

IN THE SUPREME COURT OF MISSOURI

No. SC91302

**MO. ASSOCIATION OF NURSE ANESTHETISTS, INC., GLEN KUNKEL, M.D.,
AND KEVIN SNYDERS, CRNA,**

Appellants,

v.

STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,

Respondent.

**Appeal from the Circuit Court of Cole County
Case No. 09AC-CC00235
Honorable Jon E. Beetem**

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

This is an appeal by the Missouri State Association of Nurse Anesthetists and Kevin Snyders (collectively referred to as the “Nurse Anesthetist Appellants”) and Glen Kunkel, M.D., from a decision of the Circuit Court for Cole County granting summary judgment for the Respondent Missouri State Board of Registration for the Healing Arts (“Board”) in a declaratory judgment action. The Appellants sought declaratory judgment that a resolution of the Board, and a series of letters written by the Executive Director of the Board pursuant to the resolution, were an improper rulemaking and exceeded the authority of the Board. The Circuit Court entered summary judgment in favor of the Board on March 22, 2010. The Appellants appealed the circuit court’s decision to the Court of Appeals, Western District, which affirmed on September 21, 2010. This Court sustained Appellants’ Application for Transfer on December 21, 2010.

On September 19, 2007, Charles W. Van Way III, M.D., President of the Missouri State Medical Association (“MSMA”), wrote a letter to Mark Tucker, President of the Board, expressing the MSMA’s position that the injection or placement of therapeutic agents into a human body under ultrasonic, fluoroscopic, computed tomography or magnetic resonance imaging guidance constitutes the practice of medicine and the performance of such should be restricted to licensed physicians in the State of Missouri. Dr. Van Way urged the Board to enforce this

position. L.F. 23-24¹. The MSMA is a statewide association representing medical doctors. L.F. 33-36.

At issue was the administration of agents by Certified Registered Nurse Anesthetists (CRNAs), a subset of Advanced Practice Nurses (APNs). “Certified registered nurse anesthetist” is defined in Section 335.016(8), RSMo², as “a registered nurse who is currently certified as a nurse anesthetist by the Council on Certification of Nurse Anesthetists, the Council on Recertification of Nurse Anesthetists, or other nationally recognized certifying body approved by the board of nursing.” “Advanced Practice Registered Nurse” is defined in Section 335.016(2), RSMo, as “a nurse who has education beyond the basic nursing education and is certified by a nationally recognized professional organization as a certified nurse practitioner, certified nurse midwife, certified registered nurse anesthetist, or a certified clinical nurse specialist.”

On October 23, 2007, Appellant Glenn Kunkel, M.D., wrote a letter to Mr. Tucker expressing a contrary view. L.F. 25. Donald James, D.O., also wrote a letter in opposition. L.F.26.

At its meeting of October 25, 2007, the Board considered Dr. Van Way’s and Dr. Kunkel’s letters, and listened to a statement by Appellant Snyders. L.F. 28-29. The Board directed its counsel, Sreenivasa Dandamundi, and one of its members, Dr. Toni

¹ The abbreviation “L.F.” refers to the Legal File.

² All statutory citations are to the Revised Statutes of Missouri 2000, as amended, unless otherwise noted.

Smith, to “research the nursing statutes to determine the scope of practice of nurses in performing the injecting of therapeutic agents under fluoroscopic control and to return to the Board for discussion at the next conference call.” L.F. 29.

At the Board’s January 24-25, 2008 meeting, Dr. Smith reported that she and Mr. Dandamundi had researched the nursing statutes to determine the scope of practice of APNs in performing the procedure in question. L.F. 30. She then referred the Board to Section 334.100.2(4)(d), RSMo. L.F. 30. Following Dr. Smith’s report, the Board adopted a motion stating in full:

Motion made by Dr. Hausheer and seconded by Dr. LaFerriere **to notify Dr. Van Way, Dr. Kunkel, and Dr. James that** it is beyond the scope of practice for an advanced practice nurse to inject therapeutic agents under fluoroscopic control. Motion carried with all members present and participating.

L.F. 31 (emphasis added).

Pursuant to the Board’s direction, Tina Steinman, Executive Director of the Board, wrote letters to Drs. Van Way, Kunkel, and James. Her letter to Dr. Kunkel stated:

[I]t was the Board’s decision to advise you that Chapter 334 RSMo. authorizes a physician to delegate professional responsibilities to a person who is qualified by training, skill, competency, age, experience, or licensure to perform such responsibilities. Based on the information provided to the Board, it was their opinion that

advanced practice nurses currently do not have the appropriate training, skill or experience to perform these injections.

L.F. 32. Appellants did not make a copy of the letters sent by the Board to Dr. Van Way or Dr. James part of the record. The only evidence on the record of what the Board's letters actually said is the letter to Dr. Kunkel. L.F. 32.

The Board did not take steps to undertake a rulemaking to implement the position it stated by filing with the Secretary of State or the Joint Committee on Administrative Rules, or publishing in the State Register or Code of State Regulations. L.F. 83.

Appellants' Statement of Facts refers at Pages 8-9 to an item in the February 2008 *Progress Notes*, a newsletter of the Mo. State Medical Association ("MSMA"). L.F. 34. This action, published by the MSMA, not by Respondents, is irrelevant to the merits of this case.

Although it was not part of the record before the Circuit court, the Court of Appeals took notice of the fact that an administrative proceeding involving the same parties is pending in Footnote 6 of its opinion:

Not so coincidentally, there is presently a separate proceeding pending before the AHC styled State Board of Registration for the Healing Arts v. Glenn A. Kunkel, M.D., Case No. 09-1259 HA, in which the Board has initiated a Complaint against Dr. Kunkel, in part, alleging that Dr. Kunkel improperly delegated professional responsibilities in violation of Chapter 334 (i.e. injections under fluoroscopic control). That administrative hearing before the AHC is

scheduled for final hearing on June 6, 2011. Importantly, the charging “rule” is Chapter 334, not a “letter rule” pursuant to an advisory opinion letter sent to Dr. Kunkel in February 2008. Also, the acts complained of in the Board’s Complaint against Dr. Kunkel are for acts that pre-date the February 2008 letter to Dr. Kunkel.

