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Third Court of Appeals
P.O. Box 12547
Austin, TX 78711

Re: ***Freshour v. Van Boven***
Cause No. 03-18-00817-CV
Amicus Letter Brief in support of Appellee/Cross-Appellant Robert Van Boven, M.D.

Dear Honorable Justices of the Third Court of Appeals:

Amicus curiae Association of American Physicians & Surgeons ("AAPS") respectfully submits this amicus letter brief in full support of Appellee and Cross-Appellant Robert Van Boven, M.D. This submission alerts this Honorable Court to a new decision rendered on May 24, 2019, by the Texas Supreme Court concerning the Texas Medical Board, and also to relevant published statements by the Director of the National Practitioner Data Bank, David Loewenstein, which should aid this Court in considering this appeal.[1]

Background and Interest to File

AAPS is a non-profit membership organization, founded in 1943, which has active members who practice medicine in Texas. AAPS defends the practice of private, ethical medicine, including preservation of the sanctity of the patient-physician relationship. AAPS has filed multiple amicus briefs before the U.S. Court of Appeals for the Fifth Circuit. *See, e.g.*, *Texas v. United States*, Case No. 19-10011 (5th Cir.). The U.S. Supreme Court has made use of *amicus* briefs submitted by AAPS in high-profile cases. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting). The U.S. Court of Appeals for the Third Circuit cited an *amicus* brief by AAPS in the first paragraph of one of its decisions. *See Springer v. Henry*, 435 F.3d 268, 271 (3d Cir. 2006). The Illinois Supreme Court also addressed an AAPS *amicus* brief. *See Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill.

[1] This amicus letter brief is funded entirely by the American Health Legal Foundation, which is an IRS Section 501(c)(3) organization funded almost entirely by members of AAPS. No party to this case provided any funding for this amicus letter brief.

Dec. 398, 408, 52 N.E.3d 319, 329 (2016) (discussing an *amicus* brief which was filed by AAPS).

On behalf of its members, AAPS has extensive experience with the National Practitioner Data Bank, which is at issue in this case. The decision in this case will likely affect AAPS members in Texas, and thus *Amicus* AAPS has direct and vital interests in the issues presented here.

Preliminary Statement

The National Practitioner Data Bank ("Data Bank" or "NPDB") is a sort of blacklist for physicians, which harms the reputation of all who are in it. "Are you in the Data Bank?" is the first question that many recruiters or employers want answered, and if the response is "yes" then it often ends any job opportunities for physicians. Many employers do not have the time or interest to learn the details of an applicant's entry in the Data Bank; if there is such an entry, then that is all they need to hear to disqualify a candidate.

Yet, perhaps to the surprise of many, there is no checking of the truthfulness of the reports by anyone at the Data Bank. Federal regulations generally do not authorize or even allow anyone at the Data Bank to modify the reports sent to it. Rather, the Data Bank is akin to a public bulletin board or internet website that publishes whatever is sent to it, without modifying or screening the information. If a false or misleading report is sent to the Data Bank, then it repeats that same false or misleading report to hospitals nationwide to the detriment of the subject of that report.

Accordingly, it is essential that those who report to the Data Bank do so with utmost integrity, and void reports which become false or misleading due to subsequent events. The value of the Data Bank depends entirely on the continuing integrity of the reports sent to it. Hospitals and others make inquiries of the Data Bank on the assumption that the reports remain truthful, and that the physicians who have entries in the Data Bank have committed serious misconduct to cause them to be placed on the blacklist.

The Texas Medical Board (TMB) refuses to withdraw or void its false and misleading report to the Data Bank about Robert Van Boven, M.D., despite his complete exoneration by the legal process. Instead, the TMB insists on compounding its error by adding another report to the Data Bank, as though Dr. Van Boven had committed wrongdoing a second time when he never engaged in any relevant wrongdoing.

The district court properly recognized the injustice of the TMB's conduct, and its holding in favor of Dr. Van Boven should be affirmed with respect to its denial of the plea of jurisdiction as to Defendants Scott Freshour, Margaret McNeese, Timothy Webb, and Sherif Zaafran, M.D.,

but should be reversed to the extent it dismissed Dr. Van Boven's claims against other TMB officials.

Argument

I. The Data Bank Relies on Reporting Entities Such as the TMB to Withdraw or Void a Misleading Report.

The Director in charge of the Data Bank candidly admits its role is generally ***not*** to check the truthfulness of reports that are sent to it. In an interview of David Loewenstein, Director of the Division of Practitioner Data Bank, as published in the *Journal of American Physicians and Surgeons* in Fall 2017,[2] Loewenstein explained that:

> it's ***really not the role of the NPDB to investigate the underlying*** merits of the peer-review process. We get about 100,000 reports. Last year we got about 100,000 reports, and ***we don't substantively examine the reports unless they are disputed by the subject of the report***. … [I]t is important to note that through statute and regulations the review is limited to two things: whether the report was submitted in accordance with NPDB reporting requirements, including the fact that it must be a professional review action related to professional competence or conduct, and the other thing we look at is the factual accuracy of the information based on the records we receive. ***So, we do not review the underlying merits of the action that was taken nor do we have the authority to substitute our judgment for that of the reporting entity***.

