

CAUSE NO. D-1-GN-19-003686

MICHAEL GARRETT, M.D.; and KRISTIN HELD, M.D.,

Plaintiffs,

v.

The TEXAS STATE BOARD OF PHARMACY; DENNIS WIESNER, BRADLEY MILLER, DONNIE LEWIS, JENNY YOAKUM, RICK FERNANDEZ, DANIEL GUERRERO, LORI HENKE, L. SUZAN KEDRON, JULIE SPIER, CHIP THORNSBURG, and SUZETTE TIJERINA, in their official capacities as members of the Texas State Board of Pharmacy; ALLISON BENZ, in her official capacity as the Executive Director of the Texas State Board of Pharmacy; the TEXAS MEDICAL BOARD; SHERIF ZAAFRAN, ROBERT MARTINEZ, JEFFREY LUNA, MARGARET MCNEESE, JAYARAM NAIDU, MANUEL QUINONES, KARL SWANN, DAVID VANDERWEIDE, SURENDRA VARMA, GEORGE DE LOACH, KANDACE FARMER, SCOTT HOLLIDAY, SHARON BARNES, MICHAEL COKINOS, FRANK DENTON, ROBERT GRACIA, LINDA MOLINA, LUANN MORGAN, and TIMOTHY WEBB, in their official capacities as members of the Texas Medical Board; and STEPHEN CARLTON, in his official capacity as the Executive Director of the Texas Medical Board,

Defendants.

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

98TH JUDICIAL DISTRICT

**PLAINTIFFS' ORIGINAL PETITION,
APPLICATION FOR INJUNCTIVE RELIEF,
AND REQUEST FOR DISCLOSURES**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Michael Garrett, M.D., and Kristin Held, M.D., and file their Original Petition, Application for Injunctive Relief, and Request for Disclosures against the Texas State Board of Pharmacy and its members and Executive Director in their official capacities, and the Texas Medical Board and its members and Executive Director in their official capacities, Defendants herein. In support of their Original Petition, Application for Injunctive Relief, and Request for Disclosures, Plaintiffs would show the Court the following:

INTRODUCTION

1. This state constitutional challenge seeks to vindicate the right of licensed Texas doctors to dispense safe, affordable prescription medication directly to their patients. Plaintiff Michael Garrett, M.D., is a family physician based in Austin, Texas, who regularly prescribes medication to his patients for routine health issues. Plaintiff Kristin Held, M.D., is a physician and board-certified ophthalmologist and eye surgeon based in San Antonio, Texas, who regularly prescribes medication for common eye conditions and post-surgical care. Plaintiffs both wish to offer their patients an easier way to obtain the medication they prescribe, right when they prescribe it, at prices more affordable than those offered by nearby pharmacies. In particular, Plaintiffs wish to dispense non-controlled prescription medication, at cost, to their patients.

2. Forty-five states and the District of Columbia allow doctors to dispense in this manner. But Texas, unlike the vast majority of states, generally forbids doctors from dispensing more than a 72-hour supply of medication (which is far less than most prescriptions actually require) unless they work in “rural” areas more than 15 miles from the nearest pharmacy, or are giving the medication away as free samples provided by pharmaceutical companies. These terms are too constraining for Plaintiffs, who wish to dispense patients’ full prescriptions without

having to take a financial loss, but are categorically banned from doing so because they work in populated cities near pharmacies.

3. Texas's ban is irrational. As 45 other states have recognized, doctor dispensing is a safe and effective way to increase patients' access and adherence to their prescribed medications, which is good for patients, doctors, and the broader healthcare system. As licensed doctors, Plaintiffs are just as qualified as their peers across the country to provide this beneficial service. Indeed, Texas *already allows* Plaintiffs to supply free samples of the same medications they wish to dispense at cost, and Plaintiffs have occasionally done so. Moreover, Texas *already allows* doctors who work far enough away from pharmacies to dispense patients' full prescriptions and to recover their costs, which is precisely what Plaintiffs wish to do. Yet Texas forbids Plaintiffs (and virtually all other Texas doctors) from offering the same service for their own patients.

