

No. 20-0117

IN THE SUPREME COURT OF TEXAS

ROBERT W. VAN BOVEN, M.D., D.D.S.,
Petitioner,

v.

SCOTT FRESHOUR, MARGARET MCNEESE, CHRIS PALAZOLA, AMY
SWANHOLM, TIMOTHY WEBB, AND SHERIF ZAAFRAN, M.D.,
IN THEIR OFFICIAL CAPACITIES AS OFFICERS OF THE TEXAS
MEDICAL BOARD,
Respondents.

On Review from the Third Judicial District Court of Appeals,
Cause No. 03-18-00817-CV

Brief of *Amicus Curiae*
Association of American Physicians & Surgeons
in Support of Petitioner on the Merits

Laurie L. York
State Bar No. 00785297
LAURIE L YORK LAW OFFICE
6633 Oasis Dr.
Austin, TX 78749
512-301-3777
lauriey23@yahoo.com

Counsel for *Amicus Curiae*

IDENTITY OF PARTIES AND COUNSEL

Petitioner:

Robert W. Van Boven M.D., D.D.S.

Counsel for Petitioner:

David Tuckfield (Lead Counsel)

THE AL LAW GROUP PLLC

12400 Highway 71 West, Suite 350-150

Austin, Texas 78738

Casey Low

PILLSBURY WINTHROP SHAW PITTMAN

401 Congress Ave., Suite 1700

Austin, Texas 78701

Elin Isenhower

WINSTEAD PC

401 Congress Avenue, Suite 2100

Austin, Texas 78701

eisenhower@winstead.com

Respondents:

Scott Freshour, Margaret McNeese, Chris Palazola, Amy Swanholm, Timothy Webb, and Sherif Zaafran, M.D., in their Official Capacities as Officers of the Texas Medical Board

Counsel for Respondents:

Bill Davis, Deputy Solicitor General

Ted A. Ross, Assistant Attorney General

Charles K. Eldred, Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL OF TEXAS

Administrative Law Division

P. O. Box 12548

Austin, Texas 78711-2548

***Amicus Curiae* in Support of Petition for Review and Petitioner’s Brief on the Merits:**

Donald P. Wilcox
State Bar No. 21449000
Eamon J. Reilly
State Bar No. 24085548
TEXAS MEDICAL ASSOCIATION
401 West 15th Street, Suite 100
Austin, Texas 78701
Phone: (512) 370 1336
Fax: (512) 370 1693
rocky.wilcox@texmed.org
eamon.reilly@texmed.org

***Amicus Curiae* in Support of Petitioner’s Brief on the Merits and a Decision on the Merits:**

Laurie L. York
State Bar No. 00785297
LAURIE L YORK LAW OFFICE
6633 Oasis Dr.
Austin, TX 78749
512-301-3777
lauriey23@yahoo.com

***Amicus Curie* in Support of Petition for Review and a Decision on the Merits:**

Ron Beal
State Bar No. 24005041
Professor & Attorney at Law
One Bear Place #97288
Waco, TX 76798-7288

The Honorable William W. Zedler
Arlington, Texas
817-229-1096
bill@billzedler.com

