified as an expert but was quickly forced to concede that the purported beveled tip versus pointed tip needle distinction is fiction. Dr. Hanson admitted that the diameter of a needle and the needle's length are just as important—if not more important—than the shape of a needle's tip. He could not articulate at what thickness or depth of penetration a needle would become incisive. He acknowledged that hypodermic needles, just like acupuncture needles, puncture the skin, and any incision caused by a needle is a tiny hole. In fact, he not only conceded that other objects with pointed tips may cut the skin—including skewers and an ice pick—but he admitted that an acupuncture needle may be incisive if pushed all the way through the body, such as through a patient's arm.

The “beveled” versus “pointed” needle argument, as Dr. Hanson's testimony established, is an entirely subjective, unworkable theory that has no basis in fact. Likewise, Dr. Hanson acknowledged that the books he reviewed that contain statements (in passing) that acupuncture needles do not “cut” include no references or authority in support. One of the Acupuncture Association's experts, Dr. Rosa Schnyer, testified that the research indicates the opposite—that acupuncture needles penetrate and disrupt cells, and that is in fact how acupuncture works. And Dr. Bruce Levy testified that the concept of pointed tip needles “slipping” through skin cells without cutting is impossible and is not how needles work.

3. The Chiropractic Defendants are incorrect that the Third Court of Appeals' precedent requires this Court to find that acupuncture is “nonincisive.”

The Chiropractic Defendants' “beveled versus pointed” needle distinction misapprehends the Third Court of Appeals' reasoning in this case and its earlier opinion regarding needle EMG. *See TAAOM*, 524 S.W.3d at 741-42; *Tex. Bd. of Chiropractic Exam'rs*, 375 S.W.3d at 480-82. In this case, the court of appeals upheld two Chiropractic Board rules before remanding the Board's Acupuncture Rules. Specifically, it affirmed a summary judgment upholding the Board's

definition of “incision” as a “cut” (Rule 78.1(a)(4)) and the Board’s rule 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” (Rule 78.1(b)(2)).³ *TAAOM*, 524 S.W.3d at 742-43. The court of appeals pointed to its needle EMG opinion, where it reasoned that some needles (such as ones with beveled tips) might “cut” while other needles might not. *Id.* at 742 (citing *Tex. Bd. of Chiropractic Exam’rs*, 375 S.W.3d at 481).

The Acupuncture Association does not quibble with the court of appeals upholding these two rules—the opinion does not hamper this Court’s ability to find that acupuncture is an incisive procedure. First, in regard to the court upholding Rule 78.1(b)(2), it is indeed possible for an acupuncture needle to be used nonincisively. As Wally Doggett and Beth Howlett testified at trial, a Japanese-derived form of acupuncture (called Meridian Therapy) involves only placing an acupuncture needle on the surface of the skin without penetrating it. The court of appeals’ conclusion does not mean that acupuncture needles penetrating the skin is somehow nonincisive.

Second, in regard to the court upholding Rule 78.1(a)(4), the Acupuncture Association does not dispute at this juncture that “incision” could reasonably be interpreted by the Chiropractic Board as a “cut.” Indeed, many dictionaries (medical and otherwise) define an “incision” as a “cut.” But the Chiropractic Chapter does not limit the prohibition against incisive procedures to “incisions.” Instead, the definition is enlarged; it “**includes**” making an incision but is not limited to making an incision. TEX. OCC. CODE § 201.002(3); *see also* TEX. GOV’T CODE § 311.005(13) (“‘Includes’ and ‘including’ are terms of enlargement and not of limitation or exclusive enumeration, and use of the terms does not create a presumption that components not expressed are excluded.”); *see e.g.*, *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 25-26 (Tex. App.—

³ The rules were renumbered after the court of appeals’ opinion was issued.

Tyler 2000, pet. denied) (noting use of “includes” makes list of subjects illustrative, relying on Code Construction Act).

The Acupuncture Association acknowledges that the court of appeals at times used “incision” and “incisive” interchangeably in its opinions. Those conflations were, at most, dicta and not the court’s holding. Indeed, no party had previously argued in this case, or the needle EMG case, that the Chiropractic Chapter’s prohibition against “incisive procedures” **includes**—but is not limited to—making incisions. The court of appeals never reached that issue.