4. Texas's ban has nothing to do with protecting the health or safety of real patients. But it does serve another purpose: protecting pharmacies from competition. Indeed, the practical effect of this regime is that doctors can dispense *only* in amounts (72-hour supplies), at prices (free samples), or in locations (far away from customers and pharmacies) that do not threaten the profits of Texas pharmacies. Pharmacies, by contrast, can dispense an unlimited supply of medication, for a profit, in the most populated areas of Texas—all while enjoying at least a 15-mile zone of protection from competition by the nearest doctor.

5. That is unconstitutional. Article I, Section 19 of the Texas Constitution forbids the legislature from imposing irrational, oppressive, and protectionist restrictions on the right to pursue a chosen business. Article I, Section 3 of the Texas Constitution likewise forbids the legislature from drawing irrational, oppressive, and protectionist distinctions between similarly situated groups. Because Texas's ban on doctor dispensing violates both guarantees, the Court

should enjoin Defendants from enforcing the law against Plaintiffs and all other similarly situated doctors.

JURISDICTION AND VENUE

6. Plaintiffs bring this lawsuit under Article I, Sections 3 and 19 of the Texas Constitution and the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.003.

7. Plaintiffs seek declaratory and injunctive relief against enforcement of Texas's ban on doctor dispensing, Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions) (collectively, the "Dispensing Ban"), and Defendants' policies and practices enforcing that ban, which violate Plaintiffs' right to economic liberty and equal protection of the laws.

8. This Court has jurisdiction because Plaintiffs seek to vindicate their rights under the Texas Constitution and to obtain a declaratory judgment under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.003.

9. Venue is proper in Travis County under Tex. Civ. Prac. & Rem. Code § 15.002(a).

PARTIES AND SERVICE OF PROCESS

Plaintiffs

10. Plaintiff Michael Garrett, M.D. ("Dr. Garrett") is a Texas-licensed family doctor who practices in Austin, Texas. Dr. Garrett would like to dispense non-controlled prescription medication, at cost, to his patients, but he is prohibited from doing so under Texas law because his office is located in a populated area within 15 miles of a pharmacy. *See* Tex. Occ. Code

§§ 158.001(b), 158.003(b), 551.006, 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions).

11. Plaintiff Kristin Held, M.D. (“Dr. Held”) is a Texas-licensed ophthalmologist and board-certified surgeon who practices in San Antonio, Texas. Dr. Held would like to dispense non-controlled prescription medication, at cost, to her patients, but she is prohibited from doing so under Texas law because her office is located in a populated area within 15 miles of a pharmacy. *See* Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions).

Defendants

12. Defendant Texas State Board of Pharmacy (the “Pharmacy Board”) is the state agency responsible for regulating the practice of pharmacy and, along with the other Defendants, for enforcing the Dispensing Ban against licensed doctors. *See* Tex. Occ. Code §§ 554.001(a)(1), 558.001(c), 563.051(d), 563.053(b). The Pharmacy Board is headquartered in Travis County and may be served with process at its business address at 333 Guadalupe Street #3, Austin, Texas 78701.

13. Defendants Dennis Wiesner, Bradley Miller, Donnie Lewis, Jenny Yoakum, Rick Fernandez, Daniel Guerrero, Lori Henke, L. Suzan Kedron, Julie Spier, Chip Thornsburg, and Suzette Tijerina (collectively, the “Pharmacy Board Members”) are sued in their official capacities as members of the Pharmacy Board. The Pharmacy Board Members may be served at the Pharmacy Board’s business address at 333 Guadalupe Street #3, Austin, Texas 78701.

14. Defendant Allison Benz is sued in her official capacity as the Executive Director of the Pharmacy Board, and may be served at the Pharmacy Board's business address at 333 Guadalupe Street #3, Austin, Texas 78701.

15. Defendant Texas Medical Board (the "Medical Board") is the state agency responsible for regulating the practice of medicine and, along with the other Defendants, for enforcing the Dispensing Ban against licensed doctors. *See* Tex. Occ. Code §§ 158.001(b), 158.003(b), 164.001. The Medical Board is headquartered in Travis County and may be served with process at its business address at 333 Guadalupe Street #3, Austin, Texas 78701.

