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

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, Plaintiff	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS AND YVETTE YARBROUGH, EXECUTIVE DIRECTOR IN HER OFFICIAL CAPACITY, Defendants	§	**201ST JUDICIAL DISTRICT**

ACUPUNCTURE ASSOCIATION'S RESPONSE TO DEFENDANTS' TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Plaintiff Texas Association of Acupuncture and Oriental Medicine ("Acupuncture Association") files this response to the Chiropractic Board's[1] Traditional Motion for Summary Judgment and asks that the court grant the Acupuncture Association's motion for summary judgment and deny the Chiropractic Board's cross-motion.

INTRODUCTION[2]

The Chiropractic Board's motion for summary judgment, at its core, asserts that when the legislature amended the definition of acupuncture in the Acupuncture Chapter (Texas Occupations Code, Chapter 205),[3] it authorized chiropractors to practice acupuncture without a license. Lacking any statutory authority to which to point, the Board's entire motion instead relies on what it claims was "no doubt" of the legislature's intent when it amended that

[1] The Acupuncture Association refers to Defendants Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director in her Official Capacity, collectively as "Chiropractic Board" or "Board."

[2] The Acupuncture Association's motion for summary judgment sets forth the factual and procedural background of this case. The Association incorporates that discussion in this response.

[3] *See* Acupuncture Association's motion, Exhibit B.

definition. The Board strings together statements from individual legislators and bill analyses and asks this Court to reach a result based on what it believes the law should be—not what it is. But the Board ignores that the task for this Court is to "examine the statute's text, as it provides the best indication of legislative intent." *City of Round Rock v. Rodriguez*, 399 S.W.3d 130, 137 (Tex. 2013). "The Legislature does not speak through individuals—even its members—in committee hearings, in bill analyses and reports, in legislative debate, or in pre- and post-enactment commentary; it speaks through its enactments." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 447 (Tex. 2009) (Hecht, J., concurring).

When the Court considers the statutory text of the legislature's enactment, the Chiropractic Board's argument fails as a matter of law. The Board claims that Senate Bill 361[4]—which added the words "non-surgical, non-incisive" to the definition of acupuncture in the Acupuncture Chapter—creates "an exception" excluding chiropractors from the Acupuncture Chapter and allows chiropractors "to practice acupuncture without licensure" from the Texas State Board of Acupuncture Examiners ("Acupuncture Board"). But the amendment to the Acupuncture Chapter does not mention chiropractors, does not exclude chiropractors from obtaining a license from the Acupuncture Board, does not remove chiropractors from oversight by the Acupuncture Board when practicing acupuncture, and does not excuse chiropractors from the minimum 1,800 hours of training the legislature has determined is required to safely and effectively perform acupuncture.

The Chiropractic Board's effort to pile so much meaning on the words "non-surgical, non-incisive" would create a statutory scheme where chiropractors and the public are required to hop-scotch between the Acupuncture Chapter and the Chiropractic Chapter (Texas Occupations

[4] The enrolled version of SB 361 is attached to the Chiropractic Board's motion as Appendix 21.

Code, Chapter 201)[5] (and potentially various other Occupations Code chapters and agency rules) to determine what procedures chiropractors are authorized to perform—despite that neither chapter cross-references the other—and although, according to the Chiropractic Board, neither chapter provides practitioners or patients with guidance about what training or oversight is required for chiropractors who perform acupuncture. That interpretation is unworkable and unreasonable.

It is also not reasonable to presume, as the Board suggests, that the legislature's amendment to the definition of acupuncture was intended to be a "gotcha" through which the legislature could accomplish indirectly what it was prevented from doing directly. During Senate Bill 361's journey through the legislature, members of the legislature tried to directly authorize chiropractors to practice acupuncture. But as the Board acknowledges, those amendments were stricken on points of order because the chiropractic scope of practice was not germane to the Acupuncture Board's sunset review bill. Likewise, interpreting the amendment of the Acupuncture Chapter as indirectly accomplishing the same result of expanding the scope of chiropractic would render SB 361 void under the one-subject rule in Texas Constitution, Article 3, Section 35(a). *See Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593, 601 (Tex. 1976) (a provision is valid under the one-subject rule only "where it is germane to the subject of the bill"). This Court should decline to interpret the amendment to the Acupuncture Chapter in a manner that would render it unconstitutional.

The Court should grant the Acupuncture Association's motion for summary judgment and deny the Chiropractic Board's cross-motion.

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[5] *See* Acupuncture Association's motion, Exhibit A.

ARGUMENT

The parties agree this case is one of statutory construction that can and should be resolved as a matter of law. The question is whether the Chiropractic Board possesses the statutory authority to adopt rules authorizing chiropractors to practice acupuncture without a license from the Acupuncture Board. Because of the express language of the Chiropractic Chapter, the Acupuncture Association contends that the Chiropractic Board exceeded its statutory authority in adopting rules authorizing chiropractors to practice acupuncture without a license from the Acupuncture Board. With a single-minded focus on legislative history, the Chiropractic Board argues that the legislature intended for chiropractors to be able to practice acupuncture without a license when it amended the definition of acupuncture in the Acupuncture Chapter. Because the legislature's intent about an enactment is expressed through the text, the Board's arguments fail as a matter of law. This Court should grant the Acupuncture Association's motion for summary judgment and deny the Chiropractic Board's motion.

I.

The Chiropractic Board exceeded its statutory authority by adopting rules authorizing chiropractors to practice acupuncture without a license from the Acupuncture Board.

The Chiropractic Chapter's scope of practice statute prohibits chiropractors from performing incisive, surgical procedures, with a lone exception for the use of a needle for diagnostic blood draws. As previously interpreted by the Attorney General and Austin Court of Appeals, this lone exception expressly demonstrates that needles are "incisive," and that only diagnostic blood draws are excluded from the prohibition on needle use.

