

**IN THE SUPREME COURT OF MISSOURI**

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**No. SC91302**

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**MISSOURI ASSOCIATION OF NURSE ANESTHETISTS, INC., et al.**

**Appellants,**

**v.**

**STATE BOARD OF REGISTRATION FOR THE HEALING ARTS,**

**Respondent.**

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**On Petition for Review from the  
Cole County Court, 19<sup>th</sup> Judicial District  
Honorable Jon E. Beetem**

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**BRIEF OF AMICUS CURIAE  
AMERICAN ASSOCIATION OF NURSE ANESTHETISTS  
IN SUPPORT OF APPELLANTS**

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### CONSENT OF THE PARTIES

The American Association of Nurse Anesthetists received consent from Counsel for Appellants, Tom Rynard, as well as consent from Counsel for Respondent, Edwin Frownfelter, to file this brief as required by Rule 84.05(f)(2).

### JURISDICTIONAL STATEMENT

The American Association of Nurse Anesthetists adopts the jurisdictional statement of Appellants.

### STATEMENT OF FACTS

The American Association of Nurse Anesthetists adopts the statement of facts as set forth by the Appellants

### POINT RELIED ON

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR BOHA BECAUSE BOHA'S STATEMENTS ON THE SCOPE OF PRACTICE FOR ADVANCE PRACTICE NURSES CONSTITUTED A RULE UNDER SECTION 536.010(6) AND ARE SUBJECT TO THE RULEMAKING REQUIREMENTS OF CHAPTER 536 AND SECTION 334.125, RSMO., IN THAT THE STATEMENTS ARE STATEMENTS OF GENERAL APPLICABILITY THAT IMPLEMENT, INTERPRET OR PRESCRIBE LAW OR PRACTICE, WITH FUTURE EFFECT ON THE ABILITY OF ADVANCED PRACTICE NURSES TO PERFORM THE PROCEDURES THAT ARE THE SUBJECT OF BOHA'S STATEMENTS.

## INTRODUCTION

The American Association of Nurse Anesthetists (the “AANA”) submits this amicus curiae brief in support of the Missouri Association of Nurse Anesthetists’ (“MoANA”) appeal from the entry of summary judgment in favor of the State Board of Registration for the Healing Arts (“BOHA”). The AANA urges this Court to reverse the trial court’s decision allowing the BOHA to circumvent its statutorily mandated rule-making process by proclaiming an “opinion” at a public hearing which directly affects the practices of medicine and nursing and then disseminating that proclamation to the public.

The Missouri State Medical Society (the “Medical Society”), which includes members who have a substantial economic interest in preventing competition in pain management, essentially drafted the “rule” that was publicly adopted and announced by the BOHA and usurped the regulatory authority of the Missouri Board of Nursing (the “Board of Nursing”). The effect of the *de facto* rule – the pronouncement that it is beyond the scope of Advanced Practice Nurse (“APN”) practice to inject therapeutic agents under fluoroscopic control and warning physicians that they will face discipline if they work with APNs who inject therapeutic agents – is severe for patients, physicians, and APNs. The Court of Appeals ruled that the BOHA action was not rule-making because the BOHA was not instructing physicians to refrain from using APNs for the procedures in question but only advising them of the likelihood of disciplinary proceedings by the BOHA if they did so. *Slip op.* at 8. If the Court of Appeals decision is allowed to stand, then the BOHA and other state agencies effectively will be able to

make rules while avoiding the rigors of the formal rule-making process mandated by the Missouri Administrative Procedures Act.

This Court should uphold the requirements of the Administrative Procedures Act. The BOHA cannot avoid this statutorily mandated procedural process when it sets policies that will have a widespread effect both on the healthcare professionals it regulates and, even more significantly, healthcare professionals regulated by other agencies. Reversal is also necessary because the trial court's decision leads to a result that directly contravenes this Court's opinion in *Sermchief v. Gonzales*, 660 S.W.2d 683 (Mo. banc 1983), which held that the BOHA has no jurisdiction to define the scope of practice of nurses.

#### STATEMENT OF INTEREST

Organized in 1931, the AANA is the professional association that represents over 42,000 nurse anesthetists (most of whom are Certified Registered Nurse Anesthetists ("CRNAs")) in the United States. Nurse anesthetists have been rendering quality anesthesia services in this country for nearly 150 years.

