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Supreme Court of Texas.

TEXAS BOARD OF CHIROPRACTIC EXAMINERS; PATRICK FORTNER, IN HIS OFFICIAL CAPACITY AS THE BOARD'S EXECUTIVE DIRECTOR; AND TEXAS CHIROPRACTIC ASSOCIATION, PETITIONERS,
v.
TEXAS MEDICAL ASSOCIATION, RESPONDENT

NO. 18-1223
|
Argued September 16, 2020
|
Opinion delivered: January 29, 2021

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... of professional, scientific, or economic antagonism between chiropractors and the medical community, and resultant disputes, spanning all three branches of government, regarding where any legal line between chiropractic and the practice of medicine is or should be."[1] The Texas Chiropractic Act (the Act)[2] draws that line by defining the practice of chiropractic to include evaluating the *musculoskeletal system* and improv-ing the *subluxation complex*.[3] The Texas Board of Chiropractic Examiners (the Board) has issued rules defining both terms as involving nerves in addition to muscles and bones.[4] Another Board rule authorizes chiropractors to perform an eye-movement test for neurological problems that is known by the acronym VONT.[5] The Texas Medical Association (**TMA**) asserts that only physi-cians may perform VONT. But as we recently stated, "every act that a physician may do is not automatically the unlawful practice of medicine when done by a non-physician, and terminology in one field may overlap with that of another."[6] We conclude that the challenged rules, read in context, do not exceed the statutory scope of chiropractic practice. We reverse that part of the court of appeals' judgment declaring the rules invalid[7] and render judgment that they are valid.

I

A

Chiropractic traces its roots to an encounter in the late 1800s between an alternative-medicine practitioner, D.D. Palmer, and his hearing-impaired office janitor. The details of the encounter have been disputed, but Palmer later claimed that he performed a manual...

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... to the evaluation pro-vision (§ 201.002(b)(1)), Rule 78.1(a)(5) defines *musculoskeletal system* as "[t]he system of mus-cles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form."[37] With respect to the treatment provision (§ 201.002(b)(2)), Rule 78.1(a)(9) defines *subluxation complex* as

> [a] neuromusculoskeletal condition that involves an aberrant relationship between two adjacent articular structures that may have functional or pathological sequelae, causing an alteration in the biomechanical and/or neuro-physiological reflections of these articular structures, their proximal structures, and/or other body systems that may be directly or indirectly affected by them.[38]

In comments to the Board, **TMA** opposed the definition of musculoskeletal system as "so broad as to include the nervous system and brain, and requested that the definition be limited to the spine."[39] The Board rejected the request, noting that its definition was based on medical dictionaries and was limited to structures "that move the body and maintain its form."[40] **TMA** also criticized the definition of subluxation complex as "expansive" and again requested that it be "re-vised to

narrowly focus on the spine."[41] The Board also rejected this request, stating that its definition was consistent with the statute. "[A]s commonly used by health care providers," the Board explained, "and as commonly described in medical dictionaries, the musculoskeletal system includes more than the spine."[42]

The Board also adopted in the 2006 scope-of-practice rule a provision, now in Rule 78.1(d), stating that "[i]n the practice of chiropractic, licensees may render an analysis, diagnosis, or other opinion regarding the findings of examinations and evaluations."[43] At that time, the Act's evalua-tion provision used only the words "analyze, examine, or evaluate" and did not include the word *diagnose*. Shortly after the rule was adopted, **TMA** sued for a declaration that diagnosis is the practice of medicine and beyond the Act's authorization of chiropractors to "analyze, examine, or evaluate" certain conditions. The court of appeals rejected **TMA's** contention, concluding that the diagnosis authorized by the rule was confined to the statutory practice of chiropractic.[44]

While that litigation was pending, the Board in 2010 adopted what is now Rule 78.1(c)(3)(B), authorizing chiropractors who complete specialized training and pass an examination to perform vestibular-ocular-nystagmus testing, or VONT.[45] VONT is generally an eye-movement test performed with cameras or electrodes to detect nystagmus, a type of involuntary, side-to-side eye movement that may indicate a problem in the brain, inner ears, or eyes. Authorized chiropractors use the test to help diagnose the cause of a patient's balance problem by ruling out a neurological condition that would require referral of the patient to a physician.