Missouri Association of Nurse Anesthetists, Inc. v. State Board of Registration for the Healing Arts, WD72412, Slip Opinion at 6-7 (Mo. App. W.D. 2010).

ARGUMENT

Standard of Review

When reviewing a summary judgment decision on appeal, the appellate court applies a standard of review de novo. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010). An order of summary judgment may be affirmed under any theory that is supported by the record. *Burns, supra; In re Estate of Blodgett*, 95 S.W.3d 79, 80 (Mo. banc 2003).

I. The trial court did not err in granting summary judgment for the Board, because the Board’s actions did not constitute a rule within the meaning of Section 536.010(6), RSMo, and were not subject to the rulemaking requirements of Chapter 536 and Section 334.125, RSMo. – Responding to Appellants’ Point I.

A. Standards for Declaratory Judgment

To grant a declaratory judgment, the court must be presented with: (1) a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief, as distinguished from an advisory decree upon a purely hypothetical situation; (2) a plaintiff with a legally protectable interest at stake, consisting of a pecuniary or personal interest directly at issue and subject to immediate or prospective consequential relief; (3) a controversy ripe for judicial determination; and (4) an inadequate remedy at law. *Mo. Soybean Assoc. v. Mo. Clean Water Comm’n*, 102 S.W.3d 10, 25 (Mo. banc, 2003); *Lane v. Lensmeyer*, 158 S.W.3d 218, 222 (Mo. banc 2005).

The Appellants have not met the criteria for relief in the form of declaratory judgment. They have failed to plead facts that show a substantial, presently-existing controversy arising out of an action by the Board that affects anyone’s rights. They have failed to demonstrate that the controversy is ripe for judicial determination. They have failed to demonstrate that the matter is ripe for judicial determination and that Appellants

have an inadequate remedy at law through an administrative law process that is already under way.

B. The Board’s decision to answer three letters was not a “rule” within the meaning of Section 536.101, RSMo.

Appellants contend that the motion adopted by the Missouri State Board of Registration for the Healing Arts (“Board”) and a letter from the Executive Director of the Board communicating the results of that motion are a “rule” within the meaning the Missouri Administrative Procedures Act (MAPA), Section 536.010, RSMo, which states, in part:

(6) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy, . . . The term includes the amendment or repeal of an existing rule, but does not include: . . .

(d) A determination, decision, or order in a contested case . . .

In order to prevail, Appellants would have to show that the opinion expressed by the Board “implements, interprets, or prescribes law or policy.”

The authority of the Board is established and limited by Chapter 334, RSMo, and particularly by Section 334.100, RSMo, which states the grounds for which the Board may discipline a licensee subject to its authority. Specifically, Section 334.100.2 states, in part,

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621, RSMo, against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered the person's certificate of registration or authority, permit or license for any one or any combination of the following causes: . . .

(4) Misconduct, fraud, misrepresentation, dishonesty, unethical conduct or unprofessional conduct in the performance of the functions or duties of any profession licensed or regulated by this chapter, including, but not limited to, the following: . . .

(d) Delegating professional responsibilities to a person who is not qualified by training, skill, competency, age, experience or licensure to perform such responsibilities . . .

The Board has no authority to expand on the grounds for discipline stated by the legislature in Section 334.100.2, RSMo. It does not even have the unilateral authority to impose discipline until it has sought and obtained a determination of the Administrative Hearing Commission that there is cause for discipline upon a particular set of facts. The Administrative Hearing Commission conducts an adversary proceeding with full opportunity for discovery, motions, evidentiary hearing, and briefing. Its commissioners are learned in the law and render decisions in which they conduct detailed examination of the law as applied to the facts, and those decisions in turn are subject to judicial review.

This process offers the charged licensee a full range of due process protection and an opportunity for judicial review.

The letters challenged by Appellants in this case are no more than an expression of opinion by the Board as to how the provisions of Section 334.100.2(4)(d) apply to the facts posed in an inquiry. They are so characterized by Ms. Steinman in her letter to Dr. Kunkel. [L.F. 32] The Board's power to act on that opinion is limited to electing to file a complaint with the Administrative Hearing Commission seeking authority to discipline, should a situation come before it that involves these facts. The Board's nonbinding expression of opinion did not constitute "a justiciable controversy that presents a real, substantial, presently-existing controversy admitting of specific relief." *Mo. Soybean Assoc., supra*, 102 S.W.3d at 25.

Moreover, nothing about the opinion expressed by the Board created any new obligations or liabilities that affect any individual. The Board did not prescribe a new standard that prohibits any conduct. Its authority to seek discipline of any individual is limited to the grounds specified in Section 334.100.2. The Board's letter specifically states that it is providing information as to the application of Chapter 334, not implementing a new policy: "[I]t was the Board's decision to advise you that Chapter 334 RSMo. authorizes a physician to delegate professional responsibilities" L.F. 32

MAPA does not require the Board to engage in a rulemaking process to determine which cases it will file with the Administrative Hearing Commission and which it will not. Those are classic decisions in a contested case, which under the terms of under Section 536.010(6)(d), RSMo, need not go through the rulemaking process.

Even if the Board were to make a decision that it would pursue prosecution in all cases of the administration of agents by CRNAs which come before it, this would still not be a “rule.” The Board would still have to take a record vote to make an individual decision on each and every factual case before it, and would still have to pursue discipline through an adversary case in which each individual would have a full opportunity to defend and contest the Board’s conclusion. Thus, no individual’s rights are directly determined by the Board’s expression of its opinion, which can only have any legal consequence when the Board votes to pursue a prosecution in a particular case.

In contrast, the letters challenged in this matter were very general expressions of opinion, not related to any prior regulatory action of the Board and not accomplishing a change in policy or practice in any way. The view stated was not published by the Board, or communicated at all, except in letters to three doctors who had communicated on the subject with the Board. Appellants’ assertion that this was a matter of “general applicability” is undermined by the fact that all the Board did was authorize the writing of letters to three doctors, who had expressed views to the Board. This was not a matter of general applicability; it was a matter of private correspondence.