Faced with its own unambiguous statutory language, the Chiropractic Board almost entirely focuses on the legislative history of SB 361—the Acupuncture Board's sunset bill that amended the definition of acupuncture to the "nonincisive, nonsurgical" insertion of an acupuncture needle. *See* Act of May 29, 1997, 75th Leg., R.S., ch. 1170 (codified as TEX. OCC.

CODE § 205.001(2)). Latching onto statements in legislative debate and bill analyses, the Chiropractic Board contends there is "no doubt" the legislature intended for this amendment to authorize chiropractors to practice acupuncture without a license from the Acupuncture Board.

But extrinsic aids of construction—including legislative history—are irrelevant unless statutory language is ambiguous. Here it is not. The Chiropractic Board's interpretation of its scope of practice statute is also unreasonable and should be afforded no deference by this Court. But even if the Court believes there is statutory ambiguity, SB 361's legislative history does not support the Board's position. To the contrary, it confirms that even if the bill was intended to authorize chiropractors to practice acupuncture, they are still subject to oversight by the Acupuncture Board, requiring them to complete the training mandated and obtain a license.

A. Contrary to the Chiropractic Board's assertion, it lacks "inherent authority" to adopt rules authorizing chiropractors to practice acupuncture without a license.

Primarily focused on legislative history, the Chiropractic Board dedicates just two pages to the argument that, putting legislative history aside, it has "inherent authority" to adopt rules authorizing chiropractors to practice acupuncture (and generally use needles) without an appropriate license or regulation by the Acupuncture Board. This argument turns on two administrative law principles: (1) an agency has the authority to fulfill functions or duties conferred on it by the legislature and (2) a court should grant deference to an agency's interpretation of its enabling statute. Neither of these principles supports the Board's argument. An agency has no "inherent" authority because it is a creature of the legislature and only has powers expressly conferred on it or implied powers reasonably necessary to fulfill its express functions or duties. *Pub. Util. Comm'n of Tex. v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001); *State Agencies & Insts. of Higher Ed. v. R.R. Comm'n of Tex.*, 421 S.W.3d 690, 699 (Tex. App.—Austin 2014, no pet.). Further, the principle of deference only applies if the statute is

ambiguous and the interpretation is reasonable. *See R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

Courts must construe statutes according to their plain and common language. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 389-90 (Tex. 2014); *City of Rockwall v. Hughes*, 246 S.W.3d 621, 625 (Tex. 2008). This principle remains true when determining whether an agency has exceeded its statutory authority. *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 625. Thus, while at times an agency's construction of its scope of practice statute is afforded deference, deference is only warranted if the statute is ambiguous and the agency's construction is reasonable. *Id.* Further, deference should also only be afforded if the subject matter of the rule is within the specialized expertise of the agency. *Bd. of Chiropractic Examiners v. Tex. Med. Ass'n*, 375 S.W.3d 464, 475 (Tex. App.—Austin 2012, pet. denied).[6]

Thus, because the Chiropractic Board's scope of practice statute is unambiguous, its interpretation is not reasonable, the legislature did not expressly confer authority for the Board to oversee acupuncture, and the Board no expertise over acupuncture, the Court should reject the Chiropractic Board's argument that it possesses "inherent authority" to adopt rules authorizing chiropractors to practice acupuncture without a license from the Acupuncture Board.

1. The unambiguous language of the Chiropractic Chapter prohibits chiropractors from practicing acupuncture.

Among other restrictions, the Chiropractic Chapter limits the practice of chiropractic to "nonincisive, nonsurgical procedures," with a narrow exception for "the use of a needle for the purpose of drawing blood for diagnostic testing." TEX. OCC. CODE § 201.002. Despite the fact that prohibited "incisive" procedures include procedures involving needles, as illustrated by the

[6] *See* Acupuncture Board's motion, Exhibit H.

narrow exception for diagnostic blood draws, and despite that acupuncture is not listed as an exception to this prohibition, the Chiropractic Board argues that the "incisive" provision is ambiguous so as to warrant deference to its interpretation. This is incorrect.

When a statute lists specific exceptions to its application (for needles for blood draws), the intent is clear that no other exceptions should apply (for other procedures involving needles). *Mid-Century Ins. Code of Tex. v. Kidd*, 997 S.W.2d 265, 273 (Tex. 1999); *CenterPoint Energy Elec., LLC v. Gulf Coast Coal. of Cities*, 263 S.W.3d 448, 464 (Tex. App.—Austin 2008), *aff'd* 324 S.W.3d 95 (Tex. 2010). The Chiropractic Chapter lists only one exception from the prohibition on incisive procedures—and no other exceptions may be inferred. As the Attorney General has recognized, under the Chiropractic Chapter's plain language and this established rule of statutory construction, chiropractors may not use needles except for in performing diagnostic blood draws. Tex. Att'y Gen. Op. DM-472 (1998);[7] Tex. Att'y Gen. Op. DM-415 (1996);[8] *see also* Chiropractic Board's motion, Appendix 4, p. 5.

Further, the Chiropractic Chapter instructs that incisive and surgical procedures include those procedures in which an incision is made into ***any*** tissue, cavity, or organ by ***any*** person or implement. TEX. OCC. CODE § 201.002(a)(3). There can be no dispute that skin is both a tissue and an organ.[9] And there can also be no doubt that a needle is an "implement" for making an incision—the legislature stated as much when it listed an exception for needles used for diagnostic blood draws. Thus, a needle penetrating skin is an incisive procedure expressly prohibited by the Chiropractic Chapter.

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[7] *See* Acupuncture Board's motion, Exhibit F.

[8] *See* Acupuncture Board's motion, Exhibit D.

[9] *See* Merriam-Webster Dictionary, available at http://www.merriam-webster.com/dictionary/skin; https://www.aad.org/dermatology-a-to-z/for-kids/about-skin; http://www.webmd.com/skin-problems-and-treatments/picture-of-the-skin.