A few months later, **TMA** sued to invalidate the VONT rule as exceeding the scope of chiropractic practice prescribed by the Act. After the court of appeals reversed summary judgment for **TMA**,[46] **TMA** amended its pleadings on remand to challenge Rule 78.1(a)'s definitions of the musculoskeletal system and the subluxation complex, asserting that their references to "nerves", "neuromusculoskeletal condition", and "neuro-physiological reflections" exceed the Act's re-striction of chiropractic practice to "biomechanical condition[s]".[47] **TMA** added that the definitions authorized diagnosis, which it continued to insist, as it had in its earlier suit, is solely a medical practice.[48] After a bench trial, the court issued findings of fact and conclusions of law, holding that the challenged rules are invalid because they exceed the statutory scope of chiropractic practice. It rendered judgment accordingly. The Board appealed, along with the Texas Chiropractic Association (TCA), which had joined the suit.

The court of appeals affirmed in part. Relying on the trial court's findings of fact and the evidence adduced at trial, the court of appeals held that Rule 78.1(a)(5) and (9), defining muscu-loskeletal system and subluxation complex as involving the nervous system, exceed the scope of practice prescribed...

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> ... court erred in its findings of fact or in concluding that the Rule's provision related to VONT exceeded the scope of chiropractic.[49]

While the appeal was pending, the Legislature amended the evaluation provision of the Act to add the word *diagnose*, so that the Act now authorizes chiropractors to "diagnose, analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system".[50] The court of appeals reversed the trial court's judgment invalidating the rules as authorizing diagnosis outside the statutory scope of chiropractic practice.[51]

We granted the Board's and TCA's petitions for review. As their positions are aligned, we refer to their arguments simply as the Board's.

II

As a threshold matter, the Board argues that the APA affords **TMA** no basis for challenging Rule 78.1. Section 2001.038(a) allows a challenge to an administrative rule "if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff."[52] The Board argues that **TMA's** assertions do not meet this standard because there is no evidence that chiropractors are practicing medical neurology or failing to refer patients with medical problems to

physicians. **TMA**, the Board contends, has done no more than assert policy differences with the Legislature over the scope of chiropractic practice. **TMA** responds that it has alleged that Rule 78.1 diminishes the privilege of practicing medicine and the value of physicians' medical licenses by authorizing the unlicensed practice of medicine.

We agree with **TMA** that its allegation satisfies § 2001.038(a). The MPA recognizes that "the practice of medicine is a privilege" reserved to physicians subject to "licensing, regulating, and disciplining" under that statute.[53] Obtaining and maintaining the privilege of practicing medi-cine imposes economic costs on physicians, and allowing nonphysicians to practice medicine out-side the MPA's control would impair—or at least threaten to impair—that privilege.

The Board characterizes § 2001.038(a) as a "statutory standing" provision. Constitutional standing is a prerequisite for subject matter jurisdiction.[54] In *Finance Commission of Texas v. Nor-wood*, we treated § 2001.038(a) "as but another expression of the general[,] [constitutional] doc-trine of standing."[55] But last Term in *Pike v. EMC Management, LLC*, we discouraged the use of the term *standing* to describe extra-constitutional restrictions on the right of a particular plaintiff to bring a particular lawsuit.[56] "[T]he question whether a plaintiff has ... satisfied the requisites of a particular statute", we said, "pertains in reality to the right of the plaintiff to relief rather than to the subject-matter jurisdiction of the court to afford it."[57]

Although the Board does not argue that **TMA** lacks constitutional standing, "we have an obligation to examine our jurisdiction any time it is in doubt".[58] Constitutional standing requires a concrete injury that is both traceable to the defendant's conduct and redressable by court order.[59] When constitutional standing is raised for the first time on appeal, the test must be lenient because "there is no opportunity [for the plaintiff] to cure [a pleading] defect."[60] Construing the record "liberally ... as [we] must" at this stage[61] and "resolving any doubt in [**TMA's**] favor",[62] we conclude that **TMA** has constitutional standing to bring this lawsuit. Keeping in mind that no party contests **TMA's** constitutional standing, we conclude that **TMA's** assertion that some physicians will suffer economic harm due to increased competition from chiropractors sufficiently alleges the concrete injury required for standing.[63] That alleged injury is directly traceable to the Board's rule-making and would be redressed here by judicial invalidation of the challenged rules. Likewise, no party contests **TMA's** associational standing to file suit on behalf of its members, and we conclude that **TMA's** unchallenged allegations satisfy the requirements under our caselaw for associational standing.[64]

Having concluded that **TMA** is entitled to bring this action, we will now consider the merits of its claims.

