IN THE SUPREME COURT
STATE OF GEORGIA

ARTHUR ZITRIN et al.,	:	
	:	
Appellants,	:	
	:	Case No. S07A0318
v.	:	
	:	
GEORGIA COMPOSITE STATE BOARD OF MEDICAL EXAMINERS, et al.,	:	
	:	
Appellees.	:	

BRIEF OF APPELLANT-PHYSICIANS

I. Introduction

The Appellant-physicians filed this lawsuit because their professional reputations are injured when Georgia physicians violate the Hippocratic Oath and an explicit American Medical Association (AMA) ethical standard barring physician participation in executions.

They have sued the Georgia Composite Board of Medical Examiners (Medical Board) for its erroneous conclusion that Georgia law permits physicians to violate the well-settled and longstanding prohibitions on physician participation in executions. Their lawsuit involves both a claim for declaratory relief, and an appeal of a final decision of the Board to forego meting out discipline. The trial court ignored controlling case law and erroneously concluded that Appellant-physicians lacked standing to seek declaratory relief and were not aggrieved within the meaning of the

Administrative Procedures Act.

II. Enumerations of Error

A. Statement of Jurisdiction

The Supreme Court has jurisdiction of this case on appeal for the reason that this case involves one of the grounds for which the Supreme Court retains exclusive jurisdiction (equity) pursuant to Article 6, § 6, Paragraph 3(2) and (5) of the Georgia Constitution.

B. Enumeration of Error

1. The Court erred in dismissing the Complaint (R-3) because Appellant-Physicians have standing for declaratory relief under *Moore v. Robinson*.
2. The Court erred as a matter of law in finding that the Plaintiff's were not "aggrieved" within the meaning of the Administrative Procedure Act, O.C.G.A. § 50-13-1 *et seq.*
3. The Court erred as a matter of law in finding that this case was not a "contested" case within the meaning of the Administrative Procedure Act, O.C.G.A. § 50-13-2(a).
4. To the extent that the trial court ruled on the merits of Appellant-Physicians' claims, it erred because Georgia law incorporates the American Medical Association standard which prevents physicians from participating in executions except to determine when death supervenes.

III. Statement of Facts

Lethal injection is the method of execution in Georgia, O.C.G.A. § 17-10-38(a), and the Department of Corrections is shouldered with the burden of carrying out "execution of the death sentence." O.C.G.A. § 17-10-38(b). Georgia's lethal injection statute does not require physician participation in executions (except that a physician is required to determine when "death supervenes"). O.C.G.A. § 17-10-41. Georgia law *instead* provides that physicians may be exempted from executions – "[n]o state agency, department, or official may, through regulation or otherwise, require or compel a physician to participate in the execution of a death sentence." O.C.G.A. § 17-10-38(d).[1]

A. Georgia Law on Physician Participation in Executions

Whether Georgia physicians *must* refuse to participate in executions depends upon state laws and standards dealing with medical ethics. In Georgia, a physician is prohibited from engaging in "any professional [or] unethical practice," including:

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[1] Georgia law purports to exempt certain activities from the practice of medicine if they occur during an execution: "Notwithstanding any other provision of law, prescription, preparation, compounding, dispensing, or administration of a lethal injection authorized by a sentence of death by a court of competent jurisdiction shall not constitute the practice of medicine or any other profession relating to health care which is subject by law to regulation, licensure, or certification." O.C.G.A. § 17-10-38(c). This exception permits persons who are not physicians to engage in medical procedures at an execution without facing charges of unauthorized practice of medicine. O.C.G.A. § 43-34-26 (unauthorized practice of medicine); *see also Pound v. Medney*, 176 Ga. App. 756 (1985).

- departure from, or failure to conform to, the minimal standards of acceptable and prevailing medical practice." O.C.G.A. § 43-34-37(a)(7).[2]
- violation of "a law, rule, or regulation of this state, any other state, the board, the United States, or any other lawful authority ... which regulates the practice of medicine." O.C.G.A. § 43-34-37(a) (10).

These standards are to be "liberally construed," O.C.G.A. § 43-34-37(g), and are echoed in Georgia State Composite Board of Medical Examiners own rules.[3]

Among the "minimal" medical standards to which physicians are held accountable are AMA ethical standards and the Hippocratic

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[2] O.C.G.A. §§ 43-34-37(a)(7) also specifically prohibits "prescribing or use of drugs, [or] treatment which are detrimental to the patient as determined by acceptable and prevailing medical practice or by rule of the board." The drugs, dosages and procedures utilized during the course of a lethal injection violate medical standards by creating unnecessary risks and unnecessary pain including: (1) the dosage on Pentothal mandated by the DOC protocols, (2) the use of Pavulon which is barred even for euthynizing animals, and (3) performing a central line procedure in the execution chamber without sophisticated medical equipment and devices, without trained and experienced medical staff, and without drugs able to treat the complications that may arise.