TABLE OF CONTENTS

	Page(s)
IDENTITY OF PARTIES AND COUNSEL	2
TABLE OF CONTENTS	4
TABLE OF AUTHORITIES	5
INTEREST OF <i>AMICUS CURIAE</i>	7
RULE 11 STATEMENT	8
SUMMARY OF ARGUMENT	8
ARGUMENT AND AUTHORITIES	10
I. A Writ of Mandamus is Needed Here to Enjoin the Ultra Vires Acts by the TMB Officials.....	11
A. Respondents Lack Discretion Here.....	12
B. A Writ of Mandamus for Compliance is Warranted	15
II. Sovereign Immunity Does Not Protect Erroneous Interpretations by Agencies of Their Own Legal Duties	16
PRAYER	19
CERTIFICATE OF COMPLIANCE	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>AAPS v. Hillary Clinton</i> , 997 F.2d 898 (D.C. Cir. 1993).....	7
<i>AAPS v. Mathews</i> , 423 U.S. 975 (1975).....	7
<i>AAPS v. Weinberger</i> , 395 F. Supp. 125 (N.D. Ill.), aff'd sub nom., <i>AAPS v. Mathews</i> , 423 U.S. 975 (1975)	7
<i>Aleman v. Tex. Med. Bd.</i> , 573 S.W.3d 796 (Tex. 2019).....	17, 18
<i>Anderson v. City of Seven Points</i> , 806 S.W.2d 791, 793 (Tex. 1991).....	15, 16
<i>Chambers-Liberty Counties Navigation Dist. v. State</i> , 575 S.W.3d 339 (Tex. 2019).....	15
<i>City of El Paso v. Heinrich</i> , 284 S.W.3d 366 (Tex. 2009).....	16, 17, 19
<i>City of Hous. v. Hous. Mun. Emples. Pension Sys.</i> , 549 S.W.3d 566 (Tex. 2018)	16
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	7
<i>Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.</i> , 545 S.W.3d 532 (Tex. 2018).....	17
<i>Fed. Sign v. Tex. S. Univ.</i> , 951 S.W.2d 401 (Tex. 1997).....	16
<i>Freshour v. Van Boven</i> , 03-18-00817-CV, 2020 Tex. App. LEXIS 116 (Tex. App.—Austin Jan. 9, 2020, pet. granted)	10
<i>Godoy v. Wells Fargo Bank, N.A.</i> , 575 S.W.3d 531 (Tex. 2019)	17
<i>Hamilton v. Washington</i> , No. 03-11-00594-CV, 2014 Tex. App. LEXIS 13733 (Tex. App. Dec. 23, 2014).....	15
<i>Hous. Belt & Terminal Ry. Co. v. City of Hous.</i> , 487 S.W.3d 154 (Tex. 2016)	9, 19

<i>In re Smith</i> , 333 S.W.3d 582, 585 (Tex. 2011)	19
<i>Springer v. Henry</i> , 435 F.3d 268 (3d Cir. 2006)	7, 8
<i>Texas v. United States</i> , 945 F.3d 355 (5th Cir. 2019)	7
<i>Trauth v. K.E.</i> , 613 S.W.3d 222 (Tex. App. 2020)	11, 12
<i>United States v. Rutgard</i> , 116 F.3d 1270 (9th Cir. 1997)	8
<i>Valfer v. Evanston Nw. Healthcare</i> , 2016 IL 119220, 402 Ill. Dec. 398, 52 N.E.3d 319	8

STATUTES

22 Tex. Admin. Code

§ 182.8(a)	11
§ 182.8(a)(1)	11
§ 187.43	11
§ 187.57(c)	11

Tex. Govt. Code

§ 22.002(c)	15
§ 2003.021(a)	13

Tex. Occ. Code

§ 151.002(a)(2)	11
§ 154.056(e)	11
§ 154.0561	11
§ 164.051	18
§ 164.052	18
§ 164.059	11
§ 164.059(b)	11
§ 164.060	16

OTHER AUTHORITIES

2018 Texas Administrative Law Handbook	12, 13, 14
--	------------

To the Honorable Supreme Court of Texas:

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, the Association of American Physicians & Surgeons (“AAPS”) submits this Brief as *Amicus Curiae* in support of Robert W. Van Boven, MD, DDS (hereinafter, “Dr. Van Boven”). AAPS respectfully urges the Court to grant Dr. Van Boven’s requested relief and to order Respondents to void their reports in the National Practitioner Data Bank (“NPDB” or “Data Bank”) against him.¹

INTEREST OF *AMICUS CURIAE*

Founded in 1943, *Amicus Curiae* AAPS is a national organization of physicians with an active chapter in Texas. Having thousands of supporters, AAPS defends the practice of private, ethical medicine, including preservation of the sanctity of the patient-physician relationship. Over its 78-year history, AAPS has brought several precedent-setting lawsuits, including *AAPS v. Hillary Clinton*, 997 F.2d 898 (D.C. Cir. 1993), and *AAPS v. Weinberger*, 395 F. Supp. 125 (N.D. Ill.), *aff’d sub nom.*, *AAPS v. Mathews*, 423 U.S. 975 (1975). *Amicus* briefs by AAPS have been cited by the U.S. and state Supreme Courts, and by multiple U.S. Courts of Appeals. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting); *Texas v. United States*, 945 F.3d 355, 369 (5th Cir. 2019) (quoting AAPS in the introductory paragraph of the decision); *Springer v.*

¹ The Respondents are specifically listed in the caption.

