Case No. 08-0485

IN THE SUPREME COURT OF TEXAS

TEXAS STATE BOARD OF PODIATRIC MEDICAL EXAMINERS, TEXAS PODIATRIC MEDICAL ASSOCIATION and BRUCE A SCUDDAY, D.P.M.,

Petitioners/Defendants,

vs.

TEXAS ORTHOPAEDIC ASSOCIATION, TEXAS MEDICAL ASSOCIATION, and ANDREW M. KANT, M.D.

Respondents/Plaintiffs,

On Petition for Review from the Third Court of Appeals at Austin, Texas

BRIEF *AMICI CURIAE* OF AMERICAN MEDICAL ASSOCIATION, AMERICAN ASSOCIATION OF ORTHOPAEDIC SURGEONS, AMERICAN ORTHOPAEDIC FOOT AND ANKLE SOCIETY, TEXAS ACADEMY OF FAMILY PHYSICIANS, TEXAS OPHTHALMOLOGICAL ASSOCIATION, TEXAS PEDIATRIC SOCIETY, AND TEXAS SOCIETY OF ANESTHESIOLOGISTS

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STATEMENT OF INTERESTS

The American Medical Association ("AMA"), an Illinois non-profit corporation headquartered in Chicago, is an association of approximately 240,000 physicians, residents, and medical students. Its members practice in every state and in all fields of medical specialty. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. It is the largest medical society in the United States.[1]

The American Association of Orthopaedic Surgeons ("AAOS") is a non-profit organization that serves approximately 36,000 members internationally. Its mission is to serve the profession, champion the interests of patients, and advance the highest quality of musculoskeletal health.

The American Orthopaedic Foot & Ankle Society ("AOFAS") is a non-profit medical specialty society whose 1,800 members are orthopaedic surgeons specializing in the surgical and medical treatment of injuries, diseases and other conditions of the foot and ankle. The AOFAS promotes quality patient care through education, research and training of orthopaedic surgeons and other health care providers and serves as a resource for government, industry and the health care community on issues concerning the medical and surgical care of the foot and ankle.

[1] The AMA submits this Brief *Amici Curiae* on its own behalf and as a member of the Litigation Center of the AMA, a coalition of medical societies representing the interests of organized medicine in the courts.

The Texas Academy of Family Physicians ("TAFP"), a constituent chapter of the American Academy of Family Physicians, is a medical specialty organization of over 5,500 Texas family physicians dedicated to the delivery of quality health care. The mission of TAFP is to equip family physicians in Texas with the right tools to improve the health of patients and their families and to advance and represent the specialty of family medicine.

The Texas Ophthalmological Association ("TOA") is a non-profit organization of 800 ophthalmologists practicing in Texas. Founded in 1956, its purpose is to promote and advance the science and art of medical eye care in the State of Texas.

The Texas Pediatric Society ("TPS"), the Texas Chapter of the American Academy of Pediatrics, is a non-profit organization of 3,400 Texas pediatricians and medical students. Its mission is to ensure that the children of Texas are safe and healthy, that its members are well informed and supported, and that the practice of pediatrics in Texas is both fulfilling and economically viable.

The Texas Society of Anesthesiologists ("TSA") is a voluntary, nonprofit medical association of approximately 2,400 physicians who practice the medical specialty of anesthesiology. Its members evaluate patients, determine anesthesia plans, administer anesthetics, medically direct Certified Registered Nurse Anesthetists and Anesthesiologists' Assistants, monitor patients during surgical, obstetrical and other diagnostic and therapeutic procedures, and provide post-anesthetic care in hospitals, ambulatory surgery centers and office settings throughout Texas.

The AMA, AAOS, AOFAS, TAFP, TOA, TPS, and TSA join in this brief partly because of their concern that the healthcare of Texans could be immediately and adversely impacted if the podiatry Rule at issue in this case is allowed to stand. They also join because of a concern that the courts could, if issues are not presented forcefully, unreasonably defer to ill-considered scope of practice determinations by administrative boards dominated by self-interested non-physician health care practitioners.