[3] Georgia Composite State Medical Board Regulations subject a physician to discipline if he or she is "[f]ailing to use medications and other modalities based on generally accepted and approved indications, with proper precautions to avoid adverse physical reactions." Ga. State Composite Board of Medical Examiners Rule 360-3-.02(15). The rules also prohibit "[a]ny other practice determined to be below the minimal standards of acceptable and prevailing practice." Ga. State Composite Board of Medical Examiners Rule 360-3-.02(18).

Oath. *Ketchup v. Howard*, 247 Ga. App. 54 (2000) ("Because the AMA is an organization composed of experts in the field of medicine, its code of ethics and the duties of physicians prescribed therein should be understood to reflect the standards of care of the profession... "); *see also* R-28 *(Order* at 8-9 (collecting Georgia cases using AMA standards)).[4]

Under the Hippocratic Oath, physicians swear to: "not give a fatal draught (drug) to anyone if am asked, nor will I suggest any such thing." Hippocratic Writings (translated J. Chadwick & W.N. Mann, Penquin Books 1950).[5] More specifically, physician participation in executions has been specifically prohibited by the AMA Code of Medical Ethics since 1980. "A physician, as a member of the profession dedicated to preserving life when there is hope of doing so, should not be a participant in a state execution."

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[4] The trial court intimates that if the Medical Board was guided by AMA standards, there would be an unlawful delegation problem. *Order* at 9. However, the Georgia statutes specifically anticipate the incorporation of any "law, rule, or regulation of this state, any other state, the board, the United States, or any other lawful authority ... which regulates the practice of medicine." O.C.G.A. § 43-34-37(a) (10). Moreover, there is no unlawful delegation for the Board to look to or adopt AMA standards. *Jackson v. Composite State Board of Medical Examiners of Georgia*, 256 Ga. 264, 266 (1986) (Board looked to "a variety of materials" in determining acceptable standards of practice). Indeed, many other state explicitly adopt all AMA standards. *See Infra Note* 8.

[5] "The Hippocratic Oath reaches back over 2,000 years and represents a fundamental principle of the medical profession." *Thornburn v. Department of Corrections*, 78 Cal Rptr.2d 584, 589 n. 6 (Ct. App. 1998).

AMA, Code of Medical Ethics: Current Opinions with Annotations, Opinion 2.06 "Capital Punishment" (updated June 2000), 15-19 (2000-2001):[6]

> "An individual's opinion on capital punishment is a personal moral decision of the individual. A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution. Physician participation in execution is defined generally as actions which would fall into one or more of the following categories:
>
> (1) an action which would directly cause the death of the condemned;
>
> (2) an action which would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned;
>
> (3) an action which could automatically cause an execution to be carried out on a condemned prisoner." *Id.*

With respect to lethal injections specifically, the AMA Code mandates: "In a case where the method of execution is lethal injection, the following actions by the physician would also constitute physician participation in an execution: selecting injection sites, starting intravenous lines as a port for a lethal injection device; prescribing, preparing, administering or supervising injection of drugs or their dosages or types;

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[6] The prohibition on participation in execution has extended to other health care providers by leading health care organizations including the American College of Physicians, American Nurses Association, the American Public Health Association, and the World Medical Association. *See Abu-Ali Abdur'rahaman v. Bredesen*, 2004 WL 2246227 at n. 45 (Tenn Ct. App. 2004).

inspecting, testing or maintaining lethal injection devices; and consulting with or supervising lethal injection personnel."

The Medical Association of Georgia (MAG) adopts the AMA code. MAG has "no policy statement of physician's role in executions because the Society defers to the position taken by the American Medical Association." American College of Physicians, Human Rights Watch, National Coalition to Abolish the Death Penalty, Physicians for Human Rights, *Breach of Trust: Physician Participation in Executions in the United States* (March 8, 1994) at 5; 26 Journal of Legal Ethics at 269, 261 (in reference to AMA standard of physician participation in executions, noting "widespread adherence to positions set forth by the AMA" and citing AMA standard as an "accepted standard[] of medical ethics"); *see also* M. Gottlieb, Executions and Torture: *The Consequences of Overriding Professional Ethics*, 6 Yale J. of Health Policy 351, 366-67 (2006).[7]

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[7] Like Georgia, other states routinely use of AMA standards and the Hippocratic Oath to determine minimal acceptable medical standards. *See, e.g. Schecter v. Ohio State Medical Bd.,* 2005 WL 1869733 (Ohio App. 2005) (relying on Hippocratic Oath and AMA standards in interpreting "minimal standard of care" violation of disciplinary code); *see also Arlene v. State*, 399 N.E.2d 1241 (Ohio 1980); *Korn v. Ohio State Medical Board*, 573 N.E.2d 1100 (Ohio App. 1988); *Ohio State Medical Board v. Zwick*, 392 N.E.2d 1276 (Ohio App. 19788), *State v. Carroll*, __ N.E.2d __, 54 Ohio App. 2d 160 (1977); *Weinburg v. Board of Registrations of Medicine*, 824 N.E. 2d 38 (Mass. 2005) (looking to AMA standards to "establish" "prevailing standards of medical ethics" in disciplinary proceedings); *Fincun v. Maryland Bd. Of Physician Quality Assurance*, 380 Md. 577 (2004) (looking to AMA standards and Hippocratic Oath to determine disciplinary violation); *Parrish v. Kentucky Bd. of Medical Licensure*, 145 S.W.3d 401 (Ky. App. 2004) (relying on violation of AMA standards