Prior to the Board’s letters, the duties of physicians were defined by the requirements of Section 334.100.2(4)(d), and after its letters their duties were measured by exactly the same standard, and they had exactly the same level of procedural rights and protection. The Board’s action, at most, provided information to the physicians who inquired about whether or not the Board was likely to exercise its discretion to file a complaint with the Administrative Hearing Commission if such facts came to its

attention. Section 536.010(6)(j) states that “The term includes the amendment or repeal of an existing rule, but does not include . . . a decision by an agency not to exercise a discretionary power.”

Therefore, the Board’s letters did not alter the rights, duties, and privileges of any person in any way. The Court of Appeals summarized the effect of the Board’s action concisely:

To expound, the only result arising from the Board’s expression of opinion is that the three physicians are more fully informed concerning the Board’s potential exercise of discretion. The Board is simply informing the three physicians as to the likelihood of the Board filing a complaint with the AHC if such facts, as detailed in the requests, came to its attention. The Board’s letter in no way ordered physicians to refrain from using APNs for the procedure. The Board did not create any new obligations or liabilities which affected an individual. Nor were any individual’s rights directly determined by the Board’s expression of its opinion. Practitioners have the same freedom to act whether or not the Board makes known its opinion as to its discretion to file a complaint. Should the physicians be required to defend their conduct to the AHC, and the AHC subsequently determines that the delegation of the procedures to APNs violates

section 334.100.2(4)(d), the physician will be subject to discipline – not because the Board expressed its opinion, but because the Board’s opinion is correct.

Slip opinion at 8-9.

C. The Missouri Courts have only found an agency action to be a rule when it has a direct effect on some person’s rights, duties, and privileges.

The prior cases in which the Missouri courts have considered the question of whether an agency action is a “rule” which must be promulgated under the terms of MAPA have drawn a line of division. When agency actions in themselves altered the rights and duties of the agency or members of the public, those actions were determined to be rules; actions that did not have such a direct effect in themselves were found to be outside the coverage of MAPA.

Appellants cite *Young v. Children’s Division, Department of Social Services*, 284 S.W.3d 553 (Mo. banc 2009). In that case, the agency used a manual listing various criteria to be applied in determining whether a particular child’s behavioral issues qualified that child for participation in the behavioral foster care subsidy program. The agency argued that the use of the manual did not require promulgation under MAPA because of the highly individualized decisions the program required, but this Court held that while the decision on a particular case was not a rulemaking, the development of the manual by which those decisions were made was, and the use of the manual without

proper promulgation was improper. This was a case where the agency's action – the development of a manual specifying criteria according to which individual decisions would be made – was used to determine the rights of individuals.

Appellants cite *NME Hosp., Inc. v. Dept. of Social Services*, 850 S.W.2d 71 (Mo. banc 1993) as “instructive.” Indeed it is instructive, as it displays the stark difference between the kind of unpromulgated “rule” proscribed by Chapter 536 and the kind of nonbinding statement at issue here. In *NME*, the Department of Social Services periodically published “Medicaid bulletins” in which it set forth modifications to the reimbursement rates in the officially promulgated Medicaid Manual, without going through the rulemaking process. The Department then notified a Medicaid contractor that its reimbursement rate would be reduced based on the published change. The Administrative Hearing Commission held that the amendment was not enforceable as a rule, but that it could be enforced as a contractual term. The court rejected this distinction and held that “changes in statewide policy are rules within the meaning of the Administrative Procedure Act. Failure to comply with the rulemaking procedures renders the purported rule void.” 850 S.W.2d at 75. The difference between the approach employed by the Department of Social Services in the *NME* case and the action of the Board in this case is dramatic. The bulletins challenged in *NME* set specific reimbursement rates, published and broadly applied to regularly submitted claims by providers. They substantially modified terms that had been incorporated into a properly published and promulgated regulation. That published modification drove the Department's decisions on reimbursement rates for many individual applications, which

had an immediate and substantial effect on the reimbursement the providers received. This was the kind of regulatory action the legislature contemplated when it created the procedures set forth in Section 536.021, RSMo, for the establishment and modification of regulations.

Department of Social Services v. Little Hills Healthcare, LLC, 236 S.W.3d 637 (Mo. banc 2007), was another Medicaid reimbursement case in which the Department issued notices to providers in which it modified its formula for calculating Medicaid reimbursements each fiscal year, with a direct and substantial impact on the reimbursements received by providers. Following *NME Hospital*, this Court found that the changes set forth in the annual notices were a rule that had to be promulgated under the terms of MAPA. Again, this was a case where the Department's action directly determined the reimbursement providers would receive, and thus affected the rights of persons or entities directly.

Appellants cite *State ex rel. Barnett v. Mo. State Lottery Commission*, 196 S.W. 3rd 72 (Mo.App.W.D.2006). In that case the State Lottery Commission sought to deny the holder of a winning lottery ticket a prize based on his failure to meet a claim deadline, a base set forth on the back of the ticket, but not adopted as a formal regulation until after the events in question. The court held that the agency's interpretation of the statutory language upon which it relied was incorrect, and that it could not create a substantive barrier to payment of an otherwise eligible claim by relying on an alleged contract formed by language printed on the back of the ticket. The agency relied on that language itself to establish a duty of holders of the tickets to make a claim within the time stated on

the ticket. The printed language on the ticket had a direct and substantial effect on the rights of ticket holders, which could not be done without publishing a rulemaking establishing the claim deadline.

In all these cases, a common thread is that the agency took an action that directly changes some aspect of its dealings with members of the public, and the agency relied on these actions for the authority to alter the rights, liabilities, or obligations of members of the public. Such actions can only be taken consistent with the rulemaking procedures of MAPA.

In contrast, the Missouri courts have decided several cases in which an agency action was found not to be a rule which requires a rulemaking process under MAPA, because the action did not have a direct effect on the right, liabilities, or obligations of the complaining party or some member of the public.

In *United Pharmacal Co. v. Mo. Bd. of Pharmacy*, 159 S.W.3d 361 (Mo. banc 2005), this Court determined that a statement on the agency's website that summarized the agency's understanding of the statute establishing its jurisdiction was not a rule. *United Pharmacal* most directly addresses the central question in this case: at what point does a statement by an administrative agency constitute a "rule" which must be promulgated under the terms of Chapter 536, RSMo?