Henry, 435 F.3d 268, 271 (3d Cir. 2006) (citing and siding with an AAPS argument); *United States v. Rutgard*, 116 F.3d 1270, 1275 (9th Cir. 1997) (mentioning AAPS as *amicus curiae*); *Valfer v. Evanston Nw. Healthcare*, 2016 IL 119220, ¶ 33, 402 Ill. Dec. 398, 408, 52 N.E.3d 319, 329 (the Illinois Supreme Court discussing an *amicus* brief that was filed by AAPS).

AAPS has members who practice medicine in Texas, and the decision in this case will likely affect their practices and reputations. AAPS has a strong interest in correcting false governmental reports against good physicians like Dr. Van Boven. AAPS thereby has direct and vital interests in the issues presented here.

RULE 11 STATEMENT

Pursuant to Rule 11 of the Rules of Appellate Procedures, this confirms that *Amicus* AAPS received no compensation or fees in connection with the preparation or submission of this brief. AAPS and its closely affiliated nonprofit legal foundation, the American Health Legal Foundation, will be responsible for all attorneys' fees incurred in filing this brief.

SUMMARY OF ARGUMENT

Dr. Van Boven is a superb physician who should not continue to be maligned and defamed by an incorrect entry against him in a governmental database. State law requires correcting this injustice, and nothing in the doctrine of sovereign immunity prevents ordering its correction. This Court should compel

Respondents, as officials of the Texas Medical Board (“TMB”), to send a notice to the Data Bank to void the incorrect entries against Dr. Van Boven.

Sovereign immunity does not apply when state government officials misinterpret, misapply, or misrepresent their powers. The authority of the state is properly restored when a court orders state officials to comply with state law. Properly pleaded *ultra vires* suits do not implicate sovereign immunity because they do not attempt to exert control over the state but, instead, attempt to reassert control of the state over one of its agents.

Respondents “exercise[d] judgment or *limited* discretion without reference to or in conflict with the constraints of the law authorizing the official to act.” *Hous. Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, **163** (Tex. 2016) (**emphasis in original**). The merits of the allegations of misinterpreting, misapplying, and misrepresenting disciplinary powers granted by the state to the TMB officials is for this Court to decide based on its interpretation of Texas statutory law. As the appellate court acknowledged:

When the jurisdictional issues overlap with the merits of the plaintiff’s claims, the party asserting the plea to the jurisdiction must overcome a traditional-summary-judgment-like burden of proof. *Bacon v. Texas Historical Comm’n*, 411 S.W.3d 161, 171 (Tex. App.—Austin 2013, no pet.); *University of Tex. v. Poindexter*, 306 S.W.3d 798, 806-07 (Tex. App.—Austin 2009, no pet.). Under this standard, we consider whether the evidence in the record raises a fact issue, and if it does, the jurisdictional issue must be resolved by the trier of fact. *Klumb v. Houston Mun. Emps. Pension Sys.*, 458 S.W.3d 1, 8 (Tex. 2015); *Texas Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228

(Tex. 2004). Conversely, *the trial court must rule on the plea as a matter of law if the evidence is undisputed or fails to raise a fact issue.* *Miranda*, 133 S.W.3d at 228.”

Freshour v. Van Boven, No. 03-18-00817-CV, 2020 Tex. App. LEXIS 116, at *11 n.6 (Tex. App. Jan. 9, 2020) (emphasis added).