CRNAs are highly-educated anesthesia specialists. Nurse anesthesia educational programs are graduate level programs that are accredited by the Council on Accreditation of Nurse Anesthesia Educational Programs ("COA"), which is recognized by the U.S. Department of Education and the Council for Higher Education Accreditation. An applicant for one of these programs must have a bachelor's degree in nursing or other

appropriate baccalaureate degree, be licensed as a registered nurse, and have worked for at least one year in acute nursing care.<sup>1</sup>

Nurse anesthesia educational programs include both academic and clinical study in anesthesia and take two to three years to complete. Graduates of accredited nurse anesthesia educational programs must then take and pass a rigorous National Certification Examination in order to be certified as CRNAs. Thereafter, in the vast majority of states, they must be recertified every two years. To obtain recertification, CRNAs must meet established requirements for anesthesia practice and continuing education.<sup>2</sup>

Through their long history, nurse anesthetists have demonstrated an impressive patient care safety record. Today, CRNAs safely administer approximately 32 million anesthetics to patients each year in the United States.<sup>3</sup> CRNAs are the primary providers of anesthesia care in rural America, and, as expert anesthesia professionals, deliver pain management services in all types of facilities.

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<sup>1</sup> American Association of Nurse Anesthetists, *Nurse Anesthesia Education* (May 2010), available at

<http://www.aana.com/AboutAANA.aspx?id=245&linkidentifier=id&itemid=245>.

<sup>2</sup> *Id.*

<sup>3</sup> American Association of Nurse Anesthetists, *Certified Registered Nurse Anesthetists (CRNAs) at a Glance* (May 7, 2010); available at <http://www.aana.com/ataglance.aspx>

Due to their training and experience, CRNAs are uniquely skilled to deliver pain treatment, a critical component of anesthesia care, in a compassionate and holistic manner.<sup>4</sup> CRNAs are meeting the increasing demand for pain management in the United States.<sup>5</sup>

As part of the professional scope of their practice, CRNAs manage a patient's chronic pain through the performance of selected diagnostic and therapeutic blocks or other forms of pain management.<sup>6</sup> This pain management has been described as follows:

Providing acute and chronic pain management and treatment is within the professional scope of practice of CRNAs. CRNAs employing pain management techniques is neither new nor unusual and has long been a part of CRNA practice. By virtue of education and individual clinical experience, a CRNA possesses the necessary knowledge and skills to employ therapeutic, physiological, pharmacological, interventional, and

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<sup>4</sup> American Association of Nurse Anesthetists, *Position Statement Number 2.11 Pain Management* (rev. ed. 2010), available at <http://www.aana.com/Resources.aspx?id=24804> (hereinafter ("*Position Statement Number 2.11*")), at 1.

<sup>5</sup> *Id.*

<sup>6</sup> American Association of Nurse Anesthetists, *Scope and Standards for Nurse Anesthesia Practice* (June 2006), available at <http://www.aana.com/Resources.aspx?id=24799>, at 1.



psychological modalities in the management and treatment of acute and chronic pain.<sup>7</sup>

CRNAs often use fluoroscopy, an imaging modality, to aid in pain management. Fluoroscopy allows the CRNA to visualize the location of the pain injection. Through the use of fluoroscopy, CRNAs improve their ability to place the medication in the correct place, thus improving the safety and accuracy of the injections. The use of fluoroscopy falls well within the professional scope of practice of CRNAs.<sup>8</sup>

#### ARGUMENT

#### POINT RELIED ON

**THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR BOHA BECAUSE BOHA’S STATEMENTS ON THE SCOPE OF PRACTICE FOR ADVANCE PRACTICE NURSES CONSTITUTED A RULE UNDER SECTION 536.010(6) AND ARE SUBJECT TO THE RULEMAKING REQUIREMENTS OF CHAPTER 536 AND SECTION 334.125, RSMO., IN THAT THE STATEMENTS ARE STATEMENTS OF GENERAL APPLICABILITY THAT IMPLEMENT, INTERPRET OR PRESCRIBE LAW OR PRACTICE, WITH FUTURE EFFECT ON THE ABILITY OF ADVANCED PRACTICE**

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<sup>7</sup> *Position Statement Number 2.11* at 2.

<sup>8</sup> American Association of Nurse Anesthetists, *Position Statement Number 2.6* (rev. ed. 2010), available at <http://www.aana.com/Resources.aspx?id=24804> (hereinafter (“*Position Statement Number 2.6*”), at 1.