16. Defendants Sherif Zaafran, Robert Martinez, Jeffrey Luna, Margaret McNeese, Jayaram Naidu, Manuel Quinones, Karl Swann, David Vanderweide, Surendra Varma, George De Loach, Kandace Farmer, Scott Holliday, Sharon Barnes, Michael Cokinos, Frank Denton, Robert Gracia, Linda Molina, LuAnn Morgan, and Timothy Webb (collectively, the "Medical Board Members") are sued in their official capacities as members of the Medical Board. The Medical Board Members may be served at the Medical Board's business address at 333 Guadalupe Street #3, Austin, Texas 78701.

17. Defendant Stephen Carlton is sued in his official capacity as the Executive Director of the Medical Board, and may be served at the Medical Board's business address at 333 Guadalupe Street #3, Austin, Texas 78701.

18. The Texas Attorney General has been notified of this proceeding in accordance with Section 30.004(b) of the Texas Civil Practices and Remedies Code, and may be served by serving the Honorable Ken Paxton at his business address at 300 West 15th Street, Austin, Texas 78701.

FACTS

Doctor Dispensing Is Mainstream

19. “Doctor dispensing” is the practice of licensed doctors supplying patients with the medication they have prescribed, at cost or more, directly in their offices.¹

20. For many doctors, dispensing is a way to offer patients immediate access to the medication they need without the added cost and delay of a separate trip to the pharmacy.

21. Under federal law, doctors may dispense medication they have prescribed. *See* 21 U.S.C. § 353(b)(1) (prescription medication “shall be dispensed . . . upon a written prescription of a practitioner licensed by law to administer such drug”).

22. This makes sense. Under federal law, certain medications are deemed unsafe for self-administration—yet those same medications are deemed safe and beneficial when taken under the supervision of a licensed doctor. *See id.*

23. In other words, federal law recognizes that doctors are uniquely qualified, due to their extensive training and knowledge of individual patients, to determine whether a particular medication would be appropriate in a patient’s case and to supervise its administration.

24. Of course, a doctor who desires to dispense a medication is still required, under federal law, to ensure the medication is not “adulterated” or “misbranded.” *Id.* § 331(a).

25. But a doctor can easily meet these requirements by purchasing the medication from a licensed wholesaler, *see id.* §§ 360eee(23)(A), 360eee-1(c), 360eee-2, by storing it in accordance with federal best practices and under the conditions specified by the United States Pharmacopeia/National Formulary, *see* 21 C.F.R. §§ 205.50, 210.1(a), and by dispensing it with

¹ As used in this petition, the term refers solely to the act of furnishing a pre-manufactured prescription drug product to a patient, and does not include the manufacture, preparation, or compounding of the medication itself.

any labels or warnings required by the United States Food and Drug Administration, *see id.* §§ 201, 208, 209.

26. Beyond these federal requirements, the American Medical Association also approves of doctor dispensing—on the condition that doctors “prescribe . . . based solely upon medical considerations and patient need and reasonable expectations of the effectiveness of the drug . . . for the particular patient” and “dispensing primarily benefits the patient.” *Opinion 8.06—Prescribing and Dispensing Drugs and Devices*, 12 Am. Med. Ass’n J. of Ethics 925 (Dec. 2010).

27. Within these reasonable parameters, doctor-dispensed medication is just as safe and effective as pharmacy-dispensed medication.

28. Within these reasonable parameters, doctor dispensing is a safe and effective way for doctors to offer patients more convenient and affordable access to the medications they need.

29. Within these reasonable parameters, doctor dispensing is a safe and effective way for doctors to increase their patients’ likelihoods of adherence to their prescribed course of care, thereby reducing the potential for future medical complications and expenses to patients, insurance companies, and the public as a whole.

30. Given the benefits of doctor dispensing, the practice is widely embraced by both lawmakers and physicians nationwide. Indeed, 45 states and the District of Columbia allow doctors to dispense prescription medication, at cost or more, directly to their patients, and a majority of American doctors report dispensing on a daily basis.

Doctor Dispensing Is Banned in Most of Texas

31. Texas, unlike the vast majority of states, generally bans doctors from dispensing prescription medication unless they first obtain a pharmacist’s license. Tex. Occ. Code

§§ 158.001(b), 551.006, 558.001(c), 563.051(d); 22 Tex. Admin. Code § 169.4 (Tex. Med. Bd., Providing, Dispensing, or Distributing Drugs); *see also* Tex. Att’y Gen. Op. No. MW-410 (1981) (the Dispensing Ban “preclude[s] all but licensed pharmacists from dispensing prescription drugs”).