Upon reversal of the decision below no remand should be necessary after seven years of this litigation. The uncontested facts are straightforward, and this dispute is fully ripe for final resolution here. This esteemed Court should perform a *de novo* review and conclude that Respondents, as TMB officials, have acted *ultra vires*, and should be ordered to perform their ministerial duty by this Court’s issuance of a Writ of Mandamus to order the *withdrawal* of their invalid Adverse Actions² from the Data Bank (and any public posting thereof by the TMB) by way of the standard void report format.³

ARGUMENT AND AUTHORITIES

Respondents, as TMB officials, should be ordered to provide notice to the Data Bank that both of its reports against Dr. Van Boven are voided as a matter of state law. Neither action was imposed properly under state law against Dr. Van Boven. The first report was a temporary disciplinary order (“TDO”) restricting his medical license without meeting the requisite evidentiary threshold of an expert

² Specifically, the Temporary Disciplinary Order and Revision-to-Action Order should be voided as a matter of state law.

³ “Void Report — A report format used to withdraw a report in its entirety. Also called a Void.” NPDB App. at A-13 (in the Glossary of the NPDB Guidebook).

report.⁴ The second report was an improper “order” of revision-to-action, namely the prior adverse action, and thus the second report was based on the initial TDO that was done without authority of law.⁵

There should not continue to be an unjustified, disparagingly adverse entry in the Data Bank against an exemplary physician, as Dr. Van Boven is. A Data Bank entry lasts forever, or until it is voided. Justice compels voiding an entry in a governmental database that unjustly demeans someone about alleged wrongdoing that he was cleared of by the SOAH procedure.

I. A Writ of Mandamus is Needed Here to Enjoin the *Ultra Vires* Acts by the TMB Officials.

The facts here are analogous to those in *Trauth v. K.E.*, 613 S.W.3d 222 (Tex. App. 2020). There the plaintiff K.E. alleged that state university officials misconstrued the state law enabling powers, improperly revoked K.E.’s degree, entered a false revocation on her transcript, and then refused to void the notation of its adverse action. *Id.* at 225. K.E. sought a court order that the state university officials “remove any notation that states or suggests her degree was revoked” because these state officials unlawfully revoked K.E.’s degree and wrongly

⁴ Tex. Occ. Code § 164.059; Tex. Occ. Code § 151.002(a)(2); Tex. Occ. Code § 154.056(e); Tex. Occ. Code § 154.0561; 22 Tex. Admin. Code § 182.8(a); 22 Tex. Admin. Code § 182.8(a)(1); 22 Tex. Admin. Code § 187.57(c); Tex. Occ. Code § 164.059(b). CR 344-348, CR 28-31; CR 139-141. The only expert report submitted was by Harvard Psychiatry Professor Thomas Gutheil, whose report was in support of Dr. Van Boven’s defense. CR 98-103

⁵ Respondents neither had authority to modify the TMB’s voided temporary disciplinary order nor complied with 22 Tex. Admin. Code § 187.43.

represented that state law authorized them to do so. *See id.* at 226 (inner quotations and brackets omitted). The Court of Appeals correctly held that revocation powers by state officials are within its jurisdiction, as here.

The actions and inactions by the TMB officials here are conceptually indistinguishable from *Trauth*: the harmful “notations” that these state officials refuse to withdraw from the Data Bank (and the TMB’s public postings) are adverse actions void of law. The preliminary grounds for a temporary sanction against Dr. Van Boven were overruled by the exoneration by the ultimate fact-finder. The presiding SOAH administrative judge held that no violation of state law or regulation was established to have ever been committed by Dr. Van Boven. The TMB was required by law to accept SOAH’s factual finding, and thereby dismiss the case.

A. Respondents Lack Discretion Here.

Just as in harmful misrepresentations by the state actors in *Trauth*, TMB officials in this case had no discretion to report the TMB’s overturned sanction as merely revised, rather than voiding it: “Within the bounds of its statutory authority, an agency has broad discretion to determine the appropriate sanction *when* a violation of the licensing statute or rule has been established.”⁶

⁶ 2018 Texas Administrative Law Handbook at 18 (emphasis added, citations omitted).