ARGUMENT

Introduction

Chapter 202 of the Texas Occupations Code (the "Podiatry Act") limits the practice of podiatry to treatment of the "foot." This case involves an attempt by the Texas State Board of Podiatric Medical Examiners (the "Board")[2] to expand the scope of podiatry in Texas to unprecedented levels by seeking to redefine "foot" as including anatomical structures found outside the boundaries of the foot.

The Board and the other Respondents suggest that this case deals with the limited issue of whether the "ankle" is part of the "foot" and thus within the purview of podiatric treatment. By both medical and common usage, this is wrong. The ankle is a joint that allows the foot to articulate with the distal ends of the tibia and fibula. It lies above the foot; it is not a part of the foot.

As the Court of Appeals found, though, the primary issue is whether the Board's definition of "foot" actually extends the scope of podiatric practice beyond any

[2] The Board consists of nine members, six of whom are practicing podiatrists. Only the other three Board members "represent the public." Tex. Occ. Code § 202.051 (2009).

reasonable legislative empowerment, regardless of whether the foot could be deemed to include the ankle. *Texas Orthopaedic Assocation v. Texas State Board of Podiatric Medical Examiners*, 254 S.W.3d 714, 721 (2008). Under the Board's definition, podiatrists in Texas would be permitted to provide treatment to body parts extending far beyond the foot or the ankle, even above the knee—a clear departure from the currently accepted practices of podiatrists in any jurisdiction. At the same time, the Board's regulation omits many of the anatomical structures clearly covered by even the narrowest definition of "foot." *Id.*, at n.5 (2008). As such, its definition of "foot" is grossly inaccurate.

The Texas Legislature must surely have considered patient safety and public protection as primary objectives when it enacted the Podiatry Act. Non-physician health care practitioners should have sufficient education and training to provide safe patient care. In the context of their practice, such practitioners must be prepared to evaluate individual patient cases objectively and refer those that require skills beyond their education and training to a physician or other appropriate health care expert.

In the present case, none of these considerations were reflected in the Board's careless attempt to define the term "foot" in its regulations. The Board's definition is largely incomprehensible and is in clear conflict with both everyday observation and mainstream medical views. The Court of Appeals analyzed the issues correctly, and this case does not present a significant legal question. Therefore, this Court should reject the Petition for Review.

I. THE BOARD'S DEFINITION OF "FOOT" INCLUDES STRUCTURES THAT EXTEND WELL INTO THE UPPER LEG, AND IT ALSO EXCLUDES TISSUES THAT LIE WHOLLY BELOW THE ANKLE.

The Podiatry Act establishes the right to practice podiatry in Texas. The scope of practice of podiatry is therefore dependent on the Podiatry Act's definition of "podiatry," which it defines as "the treatment of or offer to treat any disease, disorder, physical injury, deformity, or ailment of the human foot by any system or method." Tex. Occ. Code § 202.001(a)(4) (2009). Neither the word "foot" nor the term "human foot" is defined in the statute. However, on January 17, 2001, the Board promulgated the following definition in its rules governing the conduct of podiatrists:

> Foot -- The foot is the tibia and fibula in their articulation with the talus, and all bones to the toes, inclusive of all soft tissues (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus and all bones to the toes.

22 Tex. Admin. Code § 375.1(2) (2009) (the "Rule"). According to the Board, the Rule defines the "foot" as being inclusive of the "ankle."

Of course, the Board's definition does not even mention the word "ankle", and, as the Court of Appeals observed, numerous respected authorities confirm that the ankle should not be deemed a part of the foot. *Texas Orthopaedic Assocation v. Texas State Board of Podiatric Medical Examiners*, 254 S.W.3d 714, n. 3 (2008). In fact, almost every authority that has considered this question recognizes that the foot and ankle are different anatomical structures.