**NURSES TO PERFORM THE PROCEDURES THAT ARE THE SUBJECT OF  
BOHA’S STATEMENTS.**

The BOHA is responsible for “registering, licensing and supervising all physicians and surgeons, and midwives in ... [the state of Missouri].”<sup>9</sup> It has no authority and no expertise in the area of nursing and, in particular, no expertise in the education and capability of nurse anesthetists to inject therapeutic agents under fluoroscopic control. By failing to comply with the formal rule-making process mandated by the Administrative Procedures Act, the BOHA eliminated the opportunity to understand the issues involved in its decision. The formal requirements of the Administrative Procedures Act are designed to assure carefully considered decisions based on knowledge and good policy – exactly what did not happen here. In enforcing the rule promulgation procedures of chapter 536, this Court and the other appellate courts of the state have noted the fundamental purpose behind rulemaking to be precisely this: “to allow opportunity for comment by supporters or opponents of the measure, and so to induce a modification. . . . To neglect the notice ... or to give effect to a *proposed* rule before the

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<sup>9</sup> Mo. Rev. Stat. § 334.120 (2010).

time for comment has run . . . undermines the integrity of the procedure.”<sup>10</sup>

What occurred in this case is not an isolated incident. While leading authorities on health care such as the Institute of Medicine have recognized that “[n]urses should practice to the full extent of their education and training,”<sup>11</sup> Missouri is one of several states where organized medicine is challenging CRNA pain management practice. Within the last few years, CRNAs have faced challenges in Alabama, Iowa, Kentucky, Louisiana, Oklahoma, Tennessee, and Virginia.

In the fall of 2010, the Alabama Board of Medical Examiners (“Alabama Medical Board”) proposed a rule that, if adopted, would have effectively prohibited CRNA interventional pain management services.<sup>12</sup> After the Alabama Medical Board received

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<sup>10</sup> *NME Hospitals, Inc. v. Department of Social Services, Division of Medical Services* 850 S.W.2d 71, 74 (Mo. banc 1993). *See, also, Young v. Children’s Division, State of Missouri Department of Social Services*, 284 S.W.3d 553, 560 n.9 (Mo. banc 2009); *Department of Social Services, Division of Medical Services v. Senior Citizens Nursing Home District of Ray County*, 224 S.W.3d 1, 18 (Mo. App. 2007).

<sup>11</sup> Committee on the Robert Wood Johnson Foundation Initiative on the Future of Nursing, Institute of Medicine, *The Future of Nursing: Leading Change, Advancing Health* (2010).

<sup>12</sup> Alabama Board of Medical Examiners, Proposed Rule 540-X-15, Interventional Pain Management, Ala. Admin. Monthly, Volume XXVIII, Issue no. 11, Page No. 474 (August 31, 2010) *text also available at* <http://www.ala-crna.org/call-to-action/>.

letters opposing the rule from the Federal Trade Commission (“FTC”) and numerous others, including the Alabama Board of Nursing, the Alabama Hospital Association, and the Speaker of the Alabama House of Representatives, it decided not to adopt the proposed rule.<sup>13</sup>

The FTC’s comments explain why this effort to limit the scope of practice of CRNAs is against good public policy. The FTC commented:

The rule appears to prohibit certified registered nurse anesthetists (CRNAs) from performing, under the supervision of a physician, pain management procedures that the Board of Nursing considers within the scope of CRNA practice. Absent evidence that the proposed restrictions are necessary to protect the public, there appears to be no reason to sacrifice the benefits of CRNA pain management services as currently available under Alabama law.<sup>14</sup>

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<sup>13</sup> Alabama Board of Medical Examiners, Public Minutes, Regular Meeting (November 17, 2010), *available at* <http://www.albme.org/documents/11-10%20Public%20Minutes.pdf> at 12.

<sup>14</sup> F.T.C. Comment Letter, dated November 3, 2010, at Page 1; *text available at* <http://www.ftc.gov/os/2010/11/101109alabamabrdme.pdf> at 1; *see also FTC Urges Alabama Medical Panel to Not Adopt Rules on Who Can Give Pain Treatments*, The Birmingham News, 11/16/10 at [http://blog.al.com/sweethome/2010/11/ftc\\_urges\\_alabama\\_medical\\_pane.html](http://blog.al.com/sweethome/2010/11/ftc_urges_alabama_medical_pane.html).

The FTC added in a press release that “the proposed rule would reduce the availability and raise the prices of chronic pain management services. In particular, the proposed rule could be especially burdensome for some of the most vulnerable citizens of Alabama.”<sup>15</sup>

In Iowa, in response to repeated attempts by the Iowa Medical Society to restrict CRNA practice, the Iowa Board of Medicine adopted a rule providing guidance to physicians who engage in “interventional chronic pain management,”<sup>16</sup> but noted that it had no authority to regulate CRNAs.<sup>17</sup> The Iowa Medical Society also tried but failed to have legislation enacted that would have effectively prohibited CRNA chronic pain management practice and would have nullified rules adopted by the Iowa Board of Nursing and the Iowa Department of Public Health concerning APN use of fluoroscopy.<sup>18</sup>

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<sup>15</sup> F.T.C. News Release dated November 9, 2010; *text available at* <http://www.ftc.gov/opa/2010/11/alabamarule.shtm>.