The Chiropractic Board argues that the language is nonetheless not so plain. It points to dicta in the Austin Court of Appeals' *Texas Medical Association* opinion that it claims suggested there is ambiguity as to whether all needles are "incisive." 375 S.W.3d at 479-82. There, the court evaluated whether the practice of needle EMG exceeded the statutory scope of chiropractic. The court noted that differences might exist between the "technical" and "ordinary" meanings of "incisive," and that the "technical" meaning may be limited to a "cut" while the ordinary meaning may include "piercing." *See id.* at 479-80. Importantly, however, in *Texas Medical Association*, the court did not reach an answer to the question of whether, by virtue of the very wording chosen by the legislature and black-letter rules of statutory construction, ***all*** needle use except for diagnostic blood draws was intended to be prohibited. And the only reason the court even discussed any distinction among needles was because the physician parties did not challenge the Chiropractic Board's rule defining "incision" as a "cut," which the Acupuncture Association does now. *Id.* at 480. The court did not answer the question presented in this case.

Because the Chiropractic Chapter's prohibition on incisive procedures unambiguously prohibits needle use, the Chiropractic Board's interpretation of its statutory scope of practice is entitled to no deference. *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 625; *Tex. Med. Ass'n*, 375 S.W.3d at 474.

2. Because the Chiropractic Board's interpretation of its scope of practice statute is unreasonable, its construction should be afforded no deference.

Even if a statute is ambiguous, an agency's interpretation of its enabling statute is subject to deference only if the interpretation is reasonable. *Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d at 624-25; *Tex. Med. Ass'n*, 375 S.W.3d at 474-75. The Chiropractic Board argues that its interpretation of its scope of practice statute is reasonable because, by virtue of the legislature's enactment of SB 361 to amend the Acupuncture Chapter, acupuncture is an

additional exception to the Chiropractic Chapter's prohibition on needle use. As such, the Chiropractic Board argues it possessed a "logical rationale" in determining the Chiropractic Chapter's prohibition on "incisive" procedures does not include acupuncture.

The rationale, however, requires an illogical leap. Certainly, the terms "nonincisive, nonsurgical" are found in both the Chiropractic and Acupuncture Chapters. But this Court should refuse to take the leap advocated by the Board. It is not—and should never be—reasonable for a medical regulatory body to latch onto a phrase in a separate medical practice chapter to redefine (and enlarge) the statutory scope of practice set forth in its own chapter. This is particularly true when, like here, neither chapter references the other.

The Chiropractic Chapter, on its face, does not authorize chiropractors to practice acupuncture. It does not include a provision authorizing chiropractors to engage in the practice, despite attempts by some legislators to do so in early versions of SB 361 and in subsequent legislation. *See* Chiropractic Board's motion, Appendix 15, p. 6; Tex. S.B. 1601, 82nd Leg., R.S. (2011), available at http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/SB01601I.pdf#navpanes=0. The Chiropractic Chapter does not list acupuncture as an exception to the prohibition on needle use. It does not refer to any portion of the Acupuncture Chapter, and certainly not to the definition of acupuncture. It does not mention acupuncture at all. The only "authority" the Chiropractic Board points to for its actions is the definition of acupuncture found in an entirely separate chapter of the Occupations Code.

In short, the Chiropractic Board has pointed to an amendment from SB 361 as evincing that chiropractors can practice acupuncture—even though no portion of that legislation mentioned chiropractic or chiropractors, and the subject of the legislation was the functions of the ***Acupuncture Board***. Because this amendment did not address the practice of acupuncture by chiropractors, it did not exempt chiropractors from the training, licensing, and oversight

requirements in the Acupuncture Chapter, nor did it establish separate training, licensing, or oversight requirements for chiropractors to perform acupuncture. It also did not grant the Chiropractic Board rulemaking authority to regulate the practice of acupuncture. *See* TEX. OCC. CODE § 201.152(a)(1) (authorizing the Chiropractic Board to adopt rules regulating the practice of ***chiropractic***). Perhaps this is why the Chiropractic Board—which possesses no expertise in acupuncture—has done nothing to regulate this practice by chiropractors in any meaningful way, besides requiring chiropractors to complete a meager 100 hours of training. *See* 22 TEX. ADMIN. CODE § 75.21; *see also* Acupuncture Association's motion, pp. 21-22. In its motion, the Chiropractic Board does not even attempt to claim that it is regulating acupuncture by chiropractors, that it is qualified to do so, or that its practitioners are adequately trained to perform the procedure safely and effectively.

The result of the Board's improper construction would be twofold. First, chiropractors and the public would be precluded from determining the "real" scope of chiropractic by consulting the Chiropractic Chapter. Instead, they would be required to review the entire Occupations Code (and guess which parts also apply to chiropractic). Further, as the Chiropractic Board's motion makes clear, it would not be enough to read the Occupations Code. A person would also need to review legislative history, including legislative debate, to glean what "chiropractic" actually is. *See* Chiropractic Board's motion, Appendices 10-20. The Chiropractic Board's attempted use of an amendment in the Acupuncture Chapter would defeat the legislature's goal for Texas statutes—to make them "more accessible, understandable, and usable." TEX. GOV'T CODE § 323.007(a).

Second, and more importantly, the result would be a potential danger to public health. As the Attorney General has observed:

> [The Acupuncture Chapter] suggests that the legislature believes acupuncturists should be trained in accordance with statewide standards and examined by a state

> board. The legislature has established requirements for an applicant for a license to practice acupuncture: among other things, the applicant must have completed 1,800 hours of instruction in subjects including bacteriology, physiology, symptomatology, meridian and point locations, and hygiene, and must have treated patients (with supervision) for at least two terms. We believe the legislature, in the interest of public health, safety, and welfare, intended to except from the training and examination requirements only health professionals whose licenses clearly encompass the practice of acupuncture. In our opinion, the practice of chiropractic, as delineated in [the Chiropractic Chapter] does not clearly encompass the practice of acupuncture.