The AMA standard is tracked to the letter by Georgia's lethal injection law. In fact, Georgia has the only statute in the country that specifically tracks the AMA code,[8] exempting physicians from the very activities their ethical rules would proscribe:

> "selecting injection sites, starting an intravenous line or lines as a port for a lethal injection device, prescribing, preparing, administering, or supervising injection drugs or their dosages or types; inspecting, testing, or maintaining lethal injection devices; or consulting with on supervising lethal injection personnel." O.C.G.A. § 17-10-38(d); *compare* AMA, Code of Medical Ethics: Current Opinions with Annotations, Opinion 2.06 "Capital Punishment" (updated June 2000), 15-19 (2000-2001).[9]

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for discipline); *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003) (relying on position statements and standards of the AMA to determine whether use of "chelaton therapy" grounds for discipline); *Balian v. Board of Licensure in Medicine*, 722 A.2d 364 (Me. 1999) (indicating that sections of AMA Code of Ethics were basis of its decision); *Appeal of Dell*, 668 A.2d 1024 (NH 1996) (finding that petitioning physician engaged in conduct in violation of portions of AMA Code of Medical Ethics).

[8] *Compare Thornburn v. Department of Corrections*, 78 Cal Rptr.2d 584, 590 (Ct. App. 1998) (discipline of physicians inappropriate because "[California] legislature contemplated direct participation by physicians in the execution process"); *Harris v. Johnson*, 323 F.Supp.2d 797, 802 (S.D. Tex. 2004) (noting that challenge to lethal injection protocol was more palatable because "[t]here is no statutory mandate in the case at bar, therefore there is no attendant risk of stripping the State of the power to enforce its laws").

[9] *Abu-Ali Abdur'rahaman v. Bredesen*, 2004 WL 2246227 (Tenn Ct. App. 2004) ("[T]he General Assembly may very well have anticipated that licensed medical professionals would not be involved directly in executions by lethal injection because of their professional association's long-standing position that it is unethical for physicians, physician's assistants, and nurses to participate in executions.").

Georgia's lethal injection statute's harmony with AMA standards reinforces the conclusion that Georgia physicians are bound by AMA ethical standards, as part of "minimal acceptable standards of practice" under Georgia law.[10]

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[10] Appellants of course acknowledge that after the executions at issue herein, and after this lawsuit was filed, Georgia enacted legislation to exempt physicians from discipline for participation in executions. O.C.G.A. § 17-10-42.1("Participation in any execution of any convicted person carried out under this article shall not be the subject of any licensure challenge, suspension, or revocation for any physician or medical professional license in the State of Georgia."). There is no indication that this statute is retroactive, and thus it does not impact the appropriateness of discipline in this case. Moreover, at the time the challenged physicians participated in executions, the Georgia General Assembly had rejected an immunity statute. House Bill 57 (Georgia General Assembly 2005 Session). Finally, the statute addressing immunity from discipline passed in 2006 did not impact the requirement that physicians comply with established medical standards. Georgia law simply was not amended to allow physicians to dip below "minimal acceptable standards of practice."

It should be noted that the American Medical Association, the American Nurses Association and the American Public Health Association issued a joint statement on September 13, 1996 calling on state licensure and discipline boards to treat participation in executions as grounds for active disciplinary proceedings because participation in state executions:

> "contradicts the fundamental role of the health care professional as healer and comforter.... Participation in execution by lethal injection is particularly troublesome [because] this process of ending life employs the same medical knowledge, devices, and methods used be health care professionals to comfort, to heal, and preserve life."

B. Appellants' Complaint Regarding Physician Participation in Executions

Appellants are state and national physicians, professors, and medical and ethics experts. Arthur Zitrin, M.D., is a New York psychiatrist, a leading expert on the medical ethics issues associated with lethal injection and Professor Emeritus of Psychiatry at the New York University School of Medicine. Alfred Freeman, M.D., is a New York psychiatrist and Professor Emeritus of Psychiatry at New York Medical College and Past President of the American Psychiatric Association. Jonathan Groner, M.D. is an Ohio pediatric surgeon and the Trauma Medical Director at Children's Hospital in Ohio. Michael Radelet, Ph.D. is the chairman of the Department of Sociology at the University of Colorado and a leading published expert on lethal injection including the book *In Spite of Innocence*. Daniel Blumenthal, M.D., is a Georgia pediatrician affiliated with Morehouse School of Medicine and a leading expert on public health and general preventive medicine. Kelly Thrasher, M.D. is a Georgia internist in private practice. Jerome Walker, M.D. is a Georgia neurologist in private practice. R-3 (*Complaint*, ¶ 2).