Just like this case, *United Pharmacal* was a declaratory judgment action in which the plaintiff sought declaratory judgment that the agency did not have authority to take the action it had taken, that the action was a "rule" within the meaning of Section 536.010(6), RSMo, and that the action was void because it was based on a determination

that had not been promulgated as a rule under the terms of Section 536.021, RSMo.

United Pharmacial alleged in its complaint that:

22. On information and belief, in 2001, the Board of Pharmacy adopted a rule, applicable to all sellers of federal veterinary legend drugs to consumers, requiring those entities to have licensed pharmacists present when such sales take place and to obtain a license to operate a pharmacy to conduct such sales.

28. The Board of Pharmacy's rules requiring sellers of federal veterinary legend drugs to consumers to comply with licensure and regulatory requirements as a licensed pharmacy and to have a licensed pharmacist on duty when such sales take place fall outside of the delegation of authority to the Board of Pharmacy by the General Assembly, and were promulgated without notice and hearing. Said rules are, therefore, unlawful, illegal and void under the applicable statutory provisions and all other pertinent law.

159 S.W.3d at 364.

The basis of United Pharmacial's assertion that the Board of Pharmacy had adopted a rule was the publication on the agency's website of a "frequently asked question" ["FAQ"] asserting that the Board had jurisdiction over the veterinary drugs involved. Although the context was venue, the issue on which the opinion in *United Pharmacial* turned was whether the statement in the FAQ was a rule within the meaning of the statute invoked here, Section 536.010(6), RSMo. Although the agency in *United Pharmacial* had

gone so far as to issue a “cease and desist” letter directly to the plaintiff company, the court held that the issuance of the FAQ was not a “rule” within the meaning of Section 536.010(6).

The issue the court considered was the same one the Appellants ask the court to decide in this matter. This Court expressly rejected United Pharmacal’s contention that the publication of the FAQ was a rule:

Not everything that is written or published by an agency constitutes an administrative rule. In this case, the board made no attempt to comply with the protective procedures required for the promulgation of a rule. In fact, the agency did not even try to promulgate the FAQ as a rule. Pharmacal's claim of venue pursuant to section 536.050.1 must fail **because the FAQ was not an administrative rule and, as such, there is no challenge to the validity of a rule or to a threatened application of a rule.** The FAQ was merely an expression of the board's interpretation of law without any force or legal effect.

159 S.W. 3d at 365. [emphasis added] The same language applies here. The challenged resolution and letters are “an expression of the board's interpretation of law without any force or legal effect,” 159 S.W. 3d at 365 .

In his concurring opinion to *United Pharmacal*, Chief Justice White departed from the majority’s reasoning and expressed a view similar to the view urged by Appellants on the question of whether an agency’s nonbinding expression is a “rule.” The theory advanced by Appellants was considered and rejected by a 4-3 margin of the court.

Paradoxically, the concurrence that embraces Appellants' view of the FAQ as a rule would have gone even further than the majority in rejecting United Pharmacal's quest for declaratory judgment. Chief Justice White went on to state,

However, because the rule was not promulgated, Pharmacal lacked standing to bring its action to the circuit court pursuant to section 536.053. The proper forum for a challenge to a rule's procedural validity for not having been promulgated is the Administrative Hearing Commission, whereas a challenge to a rule's substantive validity, deciding legal rights, is a judicial function. The trial court erred in this case by not dismissing Pharmacal's claim concerning the rule's procedural validity.

159 S.W. 3d at 368-369.

It is mistaken to dismiss *United Pharmacal* as being merely about venue and ignore the court's extensive and searching analysis of the meaning of the term "rule" as used in Section 536.010(6). The court in *United Pharmacal* did not send the plaintiff away merely because it filed in the wrong county; both majority and concurring opinions agreed, on different theories, that the plaintiff was not entitled to declaratory relief on the ground that its rights had been determined or altered by an improperly promulgated rule. Indeed, upon remand to the circuit court, the plaintiff in *United Pharmacal* abandoned that line of argument and amended its petition to proceed on a different theory altogether. *United Pharmacal v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907 (Mo. banc 2006).

In *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 SW 3d 10 (Mo. Banc 2003), this Court determined that the Missouri Clean Water Commission's preliminary designation of certain rivers as impaired waters was not a rule. The Commission submitted to the United States Environmental Protection Administration a list of impaired waters in the state. Under the Federal Clean Water Act, the inclusion of rivers on this list is the first step in a series of events that could possibly lead to the adoption of antipollution measures that may affect the rights of individuals. The plaintiffs filed suit, seeking a declaratory judgment that the Commission had to undergo the MAPA rulemaking process before submitting the list. This Court disagreed, stating:

The State's impaired waters list requires no change in the appellants' conduct. It does not command them to do anything, nor to refrain from doing anything. As explained earlier, no rights or obligations have been created. . . . There are many steps remaining before the appellants may be required to alter their conduct.

102 S.W. 3d at 29. In *Missouri Soybean*, this Court held that an agency action is not a rule if, in itself, it does not have a direct effect on the rights or obligations of the party seeking declaratory judgment.

Much the same situation is posed here. The expression of opinion by the Board does not create or alter any rights or obligations. The obligations created by Section 334.100.2(4)(d), RSMo, are the same whether or not the Board states its opinion. Before

the belief underlying the Board's statement would have any effect on anyone, several steps would have to intervene:

1. The Board would have to identify a specific situation to which the principle it has stated would apply;
2. The Board would have to conduct a record vote as to whether to file a complaint with the Administrative Hearing Commission seeking authority to discipline;
3. If the Board voted to do so, it would have to refer the matter to counsel for filing of a complaint before the Administrative Hearing Commission alleging that the physician in question had violated Section 334.100.2(4)(d), RSMo;
4. The matter would be litigated before the Administrative Hearing Commission, including access to the full panoply of due process protection, a burden of proof on the Board, discovery, hearing, and an independent decision by the Administrative Hearing Commission;
5. If the Administrative Hearing Commission determined that the physician had violated Section 334.100.2(4)(d), RSMo, and thus that the Board had grounds for discipline, the physician would have the right to a disciplinary hearing before the Board; and
6. If dissatisfied with the decisions of the Administrative Hearing Commission and the Board, the charged physician would have the option of seeking judicial review.