III

The issue before us is whether Rules 78.1(a)(5) and (9), which define *musculoskeletal system* and *subluxation complex*, and Rule 78.1(c)(3)(B), which allows certain chiropractors to perform VONT, exceed the scope of practice prescribed by § 201.002(b)(1)–(2) of the Act. We first set out our standard of review, then consider its application to Board rulemaking, and finally determine the validity of the challenged rules.

A

Our standard of review in this case is well settled. The parties agree, as they must, that interpreting the Act and the rules involves only questions of law, which we determine de novo.[65] Although the court of appeals never expressly agreed or disagreed with this...

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... of the act involved.' "[66] The court of appeals acknowledged this principle in setting out the standard of review[67] but never in its analysis, which gave no deference to the Board's expertise regarding chiropractic practice.

When statutes use terms they do not define, as the Act does, "we must apply their common, ordinary meaning unless a contrary meaning is apparent from the statute's language."[68] Of course, the Act's terms must be understood in the context of healthcare in general and chiropractic practice in particular, which are the subject of the Act.[69] The issue is whether the definitions that the Board adopted in the rules are consistent with the meaning of the terms in the Act.

We recently applied these principles in another case involving a challenge by **TMA** to the validity of an administrative rule.

In *Texas State Board of Examiners of Marriage and Family Therapists v. Texas Medical Association*, **TMA** objected to an agency rule authorizing marriage and family therapists to provide diagnostic assessments using the Diagnostic and Statistical Manual of Mental Disorders, commonly referred to as the DSM. [70] **TMA** argued there, as it also has in this case, that diagnosis is the practice of medicine and that the rule violated both the Licensed Marriage and Family Therapists Act and the MPA by empowering therapists to diagnose any mental disease or disorder. The Therapists Board countered that the rule only authorized therapists to diagnose disorders within their sphere of expertise and training.

We treated the question of the rule's validity as a purely legal one and explained that we were obliged to decide it "based on the relevant Texas statutes" and "not on whether [therapists] are qualified to make DSM diagnoses or whether other states' laws allow them to." [71] We began our analysis with the general principle that state administrative agencies like the Therapists Board...

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... definition that is "different, more limited, or [more] precise" than the dictionary definition "is apparent from the term's use in the context of the statute, [then] we apply that meaning." [79]

The starting point of our analysis in *Marriage and Family Therapists* was the language of the Licensed Marriage and Family Therapists Act authorizing therapists to engage in "the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction in the context of marriage or family systems." [80] Against that standard we compared the Therapists Board rule au-thorizing therapists to provide a diagnostic assessment using the DSM "as part of their therapeutic role to help individuals identify their emotional, mental, and behavioral problems when necessary." [81] **TMA** conceded that the statutory authorization of evaluations included authorization for assessments, but it argued that the inclusion in the rule of the adjective *diagnostic* was a bridge too far. After looking to both traditional and medical dictionary definitions of the relevant terms to discern their "common, ordinary meanings ... within their statutory context", [82] we concluded that **TMA** was "mak[ing] too much of the rule's use of the word 'diagnostic.' " [83]

Critically, we looked to other Therapists Board rules to provide context for the rule that **TMA** was challenging. Our conclusion that **TMA** had not met its burden of demonstrating that the rule authorizing diagnostic assessments exceeded the statutory scope of practice was based in part on other rules limiting therapists to providing "services within [their] professional competency" and requiring referral of a client to another care provider when appropriate. [84]

An undercurrent of **TMA's** argument in *Marriage and Family Therapists* was that any act within the statutory scope of medical practice must necessarily be excluded from the statutory scope of other healthcare professions. We rejected that line of thinking, explaining that "every act that a physician may do is not automatically the unlawful practice of medicine when done by a non-physician, and terminology in one field may overlap with that of another." [85] This principle is clear from the text of the MPA, which defines medical practice in the broadest terms possible— "the diagnosis[ ] [or] treatment" of any "mental or physical disease or disorder", "physical deform-ity", "or injury" [86] —and then exempts from the prohibition against unlawfully practicing medicine certain nonphysician...