Initially, the Appellant-Physicians filed a complaint with the Georgia Composite Medical Board on September 20, 2004. R-3 (*Complaint*, EXHIBIT "A"). The Medical Board denied this complaint on December 15, 2004 and on January 6, 2005. R-3 (*Complaint*, EXHIBIT "A").

Seeking to protect the reputation of their profession from unethical conduct, Appellants filed a new complaint on June 1, 2005 with the Georgia Composite Board of Medical Examiners pursuant to O.C.G.A. § 43-34-37(d) seeking discipline against certain physicians who had violated medical standards by participating in executions. R-3 *(Complaint*, EXHIBIT "A").

Their complaint was supported by sworn testimony of physicians involved in the execution process, medical records from Georgia executions, and studies concerning problems occurring in lethal injections executions in Georgia and nationally. Critically, the complaint included sworn testimony from certain physicians who admitted, under oath, that (1) at least one physician had performed an infraclavicular subclavian catherterization to start an intravenous line and directed the injection of additional killing agent to produce death, and (2) that number of other physicians performed activities in the execution process above and beyond certifying the death of a person executed.[11]

On June 22, 2005, the Medical Board rejected the complaint,

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[11] The complaint explained that if physicians participate in executions, and abide by the DOC's protocol for executions, they are obligated to use drugs, dosages and procedures that violate medical standards and Georgia law because the dosages can cause unnecessary pain and create high risk of serious complications. It also alleged that deviation from the DOC's protocol to avoid such complications requires active participation by a physician in inflicting death which is also prohibited by accepted medical standards, explicit AMA ethical standards and Georgia law.

finding "there was no violation of the Georgia Medical Practices Act...." R-3 (*Complaint,* EXHIBIT "B").

Thereafter, on July 22, 2005, the Appellant-Physicians filed their Complaint in the Superior Court of Fulton County. (R-3). In this litigation, the Medical Board explicitly claimed that "[t]he Board does not have authority to discipline a licensee for violating the American Medical Association's standards" and that "as a whole, or individually, [AMA standards] do not constitute a 'law, rule or regulation' of a 'lawful authority' that 'regulates the practice of medicine.'" R-9 (Answer ¶¶ 30, 31, 33, 35, 36, 37).[12] Thus, the Medical Board's position is that "there was no violation of the Medical Practice Act," R-9 (Answer ¶ 17); and that ultimately "the Board is in no way involved in or have [sic] regulatory authority over executions by lethal injection." R-9 (Answer ¶¶ 41, 55, 58, 62).

The Superior Court of Fulton County entered an Order on August

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[12] The Medical Board counter-intuitively describes its role as:

> "[T]he duties of the Georgia Medical Board go beyond the licensing of physicians and other allied health care professionals... [t]he Medical Board investigates complaints and disciplines those who violate The Medical Practice Act or other laws governing the professional behavior of its licensees.... "

www.medicalboard.georgia.gov. The Board also notes on their web site that the American Medical Association promotes professionalism in medicine by setting standards for medical education, practice, and ethics. *Id.* The Board's decision undermines its very own mission statement.

28, 2006 granting the Appellees' Motion to Dismiss (R-10). R-28. The Court dismissed the Appellant-physicians claims for mandamus and injunctive relief. The Court also dismissed the Appellant-Physicians' request for declaratory judgment, on the basis of standing, which is appealed herein. Finally, the trial court denied the Appellant-physicians' claims for relief under the Administrative Procedure Act, ruling that the physicians were not "aggrieved" within the meaning of the Administrative Procedure Act and that the case was not "contested." Appellant-Physicians appeal these decisions as well. (R-1).

IV. Argument and Citation of Authorities

Appellants have a palpable interest in assuring that their profession is governed by the high ethical standards that they, and the AMA believe, prevent physicians from being involved in the painful taking of life by the state. The Medical Board's blanket refusal to even recognize its authority to consider such claims leaves Appellants with only one remedy to protect the reputation of their profession – this lawsuit. They have standing to protect their profession from unethical practice when the Medical Board refuses to do so – and may seek declaratory relief and appeal a final decision of the Medical Board disposing of their complaint.[13]

[13] To the extent the trial court may have reached the merits of this lawsuit, Appellant-physicians have set out the appropriate statutes outlining the merits issues herein.

A. Appellant-Physicians Have Standing for Declaratory Relief Under Moore v. Robinson

Appellant-Physicians' standing for declaratory equitable relief is controlled by the Georgia Supreme Court's decision in *Moore v. Robinson*, 206 Ga. 27 (1949); *see also Head v. Browning*, 215 Ga. 263, 266 (1959).[14] Despite the fact that Appellants presented *Moore* as controlling, the trial court failed to distinguish or cite *Moore* (even after Appellant-Physicians filed a request for reconsideration that specifically asked the trial court to explain why *Moore* does not control).