32. But there are several exceptions to Texas’s ban that, as a practical matter, allow doctors to dispense medication in ways that pose no threat to the financial interests of Texas pharmacies. *See* Tex. Occ. Code §§ 158.001(a), (c), 158.002(a), 158.003(c); 22 Tex. Admin. Code § 169.5 (Tex. Med. Bd., Exceptions).

33. For example, all Texas doctors may dispense up to a 72-hour supply of prescription medication directly to their patients. Tex. Occ. Code § 158.001(a); 22 Tex. Admin. Code §§ 169.2(6) (Tex. Med. Bd., Definitions), 169.5 (Tex. Med. Bd., Exceptions).

34. Texas doctors may also dispense an unlimited supply of prescription medication directly to their patients in the form of free samples provided by pharmaceutical manufacturers “if, in the physician’s opinion, it is advantageous to the patient, in adhering to a course of treatment prescribed by the physician, to receive the sample.” Tex. Occ. Code § 158.002(a); 22 Tex. Admin. Code § 169.5(2) (Tex. Med. Bd., Exceptions).

35. Texas further permits doctors in certain “rural” areas to dispense an unlimited supply of prescription medication directly to their patients, and to charge money for that medication, under five conditions: (A) the doctor must practice in “[a]n area in which there is no pharmacy within a 15-mile radius of the physician’s office and which is within either a county with a total population of 5,000 or less . . . or a city or town, incorporated or unincorporated, with a population of less than 2,500,” unless the city or town shares boundaries with “an incorporated city or town with an equal or greater population”; (B) the medication must not contain a

controlled substance (e.g., opiates, marijuana, cocaine); (C) the doctor must charge no more than the actual cost of dispensing the medication (i.e., the cost of the medication plus any other costs incidental to providing the service); (D) the doctor must comply with all relevant labeling, packaging, and recordkeeping requirements for each class of drugs dispensed; and (E) the doctor must notify the Medical Board and the Pharmacy Board that he or she is dispensing in a rural area. 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions); Tex. Occ. Code §§ 158.003, 563.053; Tex. Health & Safety Code § 481.001(2).

36. Each of these exceptions to the Dispensing Ban undermines its rationality. The exceptions recognize that Texas doctors, just like their peers in 45 other states and in rural parts of Texas, are qualified to safely dispense prescription medication to their patients.

37. For example, Texas doctors dispensing under the “free sample” exception are legally permitted to offer patients safe, affordable, and convenient access to the full supply of medication necessary to complete their prescribed course of care—*if* they happen to have received a sufficient supply of that medication, for free, from a pharmaceutical manufacturer.

38. Similarly, Texas doctors dispensing under the “rural” exception are legally permitted to offer patients safe, affordable, and convenient access to the full supply of medication necessary to complete their prescribed course of care—*if* they happen to work far enough away from large populations of paying patients and local pharmacies.

39. Patients who obtain medication under either of these exceptions benefit, both medically and financially, from safe, affordable, and convenient access to the medication they need.

40. But these exceptions are too narrow to extend the same benefits to the overwhelming majority of Texans, since “free samples” are necessarily an intermittent and marginal

phenomenon, and over 99% of Texas doctors are located too close to pharmacies to qualify for the “rural” exception.

41. As a result, the overwhelming majority of Texas doctors—including Plaintiffs—are forbidden from offering patients safe, affordable, and convenient access to the full supply of medication they need.

Plaintiffs Would Like to Dispense Safe, Affordable Medication to Their Patients

Plaintiff Michael Garrett, M.D.

42. Dr. Michael Garrett is a family doctor based in Austin, Texas. He has over two decades of experience practicing medicine.

43. After completing his residency in family medicine, Dr. Garrett spent the first 17 years of his career providing full-time emergency care.

44. In 2014, Dr. Garrett left emergency care to open Direct MD Austin (“Direct MD”), a full-service family practice.

45. Direct MD offers “direct primary care,” which is an arrangement where patients agree to pay a monthly fee in exchange for an agreed-upon list of medical services from their doctor.

46. Direct MD is also a “third party free” practice, which means it does not take insurance (although patients may separately seek reimbursement from their insurance providers).

47. Dr. Garrett believes that Direct MD’s unique practice model allows him to provide better, more affordable medical services to his patients than he otherwise could under a more traditional model.