The TMB’s final disposition of dismissal of its case was a ministerial duty by virtue of SOAH’s final decision overturning all adverse findings of TMB panelists at a temporary and informal show compliance proceeding. SOAH has adjudicative jurisdiction of the disputed allegations when a physician contests TMB panelists’ allegations. As a matter of state law, the preliminary legal grounds for a TMB disciplinary panel to impose temporary adverse action, pending a final disposition by the TMB, were ultimately invalidated. The statutory and regulatory provisions to temporarily impose a disciplinary order *were never satisfied by* Respondents in the first place, and their temporary disciplinary order was subsequently voided by the final decision overruling all adverse findings reached by TMB panelists at the February Temporary Suspension and Restriction Hearing (“TSRH”) and April 2016 Informal Show-Compliance Proceedings (“ISC”) proceedings.⁷

SOAH has an essential role “to separate the adjudicative function from the investigative, prosecutorial, and policymaking functions in the executive branch in relation to hearings that the office is authorized to conduct.” Tex. Gov’t Code §2003.021(a). SOAH “acts as a check on agency action that might otherwise be

⁷ Panelists at this internal TMB tribunal issued adverse findings of facts and conclusions of law alleging Dr. Van Boven committed standard of care and professional conduct violations in the care of six of 15 patients whose files were submitted to the TMB as “true and complete” in May 2014 by Lakeway Regional Medical Center, LLC, under the pretext of being a hospital “peer review” disciplinary proceedings file. *The file was neither true nor complete.*

based on a careless or arbitrary decision-making process.”⁸ When a physician appeals or contests an adverse preliminary decision, SOAH assumes jurisdiction of the case, and the presiding administrative judge is independent of the TMB in order to enhance due process with an independent trier of the facts.

Respondents incorrectly argue that the TMB has the sole authority and discretion to determine the appropriate sanction, but their position is contrary to the statutory role of the SOAH, and Respondents have acted *ultra vires* in misrepresentation the governing state law. First, the TSRH panelists imposed a TDO restricting Dr. Van Boven’s medical licensure privileges without a requisite report to meet statutory burden of proof that his continued practice of medicine constitutes a “real danger” to the public welfare, and Respondents ignore SOAH’s ultimate decision fully exonerating Dr. Van Boven of the TMB’s charges.

Second, the TMB had no motion to order a modification or revision of its TDO and no motion or vote to order full reinstatement of Dr. Van Boven’s licensure privileges pursuant to the statutory requirements and TMB rules. Despite this, Respondents nonetheless argue that the TMB had merely a “ministerial duty” to revise its temporary disciplinary order, and then report it to the NPDB. It is untenable to argue that TMB had authority to order a modified disciplinary order in the context of a full SOAH dismissal for lack of any violations.

⁸ 2018 Texas Administrative Law Handbook at 17.

B. A Writ of Mandamus for Compliance is Warranted.

Respondents' failure to void the TDO and instead falsely portray the TMB's final disposition in a revised adverse action to the NPDB are actions warranting this Court's declaratory and Mandamus relief to compel conformance with the law. *See Hamilton v. Washington*, No. 03-11-00594-CV, 2014 Tex. App. LEXIS 13733, at *32 (Tex. App. Dec. 23, 2014) ("We further conclude that the district court had jurisdiction to consider Hamilton's *ultra vires* claims against Acevedo, Washington, Cobb, and Edmonds for declaratory and mandamus relief concerning the interpretation of the Civil Service Act, Hamilton's compliance with it, and the officials' failure to perform ministerial duties under the act."). The Texas Supreme Court can issue a writ of mandamus against government officials to compel compliance with ministerial or discretionary duties enabled by state law, and on the undisputed facts here it should do so. *See Tex. Gov. Code Sec. 22.002(c); Chambers-Liberty Counties Navigation Dist. v. State.*, 575 S.W.3d 339, 354-55 (Tex. 2019) (plaintiff entitled to prospective relief seeking to invalidate and enjoin lease that exceeded authority of state signatory).

The explanation by this Court of what constitutes a "ministerial act" in the context of a writ of mandamus applies here:

A writ of mandamus can be used to compel a public official to perform a "ministerial act," which, for purposes of mandamus, is an act where "the law clearly spells out the duty to be performed by the official with sufficient

certainty that nothing is left to the exercise of discretion.” *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991).

