No. 15-0299

In The Supreme Court of Texas

Texas State Board of Examiners of Marriage and Family Therapists; Charles Horton in his Official Capacity as Executive Director; Sandra DeSobe in her Official Capacity as Presiding Officer; and Texas Association for Marriage and Family Therapy
Petitioners,

v.

Texas Medical Association
Respondent.

On Appeal from the Third Court of Appeals
Austin, Texas

Brief of Amicus Curiae California Association of Marriage and Family Therapists

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STATEMENT OF INTEREST

California Association of Marriage and Family Therapists ("CAMFT") files this amicus brief in support of Petitioners, Texas State Board of Examiners of Marriage and Family Therapists; Charles Horton in his Official Capacity as Executive Director; Sandra DeSobe in her Official Capacity as Presiding Officer, and Texas Association for Marriage and Family. CAMFT is an independent professional organization of over 31,000 members representing the interests of licensed marriage and family therapists. It is dedicated to advancing the profession as an art and a science, to maintaining high standards of professional ethics, to upholding the qualifications for the profession and to expanding the recognition and awareness of the profession. CAMFT is the largest association of Marriage and Family Therapists ("MFTs") in the country.

The issues presented in this case are of vital concern to CAMFT and its members. Diagnostic assessment is a core function of an MFT. MFTs are trained to do so, and the MFT's diagnosis will drive the treatment plan and services for each mental health patient. Diagnostic assessment is also an essential part in determining medical referrals and even eligibility for specific services. A decision prohibiting diagnosis is a decision ending the practice of MFTs as we know it, and CAMFT files this brief in hopes of curtailing what would be a disastrous outcome for our Texas colleagues.

CAMFT is paying all fees and expenses to prepare this brief. *See* TEX. R. APP. P. 11(c).

WHY REVIEW IS NEEDED

The court of appeals' decision has extraordinary implications for mental health services in Texas. Clinical diagnosis and assessment is a core function of Licensed Marriage and Family Therapists ("Licensed MFTs"). Eliminating the long-established authority to diagnose will seriously undermine a Licensed MFT's ability to accurately evaluate and effectively treat the thousands of Texans, both individuals and families, that depend on them for guidance, counseling, and healing. And it will exacerbate the already crises-level lack of mental and behavioral healthcare providers in Texas.

The ability to diagnose non-medical mental disorders is a core competency that is integrated into a Licensed MFT's education, training, and licensing examinations. The *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") has been—*and is intended to be*—used by a wide variety of mental health professionals, including Licensed MFTs. Without these tools, Licensed MFTs will be unable to form proper treatment plans—and unable to treat many patients at all. They will also be hamstrung in their ability to communicate effectively with other mental health professionals and obtain insurance reimbursement for their services. For these reasons, it is a core competency that is integrated in their education, practicum training, and licensing examination. As TMA's expert recognized, this training and experience qualifies Licensed MFTs to make non-medical mental health diagnoses. It is extraordinary that TMA admits, through its own experts, that Licensed MFTs can make *some* diagnoses but convinced two justices on the Austin court of appeals to prohibit *all* diagnostic assessments by Licensed MFTs.

No other state prohibits Licensed MFTs from diagnosing. The decision makes Texas an outlier and essentially eviscerates Texas's long-standing adherence to national accreditation and examination standards. These standards—which recognize that the ability to diagnose is fundamental to the important work of a Licensed MFT—have ensured excellence and competitiveness in Texas educational programs and have facilitated the development of best practices for Licensed MFTs nationwide. The court of appeals' decision eliminates these benefits.

Former Chief Justice Jones got it right in his dissent: The term "diagnosis" in the Board's rules does not denote a "medical" diagnosis. The Occupations Code and the Administrative Code both make clear that a Licensed MFT is limited to making diagnoses within the confines of "cognitive, affective, behavioral, or relational dysfunction in the context of marriage and family systems."[1] This sort of diagnostic assessment is well within the competency of Licensed MFTs (as even TMA's expert agrees) and, again, is fundamental to practice as a Licensed MFT. The Legislature clearly intended that Licensed MFTs be able to diagnose and treat Texans suffering from these types of non-medical mental or behavior health issues.

The decision below wrongly imposes a reading of the statute that undermines its entire purpose: it makes no sense to conclude that the Legislature intended to empower Licensed MFTs to remediate "cognitive, affective, behavioral, or relational dysfunction"

[1] TEX. OCC. CODE §502.002(6).

yet to prohibit them from diagnosing those disorders. The Court should grant review and reverse this illogical reading of the Texas Occupations Code.