That, however, is not the principal deficiency in the Rule. While the Board may have intended simply to define the foot is such a way as to include the ankle, without

other change of substance, it failed to do so. The principal issue in this case is whether the Rule establishes a reasonable definition of the foot from any viewpoint, technical or lay, so that it preserves a meaningful boundary to podiatrists' scope of practice. Manifestly, it does not.

The Rule is both over-inclusive and under-inclusive. Not only does it inaccurately include the ankle, it also includes numerous anatomical structures that extend up to the thigh. The Rule also excludes many soft tissues that are unquestionably part of the foot but do not insert into the ankle, such as the skin surrounding the foot. Consequently, under this definition of "foot," podiatrists in Texas would be authorized to perform many medical procedures for which they are untrained and heretofore unlicensed and also be prohibited from performing even some of the most basic treatments to the foot.

A. The Rule Is Overly Expansive, Because It Includes Anatomical Structures That Extend Far Beyond The Ankle Or The Foot.

The Rule starts with the assertion that the "foot" is "the tibia and fibula in their articulation with the talus." The tibia and fibula are the bones of the lower leg. By no reasonable definition could any part of these bones be properly deemed a part of the foot.

The Rule goes on to state that the "foot" is "inclusive of ***all soft tissues*** (muscles, nerves, vascular structures, tendons, ligaments and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus." (Emphasis added.) 22 Tex. Admin. Code § 375.1(2). Many of these "soft tissues," however, are not localized around the foot or the ankle, and the Rule makes no mention as to any required proximity of the "soft tissues" to the bones of the foot.

For instance, various nerves course around the ankle and include fibers that attach to the distal tibia and fibula. Thus, the tibial nerve extends from the foot through the entire leg, ultimately merging into the sciatic nerve above the knee. *See* Frank H. Netter, M.D., *Atlas of Human Anatomy* (2d ed. 2000) at 482, 483, 485, and 504. The peroneal nerve diverges from the tibial nerve at a point just above the knee. It then wraps around the upper end of the fibula ("fibular head") and diverges into two branches, both extending into the foot. *Id.* The sural nerve extends from the foot to the calf and then branches off into the tibial and peroneal nerves. *Id.*, at 483 and 504. All of these nerves attach to the distal parts of the tibia and fibula, which articulate with the talus.

Likewise, numerous veins and arteries that run through the leg include nutrient vessels that insert into the distal tibia and/or the fibula. For example, the saphenous vein runs from the foot, up the inner leg and thigh, merging with the femoral vein at the groin. *Id.*, at 508. Further, the anterior and posterior branches of the tibial artery and vein branch off from the popliteal artery and vein at the knee and extend downward into the foot on both the front and back sides of the leg. *Id.*, at 477. Also, the dorsalis pedis artery extends from the top of the foot through the ankle to the anterior tibial artery. *Id.*, at 485.

Similarly, certain ligaments of the ankle insert into the distal tibia and fibula in their articulation with the talus and extend well beyond both the foot and the ankle. As an example, the syndesmotic membrane inserts into the distal tibia and fibula in such articulation and then extends close to the knee. Moreover, the gastrocnemius muscle originates from the femur, above the knee, and inserts into the calcaneus bone of the foot.

These are just a few examples of the numerous "soft tissues" that insert into the articulation of the tibia and fibula with the talus or into the bones of the foot and continue past the ankle and often beyond the knee into the upper leg. With no language limiting the proximity of these "soft tissues" to any particular region, a podiatrist could, under the Rule, treat *any* anatomical structure, so long as any part of it inserts into the articulation of the tibia and fibula with the talus (*i.e.*, the ankle). Moreover, since the Podiatry Act allows podiatrists to "treat any disease, disorder, physical injury, deformity, or ailment" that occurs on these structures "by any system or method," the types of procedures that podiatrists could perform would be effectively unbounded. Tex. Occ. Code § 202.001(a)(4).