City of Hous. v. Hous. Mun. Emples. Pension Sys., 549 S.W.3d 566, 577 (Tex. 2018).

The duty to report implicitly includes a duty to void reports in which a temporary disciplinary action is found to be without justification. Tex. Occ. Code Ann. § 164.060. The TMB has a statutory duty to report, and that necessarily entails a duty to void the TMB’s preliminary adverse findings overturned by an appropriate administrative decision by SOAH. This Court should find jurisdiction, and order the TMB officials to void both of the TMB’s reports against Dr. Van Boven in the Data Bank.

II. Sovereign Immunity Does Not Protect Erroneous Interpretations by Agencies of Their Own Legal Duties.

As this Court explained in *City of El Paso v. Heinrich*:

“Sovereign immunity protects the State from lawsuits for money damages.” *Tex. Nat. Res. Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 853 (Tex. 2002). But “an action to determine or protect a private party’s rights against a state official who has acted without legal or statutory authority is not a suit against the State that sovereign immunity bars.” *Fed. Sign v. Tex. S. Univ.*, 951 S.W.2d 401, 405 (Tex. 1997). ... We conclude that while governmental immunity generally bars suits for retrospective monetary relief, ***it does not preclude prospective injunctive remedies in official-capacity suits against government actors who violate statutory or constitutional provisions.***

City of El Paso v. Heinrich, 284 S.W.3d 366, 368-69 (Tex. 2009) (emphasis added).

The suit here is for a prospective declaratory remedy: voiding a false accusation in the Data Bank. This fits squarely within the above well-established exception to sovereign immunity, which “does not preclude injunctive remedies in official-capacity suits.” *Id.* at 369. The Court of Appeals erred in ruling otherwise below. There is nothing in sovereign immunity that precludes a lawsuit to compel a government agency to take an action in compliance with the law. A government agency is not placed by sovereign immunity above the law as to requests for injunctive relief concerning its future conduct. *Cf. Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 536 (Tex. 2019) (“Whenever possible, we reject form-over-substance requirements that favor procedural machinations over reaching the merits of a case.”) (quoting *Dudley Constr., Ltd. v. Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018)).

There is no legitimate discretion allowed to governmental agencies to misapply the law with impunity. *See, e.g., Aleman v. Tex. Med. Bd.*, 573 S.W.3d 796 (Tex. 2019). There, as here, TMB officials had elevated form over substance in unfairly marring the reputation of a physician. 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

perpetually sullied by TMB officials because it fails to abide by sensible guideposts 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, 573 S.W.3d 796, 806 (Tex. 2019) (emphasis added).

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

This Court has emphasized that even discretionary decisions by government officials are not protected by sovereign immunity from judicial review, when an official acts outside the parameters of his discretionary authority:

governmental immunity protects exercises of discretion, but when an officer acts beyond his granted discretion—in other words, when he acts without legal authority—his acts are not protected. ... Accordingly, the principle arising out of *Heinrich* and its progeny is that governmental immunity bars suits complaining of an exercise of *absolute* discretion but not suits complaining of *either* an officer's failure to perform a ministerial act *or* an officer's exercise of judgment or *limited* discretion without reference to or in conflict with the constraints of the law authorizing the official to act. Only when such absolute discretion—free decision-making without any constraints—is granted are *ultra vires* suits absolutely barred. And, as a general rule, "a public officer has no discretion or authority to misinterpret the law." *Cf. In re Smith*, 333 S.W.3d 582, 585 (Tex. 2011) (orig. proceeding).

Hous. Belt & Terminal Ry. Co. v. City of Hous., 487 S.W.3d 154, 163 (Tex. 2016)

(emphasis in original).

This Court then explained its underlying rationale, which applies here:

prohibiting *ultra vires* suits when an officer acts outside the bounds of his granted authority would run counter to the purposes behind immunity. Allowing such suits, on the other hand, encourages enforcement of existing policy.

Id. at 164. Reversal of the decision below is essential to the Rule of Law.