ARGUMENT

I. Texas MFTs provide valuable services in a vastly underserved market.

Marriage and family therapists are a vital part of mental health care in the nation, including in Texas. Through diagnosis and therapy, Licensed MFTs help thousands of individuals and groups overcome a variety of mental and emotional disorders. Marriage and Family Therapists are highly trained psychotherapists who provide professional mental health services to individuals, couples, families and groups in an array of treatment settings. In the course of their work with adults, children, adolescents, families and marital couples, Licensed MFTs are required to assess, and treat, a broad range of mental and emotional disorders, such as depression, anxiety, conduct disorders, personality disorders, and addictions, and they provide therapy to clients who are struggling with issues such as sexual and physical abuse, trauma, domestic violence, physical illness, and loss.[2]

Despite a possible implication in the Licensed MFT title, the majority (62%) of Licensed MFT patients are individuals, either adults (47%) or children (15%).[3]

[2] Am. Ass'n for Marriage and Family Therapy, *Marriage and Family Therapists: The Friendly Mental Health Professionals* (last visited Feb. 11, 2015), available at https://www.aamft.org/iMIS15/AAMFT/Content/consumer_updates/Marriage_and_Family_Therapists.aspx. (citing the "CSAT Practice Research Network Survey").

[3] *Id.*

Nationally, Licensed MFTs treat 6.1 million people—or 2.1% of the United States population—each year.[4] This includes therapy services for 2,294,728 individuals, 808,798 children, 752,370 couples, and 526,659 families. In all, 3.4% of the roughly 120 million households in the U.S. have seen a Licensed MFT.[5]

Licensed MFTs provide effective and affordable treatment. Ninety-eight percent of clients rated their Licensed MFT's services as good or excellent, and 97 percent received the kind of help they desired.[6] In general, Licensed MFT fees are only 60% of what psychiatrists commonly charge and 80% of what psychologists charge for their services.[7] "Family therapy has been shown to reduce health care use by 21.5%."[8]

At a time when Texas has a desperate need of more mental healthcare professionals, the court of appeals' decision prohibiting Licensed MFTs from making non-medical, mental health diagnoses will further reduce the availability of effective and efficient care by prohibiting an essential component of the care currently provided by Licensed MFTs. A study conducted by the Hogg Foundation found that, "[a]s of March 2009, 173 out of 254 Texas counties (68%) and two partial counties were designated as

[4] *Id.*

[5] *Id.* *See also* http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf.

[6] *Id.*

[7] *Id.*

[8] *Id.*

Health Profession Shortage Areas (HPSAs) for mental health.[9] Further, 102 Texas counties did not have a psychologist, 48 counties did not have a licensed professional counselor, and 40 counties did not have a social worker.[10] And 171 counties did not have a single psychiatrist.[11] Even more discouraging is that the trend is going in the wrong direction; between 2000 and 2009, the number of psychiatrists, social workers, and marriage and family counselors per every 100,000 Texas residents *declined*.[12] The number of licensed chemical dependency counselors, marriage and family therapists, and psychiatric nurses also steadily declined.[13] Of the five most populous states—Texas California, New York, Illinois, and Florida—Texas has the most severe shortage of psychiatrists, social workers and psychologists.[14]

As TMA's expert confirmed, not enough psychiatrists work in Texas to diagnose all the mental disorders that people in Texas have—a situation she described as a "major

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[9] *CRISIS POINT: Mental Health Workforce Shortages in Texas*, Policy Brief of the Hogg Foundation for Mental Health (2011), at 2, available at http://www.hogg.utexas.edu/uploads/documents/Mental_Health_Crisis_final_032111.pdf (hereafter "Crisis Point").

[10] *Id.*

[11] Crisis Point at 2 (citing B. Raimer, *Texas challenges: Building our health workforce for 2014 and beyond [PowerPoint slides]*, Center for Public Policy Priorities Hobby Conference (September 2010)).

[12] Crisis Point at 8 (citing Statewide Health Coordinating Council, *Texas State Health Plan, 2011-2016: A roadmap to a healthy Texas* (January 2011), available at www.texaspha.org/resources/Documents/Texas%20State%20Health%20Plan%20A%20Roadmap%20to%20a%20Healthy%20Texas%20Preliminary%20Findings.pdf).

[13] Crisis Point at 3 (citing B. Raimer, *Texas challenges: Building our health workforce for 2014 and beyond [PowerPoint slides]*, Center for Public Policy Priorities Hobby Conference (September 2010)).