48. As a family doctor, Dr. Garrett offers a range of medical services—everything from routine checkups (e.g., annual exams, sports physicals, sick visits) to treatment for chronic conditions (e.g., diabetes, asthma, seasonal allergies) to care for acute conditions (e.g., influenza,

sprains, lacerations). See Direct MD, *Services and Fees*, <http://www.directmdaustin.com/services> (last visited June 24, 2019).

49. As part of these services, Dr. Garrett often prescribes appropriate medication for his patients as part of their overall treatment plans.

50. For example, Dr. Garrett often prescribes oral Rosuvastatin to patients with high cholesterol. Rosuvastatin is a statin medication commonly prescribed by family doctors across the country that, to effectively reduce high cholesterol, must typically be taken over the course of several days or weeks.

51. Sometimes, when Dr. Garrett has received a free sample of prescription medication from a pharmaceutical manufacturer that he believes would be “advantageous to the patient, in adhering to a course of treatment prescribed,” Tex. Occ. Code § 158.001(c), Dr. Garrett will dispense that medication directly to his patients.

52. Patients who have received such samples directly from Dr. Garrett in his office have benefitted, both medically and financially, from more convenient access to the medication they would have otherwise needed to obtain later at a pharmacy.

53. Given these benefits, Dr. Garrett would like to offer dispensing services to a broader range of patients who, in his professional judgment, would benefit from direct access to the medication he prescribes.

54. Thus, Dr. Garrett would like to go beyond merely providing free samples (which depends on pharmaceutical companies’ willingness to send him free medication) or a 72-hour supply of medication (which is often far below the quantity he actually prescribes for routine treatments like Rosuvastatin) to dispensing non-controlled prescription medication, at cost, to his patients at Direct MD.

55. In other words, Dr. Garrett would like to provide the same services for his patients that Texas doctors dispensing under the rural exception are already permitted to provide. *See* Tex. Occ. Code §§ 158.003, 563.053; 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions).

56. If Dr. Garrett were permitted to dispense in this manner, he would comply with all relevant federal and Texas laws regarding the purchasing, storage, and sale of non-controlled prescription medication, and with AMA Code of Medical Ethics Opinion 8.06.

57. If Dr. Garrett were permitted to dispense in this manner, he would offer the prescription medications his patients need at prices lower than what they would otherwise pay at nearby pharmacies.

58. If Dr. Garrett were permitted to dispense in this manner, he believes his patients would be more likely to take the medications he prescribes, which would reduce their potential for future medical complications and expenses.

Plaintiff Kristin Held, M.D.

59. Dr. Held is a physician and board-certified ophthalmologist and eye surgeon based in San Antonio, Texas. She has over three decades of experience practicing medicine.

60. In 1994, Dr. Held opened Stone Oak Ophthalmology Center (“Stone Oak”), a full-service ophthalmology center where she currently works as a solo practitioner.

61. In 2015, Dr. Held converted to a “third party free” practice model, which means she does not take insurance (although patients may separately seek reimbursement from their insurance providers).

62. Dr. Held believes that her unique practice model allows her to provide better, more affordable medical services to her patients than she otherwise could under a more traditional model.

63. As an ophthalmologist, Dr. Held offers comprehensive eye care—everything from routine checkups (e.g., vision tests, eye-health examinations) to treatment for infections or disorders (e.g., conjunctivitis, glaucoma, macular degeneration) to surgery (e.g., LASIK, PRK, cataract surgery). *See* Stone Oak, *Services*, <https://www.stoneoakeyes.com/category/services> (last visited June 24, 2019).

64. As part of these services, Dr. Held regularly prescribes medication for her patients as part of their overall treatment plans.

65. For example, Dr. Held regularly prescribes Moxifloxacin eye drops to patients immediately after performing LASIK surgery to prevent post-surgical infection. Moxifloxacin eye drops are a topical antibiotic commonly prescribed by ophthalmologists that, to effectively prevent post-surgical infection, must typically be taken immediately following surgery and for several days or weeks thereafter.

66. Sometimes, when Dr. Held has received a free sample of prescription medication (including Moxifloxacin drops) from a pharmaceutical manufacturer that she believes would be “advantageous to the patient, in adhering to a course of treatment prescribed,” Tex. Occ. Code § 158.001(c), Dr. Held will dispense that medication directly to her patients.