PRAYER

The Association of American Physicians & Surgeons prays that this Honorable Court reverse the decision by the Court of Appeals below, and order the Texas Medical Board officials to void their reports against Dr. Robert Van Boven in the National Practitioner Data Bank.

Respectfully submitted,
Association of American Physicians & Surgeons

/s/ Laurie L. York

Laurie L. York
Texas Bar No. 00785297
LAURIE L YORK LAW OFFICE
6633 Oasis Dr.
Austin, TX 78749
512-301-3777
512-288-1645 FAX
lauriey23@yahoo.com

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the type-volume limitation of Tex. R. App. P. 9.4 because it contains approximately 3,268 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4. I also certify that this Brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font and 12-point Times New Roman font for footnotes.

/s/ Laurie L. York
Laurie L. York

CERTIFICATE OF SERVICE

Pursuant to Texas Rules of Appellate Procedure 6.3 and 9.5(b), (d), (e), I certify that on this 6th day of September, 2021, I served this document electronically on all other parties—which are listed below—through the Court’s electronic filing system.

Counsel for Petitioner
David Tuckfield
THE AL LAW GROUP PLLC
12400 Highway 71 West, Suite 350-150
Austin, Texas 78738
david@allawgp.com

Casey Low
PILLSBURY WINTHROP SHAW PITTMAN
401 Congress Ave., Suite 1700
Austin, Texas 78701
casey.low@pillsburylaw.com

Elin Isenhower
WINSTEAD PC
401 Congress Ave., Suite 2100
Austin, Texas 78701
eisenhower@winstead.com

Counsel for Respondents

Bill Davis, Deputy Solicitor General
Ted A. Ross, Assistant Attorney General
Charles K. Eldred, Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
Administrative Law Division
P. O. Box 12548
Austin, Texas 78711-2548
Bill.Davis@oag.texas.gov
ted.ross@oag.texas.gov
charles.eldred@oag.texas.gov

Amicus Curiae

Ron Beal
Professor & Attorney at Law
One Bear Place #97288
Waco, TX 76798-7288

The Honorable William W. Zedler
Arlington, Texas
817-229-1096
bill@billzedler.com

ron_beal@baylor.edu

Donald P. Wilcox
Texas Medical Association
401 W. 15th Street
Austin, TX 78701-1680
512-370-1336
512-370-1636 FAX
Counsel for Amicus Texas Medical Association

/s/ Laurie L. York
Laurie L. York

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Laurie York on behalf of Laurie York
Bar No. 785297
lauriey23@yahoo.com
Envelope ID: 56984010
Status as of 9/7/2021 8:19 AM CST

Associated Case Party: Association of American Physicians & Surgeons

Name	BarNumber	Email	TimestampSubmitted	Status
Laurie L.York		lauriey23@yahoo.com	9/6/2021 4:02:05 PM	SENT

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below:

Laurie York on behalf of Laurie York
Bar No. 785297
lauriey23@yahoo.com
Envelope ID: 56989371
Status as of 9/7/2021 9:26 AM CST

Associated Case Party: Association of American Physicians & Surgeons

Name	BarNumber	Email	TimestampSubmitted	Status
Laurie L. York		lauriey23@yahoo.com	9/7/2021 9:25:35 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Charles Kenneth Eldred	793681	Charles.Eldred@oag.texas.gov	9/7/2021 9:25:35 AM	SENT
Ted Anthony Ross	24008890	Ted.Ross@oag.texas.gov	9/7/2021 9:25:35 AM	SENT
David James Tuckfield	795996	david@allawgp.com	9/7/2021 9:25:35 AM	SENT
Bill Davis		bill.davis@oag.texas.gov	9/7/2021 9:25:35 AM	SENT
Lynne Pearson		lynee.pearson@oag.texas.gov	9/7/2021 9:25:35 AM	SENT
Shannon Benson		shannon.benson@oag.texas.gov	9/7/2021 9:25:35 AM	ERROR
Elin Isenhower		elin.isenhower@pillsburylaw.com	9/7/2021 9:25:35 AM	SENT