Moore involved a plaintiff Dr. Howard E. Robinson, who was a "duly licensed and practicing chiropractor, and a citizen and resident of the State of Georgia." He filed a petition for injunctive and "general relief" (including mandamus) which alleged that the Georgia Board of Chiropractic Examiners was misinterpreting and failing to enforce Georgia law which outlined the qualifications for persons to take the chiropractic examination for licensure in Georgia. The plaintiff was already duly licensed, and so his injury was:

> that the practice of chiropractic is the practice of one of the learned professions, namely, that of healing the

[14] The standing principles applicable to declaratory, injunctive and mandamus relief are identical. *Brissey v.* Ellison, 272 Ga. 38, 39 n. 4 (2000); *see also Agan v. State*, 272 Ga. 540, 542-43 (2000) ('declaratory relief available whenever there is "uncertainty and insecurity with respect to [the plaintiffs'] rights, status and legal relations") (citation omitted).

> sick, and that as such a profession it is of vital interest to the members of the profession, and to the public in general to see that the profession of chiropractic maintains the highest educational standards possible, **that the right to practice chiropractic is a valuable right which is entitled to protection, ... that the public, the chiropractic profession generally, and the petitioner particularly are entitled to be protected from the practice of chiropractic by ignorant pretenders, charlatans, unskilled and unlearned persons, ... that the reputation of the chiropractic profession generally, and the petitioner's practice particularly, will likewise be damaged....** *Id.* at 30 (emphasis added).

After a hearing, and upon finding that the Board of Chiropractors had misinterpreted Georgia law concerning the eligibility for licensure, the trial court entered a permanent injunction against the Board. On appeal, the Board argued that "the allegations of the petition are not sufficient to show that any right of the plaintiff, either as a citizen or as a duly licensed and practicing chiropractor, has been violated so as to authorize a court in equity to grant the relief prayed...."

Rejecting that argument, the Georgia Supreme Court unanimously concluded that "the plaintiff had a right to maintain his action for injunctive relief." First, reviewing the plaintiffs rights and the Board duties, the Court reasoned:

> Prevention of the alleged unlawful practices by the Board of Chiropractic Examiners is essentially injunctive in character and the relief prayed was the only appropriate remedy available to him. **The right to practice chiropractic in this State is, like the right to practice any other profession, a valuable right, which is entitled to protection under the constitution and laws of this State.** "Where the question is one of public right and the object is to procure the enforcement of a public duty, no

> legal or special interest need be shown, but it shall be sufficient that plaintiff is interested in having the laws executed and the duty in question enforced." **And we do not think that it would be seriously contended by any one that the members of the Board of Chiropractic Examiners were not under a duty to the public generally, including, of course, the members of that profession, to administer the laws regulating the practice of chiropractic as they have been enacted....** *Id.* at 36 (emphasis added).

Next, turning to the availability of equitable relief:

> **The principle is thoroughly established, that injunction will lie and is the appropriate remedy to prevent the commission of a wrongful act by an officer or agent of this State, even when acting under color of his office but without lawful authority, and beyond the scope of his official power. If this were not the rule, our State examining boards would be free to fix the rules and prescribe the qualifications for the admission of persons who desire to practice our several professions, and there would be nothing the citizen could do to prevent it; and this is true for the reason that mandamus is an available legal remedy which may be employed only for the purpose of compelling an officer to perform a specific act where his duty to do so is clear and well defined.** *Id.* at 36-37 (emphasis added and citations omitted).

See also Rose v. Grow, 210 Ga. 664 (1954) (finding that Board of Chiropractic must enforce educational requirements for professions under state law and revoke previously issued licenses). *Moore* has never been questioned and is cited and followed in 31 later cases.[15]

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[15] Among the standing decision relying upon *Moore* are this Court's decisions in *League of Women Voters v. City of Atlanta*, 245 Ga. 859 (1980) (resident/taxpayer has standing to challenge appointive authority of municipal officer) and *Head v. Browning*, 215 Ga. 263 (1959) (citizens have standing to challenge the failure to revoke a liquor license and to declare such license "void").

The trial court found no "justiciable controversy," because that court said the Appellant-Physicians would have to allege that they are "subject to, or may become subject to, an[] investigation or discipline as the result of the alleged conflict between AMA standards and Georgia law." R-28 (*Order* at 5-6). Yet *Moore*, cited nowhere in the trial court's order, teaches otherwise in the specific context of a medical professional who complains that the Board governing his profession is not enforcing the state laws that protect the reputation of his profession.[16]

Here, as in *Moore*, the physicians allege that the Georgia laws which set forth the qualification for license of a medical profession are being grossly misinterpreted by that profession's Board of Medical Examiners, and that the result is a diminuation of the value and ethics of the profession. The right to practice medicine "is a valuable right, which is entitled to protection

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[16] This is not a case of "prosecutorial discretion." Here the Board has interpreted Georgia law as failing to give it *any authority to act*. R-9 (*Answer*, ¶¶ 30, 31, 33, 35, 36, 67); *Forsyth County v. White*, 272 Ga. 619, 620 (2000) (distinguishing cases where a governing body says that it is without authority to act at all from claims that the body should act in a particular case). Georgia law uses mandatory language in charging the Medical Board with its duties:

> The board [Georgia State Board of Composite Medical Examiners] **shall** perform such duties and possess and exercise such powers relative to the protection of the public health and the control of regulation of the practice of medicine...