67. Patients who have received such samples directly from Dr. Held in her office have benefitted, both medically and financially, from more convenient access to the medication they would have otherwise needed to obtain later at a pharmacy.

68. Given these benefits, Dr. Held would like to offer dispensing services to a broader range of patients who, in her professional judgment, would benefit from direct access to the medication she prescribes.

69. Thus, Dr. Held would like to go beyond merely providing free samples (which depends on pharmaceutical companies' willingness to send her free medication) or a 72-hour supply of medication (which is often far below the quantity she actually prescribes for treatments like Moxifloxacin) to dispensing non-controlled prescription medication, at cost, to her patients at Stone Oak.

70. In other words, Dr. Held would like to provide the same services for her patients that Texas doctors dispensing under the rural exception are already permitted to provide. *See* Tex. Occ. Code §§ 158.003, 563.053; 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions).

71. If Dr. Held were permitted to dispense in this manner, she would comply with all relevant federal and Texas laws regarding the purchasing, storage, and sale of non-controlled prescription medication, and with AMA Code of Medical Ethics Opinion 8.06.

72. If Dr. Held were permitted to dispense in this manner, she would offer the prescription medications her patients need at prices lower than what they would otherwise pay at nearby pharmacies.

73. If Dr. Held were permitted to dispense in this manner, she believes her patients would be more likely to take the medications she prescribes, which would reduce their potential for future medical complications and expenses.

Texas Bans Plaintiffs from Dispensing Safe, Affordable Medication to Their Patients

74. Yet Plaintiffs are not permitted to dispense non-controlled prescription medication in the safe, affordable manner described above. *See* Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions).

75. Plaintiffs are not banned from dispensing because it is difficult. To the contrary, most of the real-world tasks associated with dispensing are “nonjudgmental technical duties” that any pharmacy technician can perform with little more than a high school degree and a passing score on the state certification exam. *See* Tex. Occ. Code § 568.001.

76. Plaintiffs are not banned from dispensing because they would be unable to comply with relevant Pharmacy Board standards for the proper storage, labeling, and dispensing of prescription medication. *See* 22 Tex. Admin. Code § 291.33(b)–(i) (Tex. Pharm. Bd., Operational Standards). These are common-sense requirements that Plaintiffs—as licensed doctors with decades of experience—could easily meet.

77. Plaintiffs are not banned from dispensing because their actual services would be in any way different from the services their rural peers are already permitted to provide. Again, Plaintiffs do not intend to charge more than the cost of dispensing the medication; would comply with all relevant labeling, packaging, and recordkeeping requirements for each class of drug dispensed; and would notify the Medical Board and Pharmacy Board that they are dispensing. *See* Tex. Occ. Code §§ 158.003, 563.053; 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions).

78. Instead, the *only* reason Plaintiffs are banned from dispensing non-controlled prescription medication and recovering their costs is that Plaintiffs’ offices are located in

populated areas within 15 miles of pharmacies. *See* Tex. Occ. Code §§ 158.003(b), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions); *see also* Tex. Att’y Gen. Op. No. JM-304 (1985) (the Dispensing Ban “prohibits a physician from charging a fee to cover the cost of drugs supplied to a patient for self-medication, unless such physician practices in ‘a rural area’”).

79. Violating the Dispensing Ban is not an option. Doing so would expose Plaintiffs to grave penalties—from thousands of dollars in fines to suspension or revocation of their medical licenses to even a year in jail (for the commission of a Class A misdemeanor). *See* Tex. Occ. Code §§ 164.001, 165.001, 165.101, 165.151, 566.001, 566.101, 566.151.

80. Indeed, Defendants have aggressively enforced Texas’s dispensing laws several times in recent years against doctors who violated them.

**Banning Plaintiffs from Dispensing Safe, Affordable Medication to Their Patients Serves
No Legitimate State Interest**

81. Plaintiffs, just like their peers in 45 states across the country and in rural Texas, are qualified to safely and ethically dispense non-controlled prescription medication, at cost, to their patients.

82. Neither the proximity of Plaintiffs’ offices to pharmacies nor the populations of the municipalities in which their offices are located has any bearing on Plaintiffs’ ability to safely and ethically dispense non-controlled prescription medication, at cost, to patients who need it.