Tex. Att'y Gen. Op. DM-415 (1996) (internal citations omitted). Though the Attorney General later erroneously reversed course on its ultimate conclusion (based on SB 361), the Attorney General has continued to apply this safety rationale in subsequent decisions. *See* Tex. Att'y Gen. Op. DM-472 (1998). The Chiropractic Chapter, on its face, does not allow chiropractors to practice acupuncture, and an amendment to the Acupuncture Chapter does not change this.

3. The Chiropractic Board has no authority to exceed the powers expressly conferred on it by usurping the regulatory authority of the Acupuncture Board.

One of the fundamental principles of administrative law is that because an agency is solely a creature of the legislature, it only has the powers expressly stated in its governing statute. *State Agencies*, 421 S.W.3d at 699. The agency may not create or exercise what really amounts to a new or additional power. *Id.* And while an agency possesses some implied powers that are necessary to fulfill its express functions, it may not, "through the guise of implied powers, exercise what is effectively a new power, or a power contrary to a statute." *Id.*

Here, as discussed above, there is nothing in the Chiropractic Board's governing statute—the Chiropractic Chapter—that authorizes it to regulate or authorize chiropractors to practice acupuncture. The Acupuncture Chapter is not the Chiropractic Board's governing statute. As such, under this principle, the Chiropractic Board may not create or exercise what is

actually a new or additional power by usurping language from another agency's governing statute.

4. A post hoc letter from a legislator opining legislative intent does not change the plain meaning of the chiropractic scope of practice statute.

The Chiropractic Board relies on a 1997 letter from former Representative Tom Uher, in which he informed the Attorney General that "incisive" was not intended to be so broad as to prohibit all needle use. *See* Chiropractic Board's motion, Appendix 26. The Chiropractic Board claims this letter contradicts the Acupuncture Association's assertion that the use of a needle to draw blood is the only use of needles permitted by the Chiropractic Chapter.

It is axiomatic that a statement by a legislator cannot make an unambiguous statute ambiguous nor does it evidence legislative intent. *See Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 191-92 (Tex. 2010); *Ojo v. Farmers Grp., Inc.*, 356 S.W.3d 421, 435 (Tex. 2011). But to the extent Representative Uher's statement is afforded any weight, it is belied by the actual legislative history. In 1995, the legislature amended the Chiropractic Chapter to include the current language prohibiting chiropractors from performing incisive procedures, with one exception for diagnostic blood draws. *Tex. Med. Ass'n*, 375 S.W.3d at 469. The impetus of this change was a floor amendment offered by Representative Uher that contained the current limitation to nonincisive procedures, but with broad exceptions for needle use, including for acupuncture and needle EMG. *Id.* n.7. His amendment, however, was amended by then-Representative Janek to strip these broad exceptions from the bill, leaving the narrow exception for diagnostic blood draws. *Id.* When presenting his amendment, Representative Janek stated that "[t]his amendment would take out any ability by the chiropractors to put needles into people." *Id.* Representative Uher's amendment was ultimately adopted, but as circumscribed by Representative Janek's amendment. Thus, contrary to Representative Uher's statement, the intent

of the amendment as actually adopted was the opposite—it was meant to prohibit needle-use in its entirety, save one narrow exception.

5. The scope of chiropractic is limited the nonincisive treatment of the musculoskeletal system of the body.

The Chiropractic Board suggests that because chiropractors are not limited to procedures of "adjustment and manipulation," they may perform acupuncture. The Acupuncture Association agrees that chiropractors are not limited to adjustment and manipulation. *See* TEX. GOV'T CODE § 311.005(13); TEX. OCC. CODE § 201.002(b). But the Chiropractic Chapter does expressly limit the part of the body chiropractors can treat—the musculoskeletal system. Chiropractors are not only prohibited from performing procedures involving needles, but also are limited to procedures related to the musculoskeletal system of the body. Acupuncture treats the entire body. TEX. OCC. CODE § 205.001(2). Thus, chiropractors may not perform acupuncture or any other medical practice that treats the entire body. *See* TEX. OCC. CODE §§ 201.002(b), 205.001(2).

It bears repeating that the Chiropractic Board's entire argument is that it may use a definition in the Acupuncture Chapter to redefine its own scope of practice so as to allow chiropractors to practice acupuncture—something that is impermissible. But even that definition does not support the Board's position. The Acupuncture Chapter broadly defines acupuncture to include the treatment of ***any*** "human condition." *Id.* § 205.001(2). This definition confirms that chiropractors are not authorized to practice the procedure not only because it requires needle use, but also because it treats conditions beyond those related to the musculoskeletal system.

B. Legislative history is not relevant because the Chiropractic Chapter is unambiguous. But even if the Court considers legislative history, the history supports that the amendment to the definition of acupuncture did not authorize chiropractors to practice acupuncture without a license from the Acupuncture Board.

Consideration of legislative history is only appropriate when a statute is ambiguous. *Crosstex*, 430 S.W.3d at 389; *Collins v. Cnty. of El Paso*, 954 S.W.2d 137, 147 (Tex. App.—El

Paso 1997, pet. denied). Because the chiropractic scope of practice statute is unambiguous, the Court need not consider the Chiropractic Board's lengthy discussion of legislative history. But if the Court believes a review of legislative history is appropriate, the history supports the Acupuncture Association's position that chiropractors may not practice acupuncture unless they obtain a license from the Acupuncture Board.

The Acupuncture Association does not dispute most of the Chiropractic Board's recitation of SB 361's legislative background:

- The bill originated in the Senate and did not include a provision amending the definition of acupuncture. But former Senator Madla offered an amendment amending the definition of acupuncture by inserting the "nonsurgical, nonincisive" language that is at issue in this dispute. *See* Chiropractic Board's motion, Appendix 10. The Senate passed the legislation as amended by Senator Madla. *See id.*, Appendix 12.