O.C.G.A. § 43-34-21(d) *(emphasis added).*

under the constitution and laws of this state," and the Appellant-physicians view any physician who would blatantly violate AMA medical ethical standards, Georgia law, and the Hippocratic Oath by participating in the taking of life to diminish the profession in much the same way that Dr. Moore feared "pretenders" and "charlatans" would invade his profession.[17] Like Dr. Moore, the Appellant-Physicians have a special interest in the preservation of their profession that entitles them to seek equitable relief against the Composite Board of Medical Examiners which has twice refused to abide by the state laws and established AMA medical standards for the ethical practice of medicine.

Standing is also illustrated here by juxtaposing this case with *Adams v. Georgia Department of Corrections*, 274 Ga. 461 (2001) wherein a group of death penalty opponents sought to prevent future executions by electrocution. The plaintiffs relied upon O.C.G.A. § 9-6-24 which permits mandamus actions where "a plaintiff is

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[17] Although the trial court did not make this finding, if this Court finds that there was a notice pleading defect – because the Appellant-Physicians needed to even more explicitly delineate the impact of violating the basic ethical standards on them individually and the profession generally – the appropriate remedy is to grant leave to amend a complaint. *See Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237, 1238 (11th Cir. 2000) ("A district court, before dismissing a complaint with prejudice because of a mere pleading defect, ordinarily must give a plaintiff one opportunity to amend the complaint and cure the pleading defect); *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991) (same); *Allen v. Dept. of Human Resources ex. rel. Allen*, 262 Ga. 521, 524 (1992) (same); *Holiday Constr. Co. v. Higginbotham*, 171 Ga. App. 114 (1984) (same).

interested in having the laws executed and the duty in question enforced." However, the *Adams* plaintiffs failed to establish standing because they "s[ought] to prevent, rather than enforce, the performance of a public duty" as the relief they requested would prevent the DOC from carrying out its duty to perform executions.

Here, in contrast to *Adams*, Appellant-Physicians do not seek to prevent any execution. They seek to require the Medical Board to "enforce" Georgia laws which prevent Georgia physicians from violating clear AMA standards on physician participation in lethal injections. This case is follows a long line of authority, with *Moore v. Robinson* being the most on-point example, where citizens seek to ensure that public officials carry out their legal obligations. *See, e.g. Board of Commissioners of the City of Manchester*, 170 Ga. 361 (1930) (resident/taxpayer has standing to enforce statutory duty to appoint city manager); *Arenson v. Board of Trustees of Employees' Retirement System*, 257 Ga. 579 (1987) (resident-taxpayer has standing to challenge disposition of public funds); *League of Women Voters v. City of Atlanta*, 245 Ga. 859 (1980) (resident/taxpayer has standing to challenge appointive authority of municipal officer) (*citing Moore v. Robinson*, 206 Ga. 27 (1949)).

Moreover, unlike *Adams*, the Appellant-Physicians have a special and more direct interest as physicians seeking

clarification of their and their fellow professionals statutory and professional responsibilities – where violations of those duties and responsibilities may result in disciplinary sanctions. *Compare Adams*, 274 Ga. at 462 (plaintiffs merely had "a moral objection to a statutory mandate").[18]

Following a long line of standing jurisprudence, demonstrated most specifically by *Moore*, the Appellants have standing to defend their reputations, and that of their profession, by challenging the Medical Board's interpretation of the very statutes which set out the ethical duties of the profession. The parties have diametrically opposed views of the proper interpretation of Georgia law both as to the relevance of AMA standards to physician duties generally, and as to the obligation to comply with long-standing AMA standards on physician participation in lethal injections

[18] This case bears no realistic resemblance to the primary decision relied upon by Board, *Burton v. Composite State Board of Medical Examiners*, 245 Ga. App. 587 (2000). There, a physician sought a declaratory judgment concerning the constitutionality of a Board rule (not a state law) that arguably prohibited provision of medical treatment to the physician's wife. The Court of Appeals not surprisingly concluded that no standing existed because (1) there was no Board complaint concerning the conduct at issue, (2) the plaintiff "ha[d] not alleged that he is currently providing medical treatment to his wife." (3) the physician had not alleged "that he plans to provide such treatment in the future," and (4) plaintiff's counsel "conceded" that the case was "purely hypothetical." Here, of course, there is a complaint under appeal from the Board, the actions complained of did happen, they will again in future executions, the plaintiffs allege an injury to their professional practice and the parties have crossed swords on the proper interpretation of Georgia law.

specifically. *See State Farm Mutual Ins. Co. v. Mabry*, 274 Ga. 498 (2001) (equitable relief particularly appropriate where the parties have different interpretations of a "purely legal" question that is "an important issue, one that needs to be decided"). The trial court erred by failing to recognize that under *Moore*, Appellant-Physicians have standing to protect their reputation from unethical conduct which undermines core principles of their profession.