As in *Missouri Soybean*, many steps have to happen before the Board's expressed views can result in any actual impact on a physician such as Appellant Kunkel. As to the Appellants Missouri Association of Nurse Anesthetists and CRNA Snyders, the Board has no authority to take any action at all regarding their right to practice nursing.

In *Baugus v. Dir. of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994), this Court held that the choice of language to describe automobile titles by the Director of Revenue was not a rule. The Director announced an intent to issue titles to certain salvaged vehicles with a designation "prior salvage," in order to implement a statutory change relating to title designations. The term "prior salvage" was not used in the statute, but reflected a distinction the Director deemed appropriate to inform subsequent purchasers of the status of the title. A group of independent used car dealers brought a declaratory judgment action, alleging that because the use of the term "prior salvage" did not appear in the statute, the Director was required to go through a Chapter 536 rulemaking process before employing it.

This Court addressed the issue by adopting a quotation from Bonfield, *State Administrative Rule Making*, Section 3.3.1 (1986):

Not every generally applicable statement or "announcement" of intent by a state agency is a rule. Implicit in the concept of the word "rule" is that the agency declaration has a potential, however slight, of impacting the substantive or procedural rights of some member of the public.

878 S.W.2d at 42. This Court then determined that the designation as “prior salvage” did not change the status of the vehicle in any way, but merely communicated that status more clearly. Since it did not change the nature of the title in any way, it did not affect the rights of the plaintiff auto dealers, and accordingly the Court determined that the policy was not a rulemaking which had to proceed under the requirements of MAPA.

Appellants attempt to distinguish *Baugus* by dwelling on the “however slight” language of the second sentence of this statement, to the exclusion of the dominant language in that sentence of “impacting the substantive or procedural rights of some member of the public.” The first sentence that “[n]ot every generally applicable statement or ‘announcement’ of intent by a state agency is a rule” must also mean something. To suggest that any statement of general applicability that may have a distant effect on some person’s interests is “impacting rights” is to give the second sentence of this language such a broad construction as to render meaningless the first.

Appellants also contend that the only significance of *Baugus* is the quotation of the language above. They miss the point that in *Baugus*, this Court addressed the question of whether an agency action has a direct effect on a person’s rights, as opposed to the concern that it might influence some other events that in turn could have an adverse effect on the complaining party’s interests. The auto dealers in *Baugus* objected to the use of a term for salvage out of concern that it might adversely affect the interest of potential customers in vehicles they might have for sale. This Court held that this was not a direct effect on their rights, as it did not alter the status of the vehicle and any commercial impact was indirect in nature. This is analogous to the situation in the case

before the Court. The nurse anesthetist appellants cannot show that the Board's resolution directly affects their rights, but they speculate that the Board's expression of a view may affect the decisions of physicians regarding delegation of the procedure at issue to nurse anesthetists, indirectly affecting the employment prospects of nurse anesthetists. This is exactly the kind of indirect, speculative impact that this Court identified in *Baugus*, and found insufficient to support a finding that the agency action directly affected the party's rights.

The agency actions in *Young*, *NME Hospital*, *Little Hills Healthcare*, and *Barnett* all had the direct effect of changing some aspect of the aggrieved party's relationship with the government agency, and themselves formed the basis on which the agency relied to reduce or defeat its financial obligations to the plaintiffs. In contrast, the *United Pharmacal*, *Missouri Soybean* and *Baugus* cases have in common that each found an agency action was not a rule for the purposes of MAPA if it did not have a direct, rights-changing impact on the plaintiffs. This case belongs in the latter group of cases, as the writing of three letters by the Board did not change the basis on which it sought discipline against the physician appellant over which it had jurisdiction, and did not seek to establish any kind of control or direction to the nurse anesthetist appellants who were outside the Board's authority. Consistent with this distinction, the trial court below correctly found that the Appellants were not entitled to declaratory judgment that their rights had been violated, because they failed to plead facts which would establish that the Board's action substantially and directly changed or affected their rights in any way.

D. Requiring licensing boards to engage in rulemaking for all communications with the professions they regulate would not serve the interests of either the profession or the public.

Amicus Chamber of Commerce and Industry offers a largely rhetorical argument in which the central point seems to be:

The regulatory maze affects all businesses in Missouri. Business leaders navigating the regulatory maze should be afforded the opportunity to rely upon the rulings and guidance of government agencies. Should the government be allowed to take the position that letter rulings are merely advisory opinions with no force and effect of law the businesses which rely upon them are left with no option but to proceed into the regulatory maze with no guidance - only to be subject to fines and discipline for straying from the unknown path. This situation presented is untenable for an already over-regulated business sector.

Amicus brief of Chamber of Commerce and Industry, Page 8.

Amicus Chamber's position is fraught with irony. What the Board attempted to do in this situation was exactly what Amicus Chamber exhorts it to do – to provide guidance to the community it regulates. Amicus and Appellants seem to assume that the only alternative the Board had was to undertake a rulemaking process specifying what its decisions would be in the enforcement of a statute within its jurisdiction. This is not, however, the only option the Board had, nor the most likely. The far more probable

course the Board could have taken would be to hold its cards close to its chest, decline to answer the inquiry, and consider whether to initiate disciplinary cases on particular situations as they came to the Board's attention. This course would leave practicing physicians in exactly the area of uncertainty Amicus Chamber deplors, yet it is perfectly legal and immune to any plausible procedural challenge from Appellants. The Board decided instead to communicate openly with the doctors making the inquiry about its intentions.

This is exactly the kind of nonregulatory comment licensing boards are often called upon to make for the benefit of the business community they license. As noted in *United Pharmacal* and *Baugus*, not every statement an agency makes is a rule. Licensing boards are often called upon to exercise educational and leadership roles which are not strictly within the rulemaking and disciplinary functions that form the core of their statutory responsibility, and generally these efforts are beneficial to and appreciated by the professional communities they oversee. If Appellants and Amicus Chamber are successful in forcing the Board to engage in the time-consuming process of rulemaking for every form of communication they have with the professional communities they oversee, the ironic result will not be more rulemaking, but less communication. This development would not serve either the interest of the professional community in being able to conduct its business with clarity as to its responsibilities, or the interest of the public in having well-informed professional communities serving them in a manner consistent with the requirements of the law.