83. In fact, if Plaintiffs were permitted to dispense in the same manner as their rural peers, Plaintiffs’ patients would (A) benefit from greater access to safe, affordable prescription medication; (B) be more likely to take to the medications they are prescribed; and (C) be less likely to suffer future medical complications and expenses.

84. The Dispensing Ban does not serve any legitimate public health or safety purpose.

85. Defendants do not possess and cannot produce any evidence that the Dispensing Ban serves any legitimate public health or safety purpose.

86. The Dispensing Ban does not serve any other legitimate state interest.

87. Defendants do not possess and cannot produce any evidence that the Dispensing Ban serves any other legitimate state interest.

88. The Dispensing Ban's actual purpose is to protect the private financial interests of Texas pharmacies.

89. The Dispensing Ban's real-world effect is to protect the private financial interests of Texas pharmacies

90. Protecting Texas pharmacies from economic competition is not a legitimate state interest.

INJURY TO PLAINTIFFS

91. The Dispensing Ban prohibits Plaintiffs from dispensing non-controlled prescription medication, at cost, to their patients.

92. The Dispensing Ban prohibits Plaintiffs from offering services that would allow them to better care for the health and welfare of their patients.

93. The Dispensing Ban prohibits Plaintiffs from offering prescription medication at prices lower than those available at most pharmacies.

94. The Dispensing Ban prohibits Plaintiffs from offering services that would make their practices more attractive to prospective patients.

95. But for the Dispensing Ban, Plaintiffs would immediately begin dispensing non-controlled prescription medication, at cost, to their patients, and would do so in compliance with all relevant federal and Texas laws, and with AMA Code of Medical Ethics Opinion 8.06.

CAUSES OF ACTION

First Cause of Action

(Tex. Const. Art. I, Section 19—Due Course of the Law of the Land)

96. Article I, Section 19 of the Texas Constitution provides:

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land.

97. Among other things, Section 19 (commonly known as the Texas Constitution’s “substantive due course of law” guarantee) protects Plaintiffs’ rights to pursue a chosen business free from irrational and protectionist government interference.

98. As licensed doctors who seek to provide better services for their patients, Plaintiffs’ chosen businesses would involve the dispensing of non-controlled prescription medication, at cost, to patients who—in Plaintiffs’ professional judgment—need the medication.

99. The Dispensing Ban prevents Plaintiffs from offering these beneficial services based solely on the locations of their offices relative to large populations of paying patients and local pharmacies.

100. The Dispensing Ban does not serve any legitimate state interest.

101. The Dispensing Ban’s purpose is not rationally related to any legitimate state interest.

102. The Dispensing Ban’s actual, real-world effect does not serve any legitimate state interest.

103. The Dispensing Ban’s actual, real-world effect is so unduly burdensome as to be unconstitutionally oppressive.

104. The Dispensing Ban’s actual purpose is to protect the private financial interests of Texas pharmacies.

105. The Dispensing Ban's real-world effect is to protect the private financial interests of Texas pharmacies

106. The Dispensing Ban is a protectionist law, and economic protectionism is not a legitimate state interest.

107. The Dispensing Ban, both on its face and as applied to Plaintiffs, violates Article I, Section 19's substantive-due-course guarantee.

108. Plaintiffs respectfully ask the Court to enter a judgment under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.003, declaring that the Dispensing Ban, Tex. Occ. Code §§ 158.001(b), 158.003, 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions), violates Article I, Section 19 of the Texas Constitution, both on its face and as applied to Plaintiffs.

109. Unless Defendants are enjoined from enforcing the Dispensing Ban, Plaintiffs will suffer continuing and irreparable harm.

Second Cause of Action
(Tex. Const. Art. I, Section 3—Equal Rights; Exclusive Separate Privileges)

110. Article I, Section 3 of the Texas Constitution provides:

All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

111. Among other things, Section 3 protects Plaintiffs' rights to equal protection of the laws, which includes the right to pursue a chosen business free from irrational and protectionist legislative classifications.

112. As licensed doctors who seek to provide better services for their patients, Plaintiffs' chosen businesses would involve the dispensing of non-controlled prescription medication, at cost, to patients who—in Plaintiffs' professional judgment—need the medication.