- When the bill was heard in the House Committee on Public Health, then-Representative Gray (the House sponsor of the bill) offered amendments that specifically removed the "nonincisive, nonsurgical" amendment to the Acupuncture Chapter that had been adopted in the senate and instead amended the ***Chiropractic Chapter*** to expressly authorize chiropractors to practice acupuncture, set forth training and education requirements, and provide for oversight by the Chiropractic Board. *See id.*, Appendix 15.

- The legislation proceeded to the House floor. But, as explained by the Chiropractic Board, "[b]ecause these amendments attempted to amend the Chiropractic Act rather than the Acupuncture Act, when they were offered on the floor of the House, they were subject to points of order as not germane to the original bill." *See id*., p. 6 and Appendix 16.

- Ultimately, the bill was sent to conference committee where the conferees reinserted the amendment to the definition of acupuncture that had previously been added in the Senate.

The Chiropractic Board's take on this history is that the amendment to the Acupuncture Chapter's definition of acupuncture was intended to create a "carve out" from that chapter so that chiropractors could practice acupuncture without a license or oversight by the Acupuncture Board. But as has been explained, the amendment to the Acupuncture Chapter did nothing to broaden the chiropractic scope of practice in the Chiropractic Chapter. And an amendment to the

Acupuncture Chapter certainly does not give the Chiropractic Board more powers than what it is given in its own chapter.

The Chiropractic Board attaches a transcript from the House committee hearing on SB 361 that it believes confirms that the bill was intended to authorize chiropractors to practice acupuncture without a license from the Acupuncture Board. But the testimony confirms the opposite. In the transcript, Representative Gray explained why the House should strip the Senate's amendment to the definition of acupuncture and instead directly amend the Chiropractic Chapter to authorize chiropractors to practice acupuncture. Her reason was because amending the Acupuncture Chapter—as proposed by the Senate and ultimately passed into law—would result in chiropractors being subject to the mandates of the Acupuncture Chapter and oversight by the Acupuncture Board. Representative Gray testified: "The Senate bill included language that put [the practice acupuncture by chiropractors] under the Acupuncture Board. … What the [House's] amendments would do is put [the practice of acupuncture by chiropractors] under the Chiropractic Board but with certain guidelines . … [An amendment authorizing chiropractors to practice acupuncture] needs to be in the practice act as it relates to chiropractors and not [ ] under the Board of Acupuncture Examiners." Chiropractic Board's motion, Appendix 14, pp. 3-5, 8.

As discussed, ultimately Representative Gray's amendments were struck from the bill and Senator Madla's amendment to the definition of acupuncture in the Acupuncture Chapter was reinserted. Thus, as explained by Representative Gray, the amendment to the Acupuncture Chapter did not authorize chiropractors to practice acupuncture without a license from the Acupuncture Board, nor did it authorize the Chiropractic Board to regulate the practice of

acupuncture, including by adopting rules. Chiropractors practicing acupuncture are required to obtain a license from the Acupuncture Board and remain within the oversight of that agency.[10]

Further, the fact that the proposed amendments to the Chiropractic Chapter were struck on germaneness grounds is telling. The amendments were removed because they would have expanded the regulatory authority of the Chiropractic Board, while the sunset bill was limited to the regulatory authority of the Acupuncture Board. The legislature is not authorized to do indirectly what it may not do directly. *W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 600 (Tex. 2003). Because the amendment to the definition of acupuncture could not have the effect of granting the Chiropractic Board authority it could not be granted directly, the Court should refuse to interpret the provision in this manner.

The Chiropractic Board also argues that in *Texas Medical Association* the Austin Court of Appeals concluded that SB 361 was intended to authorize chiropractors to practice acupuncture. This is untrue. The Court did reference DM-471,[11] in which the Attorney General reasoned that SB 361 authorized chiropractors to practice acupuncture, and in dicta observed that the amendments may have been made "with reference to" the Chiropractic Chapter. *Tex. Med. Ass'n*, 375 S.W.3d at 477. But the Court did not conclude that SB 361 authorized chiropractors to practice acupuncture without a license from the Acupuncture Board. It was not asked and did not answer the question presented in this case.

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[10] The Chiropractic Board additionally attaches bill analyses that similarly do not support its "carve out" argument. The bill analysis cited by the Board as stating that the legislation authorized chiropractors to practice acupuncture was not analyzing the amendment to the definition of acupuncture in the Acupuncture Chapter. It was analyzing the proposed committee amendments specifically amending the Chiropractic Chapter to expressly authorize chiropractors to practice acupuncture under the authority of the Chiropractic Board—and those amendments did not become law. *See* Chiropractic Board's motion, Appendix 13. The bill analyses reviewing the senate amendment to the Acupuncture Chapter also say nothing about any intent to allow chiropractors to practice acupuncture without a license issued by the Acupuncture Board. *See* Chiropractic Board's motion, Appendices 11, 15.

[11] *See* Acupuncture Board's motion, Exhibit E.

Finally, the Chiropractic Board argues that SB 361 must have been intended to authorize chiropractors to practice acupuncture because otherwise the amendment would have been meaningless and surplusage. The Chiropractic Board claims that this is because acupuncturists could already use needles. Again, this argument fails for several reasons.

First, as explained, even if some legislators thought the amendment was intended to authorize chiropractors to practice acupuncture without a license, that is not what the amendment accomplished.

Second, in claiming the amendment would be surplusage because "acupuncturists could already use needles," the Board appears to recognize that the legislature cannot realistically limit the practice of acupuncture to the use of "nonincisive" needles. As Representative Janek observed during debate on SB 361, "a needle is a needle." Chiropractic Board's motion, Appendix 14, p. 18. All needle-use is incisive. Thus, if the addition of the term "nonincisive" did nothing to limit the practice of acupuncture, as argued by the Chiropractic Board, it similarly could not have effectively expanded the scope of chiropractic.

