No. 03-15-00262-CV

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IN THE COURT OF APPEALS FOR
THE THIRD DISTRICT OF TEXAS AT AUSTIN

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**TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE,**
***Appellant*,**
**v.**
**TEXAS BOARD OF CHIROPRACTIC EXAMINERS AND PATRICIA GILBERT, EXECUTIVE DIRECTOR IN HER OFFICIAL CAPACITY,**
***Appellees*.**

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On Appeal from the 201st Judicial District Court, Travis County, Texas
Cause No. D-1-GN-14-000355

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# RESPONSE TO MOTION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE ROSE AND JUSTICES PEMBERTON AND FIELD:

Appellees submit this response to the motion for rehearing filed by appellant Texas Association of Acupuncture and Oriental Medicine.

## I. The Court ordered a partial remand because it correctly deferred to the Board's reasonable interpretation of Occupations Code section 201.002(a)(3), which the Board is charged with enforcing.

Attempting to capitalize on the Court's rejection of the Board's *in pari materia* argument, the Association reasserts its previously unsuccessful arguments as reasons

why the Court should not have deferred to the Board's reasonable construction of its own enabling statute. As before, neither argument is persuasive.

First, the Association challenges the Court's reliance on dictionary definitions of the term "incisive," contending that the Legislature has defined the term. Motion at 4. As is evident from the Court's analysis of the meaning of the term "incisive" in *Texas Board of Chiropractic Examiners v. Texas Medical Association (TMA I)*, however, the Court has already acknowledged that Code section 201.002(a)(3)'s statement of the meaning of the term "incisive or surgical procedure" is ambiguous. *See* 375 S.W.3d 464, 479-482 (Tex. App.—Austin 2012, pet. denied). The Association is asking the Court to revisit this assessment.

The Association's argument essentially equates the Court's rejection of the Board's *in pari materia* argument to a willingness to ignore the fact that the Legislature defined "acupuncture" to mean "the nonsurgical, nonincisive insertion of an acupuncture needle . . . to specific areas of the human body . . .." Tex. Occ. Code § 205.001(2)(A). The Court does not have to read the two statutes *in pari materia* to acknowledge that the Legislature's definition of the term "acupuncture" indicates a legislative belief that needles can be used nonincisively for purposes other than drawing blood for diagnostic testing. As this Court correctly recognized, the fact that the Board's definition of the term "incision" is consistent with the Legislature's apparent belief that needles can be used both incisively and nonincisively supports the conclusion that the Board's reading of Code section 201.002(a)(3) is reasonable.

The Association also contends that the Court should not have ordered a partial remand because the Court's rejection of the Board's *in pari materia* argument "removed the Board's premise" for its understanding of section 201.002(a)(3). Motion at 5.[1] Yet the Association provides the Court no authority for its tacit assertion that, because the Court has rejected the Board's *in pari materia* argument, the Court must also ignore the Legislature's belief, reflected in the language of Code section 205.001(2)(a), that needle use can be nonincisive. Instead, it simply continues its insistence that "the only reasonable way to read the Chiropractic Chapter" is to preclude chiropractors from using needles for any reason other than to draw blood for diagnostic testing. Motion at 6. It also insists that, if the Court does not read section 201.002(a)(3) the way that the Association does, many categories of people will be compelled to examine needles under microscopes to determine whether particular needles are capable of cutting the skin. *Id.* The Board respectfully suggests that this is not true. If the evidence on remand establishes that a person can use nonincisive needs to perform acupuncture, the rules as they currently exist would only permit chiropractors to use those needles

[1] The Association asserts that the Board has, for years, contended that the amendment of the definition of the term "acupuncture" in Occupations Code chapter 205 (governing the practice of acupuncture) "expanded the scope of the Chiropractic Chapter to authorize chiropractors to practice acupuncture." Motion at 5. The Association then noted that the Board relied on "the amendment" in adopting the rules the Association challenged. Motion at 5, n.4. Although the Association's argument is structured to suggest that the Board relied on the amendment of the term "acupuncture" in Code chapter 205 when adopting its acupuncture rules, that suggestion is not correct. Examination of the cited preambles to the predecessors to Rules 78.13(e)(2)(C) and 78.14 reveals that the Board relied on Code section 205.003, as exempting chiropractors from the provisions of that Chapter.

and no others to perform acupuncture. The Court has correctly concluded that this issue is one of fact that must be first considered and resolved by the trial court.

## II. After proper consideration of matters within its scope of authority, the Court correctly concluded that the Board's interpretation of section 201.002(a)(3) was reasonable.

The Association further argues that, if the Court persists in its erroneous belief that section 201.002(a)(3) is ambiguous, it should nevertheless decline to defer to the Board's interpretation of its enabling statute because that interpretation is "unreasonable." Motion at 7. In reality, the Association has invited the Court to: (a) leapfrog over the trial court's factual determination, which has not yet been made; and (b) opine on the wisdom of allowing chiropractors to use nonincisive needles to perform acupuncture without being subject to the provisions of Code chapter 205. As reflected in the Court's opinion, neither action is appropriate.

Remand of this segment of the case would allow the Association to advance its factual argument that all needles are "incisive," in the technical sense of the word, including needles used for acupuncture. If the Association can meet its burden of proving this fact, then it will be entitled to prevail on its rules challenges.[2] Yet, before satisfying its burden of proving, as a matter of fact, that acupuncture can only be carried out with incisive needles, the Association urges the Court to consider the wisdom of permitting chiropractors to perform acupuncture without complying with the

[2] The Board agrees, as the Association argues in section I of its Motion, that the Association challenged Rule 78.13(e)(2)(C), not Rule 78.13(c)(2)(C) (the laboratory examination rule).

provisions of Code chapter 205. The Court should reject this invitation because, first, any such analysis would invade the province of the Legislature. *Smith v. Nelson*, 53 S.W.3d 792, 795-96 (Tex. App.—Austin 2001, pet. denied) ("This Court must interpret the intent of the legislature as expressed in the plain language of a statute; we do not sit to assess the wisdom or desirability of the legislative act."). Second, as a practical matter, if the Association can prove on remand that acupuncture can only be performed with incisive needles, there would be no need to engage in such an analysis – even under the guise of assessing the reasonableness of the Board's interpretation of its enabling statute.

## CONCLUSION AND PRAYER

For all of the reasons set out in the Court's opinions this case and in this response, Appellees respectfully request that the Court deny Appellant's motion for rehearing and grant Appellees such other and further relief to which they have shown themselves to be entitled, both at law and in equity.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this Response to Appellant's Motion for Rehearing complies with Texas Rule of Appellate Procedure 9.4(i)(2) because it contains 1,116 words. The word processing software used to prepare the Response and to calculate the word count is Microsoft Word.

*/s/ Karen L. Watkins*
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record by electronic service on this the 29th day of December, 2016, to the following:

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