II. Appellants were not entitled to declaratory judgment on Count III, as the Board has jurisdiction to address the duties of physicians regarding delegations to advanced practice nurses. – Responding to Appellants’ Point II.

A. The Board’s duty to enforce a provision that delegations by physicians must be to qualified persons requires it to make a threshold determination as to whether the person to whom the task is delegated is qualified.

In Count III, Appellants do not contend that the Board did not follow procedure in expressing its opinion, or even that the Board’s opinion is wrong. They contend that the Board has no right to an opinion.

The court below did not distinguish in its judgment between the rationale of Count III and the other allegations of the petition. In sustaining a motion for summary judgment, a trial court may state its theory or reasons for so doing. When no grounds are stated, the trial court is presumed to base its decision on the grounds specified in the motion. *Grisamore v. State Farm Mut. Auto. Ins. Co.*, 306 S.W.3d 570, 571 (Mo.App. W.D.,2010). Appellants made the same argument regarding Count III in their suggestions in opposition to the motion for summary judgment as they make here, so presumably the court below was cognizant of their arguments and did not find them persuasive.

In Count III of the Amended Petition for Declaratory and Injunctive Relief, Appellants contended that “The Board of Healing Arts lacks authority to define and

determine the scope of practice for registered professional nurses and advanced practice nurses.” L.F. 14. Appellants argue that only the Board of Nursing has authority to determine the scope of practice for nurses, and that the Board has invaded to territory of the Board of Nursing in determining the scope of practice for APNs.

Appellants are wrong on both counts. Neither the Board of Nursing nor the Board of Registration for the Healing Arts has authority to define the scope of practice of nursing; that is determined by Chapter 335, RSMo. The Board of Nursing has authority to determine whether the actions of a nurse fall within the defined scope of practice for purposes of discipline of that nurse’s license. The Board of Registration for the Healing Arts has authority, conferred upon it by the General Assembly by the adoption of Section 334.100.2(4)(d), RSMo, to determine whether a physician has engaged in “delegating professional responsibilities to a person who is not qualified by training, skill, competency, age, experience or licensure to perform such responsibilities.” This authority extends only to the conduct of physicians, not nurses. It is not possible for the Board to discharge its statutory duty to enforce this section unless it makes determinations as to who is “qualified by training, skill, competency, age, experience or licensure” to perform the delegated services. Section 334.100.2(4)(d), RSMo.

Section 334.100.2(4)(d), RSMo, is not all about nurses. That section requires a physician to exercise sound professional judgment as to whether a particular delegation is to a person qualified by a number of criteria. A delegation to a lay person, a nurse, or even another physician may be in violation of the rule, if that person is not qualified by reason qualified by training, skill, competency, age, experience, or licensure to the task in

question. Appellants propose to strip the Board of any authority to question the delegation of a task to a nurse, unless and until the Board of Nursing determines that the task in question is outside the scope of practice for any nurse. They fail to apprehend that the Board has a duty to determine the responsibilities of physicians, not nurses. The Board of Registration for the Healing Arts has a responsibility to enforce Section 334.100(4)(d), and in order to do so it must determine the threshold question of whether the delegation was appropriate. It does not increase or diminish the authority of nurses to do anything.

The tentative and limited nature of the opinion expressed by the Board undermines the Appellants' contention that the Board was determining as opposed to ascertaining the scope of practice for nurses. The Board's letter states, "advanced practice nurses currently do not have the appropriate training, skill or experience to perform these injections." L.F. 32. It is important to note that the Board did not mention the qualification of CRNAs, a subset of APNs. Certainly there are many APNs who are not CRNAs, who do not have the skill, training, or experience to perform the injections at issue. The Board's very general statement of opinion can be read multiple ways. It could be read to mean, "No APN has the appropriate training, skill, or experience to perform these injections." It could be read to mean, "The fact that a person is licensed as an APN does not mean that the person, merely by virtue of that status, has the appropriate training, skill, or experience to perform these injections." The latter reading leaves open the door that a properly qualified CRNA might, under the terms of his or her personal level of training, skill, and experience, be qualified to perform the injections.

The open-ended nature of the Board's opinion is reinforced by the proviso in the letter that APNs do not have the requisite qualifications "at this time," and the further invitation in the last paragraph of Board's letter to Dr. Kunkel to provide additional information to change the Board's opinion. L.F. 32. This is not language which was meant to establish either a rule of general applicability or a final and conclusive determination of the scope of practice for all APNs, including CRNAs. The Board was expressing both an opinion based on the information available to it at this time, and an openness to revisiting that opinion if further information becomes available. It will be required to revisit that question each time it has before it a situation in which a physician has delegated the procedure in question to an APN.

B. *Sermchief v. Gonzales* is not applicable, as the Board did not attempt to regulate the conduct of nurses.

Appellants ground their claim that the Board lacks authority to express its opinion on the coverage of one of the statutes it enforces upon this Court's decision in *Sermchief v. Gonzales*, 660 S.W.2d 683 (Mo. banc 1983). *Sermchief*, however, is factually distinguishable from the case at bar. In that case, the court's decision followed a finding that:

The Board threatened to order the appellant nurses and physicians to show cause why the nurses should not be found guilty of the unauthorized practice of medicine and the physicians guilty of aiding and abetting such unauthorized practice.

660 S.W. 2d at 685.

In *Sermchief*, the Board had taken action directly affecting the rights of the plaintiff nurses – it had threatened to bring legal proceedings against the nurses for the unauthorized practice of medicine. No such threat has been made in this case. The publication of an expression of opinion by the Board does not represent a substantive action against the interests of any of the named appellants, as was found in *Sermchief*.

Moreover, *Sermchief* dealt directly with the statutory language of the relationship of Chapter 334, regulating the conduct of physicians, and Chapter 335, dealing with the conduct of nurses. *Sermchief* examined practices the court found to be directly within the coverage of the statutory language – for instance, the administration of medications prescribed by a licensed professional under standing orders. In contrast, the practice at issue here – the injection of therapeutic agents under fluoroscopic guidance – is a subject requiring extensive understanding of the medical consequences of such actions, which is not directly addressed in either statute.