C. Extrinsic rules of construction, like in pari materia, are not relevant because the Chiropractic Chapter is unambiguous. But even if the Court resorts to extrinsic aids of construction, the Acupuncture Chapter and Chiropractic Chapter cannot be read in pari materia.

The Chiropractic Board next contends that it is permissible to use a definition in the Acupuncture Chapter to change the meaning of a definition in the Chiropractic Chapter because the provisions should be read *in pari materia*. Once again, it is impermissible for a court to resort to extrinsic aids of construction, such as the doctrine of *in pari materia*, when a statute is unambiguous. *See Cnty. of El Paso*, 954 S.W.2d at 147. That is so here.

Regardless, the definition of acupuncture in the Acupuncture Chapter and the definition of chiropractic in the Chiropractic Chapter should not be read *in pari materia*, as explained at length in the Acupuncture Association's motion for summary judgment. *See* Acupuncture

Association's motion, pp. 25-31. But the bottom line is that the Acupuncture Chapter's definition of acupuncture does not mention the subject of chiropractic, the Acupuncture Chapter does not share the purpose of the Chiropractic Chapter, and the two chapters do not relate to the same conduct (the practice and licensing of chiropractors versus acupuncturists). *See, e.g.*, *In re JMR*, 149 S.W.3d 289, 291 (Tex. App.—Austin 2004, no pet.). The chapters cannot be read *in pari materia* so as to "carve out" an exception for chiropractors from the Acupuncture Board's regulation of acupuncture—particularly when the language of neither chapter states such an exception.[12]

II.

Legislation enacting a statutory scheme that purports to authorize chiropractors to practice acupuncture without a license issued by the Acupuncture Board violates Texas Constitution, Article III, Section 35.

Texas Constitution, Article III, Section 35 prescribes that a bill containing more than one subject is unconstitutional. As such, the Acupuncture Association argues that, alternatively, if SB 361 enlarged the practice of chiropractic to include acupuncture without the need for a license from the Acupuncture Board, it violated the one-subject rule. The Chiropractic Board contends that this constitutional mandate is inapplicable because SB 361 was intended to exempt chiropractors practicing acupuncture from the Acupuncture Chapter's licensing and oversight requirements, and thus was related to the subject of the functions of the Acupuncture Board.

As an initial matter, the Chiropractic Board's stance seemingly contradicts its arguments elsewhere in its motion. The Board first claimed that the amendment to the Acupuncture Chapter

[12] The Chiropractic Board also argues that under the doctrine of *in pari materia*, if two provisions conflict, the specific should prevail over the general. TEX. OCC. CODE § 311.026. This argument is puzzling. First, there is no indication that the chapters conflict: one regulates acupuncture and the other chiropractic. But it is also not clear which chapter the Board claims is "general" and which is "specific," when only the Acupuncture Chapter was amended.

was intended solely to authorize chiropractors to practice acupuncture, and was not relevant to acupuncturists because that would be surplusage. But now it claims that the amendment fits squarely within the subject of SB 361, which was the continuation and functions—and apparently an unstated exception from the authority—of the Acupuncture Board. The Chiropractic Board cannot have it both ways.

The argument also contradicts the plain language of SB 361. The Chiropractic Board attempts to compare the Medical Practice Act's exemptions for certain medical professionals (TEX. OCC. CODE § 151.052), to the amendment to the Acupuncture Chapter, claiming that SB 361 similarly exempted chiropractors from the Acupuncture Chapter. This convoluted argument stumbles at the gate. First, there is no indication the exemptions in the Medical Practice Act were enacted as part of a different agency's sunset bill. Second, the exemptions in the Medical Practice Act are expressly stated. But there is nothing in the Acupuncture Chapter stating that chiropractors are exempt from the requirements of that chapter.[13]

As was concluded in the House, the amendments to the Chiropractic Chapter authorizing chiropractors to practice acupuncture were not germane to SB 361: the Acupuncture Board's sunset bill. Because these direct amendments were not germane, it follows that an amendment purportedly indirectly authorizing the same conduct is also not germane. *See W. Orange-Cove*, 107 S.W.3d at 600. Germaneness and the constitutional one-subject mandate are one and the same. *See Jessen Assocs.*, 531 S.W.2d at 601. Thus, if the amendment to the Acupuncture

[13] The Chiropractic Board likewise cannot rely on the provision in the Acupuncture Chapter that exempts health care professionals licensed under another statute and acting within the scope of the license. TEX. OCC. CODE § 205.003. This provision would allow chiropractors to practice acupuncture without a license from the Acupuncture Board only if acupuncture was within the scope of chiropractic as provided in the Chiropractic Chapter. But in that instance, the provisions of the Acupuncture Chapter would not govern—and the definition of acupuncture in the Acupuncture Chapter could not be used to expand the scope of chiropractic.

Chapter authorizes chiropractors to practice acupuncture, it rendered that portion of the bill unconstitutional.

III.

Legislation purportedly authorizing chiropractors to practice acupuncture without a license violates Texas Constitution, Article XVI, Section 31.

The Chiropractic Board argues that the constitutional prohibition on the legislature preferring one school of medicine over another does not apply because chiropractic is not a school of medicine. The Chiropractic Board also suggests, without taking a direct position, that acupuncture is similarly not a school of medicine. The Chiropractic Board misunderstands the Acupuncture Association's argument.

The Acupuncture Association has made the alternative argument that in the event the Court concludes that the amendment to the Acupuncture Chapter authorized chiropractors to practice acupuncture without a license from the Acupuncture Board, and without completing the extensive training required for that license, then the statutory scheme is unconstitutional because it would allow chiropractors to practice acupuncture with less training and education than acupuncturists. There are two reasons this is correct.