113. The Dispensing Ban draws an unconstitutional distinction between Plaintiffs (who are not permitted to dispense non-controlled prescription medication, at cost, to their patients) and rural doctors (who are permitted to provide identical services to their patients) based solely on the locations of their offices relative to large populations of paying patients and local pharmacies.

114. The Dispensing Ban's distinction between Plaintiffs and rural doctors does not serve any legitimate state interest.

115. The Dispensing Ban's purpose in distinguishing between Plaintiffs and rural doctors is not rationally related to any legitimate state interest.

116. The actual, real-world effect of the Dispensing Ban's distinction between Plaintiffs and rural doctors does not serve any legitimate state purpose.

117. The actual, real-world effect of the Dispensing Ban's distinction between Plaintiffs and rural doctors is so unduly burdensome as to be unconstitutionally oppressive.

118. The Dispensing Ban's actual purpose in distinguishing between Plaintiffs and rural doctors is to protect the private financial interests of Texas pharmacies.

119. The Dispensing Ban's real-world effect in distinguishing between Plaintiffs and rural doctors is to protect the private financial interests of Texas pharmacies.

120. The Dispensing Ban's distinction between Plaintiffs and rural doctors is a protectionist distinction, and economic protectionism is not a legitimate state interest.

121. The Dispensing Ban, both on its face and as applied to Plaintiffs, violates Article I, Section 3's equal-protection guarantee.

122. In addition to its equal-protection guarantee, Section 3 also forbids the government from granting “exclusive separate . . . privileges” not “in consideration of public services.”

123. The Dispensing Ban’s “rural” exception grants certain private doctors an exclusive separate privilege to dispense non-controlled prescription medication, at cost, to their patients.

124. Private doctors dispensing non-controlled prescription medication, at cost, to their patients are not providing public services.

125. Therefore, the Dispensing Ban grants certain private doctors an exclusive separate privilege not in consideration of public services in violation of Article I, Section 3.

126. Plaintiffs respectfully ask the Court to enter a judgment under the Uniform Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code § 37.003, declaring that the Dispensing Ban, Tex. Occ. Code §§ 158.001(b), 158.003, 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions), violates Article I, Section 3 of the Texas Constitution, both on its face and as applied to Plaintiffs.

127. Unless Defendants are enjoined from enforcing the Dispensing Ban, Plaintiffs will suffer continuing and irreparable harm.

APPLICATION FOR PERMANENT INJUNCTION

128. Plaintiffs respectfully ask the Court to set their application for permanent injunction for a hearing and, following the hearing, to issue a permanent injunction against Defendants.

ATTORNEYS’ FEES

129. Plaintiffs hereby request all costs and reasonable attorneys’ fees, as permitted by Section 37.009 of the Texas Civil Practices and Remedies Code.

DISCOVERY CONTROL PLAN

130. Plaintiffs intend to conduct Level 2 discovery under Rule 190.3 of the Texas Rules of Civil Procedure.

REQUEST FOR DISCLOSURE

131. Plaintiffs request that Defendants disclose, within 50 days of the service of this request, the information and materials described in Rule 194.2(a), (b), (c), (e), (f), (i), and (l) of the Texas Rules of Civil Procedure.

PRAYER AND RELIEF REQUESTED

WHEREFORE, Plaintiffs pray for judgment as follows:

A. For a declaratory judgment that the Dispensing Ban, Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions), violates Article I, Section 19 of the Texas Constitution, both on its face and as applied to Plaintiffs;

B. For a declaratory judgment that the Dispensing Ban, Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions), violates Article I, Section 3 of the Texas Constitution, both on its face and as applied to Plaintiffs;

C. For a permanent injunction barring Defendants from enforcing the Dispensing Ban, Tex. Occ. Code §§ 158.001(b), 158.003(b), 551.006, 558.001(c), 563.051(d), 563.053(b); 22 Tex. Admin. Code §§ 169.2(10) (Tex. Med. Bd., Definitions), 169.5(1) (Tex. Med. Bd., Exceptions), against Plaintiffs and all other similarly situated doctors;

D. For an award of \$1 in nominal damages;

E. For an award of attorneys' fees and court costs; and

F. For all other legal and equitable relief to which Plaintiffs may be entitled.

RESPECTFULLY SUBMITTED this 27th day of June, 2019.

INSTITUTE FOR JUSTICE

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*Motion for admission *pro hac vice* to be filed