[14] Crisis Point at 3.

problem."[15] She also confirmed that "Texas ranks far below the national average in the number of mental health professionals per 100,000 residents," and that roughly two-thirds of Texas's 254 counties do not have a single psychiatrist.[16]

Nor can primary care physicians ("PCPs") fill the gap. According to the report to the Texas Legislature by the Integration of Health and Behavioral Health Workgroup, there are many reasons why the need to diagnose and treat behavioral health conditions cannot adequately be fulfilled in the primary care setting, including lack of behavioral health training for PCPs.[17] Thus, "[b]ehavioral health conditions can go undetected, unaddressed or not fully addressed by PCPs."[18] And even when treatment is provided by PCPs, "it may be insufficient to meet the behavioral health needs of patients."[19] Additionally, "PCPs are trained to address needs in a shorter time period," a practice that is reinforced by insurance reimbursement practices that permit only limited appointment times.[20] Yet, patients with mental or behavioral health problems often require longer visits that may not be accommodated in the primary care

[15] CR390–91.

[16] CR391.

[17] Tex. Health & Human Servs. Comm'n, *Legislative Report of the Integration of Health and Behavioral Health Workgroup* (81st Texas Legislature) at 20 (August 2010), available at http://www.hhsc.state.tx.us/reports/2010/IntegrationReport_73010.pdf. In 2009, the 81st Texas Legislature passed House Bill 2196, which established the "Integration of Health and Behavioral Health Workgroup" to study problems in access to mental health care in Texas. *Id.* at iii.

[18] *Id.* at 20.

[19] *Id.*

[20] *Id.*

setting.[21] Further, the behavioral health diagnosis and treatment of children in a PCP setting can be particularly challenging due to related complications such as unrecognized child maltreatment, exposure to trauma, and parenting and family patterns that may contribute to behavioral health conditions.[22]

The shortage of mental health workers has been felt perhaps most acutely by military veterans returning from war. In response to this shortage and to ensure that returning veterans have the care that they deserve, on April 19th, the Department of Veterans Affairs announced that it would hire an additional 1,900 mental health staff nationwide.[23] On April 24th, in a follow-up message, the VA announced that Licensed MFTs and licensed professional mental health counselors will be included in the additional mental health staff. In this announcement, Secretary of Veterans Affairs Eric K. Shinseki stated that "(t)he addition of these two mental health professions is an important part of VA's mission to expand access to mental health services."[24] Secretary Shinseki explained that "Veterans and their families can face unique challenges. By providing a complete range of services, we can help them address those challenges and

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[21] *Id.*

[22] *Id.* (citing Pincus, H., Pechura, C., Elinson, L., and Pettit, A., *Depression in Primary Care: Linking Clinical and Systems Strategies*, 23 GEN. HOSP. PSYCHIATRY 311-318 (2001).

[23] United States Dept. of Veterans Affairs, Office of Public & Intergovernmental Affairs, *VA Adding Family Therapists and Mental Health Counselors to Workforce* (April 19, 2012), available at http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2302.

[24] United States Dept. of Veterans Affairs, Office of Public & Intergovernmental Affairs, *VA Adding Family Therapists and Mental Health Counselors to Workforce* (April 24, 2012), available at http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2303.

help keep more families together."[25] Further, these professionals "will provide mental health diagnostic and psychosocial treatment services for Veterans and their families in coordination with existing mental health professionals at VA's medical centers, community-based outpatient clinics, and Vet Centers."[26] The VA's staffing standards for Licensed MFTs requires that they must be competent in "formal diagnostic assessments"[27] Yet, under the court of appeals' decision, Licensed MFTs in Texas would be prohibited from treating Texas veterans because they would be prohibited from providing the diagnostic services required by the VA.

As Texas and national standards recognize, diagnosing mental health problems is fundamental to what Licensed MFTs do. For over 20 years, Texas—like most other states—has authorized Licensed MFTs to diagnose non-medical mental health disorders, including depression, and anxiety disorders, such as phobias, panic disorder, and PTSD. [28] As discussed further in Part II.B below, consistent with national standards, Texas Licensed MFTs have been educated, trained, and examined on methods of diagnosis. Using this authority and knowledge, Licensed MFTs have

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[25] *Id.*

[26] *Id.*

[27] VA Handbook 5005/41, Appendix G42, 3.b(1)(b) (Sept. 28, 2010) (providing that Licensed MFTs who work for the federal VA must be competent in "formal diagnostic assessments").