First, both acupuncture and chiropractic were historically considered practices of medicine that could only be performed by physicians. *Thompson v. Tex. State Bd. of Med. Exam'rs*, 570 S.W.2d 123, 130 (Tex. App.—Tyler 1978, writ ref'd n.r.e.); *Teem v. State*, 183 S.W. 1144, 1147-48 (Tex. Crim. App. 1916). While chiropractic was eventually exempted from the Medical Practice Act (so long as it is strictly practiced within the confines of the Chiropractic Chapter), acupuncture has never been fully severed, and the Acupuncture Board still operates under the supervision of the Texas Medical Board. *See, e.g.*, TEX. OCC. CODE §§ 151.052, 205.101; *Andrews v. Ballard*, 498 F. Supp. 1038, 1039-40 (S.D. Tex. 1980). Further, as the treatise cited by the Chiropractic Board explains, the "practice of medicine" encompasses a

healing art that encompasses the whole body rather than a part of the body. George D. Braden et al., *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, at 768 (1977) (Chiropractic Board's motion, Appendix 27). Acupuncture, by its very statutory definition, treats any condition in the human body. TEX. OCC. CODE § 205.001(2). It is therefore a practice of medicine.

Second, while the Chiropractic Board is correct that chiropractic is not the practice of medicine by virtue of its exemption from the Medical Practice Act, this is only the case so long as it is practiced ***strictly*** in accordance with its statutory scope. *Id.* § 151.002(13), 151.052. If it is not practiced in this strict manner, it is not only the practice of medicine, but it is also the unauthorized practice of medicine. *See, e.g., Tex. Orthopaedic Ass'n v. Tex. State Bd. of Podiatric Exam'rs*, 254 S.W.3d 714, 717, 721 (Tex. App.—Austin 2008, pet. denied). Chiropractors who practice acupuncture are not strictly engaged in the practice of chiropractic; thus, they are practicing medicine. Further, as noted, a practice that encompasses the whole body is the practice of medicine. *Schlichting v. Tex. State Bd. of Med. Examn'rs*, 310 S.W.2d 557, 564 (Tex. 1958); Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis*, at 768. While chiropractic is limited to treating the musculoskeletal system (TEX. OCC. CODE § 201.002(b)), if a chiropractor treats the entire body, such as by performing acupuncture, the chiropractor ceases to strictly practice chiropractic and instead is practicing medicine. *Id.*

By the Chiropractic Board's own admission, it has authorized chiropractors to practice acupuncture without a license from the Acupuncture Board and with limited training (100 hours) in the procedure. Acupuncturists, on the other hand, are required to hold a license issued by the Acupuncture Board and complete intensive training and education (1,800 to 2,400 hours or more) to obtain that license. *Id.* §§ 205.203, .206, .255. As the Supreme Court concluded in *Schlichting*, "to allow [a practitioner] to be licensed upon easier terms than those required for the

practice of 'medicine' would violate the very provision of the state Constitution under which the appellant now claims relief. The same would be true should we permit it to be practiced without any license at all, while enforcing a statute that requires practitioners of 'medicine' to be licensed and on quite onerous conditions." 158 S.W.2d at 564. If the statutory scheme authorizes chiropractors to practice acupuncture without a license from the Acupuncture Board, with far less onerous education requirements for chiropractors than for licensed acupuncturists, the legislature "prefers" chiropractors over acupuncturists, in violation of Texas Constitution, Article XVI, Section 31.

IV.

The Chiropractic Board's statute of limitations defense fails as a matter of law.[14]

The Chiropractic Board urges the Court to conclude the Acupuncture Association's challenge is time-barred under the residual statute of limitations found in the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE § 16.051. As the Chiropractic Board acknowledges, no court has applied the residual statute of limitations to a declaratory judgment action challenging the validity of agency rules. Adopting the Board's novel argument would be a sea change in how Texas courts resolve allegations that an agency is overstepping its statutory authority. And it would thwart the very purpose of the statutory scheme the Board seeks to continue to violate.

The Chiropractic Board urges that because it has for more than four years illegally authorized chiropractors to practice acupuncture, it can continue to exceed its statutory authority and violate Texas law, daily and with impunity. This is not the law in Texas. In 2012, in *Texas Medical Association*, the Austin Court of Appeals invalidated the Chiropractic Board's rules

[14] The Chiropractic Board has not sought summary judgment on its laches defense. That defense would also fail as a matter of law.

allowing chiropractors to perform needle EMG and manipulation under anesthesia—despite that the Chiropractic Board had been authorizing chiropractors to practice needle EMG and manipulation under anesthesia since at least the 1980s.[15] 375 S.W.3d at 469, 481, 488. Likewise, earlier this year, in *Texas Association of Psychological Associates v. Texas State Board for Examiners of Psychologists*, the Austin Court of Appeals reviewed whether the Psychology Board's rules exceeded its statutory authority—despite that the challenged rules had been adopted more than four years earlier. 439 S.W.3d 597, 600-02 (Tex. App.—Austin 2014, no pet.). And in *Texas State Board of Examiners of Marriage & Family Therapists v. Texas Medical Asssociation*, the Austin Court of Appeals reviewed and affirmed a trial court judgment invalidating a rule that had been adopted in 1994. No. 03-00077-CV, __ S.W.3d __ (Tex. App.—Austin Nov. 21, 2014, no pet. h.).[16]

The residual statute of limitations has not been applied as urged by the Chiropractic Board because limitations cannot be used to defeat the legislative intent of a statute. *See Heine v. Tex. Dept. of Pub. Safety*, 92 S.W.3d 642, 648-49 (Tex. App.—Austin 2002, pet. denied). The legislature enacted the statutes regulating the various healthcare professions, including acupuncture and chiropractic, to protect the public. To ensure practitioners possess the "requisite degree of skill in learning in [these] professions which affect the public," the legislature mandates that individuals complete specified training, obtain a license, and be overseen by the governing Board for each specific healthcare profession. *See Tex. State Bd. of Public*

[15] As the Sunset Commission observed in making recommendations regarding the Chiropractic Board, the Chiropractic Board evaded rule challenges and obtaining stakeholder input by issuing "opinions" that operated as de facto rules rather than adopting rules through the statutorily required process. *See* Chiropractic Board's motion, Appendix 24, pp. 7-8. These opinions authorized manipulation under anesthesia, needle EMG, and acupuncture. *Id.*

[16] Because this opinion was released on the date this response was filed, no Westlaw cite was yet available.