<sup>16</sup> Iowa Admin. Code r. 653-13.9 (2010).

<sup>17</sup> Iowa Board of Medicine, Public Session Minutes of the Board Meeting (April 9, 2010), *available at* <http://medicalboard.iowa.gov/Minutes/PubMin4-9-10.pdf>, at (D)(2)(b).

<sup>18</sup> The Iowa Medical Society and the Iowa Society of Anesthesiologists then recently filed a lawsuit challenging the fluoroscopy rules. The Iowa trial court has issued a stay of the rules, preserving the status quo of CRNAs utilizing fluoroscopically guided services until the court has reached a decision on the merits of the case.

In Kentucky, the founder of the American Society of Interventional Pain Physicians sought legislation to prohibit CRNAs from performing “interventional pain management.” The Kentucky legislature rejected that proposed bill.<sup>19</sup>

In Oklahoma, after the Attorney General opined that pain management is within the legal scope of CRNA practice, the Oklahoma Society of Anesthesiologists sought legislation to restrict CRNA practice. Ultimately, the Oklahoma legislature enacted a compromise bill.<sup>20</sup>

In Tennessee, the state medical association had bills introduced in the legislature to restrict CRNA, APN, and Physician Assistant pain management practice, but the bills failed.<sup>21</sup>

Likewise, the Virginia Society of Anesthesiologists tried to amend a Virginia Board of Medicine rule to prohibit CRNAs from performing regional anesthesia for pain

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<sup>19</sup> S.B. 170 (Ky 2008).

<sup>20</sup> See Okla. Stat. tit. 59, § 650 (2010).

<sup>21</sup> S.B. 3332/H.B. 3580, 106<sup>th</sup> Gen. Assem., Reg. Sess. (Tenn. 2010).

management purposes in physician offices. The Virginia Board of Medicine, however, rejected the proposal.<sup>22</sup>

In Missouri, as has happened elsewhere, the Medical Society attempted an end run around the formal process. Unlike most of the other states that addressed this issue, however, in Missouri the Medical Society was successful in circumventing legislative and regulatory channels. The Medical Society convinced the BOHA to “proclaim” a standard of practice that prohibits CRNAs from performing certain pain management procedures and prohibits physicians from working with CRNAs who perform such procedures – something the BOHA had no authority to do. This Court should reverse the trial court’s blessing of this unlawful regulatory activity and reinforce its decision in *Sermchief* that the BOHA has no jurisdiction to define the scope of practice of nurses.

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<sup>22</sup> 18 VAC 85-20-330 (2006). Louisiana is the only state that has prohibited CRNA “interventional” pain management practice. In 2008, an anesthesiologist pain management group that competes with physician groups employing CRNAs succeeded in having a Louisiana court issue a declaratory judgment that interventional pain management is exclusively the practice of medicine. This decision is clearly an outlier. The other states that have addressed pain management have rejected prohibitions on CRNA pain management practice. See *Spine Diagnostics Center of Baton Rouge Inc. v. Louisiana State Board of Nursing*, 4 So.3d 854 (La. Ct. App. 2008).

## CONCLUSION

Wherefore, Amicus Curiae AANA requests that this Court reverse the trial court's decision and for such other relief as this Court deems appropriate.

THE AMERICAN ASSOCIATION OF  
NURSE ANESTHETISTS

By its Attorneys

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CERTIFICATE OF COMPLIANCE

The undersigned certified that a copy of the computer diskette containing the full text of Brief of *Amicus Curiae* American Association of Nurse Anesthetists, in Support of Appellants is attached to the Brief is virus free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 2,369 words, as calculated by the Microsoft Word software used to prepare this Brief.

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Marshall V. Wilson

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document by mailing a true copy thereof on this 21st day of January, 2011, via prepaid U.S. Mail, to Mr. Edwin R. Frownfelter, Assistant Attorney General, 615 E. 13<sup>th</sup> Street, Suite 401, Kansas City, MO 64106; James B. Deutsch, Blitz, Bardgett & Deutsch, L.C., 308 East High Street, Suite 301, Jefferson City, MO 65101; and Richard M. Aubuchon, General Counsel, Missouri Chamber of Commerce & Industry, Inc. 428 East Capitol Avenue, P.O. Box 149, Jefferson City, MO 65102.

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