In this regard, the relief sought in this petition differs significantly from that sought by the plaintiffs in *Sermchief*. In that declaratory judgment action, the plaintiffs grounded their case on a statutory argument that the services in question – administration of certain medications and performance of certain routine procedures – were specifically authorized in amendments to the Nursing Practice Act, Chapter 335, RSMo. In this action, however, the petition for declaratory judgment does not plead facts which would establish that CRNAs have the requisite “training, skill, competency, age, experience or licensure to perform such responsibilities.” Section 334.100.2(4)(d), RSMo. Their

petition does not even aver that APNS or CRNAs have the training, skill, and experience to safely perform this highly technical practice – injection of therapeutic agents under fluoroscopic guidance. They simply, flatly claim that the Board has no authority to consider the question, even though the Board’s own statute, Section 334.100.2(4)(d), RSMo, requires it to make that determination. They allege, in conclusory fashion, that only the Board of Nursing is empowered to determine whether APNs or CRNAs are qualified to perform such injections. The theory of the petition is that it is none of the Board’s business to consider whether any nurse has the “training, skill, competency, age, experience or licensure to perform such responsibilities,” and that it must defer that determination to the Board of Nursing. The Appellants’ argument implies that even if the Board of Nursing has not determined whether a particular practice is within the scope of practice for a nurse, the Board of Registration for the Healing Arts is still forbidden to question such a delegation without the approval of the Board of Nursing. There is no authority for such a proposition in the language of Section 334.100.2(4)(d).

Appellants read *Sermchief* as establishing a blanket rule that only the Board of Nursing can determine the limits of practice for nurses for any purpose, and that the Board of Registration for the Healing Arts is bound by the Board of Nursing’s determination. That is not what the statutes say, and it is not what *Sermchief* says. The holding in *Sermchief* was a careful and specific determination that the particular actions in question were authorized by specific sections of the nursing statute, Chapter 335, RSMo. *Sermchief* did not hold, as Appellants claim, that the Board of Registration for the Healing Arts has no jurisdiction to determine any issue regarding the scope of

practice for nursing, ever. *Sermchief* says nothing about the relative positions of the Boards of Nursing and Healing Arts. In *Sermchief*, this Court did not hold that either board has the authority to determine the scope of practice for nursing; it looked exclusively to the statute to make that determination for itself. Nothing in *Sermchief* forecloses the Board from making a threshold determination necessary to the enforcement of its own statute, regarding the conduct of physicians clearly subject to its jurisdiction.

C. Appellants have failed to plead facts which provide a basis for declaratory judgment, and thus the matter is not ripe for adjudication.

While the scope of declaratory judgment in Missouri is fairly broad, it is still the law that a petition for declaratory judgment must present an actual, justiciable case or controversy. A court cannot render a declaratory judgment unless the petition presents a controversy ripe for judicial determination. *Mo. Soybean Association*, 102 S.W.3d 10, 25-29 (Mo. banc, 2003); *Mo. Health Care Assoc. v. Attorney General of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997). A ripe controversy is a controversy of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Mo. Soybean*, 102 S.W.3d at 27. A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character. *Id* at 26.

It may be that upon an appropriate case, after an administrative proceeding as defined in the statute, the question will be ripe for judicial determination. This is not such a case. The Appellants' petition did not state a count pleading that CRNAs are qualified to perform the procedure in question and that the action of the Board restricts their right to do so. Counts I and II were limited to MAPA arguments; Count III was limited to the jurisdictional claim discussed in the preceding section. By seeking to short-circuit the administrative process and foreclose the Board from taking any position on the statute it is obligated to enforce, the petition in this case does not raise the substantive question of whether the delegation of the procedure in question to CRNAs is proper under either Section 334.100.2(4)(d) or Chapter 335. The court below was justified in granting summary judgment on Count III, because in drafting Count III the Appellants failed to frame the question which they now ask this Court to decide.

Paradoxically, the Appellants, who claim they are aggrieved at the purported usurpation of the authority of the Board of Nursing in the Board's expression of opinion, demand in the Petition that the court issue "a preliminary and a permanent injunction prohibiting the Board from enforcing its letter rule against CRNAs and the physicians for whom they work pending final resolution of this case." In other words, the Appellants claim to defend the authority of the Board of Nursing by seeking to enjoin the Board of Registration for the Healing Arts from carrying out its statutory duty of enforcing Section 334.100.2(4)(d) with regard to physicians. A declaratory judgment that attempts to bar an agency from acting on future cases or applications which are within its jurisdiction to determine is an improper advisory opinion. *State ex rel. Mo. Parks Assoc. v. Mo. Dept.*

of Nat. Resources, 316 S.W.3d 375 (Mo.App. W.D. 2010) This Court has stated, “The existence of jurisdiction to grant a declaratory judgment does not invalidate other obstacles to the granting of judicial relief. If administrative remedies are adequate, they must be exhausted before declaratory relief may be granted.” *Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 353 (Mo. banc,1995). In *Angoff*, this Court added that:

[T]here are exceptional circumstances where declaratory relief may be granted against an agency without exhaustion of the administrative remedies. The exceptions are usually characterized by the inadequacy of the administrative remedy. Unreasonable delay by the agency in deciding the issues in an administrative proceeding authorizes the court to proceed to compel agency action or remove the case to the court for decision.

909 S.W.2d at 353. There is no allegation, and no evidence, that the Board has unreasonably delayed the resolution of this issue, or that the protections built into the administrative process in which Appellant Kunkel is already involved are inadequate.

It should be noted that the Appellants in this matter have differing interests and different stakes in this proceeding. Appellants Mo. Association of Nurse Anesthetists and Kevin Snyders (“the nurse anesthetist appellants”) are not licensed physicians subject to the authority of the Board. The Board’s expression of opinion has no effect on their rights unless the Board takes action to enforce that opinion against them, as occurred in *Sermchief* when the Board “threatened to order the appellant nurses . . . to show cause

why the nurses should not be found guilty of the unauthorized practice of medicine.”

Until such an event happens, the nurse anesthetist appellants cannot show that any action of the Board in publishing its view of a controversial issue affects their rights, and they have not shown a justiciable case or controversy necessary to support a declaratory judgment. *Mo. Soybean, supra*, 102 S.W.3d at 25.