Accountancy v. Fulcher, 515 S.W.2d 950, 954 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.). This is essential for healthcare professions because, absent adequate training, the very life and safety of the public are at stake. *See, e.g., Patel v. Tex. Dep't of Licensing and Regulation*, No. 03–11–00057–CV, 2012 WL 3055479, at *13 (Tex. App.—Austin 2012, pet. granted); *Tex. State Bd. of Barber Exam'rs v. Beaumont Barber College, Inc.*, 454 S.W.2d 729, 731 (Tex. 1970).

But the Chiropractic Board's limitations argument seeks to erase the protections afforded by the Acupuncture Chapter. It argues that because it has, for years, illegally allowed chiropractors to practice acupuncture with just five percent of the training hours required for acupuncturists, without a license from the Acupuncture Board, and without oversight from any board, it should be allowed to continue to do so into perpetuity—putting countless additional patients at risk of being deceived about the qualifications of their practitioners, subject to incompetent and ineffective treatment or, worse, harmed. The protective intent of the legislature in enacting the Acupuncture Chapter "should not be thwarted" by applying Section 16.051 so as to give the Chiropractic Board a free pass to continue violating Texas law. *Heine*, 92 S.W.3d at 649.

Moreover, even if the Court concludes that the four-year residual statute of limitations in Section 16.051 does govern challenges to an agency's authority to adopt and enforce administrative rules, there are at least three reasons why this Court should hold that the Acupuncture's Association's claims for declaratory and injunctive relief are not time-barred.

First, the Board misleads the Court by arguing that the "most recent action of the Chiropractic Board relevant to the lawsuit became four years old on July 2, 2013." To the contrary, in 2013, the Board adopted amended versions of both of the challenged rules as specifically related to needle use and the practice of acupuncture by chiropractors: the

Chiropractic Board's rules 75.17 and 75.21. When an agency promulgates a new version of a rule, any limitations period begins anew and a court has authority to review the entire amended rule (not just specifically amended subparts of the rule). *See State Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Texas*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied).[17] Thus, the Acupuncture Association's challenge to the amended rules would not be time-barred until 2017.

Second, equally important here is what the Chiropractic Board failed to amend in 2013. In 2012, in *Texas Medical Association*, the Austin Court of Appeals upheld the trial court's decision invalidating the entirety of rule 75.17(a)(3). *See* 375 S.W.3d at 481. But when the Board thereafter amended that rule, it did not amend the portion of the rule that continues to allow needle-use by chiropractors. And the Board did not amend the related rules 75.17(b)(4), 75.17(e)(2)(C), and 75.21, even though the court invalidated rules permitting chiropractors to use needles. "A cause of action accrues and the applicable limitations period begins to run when a wrongful act causes some legal injury." *Nw. Austin Municipal Util. Dist. No. 1 v. City of Austin*, 274 S.W.3d 820, 836-37 (Tex. App.—Austin 2008, pet. denied). The Board's failure in 2013 to bring its rules within this new precedent constituted an additional wrongful act that created a new controversy between the Board and the Acupuncture Association. Thus, for this additional reason, the Acupuncture Association's claims would not be time-barred until 2017.

Third, the residual statute of limitations in section 16.051 does not bar the Acupuncture Association's challenge that the Chiropractic Board's rules are a continuing and ongoing violation of state law. *Id.* at 836. The Board did not just authorize chiropractors to practice acupuncture (without adequate training, a license from the Acupuncture Board, or oversight) at

[17] This case concerned a limitation provision in the Public Utility Regulatory Act, not the residual limitations statute. *See id.* But the same reasoning is applicable here.

some distant time in the past—it continues to do so every day. Until the Board's rules are amended or repealed, the Board violates state law every day, "caus[ing] the accrual of the cause of action to occur each day." *Dvorken v. Lone Star Indus., Inc.*, 740 S.W.2d 565, 567 (Tex. App.—Fort Worth 1987, no writ). While Section 16.051 may bar the Association from seeking damages that accrued more than four years ago, it does not bar this suit to determine if the challenged rules are currently in violation of Texas law. *Austin Municipal Util. Dist. No. 1*, 274 S.W.3d at 837. Thus, the Acupuncture Association's challenge to the continuing violation is not time-barred.

For each of these reasons, the Court should deny the Board's request for summary judgment on its affirmative defense of limitations.

V.

The Chiropractic Board's request for attorney's fees should be denied.

The Chiropractic Board asks the Court to award it attorney's fees for its defense of the Acupuncture Association's Declaratory Judgment Act claims. The Acupuncture Association urges the Court to deny this request. Even if the Court ultimately sides with the Board, the Acupuncture Association asserted colorable legal claims, in good faith, to address previously unanswered statutory construction questions.

CONCLUSION AND PRAYER

The Court should be clear on what the Chiropractic Board asks it to do. Because of a two-word phrase in the Acupuncture Chapter (defining acupuncture as "nonincisive, nonsurgical"), it asks this Court to declare that chiropractors may practice acupuncture without a license from the Acupuncture Board, without the legislatively mandated training, and without regulatory oversight. The Court should refuse to take the unprecedented leap the Chiropractic Board proposes.

For these reasons, Plaintiff Texas Association of Acupuncture and Oriental Medicine prays that the Court grant its motion for summary judgment, deny Defendants' motion for summary judgment, and grant any further relief to which Plaintiff may be justly entitled, at law or in equity.

Respectfully submitted,

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