[28] CAMFT uses the phrase "diagnosis of non-medical mental health disorders" throughout this brief. This is not a technical phrase, of course, but is intended to acknowledge that, as the trial court below recognized, there are some mental health disorders that do require a medical diagnosis, though many that do not. As explained in Section II, B. (at pp. 16-18), only the diagnosis of non-medical disorders are within the scope of a Licensed MFT's practice, and Licensed MFTs are specifically trained to know when consultation with or referral to a physician is required.

improved the lives of the many Texans who have come to them for answers, guidance, and therapeutic healing.

The court of appeals' decision to deprive Licensed MFTs of the ability to diagnose non-medical mental health problems will lead to many Texans losing access to diagnosis and treatment for their mental disorders. Moreover, by hobbling Licensed MFTs' ability to assess and treat their clients, the decision will make it difficult to recruit Licensed MFTs from outside Texas to help fill the widening gap in access to effective and efficient mental health care.

II. Consistent with national standards, Licensed MFTs are qualified through education, training, and experience to make non-medical mental health diagnoses using the DSM.

The DSM, along with the integrated ICD coding, is the universal diagnostic system used in diagnosing mental health disorders in the United States and much of the rest of the world. The DSM has been—*and is intended to be*—used by a wide variety of mental health professionals, including Licensed MFTs. Diagnosis is integral to Licensed MFTs' ability to counsel and assist the many thousands of Texans that seek their services every day. The court of appeals' decision undermines their ability to provide effective treatment. Further, without the ability to diagnose using the DSM, Licensed MFTs will be unable to communicate effectively with other mental health professionals and will find it difficult to obtain insurance reimbursement for their services.

For these reasons, diagnosis is a core competency that is integrated in their education, practicum training, and licensing examination. To become licensed in Texas, a Licensed MFT must meet rigorous academic and training requirements and must pass a national standardized licensure examination. These standards adhere to established national accreditation and examination standards for Licensed MFTs. These national standards recognize that diagnosis is fundamental to practice as a Licensed MFT and require it as part of the core academic curriculum and a large portion of the licensure examination. These standards ensure that Licensed MFTs have the education and training necessary for accurately making non-medical mental health diagnoses.

A. The DSM and ICD diagnosis and coding systems are universal tools intended for use by all mental health professionals.

The DSM is the diagnostic system used by all mental health professionals. It consists of three major components: (1) the diagnostic classification, (2) the diagnostic criteria sets, and (3) the descriptive text. The first component, *diagnostic classification*, is the list of mental disorders that are officially part of the DSM system. "'Making a DSM diagnosis' consists of selecting those disorders from the classification that best reflect the signs and symptoms that are exhibited by the individual being evaluated."[29] Each diagnostic label is associated with a diagnostic code, which is used by institutions and agencies for data collection and billing purposes.[30] These diagnostic codes are derived

[29] Am. Psychiatric Ass'n, *DSM* (last visited on Feb. 11, 2015), available at http://www.psychiatry.org/practice/dsm.

[30] *Id.*

from the coding system used by all health care professionals in the United States, known as the *International Classification of Diseases, Ninth Edition, Clinical Modification* (ICD-9-CM).[31]

Next for each disorder included in DSM, a set of *diagnostic criteria* indicate what symptoms must be present (and for how long) as well as symptoms, disorders, and conditions that must not be present in order to qualify for a particular diagnosis.[32] "Many users find these diagnostic criteria particularly useful because they provide a concise description of each disorder."[33] Importantly, the use of the DSM's diagnostic criteria has been shown to increase diagnostic reliability.[34]

The third component of the DSM is the *descriptive text* that accompanies each disorder. The text of the DSM-5 systematically describes each disorder under twelve headings, including: "Diagnostic Features"; "Associated Features Supporting Diagnosis"; "Subtypes and/or Specifiers"; "Prevalence"; "Development and Course";

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[31] *Id.* Overseen by the World Health Organization, the ICD is a world-wide project to classify all health disorders (including mental and behavioral) and provide diagnostic assistance. Centers for Disease Control and Prevention, *International Classification of Diseases, Ninth Revision, Clinical Modification (ICD-9-CM)* (last visited Feb. 11, 2015), available at http://www.cdc.gov/nchs/icd/icd9cm.htm. It is designed to promote international comparability in the collection, processing, classification, and presentation of health statistics. *Id.* The DSM-5 contains both the currently used ICD-9-CM codes as well as the incoming ICD-10-CM codes. Am. Psychiatric Ass'n, *Understanding ICD-10-CM and DSM-5: A Quick Guide for Psychiatrists and Other Mental Health Clinicians* at 1-2 (last visited Feb. 11, 2015), available at http://www.dsm5.org/Documents/Understanding%20ICD%2002-21-14%20FINAL.pdf.