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... statute or "runs counter to the general objectives of" that statute. [88]

B

The lower courts failed to apply this analysis, even though the court of appeals had the benefit of our decision in *Marriage and Family Therapists* and even though the legal principles we applied there broke no new ground. The trial court weighed evidence—specifically, witness testimony presenting each side's view of the appropriate line between chiropractic and medical neurology—as if it were doing the Board's work anew. The court's findings of fact and conclusions of law make it clear that it failed to afford Rule 78.1 a presumption of validity. For example, the court found that "[t]here is no commonly accepted definition of musculoskeletal system that includes nerves"—implicitly crediting **TMA's** evidence over the Board's. **TMA** witnesses testified that strict anatomical lines delineate one system of the human body from another. [89] Board witnesses testified that chiropractic takes a functional view of the body that does not permit the bio-mechanical condition of the muscles and bones that comprise the musculoskeletal system to be evaluated apart from the nerves that animate them. The court

of appeals gave a nod to our analysis in *Marriage and Family Therapists* but then held that in light of the witness testimony presented by **TMA**, "sufficient evidence" supported the trial court's judgment that Rule 78.1 exceeds the statutory scope of chiropractic. [90] In so doing, the court applied an incorrect standard of review. The proper question for the court was whether, despite Rule 78.1's presumption of validity, the rule contravenes the Act's specific text or runs counter to its purpose as a matter of law.

With the Board, the Legislature has delegated to a regulated group of practitioners and public members the responsibility of "clarifying what activities are included within the scope of the practice of chiropractic and what activities are outside of that scope", [91] and it has required the Board in doing so to take measures beyond what is required by the APA to "seek input early in the rule development process" from the "persons who will be most affected" by it. [92] Judges are experts in statutory analysis, not in healthcare. To prevent expensive and time-consuming usurpations of administrative agencies' policymaking work, the court's inquiry in a § 2001.038(a) suit challenging the validity of an agency rule must be limited. The textual analysis we set out in *Marriage and Family Therapists* ensures that courts will stay in their lane. To that analysis we now turn.

C

TMA contends that Rule 78.1(a)'s references to nerves exceed the Act's scope of chiro-practic practice. Specifically, the rule's definition of the statutory phrase *musculoskeletal system* includes not only bones, joints, muscles, tendons, and ligaments but also the "associated ... nerves that move the body and maintain its form." [93] And the rule defines the statutory phrase *subluxation complex* as a "neuromusculoskeletal condition" that can alter certain "neuro-physiological reflections". [94] **TMA** argues that these references to nerves authorize chiropractors to diagnose any neurological condition, which is the practice of medicine.

TMA's argument echoes its position in *Marriage and Family Therapists* that a rule per-mitting therapists to make diagnostic assessments allows them to diagnose any mental disorder. But here, as was the case there, the rule's words cannot be read beyond their context. Nothing in Rule 78.1 suggests that chiropractic practice extends beyond the evaluation and treatment of the musculoskeletal system. The rule merely acknowledges the reality that chiropractors cannot ignore the presence and effect of associated nerves that help shape the musculoskeletal system and allow it to move. The Board's definition of musculoskeletal system only includes those nerves "associated" with the muscles, tendons, ligaments, bones, joints, and tissues "that move the body and maintain its...

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... evaluation services" to "[d]ifferentiate a patient or condition for which chiropractic treat-ment is appropriate from a patient or condition that is in need of care from a medical or other class of provider." [97] Rule 79, governing "Unprofessional Conduct", states that "[a] licensee shall ... timely refer a patient to another appropriate health care provider for a condition outside the scope of practice" [98] and that "[a] licensee *may not* ... perform or attempt to perform proce-dures for which the licensee is untrained". [99] Licensees who engage in unprofessional conduct are "subject to disciplinary action." [100] Far from authorizing chiropractors to stray beyond the Act's boundaries, the Board's rules, taken together, seek to ensure that chiropractors remain inside them.

TMA argues that no commonly accepted definition of the musculoskeletal system includes nerves. But **TMA** over reads Rule 78.1. The rule merely recognizes the reality that musculoskeletal dysfunctions cannot be diagnosed or treated without considering associated nerves. Medical neurology is a far broader field. The Board argues that chiropractors must consider the nerves involved in a musculoskeletal system in order to determine whether referral to a neurologist is required. **TMA** characterizes this view as functional and argues that it ignores the fact that body systems are separate. But it is not for the judiciary to decide between these competing views. That decision was the Board's, and it could reasonably consider neural involvement in the musculoskeletal system in defining the scope of chiropractic. **TMA** argues that the danger is that a chiropractor will not make a referral to a neurologist when one is required. But the answer to **TMA's** concern is in Rule 79, which provides for professional discipline if that were to occur.