Lawrence R. Huntoon, M.D., Ph.D., "Sham Peer Review and the National Practitioner Data Bank" [hereinafter, *Loewenstein*], Vol. 22, No. 3 at 69-70 (Fall 2017) (emphasis added). Data Bank Director Loewenstein elaborated that:

> ***[It] would be outside the scope of our review to look at the underlying merits of the action***.

Id. at 70 (emphasis added).

That means a reporting agency such as the TMB itself must take the initiative to void any of its reports to the Data Bank which become misleading, as the TMB's report against Dr. Van Boven has become. Otherwise the consequences are manifestly unjust to the subject of the report – in this case Dr. Van Boven – and the integrity of the Data Bank itself is undermined.

[2] www.jpands.org/vol22no3/huntoon.pdf (viewed June 4, 2019).

II. Semantics Do Not Justifying Continuing to Harm a Physician with an Improper Data Bank Entry.

Data Bank rules require the TMB to void its report whenever its discipline "was overturned on appeal," Data Bank Guidebook at E-8. The position of the TMB that its discipline of Dr. Van Boven was not actually overturned on appeal – even though it was rejected by a SOAH ruling and then by the TMB itself – is an abuse of semantics by the TMB which should be emphatically rejected by this eminent Court.

The Director of the Data Bank, in his above-quoted interview as published in the *Journal of American Physicians & Surgeons*, emphasized that:

> [I]f that underlying action [against a physician] would be overturned by the jury verdict, then it would fall into that void situation I just talked about earlier. ***So, that action no longer would exist***. In terms of a physician being exonerated by an internal review proceeding, so any action is overturned on appeal, ***that would need to be voided***.

Loewenstein, at 71.

The equivalent of a jury verdict in favor of the physician occurred here, when the SOAH Judge held entirely in favor of Dr. Van Boven and the TMB affirmed that favorable ruling. There is no plausible interpretation of the Data Bank rules and its Director's foregoing comments which permit allowing an invalid, later-vacated temporary order against a physician to remain in the Data Bank. The temporary order no longer exists in the eyes of the law, 22 Tex. Admin. Code, Section 187.61(b), and should not continue to exist in the Data Bank either.

Furthermore, there is a Kafkaesque element implicit in the TMB's actions and argument. The mere allegation of wrongdoing, with an administrative court finding after complete litigation that the allegation is unsubstantiated, is being used to blacklist a physician. A jury or court process can never prove innocence. The process does not fail because of this, as the default assumption is supposed to be innocence. TMB violates this legal and societal norm by persevering in arguing to punish the physician despite the legal exoneration.

It would impermissibly elevate form over substance for a court to hold that the TMB should void its report if a jury verdict overturned it, or if an appellate court overturned it, but not if a SOAH judge held in favor of a physician after a full trial, as occurred below. The TMB should be ordered to fully void all of its reports to the Data Bank about Dr. Van Boven.

III. The Texas Supreme Court Recently Reversed Overreach by the TMB, which Supports Reversing Its Overreach against Dr. Van Boven.

On May 24, 2019, a near-unanimous decision by the Texas Supreme Court soundly rejected and reversed overreach by the TMB in another disciplinary case. *Aleman v. Texas Medical Board*, 2019 Tex. LEXIS 495, 62 Tex. Sup. Ct. J. 1108, 2019 WL 2237984 (May 24, 2019). There, as here, the TMB had elevated form over substance and insisted on marring the reputation of a physician, contrary to justice. There the physician manually hand-signed death certificates rather than participate in an electronic system for processing death certificates. Here Dr. Van Boven was accused *and cleared* of wrongdoing with patients. In neither case should the physician's reputation be sullied by the TMB because it fails to abide by sensible limits on its vast powers.

While the *Aleman* decision did not directly address the Data Bank, the logic and force of its ruling applies here as well:

> Accordingly, we hold that a physician's act of completing the medical certification for a death certificate manually rather than by using the approved electronic process does not constitute a "prohibited practice" under section 164.052 of the Medical Practice Act, and section 164.051 in turn does not authorize the Board to take disciplinary action against a person for such conduct. ***Because the Board relied on an erroneous interpretation of the Medical Practice Act to discipline Dr. Aleman, it necessarily abused its discretion in doing so***. We therefore reverse the court of appeals' judgment to the extent it upholds the portions of the Board's order (1) concluding that Dr. Aleman violated the Medical Practice Act and (2) imposing sanctions against him.

Aleman, 2019 Tex. LEXIS 495, at *22 (emphasis added).

Dr. Van Boven was accused and cleared of every allegation by the TMB of wrongdoing against him. Its initial temporary adverse action against him is thereby null and void. It would be contrary to the spirit of the recent Texas Supreme Court ruling in *Aleman* to allow TMB officials to perpetuate its devastating harm to Dr. Van Boven, his career, and his reputation based on discredited allegations of wrongdoing.

Conclusion

The district court decision below should be affirmed with respect to its denial of the plea of jurisdiction as to Defendants Scott Freshour, Margaret McNeese, Timothy Webb, and Sherif Zaafran, M.D., but otherwise reversed.

Sincerely,

/s/ Laurie L. York

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing document has been served on this 9th day of June, 2019 by e-file and/or electronic mail in accordance with the Texas Rules of Civil Procedure to the following:

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