B. The Court below erred as a matter of law in failing to find that Appellant-Physicians are "aggrieved" within the meaning of the Administrative Procedure Act

The trial court erred as a matter of law in finding that the Appellant physicians were not "aggrieved" within the context of the Administrative Procedure Act, O.C.G.A. § 50-13-19(a).

> Any person who has exhausted all administrative remedies available within the agency and who is **aggrieved** by a final decision in a context case is entitled to judicial review under this chapter.

O.C.G.A. § 50-13-19(a) (emphasis supplied).

In the context of the Administrative Practice Act, the word "aggrieved" has been interpreted to mean that the person seeking to appeal must show that he has an interest in the agency decision that has been specifically and adversely affected thereto. *Georgia Power Co. v. Campaign for a Prosperous Georgia*, 255 Ga. 253 (1985). The party must demonstrate special damage as a result of the decision complained of, rather than merely some damage which is common to everyone else similarly situated. *Id.* at 257-58; *see*

Thebaut v. Georgia Board of Dentistry, 235 Ga. App. 194, 197 (1998) (person seeking to appeal must show that he has interest in agency decision that has been specially and adversely affected thereby). However, **the fact that a party shares the burden being challenged with others does not disentitle him from challenging the decision.** *Id.* at 258 (emphasis added).

In *Campaign*, the Supreme Court examined the meaning of an "aggrieved" party within the setting of an application by the Georgia Power Company to the Public Service Commission for an electricity rate increase. *Id.* at 254. The Campaign for Prosperous Georgia, representing the electricity consumer interest, sought to intervene based on the fact that any rate increase would affect its members. *Id.* at 254. The Supreme Court noted that the Campaign's members are users of electricity who will pay higher rates as a result of the rate increase granted to Georgia Power by the Public Service Commission. *Id.* at 258.

Finding that the Campaign members were "aggrieved" parties, the Supreme Court held that

> a ratepayer who is compelled to pay higher utility rates by agency action is a person specifically, personally and adversely affected. **The fact that he shares this additional burden with other users does not disentitle him from challenging the results.**

Id. at 258 (emphasis supplied)

Economic injury also has been established as a test as to whether a party is considered "aggrieved" in the context of the

Administrative Procedure Act. In *Board of Natural Resources v. Georgia Emission Testing Company*, the Georgia Emission Testing Company challenged the authority of the Board of Natural Resources to promulgate certain regulations pertaining to emissions testing. 249 Ga. App. 817 (2001). The Board challenged the testing company's standing, claiming it was not "aggrieved" in that it had sold the company's assets prior to judicial review. The Court of Appeals specifically held that since the testing company had presented evidence that it suffered or would suffer economic injury as a result of the Board's regulations, it was aggrieved. *Id.* at 819; *see also Chattahoochee Valley Home Health Care, Inc. v. Healthmaster, Inc.*, 191 Ga. App. 42 (1989) (well-settled that business entity may be considered "aggrieved" by administrative decision that confers economic benefit upon competition).

In the subject case, the trial court erred in failing to find that the Appellants were "aggrieved" parties within the context of the Administrative Procedure Act. In *Thebaut*, the Court of Appeals noted that among other items contributing to "aggrieved" status therein, the party suffered a "chilling effect on the recipient's approach to his practice." *Id.* at 197. Similarly, herein, the Appellant physicians are affected by the Defendants' decision not to initiate an investigation. Three of the Appellant physicians are Georgia doctors who are unsure as to the applicability of American Medical Association standards in Georgia. The Appellees'

decision impacts these Georgia doctors therefore making them "aggrieved" within the meaning of the APA.

Additionally, as the *Campaign for a Prosperous Georgia* opinion states, simply because additional others are also impacted by the decision does not deny the Appellant physicians the opportunity to challenge the Appellees' decision. To the extent the Appellees deviate from the standards of the American Medical Association, the value of the Appellant-Physicians' profession is undermined in that they are no longer part of a profession charged only with preserving life and not taking life.

- Similarly, the Appellant-Physicians may suffer economic injury as a result of the Appellees' decision not to initiate an investigation.
- Again, three of the Appellant-Physicians are Georgia doctors who are unsure as to the applicability of the AMA standards in Georgia.
- Again, the Appellees' decision devalues the value of the Appellant-Physicians' ethical standards set by the AMA to preserve life.