Thus, even if this Court were to agree with the Chiropractic Defendants that acupuncture needles do not “cut,” that would not mean that acupuncture is a nonincisive procedure. The testimony and evidence at trial established that “cut,” “puncture,” and “pierce” are closely related words and that “incisive” can encompass “piercing,” “puncturing,” and “cutting” to the extent there is any distinction between these words. Exhibit P-054 (Merriam-Webster Dictionary defining “incisive” as “having a cutting edge or piercing point”); Exhibit P-055 (Dictionary.com defining “incisive” as “adapted for cutting or piercing”); Exhibits P-056-P-059 (thesauruses and dictionaries listing words such as “cut,” “pierce,” and “puncture” as synonyms); *see also* Testimony of Dr. Howlett, Dr. Schnyer, Dr. Levy, Mr. Doggett. Notably, while the Chiropractic Defendants attempt to articulate a distinction between “incisive” and “nonincisive” needles, and “cutting” and “piercing” needles, their own expert, Dr. Hanson, could not even articulate a distinction between “tearing” and “cutting” paper during his testimony. The attempted semantics in this case are absurd.

But in any event, as explained above, acupuncture needles do “cut” when inserted into the skin. In reality, there is no meaningful distinction between a needle with a “beveled” tip and a needle with a “pointed” tip. All taper to a point, all puncture and cut the skin, and all cause tiny

holes, as even Dr. Hanson admitted. All can cause bleeding, bruising, infection, or organ puncture. This case, with the benefit of a full record that was missing in the needle EMG case and this case when it was on appeal, demonstrates that acupuncture is an incisive procedure, regardless of the type of acupuncture needle used.⁴

4. “Dry needling” is a form of acupuncture that is likewise incisive.

The uncontroverted evidence also established that dry needling is a form of acupuncture. Dr. Schnyer, Dr. Howlett, and Mr. Doggett **all** testified that dry needling is a form of acupuncture and is incisive, as supported by the statements of numerous acupuncture and medical organizations. Exhibits P-063-P-069. The uncontroverted testimony was that dry needling involves the insertion of acupuncture needles into the body.

The only controverting testimony was from Dr. Bronson, president of the Chiropractic Board. But as mentioned, Dr. Bronson did not testify as an expert witness but merely as a lay witness with a personal interest in the outcome of the case. Additionally, Dr. Bronson testified that he does not perform dry needling—so he cannot claim to meaningfully know whether dry needling is a form of acupuncture. In general, the veracity of Dr. Bronson’s testimony regarding dry needling is questionable. At trial, he testified that he does not perform dry needling in his practice—yet twice testified in his deposition that he **does** perform dry needling.⁵ Further, the evidence at trial established that, until somewhat recently, the Chiropractic Board advised its licensees that they must complete acupuncture training before performing dry needling. Exhibits

⁴ The needle EMG opinion and opinion in this case were appeals of summary judgments, not trials.

⁵ During his impeachment, Dr. Bronson dubiously testified at trial that he only performed dry needling once on his wife. Notably, though not discovered until after trial, Dr. Bronson’s own website advertises he performs dry needling along with acupuncture. <https://www.bronsonclinic.com/services/acupuncture/what-to-expect> (“Dr. Bronson’s primary reason for using acupuncture **and dry needling** is to reduce pain from muscle spasms and from other painful tissue that may be restricting proper motion.”) (emphasis added). Presumably Dr. Bronson might remove this from his website upon review of this filing.

P-070, P-072, P-073. The Chiropractic Board’s about-face on this issue belies its current stance that dry needling is not a form of acupuncture.

This Court asked at trial whether physical therapists may perform dry needling. The Texas Attorney General has said they can. Exhibit D-052. But the scope of the practice of physical therapy is not at issue in this case. Physical therapists are governed by a different scope of practice than chiropractors (for instance, the Physical Therapy Chapter does not include a prohibition on incisive procedures, *see* TEX. OCC. CODE § 453.005)), and the Texas Board of Physical Therapy Examiners has not adopted a rule that physical therapists may perform “acupuncture.” Physical therapists are irrelevant to this dispute. The only issue in this case is whether the Chiropractic Board’s Acupuncture Rules are valid, and encompassed within that issue is whether “dry needling” is a form of acupuncture that is therefore also prohibited.

C. The Acupuncture Rules are invalid because they usurp the separate profession of acupuncture without statutory authorization.

As explained, the only credible evidence at trial demonstrated that acupuncture is an incisive procedure. Thus, the Acupuncture Rules contravene specific statutory text. But they also contravene the objectives of the Chiropractic Chapter by authorizing chiropractors to perform the separately regulated profession of acupuncture. That the Acupuncture Rules authorize chiropractors to usurp a separate, regulated healthcare profession—not just a discrete technique—makes this case fundamentally different from the 2021 *Texas Board of Chiropractic Examiners’* opinion and other scope-of-practice cases. The Acupuncture Association is not aware of any other Texas agency rule that authorizes its licensees to perform a separate, regulated profession.