This expansion of podiatry would include procedures that podiatrists are untrained, unqualified, and—by a fair definition of the Podiatry Act—unlicensed to perform. For instance, entrapment of the peroneal nerve (*i.e.*, a pinched peroneal nerve) requires a surgical procedure performed at the fibular head, just below the knee. *See* T. Fabre, M.D., et al., *Peroneal Nerve Entrapment*, 80-A Journal of Bone and Joint Surgery 47-53 (1998). Biopsies of the sural nerve, which are used to determine the nature of neuropathies (*i.e.*, nerve damage), and grafts of the saphenous vein, which are used for various vascular bypass surgeries (*i.e.*, repair of damaged blood vessels), both involve surgeries on the leg. *See* C. M. Gabriel, et al., *Prospective Study of the Usefulness of Sural Nerve Biopsy*, 69 Journal of Neurology, Neurosurgery & Psychiatry 442-446 (2000), and John W. Hallett, Jr., et al., *Comprehensive Vascular and Endovascular*

Surgery 108-110 (Mosby 2004). Under the Rule, however, such procedures would fall within the scope of podiatry.

That podiatric treatments must necessarily consider the interrelationship between the foot and the body's other anatomical structures is obvious. At the same time, it is irrelevant to the Rule's validity. Even if, as the Court of Appeals noted (254 S.W.3d at 720), some podiatrists may be trained to treat the ankle and may in fact have been treating the ankle, the Board would still have no authority to define the foot as something it is not.

B. The Rule Erroneously Excludes "Soft Tissues" Of The Foot That Do Not Insert Into The Articulation Of The Tibia And Fibula With The Talus.

The Rule is also flawed because it fails to include certain anatomical structures that are unquestionably part of the foot but do not insert into the articulation forming the ankle. Under the Rule, the foot is "inclusive of all soft tissues … that insert into the tibia and fibula in their articulation with the talus and all bones to the toes." 22 Tex. Admin. Code § 375.1(2). There are, however, numerous soft tissues that do *not* "insert" into this articulation or with the bones of the foot but are still considered part of the foot. These include the toe nails, the plantar fascia (connective tissue extending from the heel to the ball of the foot, forming the arch), many of the intrinsic muscles of the foot (muscles contained entirely within the foot), and countless other soft tissues that are intrinsic to the foot. *See* Frank H. Netter, M.D., *Atlas of Human Anatomy* (2d ed. 2000), at 496, 499, and 500.

The skin covering the foot is another example. Under the language of the Rule, podiatrists would not be permitted to treat or make incisions into the skin around the foot, since the skin is not a bone and does not insert into the articulation of the tibia and fibula with the talus or into the bones of the foot. No reasonable person would agree that the scope of practice of podiatry should be so limited.

II. THE BOARD'S CONSTRUCTION OF THE PODIATRY STATUTE MERITS NO JUDICIAL DEFERENCE

The judiciary gives weight to an agency's construction of a statute only if that construction is reasonable and is consistent with the plain language of the statute. *City of Austin v. Southwestern Bell Telephone Co.*, 92 S.W.3d 434, 441-442 (2002). As explained above and in the Court of Appeals decision, the Rule in this case is neither reasonable nor consistent with the Podiatry Act. Moreover, in light of the obvious self-interest of the majority of the Board's membership, the Rule should carry no presumption of validity.

A. The Rule Is Invalid Under The Rulemaking Provision Of The Podiatry Act And Texas Common Law, Because It Is Unreasonable and Inconsistent With The Statute.

The Podiatry Act only authorizes the Board to adopt "reasonable or necessary rules, regulations, and bylaws." Tex. Occ. Code § 202.151 (2009). Thus, an "unreasonable" regulation would exceed the Board's rulemaking authority. In the present case, the Rule is unreasonable because, as explained *supra*, it conflicts with the ordinary meaning of the word "foot". Moreover, in this question of human health and safety, "reasonable" should imply due care in draftsmanship, so that the ambits of podiatric care

are comprehensible both to skilled practitioners and to the lay public. The Rule fails both of these tests of reasonableness, and it should therefore be deemed invalid.