Appellant Kunkel is in a different position. As a licensed physician, he is subject to the Board’s jurisdiction, and the Board could bring a complaint against him before the Administrative Hearing Commission alleging violation of Section 334.100.2(4)(d) if it concludes that he has made an inappropriate delegation to Appellant Snyders or any other CRNA. Appellant Kunkel, however, cannot meet the fourth prong of entitlement to declaratory judgment: he cannot show that he lacks an adequate remedy at law.

Before the Board can take any disciplinary action against Appellant Kunkel, it must file a complaint before the Administrative Hearing Commission and meet a burden of proof, in a proceeding with a full panoply of due process protections, to obtain an independent finding from the Administrative Hearing Commission that there is cause for discipline under the applicable section of the statute. As the Court of Appeals noted, an administrative proceeding based on delegation of the procedure to Appellant Snyders by Appellant Kunkel is already underway. Appellant Kunkel, furthermore, has access to judicial review before any discipline the Board might impose upon him would take effect. Therefore, Appellant Kunkel has a fully effective remedy at law. A licensee is not entitled to declaratory judgment to prevent a licensing agency from pursuing disciplinary

measures provided by law, for to allow such relief would be to short-circuit the legal process created by the General Assembly in licensing matters.

Because the Appellants failed to plead facts showing conduct that would create any substantial infringement of their rights, and failed to plead facts showing they did not have an adequate remedy at law, the court below was justified in entering summary judgment for the Board.

III. The Board’s expression of opinion does not have any direct impact on the nurse anesthetist-appellants, and the physician-appellant has a full range of administrative remedies before the Board can take any action adverse to him. –

Responding to Appellants’ Point III

Appellants’ decision to add a third point relied upon raising the issue of standing is curious, as neither the Circuit Court nor the Court of Appeals decided the case on a theory of standing. The Circuit Court did not address the issue, and the Court of Appeals concluded that the issue was one of ripeness rather than standing.

The Court of Appeals quoted *Missouri Soybean* in applying the *Abbott* test, after *Abbott Labs., Inc. v. Gardner*, 387 U.S. 136, 148-49 (1967) (overruled on other grounds):

Determining whether a particular case is ripe for judicial resolution requires a two-fold inquiry [the “Abbott Test”]: a court must evaluate (1) whether the issues tendered are appropriate for judicial resolution, and (2) the hardship to the parties if judicial relief is denied.”

Slip Opinion at 11.

Applying the *Abbott* test, the Court of Appeals concluded that the matter was not ripe for adjudication, not that Appellants lacked standing:

In this case, withholding judicial review will not cause the parties significant hardship. The Board’s letter does not command physicians or APNs to do anything or to refrain from doing anything; the letter does not subject physicians or APNs to civil or criminal liability; nor does the letter create any legal rights or obligations. Moreover, the

numerous steps and procedural requirements that must be observed before any liability will attach to a physician or APN, significantly remove the Board's expression of opinion from any harm that will purportedly be suffered. Only when there is a substantive action against the interests of the Practitioners, i.e. a promulgated rule or an actual legal proceeding, will there be an imminent and more certain harm and, therefore, a controversy ripe for judicial review. That proceeding, however, does not exist in the present case before us.

Slip Opinion at 12.

Much of Appellants' Point III is devoted to an argument that licensees should be entitled to declaratory judgment in order to not have to face the stress and risk of disciplinary proceedings. It is true that an affected licensee may bring a declaratory judgment action to challenge the validity of a regulation that restricts them from performing some activity that would be lawful were it not for the regulation at issue. *Bresler v. Tietjen*, 424 S.W.2d 65 (Mo.banc 1968).

However, the argument advanced in Point III is entirely dependent upon the resolution of the issues raised in Appellants' Points I and II as to whether the Board's letters constituted a rulemaking, and whether the conclusion expressed in the letters was beyond its authority to determine. Appellants' Point III was not raised in the courts below and adds nothing to the issues before the Court, other than more rhetoric making the same points the Appellants had already stated.

Appellants do concede that the grievance of the nurse anesthetist appellants is indirect and consequential in nature:

The reality of the regulatory world is that agency statements interpreting law, in whatever form issued, influence and control the actions of those regulated and also have a **ripple negative effect** on those outside the regulated profession.

Appellants' Substitute Brief, Page 43. [emphasis added]

This confirms what the Board has noted above: the injury alleged by the nurse anesthetist appellants is an indirect "ripple effect." As argued at length above, an agency action is a rule only to the extent it has a direct effect on the aggrieved party. Appellants' "ripple effect" claim is an acknowledgement that nothing in the Board's action has the kind of direct effect on the nurse anesthetist appellants necessary to create a current controversy ripe for judicial review.

As to Appellant Kunkel, any claim he might have that he is entitled to declaratory relief on a preemptive basis is moot in light of the pendency of a disciplinary proceeding against him. As argued above, Appellant Kunkel now has available a full administrative remedy. If, as he contends, the opinion of the Board is wrong and his delegation of the questioned injections to Appellant Snyders is proper solely on the basis of Appellant Snyders' licensure as a CRNA, he will have a complete defense to the disciplinary action and he has no need of declaratory relief. Because, as noted by the Court of Appeals, the disciplinary action is based on Section 334.100.2(4)(d), rather than the policy stated in the letters, and on events occurring before the issuance of the challenged letters,

Appellant Kunkel cannot claim he is deterred from legal activity by the letters, as his disciplinary liability now is the same as it was before the letters were issued.

Appellants' Point III therefore states no grounds for reversal of the decision below. The decision of the Circuit Court to grant summary judgment in favor of the Board should be affirmed.

CONCLUSION

For these reasons, the decision of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF ATTORNEY

I hereby certify that the foregoing Respondent's Brief complies with the provisions of Rule 55.03 and complies with the limitations contained in Rule 84.06(b) and that:

- (A) It contains 9,909 words and 825 lines, as calculated by counsel's word processing program;
- (B) A copy of this brief is on the attached compact disk; and that
- (C) The disk has been scanned for viruses by counsel's anti-virus program and is free of any virus.

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CERTIFICATE OF SERVICE

I certify that on February 14, 2011, I served a copy of the foregoing Substitute Brief of Respondent upon counsel of record for Appellants and amici, by mailing a copy to each of them via first class mail at the following addresses, and by sending an electronic copy in Word 2003 format to them at the following email addresses:

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