The Acupuncture Rules not only usurp the profession of acupuncture, but they hand over the keys to the profession with only a fraction of the training required by the Legislature. Under the Chiropractic Board’s rule, chiropractors may perform acupuncture if they complete a 100-hour

training course and pass an acupuncture test offered by the National Board of Chiropractic Examiners. Exhibit P-001. The testimony at trial established that the 100-hour course need not be accredited by any accrediting organization, and the rule plainly authorizes the 100-hour course to be completed online—without a hands-on, clinical component. The Chiropractic Board’s assurance that it would not actually approve an online course rings hollow when it amended its acupuncture rule in 2020 to **remove** any clinical training requirement. Exhibits P-040, P-042. Dr. Kenneth Thomas, a chiropractor, testified regarding the training chiropractors receive in chiropractic school. His testimony demonstrated that chiropractors receive robust training in chiropractic, including extensive coursework in anatomy. But chiropractors receive **zero** training in acupuncture at chiropractic school, clinical or otherwise.

In contrast, licensed acupuncturists receive thousands of hours of training, with about 1,368 of those hours specifically devoted to acupuncture needling. Exhibit P-083. Acupuncturists receive over 1,000 hours of clinical training, in which they treat patients in a supervised setting. Exhibits P-080-P-083. This training is statutorily required since the Legislature delegates to the Acupuncture Board the authority to set standards for acupuncture schools—and these are requirements established by the Acupuncture Board. TEX. OCC. CODE § 205.206. The training disparity is extreme. And training should matter.

The Chiropractic Defendants have pointed to Texas Occupations Code section 205.003, which provides an exemption from the requirements of the Acupuncture Chapter for “health care professional[s] licensed under another statute of this state and acting within the scope of the license.” TEX. OCC. CODE § 205.003(a). This exemption mirrors many other professional licensure acts. *See, e.g., id.* § 203.004 (midwives chapter); § 501.004 (psychologists chapter).

The Acupuncture Association agrees overlap can exist among professional scopes of practice. But the exemption in the Acupuncture Chapter only applies to chiropractors if they are acting within the scope of their license. Nothing in the Chiropractic Chapter mentions or even alludes to acupuncture. Instead, the Legislature has repeatedly rejected attempts to amend the Chiropractic Chapter to authorize chiropractors to perform acupuncture. *See* Tex. H.B. 4889, 88th Leg., R.S. (2023); Tex. H.B. 943, 87th Leg., R.S. (2021); Tex. H.B. 2869, 86th Leg., R.S. (2019); Committee Amendment No. 3 to Tex. S.B. 361, 75th Leg., R.S. (May 1997); Floor Amendment No. 9 to Tex. S.B. 673, 74th Leg., R.S. (May 1995). And the Chiropractic Chapter prohibits chiropractors from performing incisive procedures such as acupuncture.

D. The Chiropractic Board is entitled to no deference.

The Chiropractic Board is not entitled to deference in regard to acupuncture. First, as mentioned, unlike other scope of practice challenges that concern discrete medical procedures, the rules here authorize chiropractors to perform a separate regulated profession—acupuncture. A state agency is only entitled to deference in regard to issues that lie within that agency’s expertise. *Tex. Bd. of Chiropractic Exam’rs*, 375 S.W.3d at 475; *Rogers*, 390 S.W.3d at 384; *Rylander*, 45 S.W.3d at 302. The Chiropractic Board has no expertise in acupuncture. It is comprised of six licensed chiropractors and three public members—but no acupuncturists or medical doctors. Exhibit P-131. It is charged by the Legislature with regulating chiropractic—not acupuncture. *See generally* TEX. OCC. CODE ch. 201.

In contrast, the Acupuncture Board is charged by the Legislature with regulating acupuncture, has substantial expertise in acupuncture, and is comprised of four licensed acupuncturists, two medical doctors, and two public members. Exhibit P-132; *see generally* TEX. OCC. CODE ch. 205. Dr. Levy, Mr. Doggett, and the Chiropractic Defendants’ expert, Dr. Mark

Hanson, all testified that the Acupuncture Board would have more expertise than the Chiropractic Board where acupuncture is concerned.

If any agency is entitled to deference for acupuncture, it is the Acupuncture Board—not the Chiropractic Board. The Acupuncture Board has repeatedly stated that (1) acupuncture is an incisive procedure, and (2) there is no basis for the Chiropractic Board to usurp the profession of acupuncture—and particularly with a mere fraction of the acupuncture training acupuncturists must complete. Exhibits P-126-P-129; Sworn Statement of Mari Robinson (filed Jan. 2, 2015).