B. The Board Is Not Empowered To Expand The Scope Of Its Own Authority Unilaterally.

While in some circumstances a court may defer to an administrative agency's interpretation of a statute, such deference is only appropriate with respect to an agency "charged with its enforcement." *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993). Therefore, deference should not be given to an agency rule that affects the meaning of a statute for which the agency is not responsible.

In the present case, the Board's definition of "foot" directly affects the meaning of the Texas Medical Practice Act, Tex. Occ. Code § 151.001, *et seq.* (2009) (the "Medical Practice Act"), a statute the Board is not charged with enforcing. The purpose of the Medical Practice Act is "to protect the public interest" by regulating the granting of the privilege to practice medicine and "its subsequent use and control." Tex. Occ. Code § 151.003. The Medical Practice Act exempts certain non-physician health care practitioners, such as "licensed podiatrist[s] engaged strictly in the practice of podiatry as defined by law," from its regulatory requirements. Tex. Occ. Code § 151.052.

The Rule effectively expands the scope of this exemption by redefining "podiatry." The Board should not have the power to expand this exemption clause unilaterally and thus affect the application and construction of the Medical Practice Act. Such expansion would enable podiatrists to treat parts of the body outside their area of expertise, without satisfying the requirements of the Medical Practice Act. *See Texas*

Orthopaedic Assocation v. Texas State Board of Podiatric Medical Examiners, 254 S.W.3d 714, 721 (2008). The Medical Practice Act was intended to be administered by individuals who have expertise in the area of medical practice. The Board is not so qualified.

In addition, not only does the Board lack the knowledge and expertise necessary to determine the circumstances in which the requirements of the Medical Practice Act should apply, the members of the Board are directly representative of an industry that has financial and political incentives to expand such an exemption. The Board is composed of six practicing podiatrists and three general members of the public.[3] Tex. Occ. Code § 202.051. It is therefore influenced by the commercial interests of podiatrists and not by those who have expertise in the practice of medicine. Allowing the Board to have such power would be reckless and a threat to public health.

Conclusion

The Court of Appeals decided this case correctly. The issues do not merit a further appeal. *Amici curiae*, the American Medical Association, the American Association of Orthopaedic Surgeons, the American Orthopaedic Foot & Ankle Society, the Texas Academy of Family Physicians, the Texas Pediatric Society, the Texas Ophthalmological Association, and the Texas Society of Anesthesiologists, therefore ask this Court to deny the Petition for Review.

[3] By contrast, the Texas Medical Board ("TMB"), the agency charged with administering the Medical Practice Act, is composed of 19 members: nine Medical Doctors, three Doctors of Osteopathic Medicine, and seven representatives of the public. Moreover, TMB members can serve only with the "advice and consent of the senate." Tex. Occ. Code § 152.002 (2009). This "advice and consent" requirement does not apply to members of the Board.

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DISCLOSURE STATEMENT

Under Rule 11(c) of the Texas Rule of Appellate Procedure, *amici curiae*, the American Medical Association, the American Association of Orthopaedic Surgeons, the American Orthopaedic Foot and Ankle Society, the Texas Academy of Family Physicians, the Texas Ophthalmological Association, the Texas Pediatric Society, and the Texas Society of Anesthesiologists, state that no fee was paid or will be paid in preparation of this brief.

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CERTIFICATE OF SERVICE

I certify that on August 7, 2009, copies of the preceding Brief Amici Curiae of the American Medical Association, American Association of Orthopedic Surgeons, American Orthopaedic Foot and Ankle Society, Texas Academy of Family Physicians, Texas Ophthalmologist Association, Texas Pediatric Society, and Texas Society of Anesthesiologists was served by certified mail, return receipt requested.

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