For all of these reasons, we conclude that **TMA** "makes too much" of the references to nerves in the Board's definitions of musculoskeletal system and subluxation complex. [101] **TMA** has not overcome the definitions' presumption of validity by demonstrating that they contravene specific language in the Act or run counter to the Act's objectives. [102]

D

TMA also challenges Rule 78.1(c)(3)(B)'s authorization for chiropractors who have completed specialized training to perform VONT. The technical language of the rule does not aid our statutory analysis. The parties describe VONT as a test that measures a patient's eye movements with a camera or through electrodes, and they agree that it does not fall within any category of procedure that the Legislature has expressly excluded from the scope of chiropractic—VONT is not "incisive or surgical"; it does not require "the prescription of controlled substances"; and it does not "use ... x-ray therapy" or otherwise "expose[ ] the body to radioactive materials." [103] TMA presented evidence in the trial court that VONT is a neurological test that a medical doctor may use to diagnose a problem of the brain, inner ear, or eyes, none of which is a part of the spine or musculoskeletal system. Therefore, TMA argues, it exceeds the statutory scope of chiropractic for a chiropractor to perform VONT.

But the Board also presented evidence that VONT can be used to facilitate chiropractic treatment. One chiropractor witness, Frederick Carrick, D.O., testified by deposition that because spinal joints move reflexively opposite the direction of eye movements, VONT can "tell[ ] you the integrity of spinal musculature in reaction reflexogenically to an environmental perturbation" and "can be indispensable in [demonstrating] what side of the spine to treat". [104] The Board explains that a chiropractor can also use VONT to rule out nonchiropractic causes of certain disorders, which can help the chiropractor to determine whether chiropractic treatment is appropriate or whether the...

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... and how to treat a patient's musculoskeletal system. The Legislature has authorized chi-ropractors "to diagnose ... the biomechanical condition of the spine and musculoskeletal system". [106] In Rule 78.1, which is presumptively valid, the Board has set out how a VONT test can be used to perform that diagnosis without exceeding the statutory scope of chiropractic. The dissent dramatically concludes that with the Rule's limited authorization of VONT, "limitations on chiropractic practice lose all meaning" and "[a] chiropractor's practice becomes coextensive with a medical doctor's practice". [107] But far from equating chiropractors and physicians, the Board's rules in fact carefully observe the statutory boundary between the two professions.

The dissent also echoes TMA's argument that the Act does not permit chiropractors to make differential diagnoses by ruling out possible neurological causes of a patient's dysfunction. The dissent says that "[t]o 'rule out' a neurological condition based on a neurological examination is to say, affirmatively, that it is not a cause of the patient's symptoms." [108] The accuracy of this characterization is questionable. A more realistic explanation of differential diagnosis is that it is the process every healthcare provider goes through when assessing a patient's symptoms to determine whether it is appropriate to treat the patient or refer the patient elsewhere. An unchallenged Board rule expressly addresses this process by requiring chiropractors to refer patients to other healthcare...

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... how a chiropractor might use the test "to diagnose, analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system". [111] Because a § 2001.038(a) suit challenges the facial va-lidity of an agency rule, that must be the end of the inquiry. The court of appeals reasoned that "[s]imply because [VONT] might under some circumstances be useful does not require that chi-ropractors be able to perform the test". [112] Whether VONT *should* be used by chiropractors is a policy judgment for the Legislature and the Board, not for the courts. [113] The sole question for courts is whether the text or objectives of the Act forbid chiropractors from using VONT. [114] We hold that they do not.

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Applying the proper standard of review, we conclude that TMA has not carried its burden of demonstrating that the challenged provisions of Rule 78.1 contravene the specific text or the objectives of the Act. Accordingly, we reverse the judgment of the court of appeals in part and render judgment declaring that the challenged provisions are valid.

All Citations

--- S.W.3d ----, 2021 WL 299166

Footnotes

1 *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 467 (Tex. App.—Austin 2012, pet. denied). That case was a precursor to this one. The parties have appealed the underlying case three times to the court of appeals and twice to this Court. Each appeal to the court of appeals is styled *Texas Board of Chiropractic Examiners v. Texas Medical Board.* In order they are No. 03-12-00151-CV, 2012 WL 5974063 (Tex. App.—Austin Nov. 21, 2012, no pet.) (mem. op.); No. 03-14-00396-CV, 2014 WL 7014530 (Tex. App.—Austin Dec. 8, 2014, pet. denied) (mem. op.); and 566 S.W.3d 776 (Tex. App.—Austin 2018) (the decision below).

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