Second, the Chiropractic Board is only entitled to deference if its construction of a statute is reasonable. *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 625. There is nothing reasonable about the Chiropractic Board’s acupuncture rules, which usurp the regulated profession of acupuncture and with only a fraction of the training statutorily required.

The Chiropractic Defendants will likely argue that since there is no evidence of chiropractors causing serious injuries in performing acupuncture and since a chiropractor “might” help some patients in performing acupuncture, then the Chiropractic Board’s acupuncture rules must be reasonable. The Acupuncture Association has never claimed that chiropractors who perform acupuncture are causing widespread injuries—though, as the testimony showed, the Acupuncture Association does not have access to malpractice insurance claims, complaints regarding the practice of acupuncture by chiropractors, or specific patient information because of HIPAA safeguards. The point is there is more risk when an insufficiently trained person performs a healthcare practice such as acupuncture. And there is certainly greater risk that the acupuncture will be less effective—or completely ineffective—if an improperly trained person performs acupuncture. Dr. Howlett, Dr. Schnyer, and Mr. Doggett all testified to this point.

The Chiropractic Defendants’ argument regarding the alleged safety of acupuncture also fails for the same reason it failed when the Chiropractic Board raised it in support of its needle EMG rule. The Chiropractic Board stated about its needle EMG rule: “the Board has found there has been no history of complaints or malpractice insurance claims against chiropractors relating to the practice of needle EMG. This lack of complaints and malpractice claims indicates that the practice of needle EMG by chiropractors has not presented any concerns regarding public health and safety.” Exhibit P-4 at 5. The Chiropractic Board found that “the *absence* of any concern for public health and safety for more than 25 years regarding the practice of needle EMG by chiropractors [indicates] that needle EMG is within the scope of practice of chiropractic in Texas.” *Id.*

Despite this alleged safety record in regard to needle EMG, the trial court struck down the Board’s needle EMG rule as invalid—and the court of appeals affirmed. *Tex. Bd. of Chiropractic Exam’rs*, 375 S.W.3d at 481-82. The fact that chiropractors have purportedly “safely” been performing acupuncture over the past few decades no more saves its Acupuncture Rules here than in the needle EMG case.

CONCLUSION

The Acupuncture Association urges this Court to invalidate the Chiropractic Board’s Acupuncture Rules because the rules are outside the statutory scope of chiropractic. A proposed final judgment (**Appendix A**) is attached. The Acupuncture Association anticipates that findings of fact and conclusions of law will be requested in this case after this Court signs a final judgment. TEX. R. CIV. P. 296. The Acupuncture Association reserves all rights in regard to requests for findings of facts and conclusions of law. The Acupuncture Association also intends to file a

rebuttal to the Chiropractic Defendants' closing statement by September 27, 2023, per the parties' agreement.

Respectfully submitted,

By: /s/ Shelby O'Brien

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Closing Statement (when excluding the caption, signature, certificate of compliance, and certificate of service) contains 4,454 words.

/s/ Shelby O'Brien

Shelby O'Brien

CERTIFICATE OF SERVICE

I hereby certify that, on September 14, 2023, a true and correct copy of the above and foregoing has been served by electronic filing service on the following:

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APPENDIX A

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FINAL JUDGMENT

On August 28, 2023, the above-captioned matter was called for trial. Plaintiff Texas Association of Acupuncture and Oriental Medicine’s (“TAAOM”), Defendant Texas Board of Chiropractic Examiners’ (“Chiropractic Board”), and Intervenor Texas Chiropractic Association (“Chiropractic Association”) appeared by and through their attorneys of record and announced ready for trial. The trial proceeded before the Court to which all matters in controversy, legal and factual, were submitted.

After considering the evidence, authorities, and arguments of counsel, the Court is of the opinion that and so finds and concludes that the provisions of 22 Texas Administrative Code §§ 78.1(e)(2)(C) and 78.14 are invalid.

The Court therefore **ORDERS** that the authorization for chiropractors to perform acupuncture, including the form of acupuncture known as “dry needling,” in 22 Texas Administrative Code §§ 78.1(e)(2)(C) and 78.14, exceeds the scope of chiropractic as defined in Texas Occupations Code section 201.002 and is therefore void and invalid.

All costs of the court are assessed jointly against the Chiropractic Board and the Chiropractic Association.

All relief not granted expressly by this Final Judgment is denied.

This judgment is final, disposes of all claims and all parties, and is appealable.

Signed on this _____ day of September, 2023.

JUDGE PRESIDING