For this reason, Appellant-Physicians are "aggrieved" within the meaning of the APA, and the Court below erred as a matter of law in finding otherwise.

C. **The Court below erred as a matter of law in failing to find that this was a "contested" case within the meaning of the Administrative Procedure Act**

The trial court erred as a matter of law in failing to find that the case at bar was "contested" within the meaning of the Administrative Procedure Act.

> 'Contested case' means a proceeding... in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.

O.C.G.A. § 50-13-2. The Georgia Court of Appeals has explained:

> The 'standing to challenge' the administrative decision is what is intended to be established by the requirement in [O.C.G.A. § 50-13-19] that the judicial review be of a 'contested case;' and this is what is meant to be described by the language at [O.C.G.A. § 50-13-2].

National Council on Compensation Insurance v. Caldwell, 154 Ga. App. 528, 530 (1980) (reversing dismissal of petition for judicial review). In *National Council*, the Court of Appeals stated that rate-setting was the insurance commissioner's function, and it was not the court's job to tell him how to discharge that task. *Id.* at 531. The court also concluded that the decisions of the insurance commissioner in making rate decisions were subject to judicial review under the Administrative Procedure Act. *Id.* at 530.

In this case, the trial court states that the Board's "refusal to open an investigation does not amount to a 'contested' case, as a matter of law." *See* R-28 (*Order* at 11). However, the decision by an agency as to whether or not to open an investigation has been

deemed a prerequisite to superior court review. *See generally USA Payday Cash Advance Centers v. Oxendine*, 262 Ga. App. 632, 634 (2003). In *Payday*, complaining check cashing services moved for a declaratory judgment action concerning the propriety of "payday" loans; they filed their action **before** the Commissioner of Insurance had decided whether or not to open an investigation into the arrangement. *Id.* at 633. The Commissioner of Insurance successfully moved for summary judgment on the grounds that the check cashing services has failed to exhaust their administrative remedies. *Id.* at 635. In *Payday*, the Court of Appeals concluded that the Commissioner of Insurance should have been given the chance to decide whether or not to open an investigation before any declaratory judgment should have been filed. *See Id.* at 634-35.

Additionally, in their examinations of the meaning "contested case" within the context of the Administrative Procedure Act, the courts have distinguished between severe or light sanctions, or no sanctions at all. *See Thebaut v. Georgia Board of Dentistry*, 235 Ga. App. 195, 198 (1998). The courts have explained that regardless of the conclusion of the matter before it, an administrative agency "cannot strip the final decision of its reviewability." *Id.* at 198 (fact that letter of concern could have been issued without hearing taking place did not preclude judicial review).

Regardless of the nature of the sanctions imposed, the

> final decision is still a 'final decision in a contested case' and is therefore' entitled to judicial review under' the APA.

Id. at 198.

In this case, as the trial court states the Appellees' decision was final. *See* R-28 (*Order* at 10). The Appellees decided not to open an investigation, and they made this decision more than once. Regardless of the nature of the decision, it is still a "final decision in a contested case" and is therefore "entitled to judicial review under" the APA. The Appellees clearly and repeatedly declined to open an investigation into the Appellant-Physicians' claims. As set forth in *Payday*, this decision not to initiate an investigation is sufficient to trigger administrative superior court review.

The lower court relies on *Federated Dept. Stores, Inc. v. Georgia Public Service Commission* for the proposition that a the "request for an investigation was not a 'contested' case under the meaning of the APA." *See* R-28 (*Order* at 11); *Federated Dept. Stores, Inc. v. Georgia Public Service Commission*, 278 Ga. App. 239 (2006). However, not only did the administrative agency in that case afford the complainant an investigation and hearing, it allowed its complainant the opportunity for meaningful review in a subsequent proceeding that already was scheduled to hear the same facts.

In *Federated*, the petitioning store alleged discrimination and

asked the Public Service Commission to review the manner in which Georgia Power assessed rates for new and established customers. *Id*. The Public Service Commission held a hearing on the store's request, and subsequently issued an order acknowledging discrimination, although not determining if the discrimination was unjust. *Id*. The commission's order stated that the purpose of the proceeding was not to modify rates, but to gather information for future cases, specifically a Georgia Power rate case scheduled for later that year. *Id*.

Unlike *Federated*, the Appellant-Physicians herein did not receive the investigation they requested repeatedly. Neither were they granted any hearing. Finally, there is no pending case previously scheduled where the administrative agency plans to consider the issue the Appellant-Physicians raise. The trial court erred as a matter of law in finding that this case was not "contested" within the meaning of the Administrative Procedure Act.

IV. Conclusion

Appellants have standing protect their profession's reputation from unethical conduct under the principles of *Moore v. Robinson*. They also are aggrieved by an adverse, contested decision of the Medical Board and have the right to appeal that decision. Physicians must be held to at least the "minimal standards" of their profession, and the taking of life by execution violates a physicians most fundamental role.

Respectfully submitted,

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