[32] Am. Psychiatric Ass'n, *DSM* (last visited on Feb. 11, 2015), available at http://www.psychiatry.org/practice/dsm.

[33] *Id.*

[34] *Id.*

"Risk and Prognostic Factors"; "Diagnostic Measures"; and "Functional Consequences".[35]

1. Non-physician mental health professionals helped create the DSM.

Although the DSM is published by the American Psychiatry Association ("APA"), the DSM-5 drafting task force included non-physician mental health professionals.[36] In fact, half of the members of the APA's "Diagnostic Assessment Instruments" study group are not medical doctors.[37] Indeed, each of the 13 study groups that drafted the DSM-5 included non-physician members,[38] and for some study groups—e.g., "ADHD and Disruptive Behavior Disorders" and "Sleep-Wake Disorders"—non-physician members comprised over half of the study group's members.[39]

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[35] *Id.* (emphasis original).

[36] Am. Psychiatric Ass'n, *Task Force Members* (last visited Feb. 11, 2015), available at http://www.dsm5.org/MeetUs/Pages/TaskForceMembers.aspx (listing at 5 non-MDs as members of the DSM-5 task force).

[37] Am. Psychiatric Ass'n, *Diagnostic Assessment Instruments* (last visited Feb. 11, 2015), available at http://www.dsm5.org/MeetUs/Pages/DiagnosticAssessmentInstruments.aspx. (listing members and explaining that "The study group sought to develop instruments that are: useful for a broad range of professionals, such as psychiatrists, other mental health clinicians, primary care clinicians, and researchers.")

[38] Am. Psychiatric Ass'n, *Meet Us* (last visited Feb. 11, 2015), available at http://www.dsm5.org/MeetUs/Pages/Default.aspx.

[39] Am. Psychiatric Ass'n, *ADHD and Disruptive Behaviors* (last visited Feb. 11, 2015), available at http://www.dsm5.org/MeetUs/Pages/ADHD.aspx; Am. Psychiatric Ass'n, *Sleep-Wake Disorders* (last visited Feb. 11, 2015), available at http://www.dsm5.org/MeetUs/Pages/Sleep-WakeDisorders.aspx.

This invaluable diagnostic tool was created to be used by all mental health professionals. It is vitally important that all those involved in the treatment of a patient have a common language and common understanding of diagnostic terms. The APA unmistakably believes that it should be used by non-physician mental health professionals like Licensed MFTs. In the APA's words, the DSM "can be used by a wide range of health and mental health professionals, including psychiatrists and other physicians, psychologists, social workers, nurses, occupational and rehabilitation therapists, and counselors."[40] The APA approvingly notes that the DSM "has been used by professionals in a wide array of contexts, including psychiatrists and other physicians, psychologists, social workers, nurses, occupational and rehabilitation therapists, and counselors, as well as by clinicians and researchers of many different orientations (e.g., biological, psychodynamic, cognitive, behavioral, interpersonal, family/systems)."[41]

2. The DSM is critical for all professional mental health providers, including Licensed MFTs.

Diagnosis using the DSM serves several important purposes, including proper treatment for clients, effective communication among mental health professionals, public statistics and clinical research, and reimbursement through the insurance system.

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[40] *Id.*

[41] Am. Psychiatric Ass'n, *About DSM-5* (last visited Feb. 11, 2015), available at http://www.dsm5.org/about/Pages/Default.aspx.

Proper treatment. Diagnosis, along with testing, interviews, and other measures, is used to conceptualize client problems and assist in the accurate development of treatment plans. Every mental health disorder has its own set of treatment protocols. Proceeding to treat a client without first diagnosing the problem will make it impossible to develop an appropriate treatment plan, ultimately, perhaps, causing harm to the patient. Moreover, accurately and appropriately communicating a mental health diagnosis to a client can help the individual understand his or her prognosis and aid in forming reasonable expectations for treatment.

Effective communication with other mental health professionals and clients. The DSM is an essential and effective way of communicating among mental health professionals who may be part of a client's treatment team. By providing a common diagnostic language, the DSM ensures that all mental health professionals mean the same thing by a particular diagnosis.[42] Without this standardized, common understanding of diagnostic criteria, there would be no effective communication and collaboration among practitioners. Both the Working Group Report and the Hogg Foundation Crisis Point study conclude and recommend that collaborative approaches to mental health care are essential to addressing the overwhelming need for mental health services in Texas. This sort of collaboration cannot take place if the various

[42] Am. Psychiatric Ass'n, *Insurance Implications of DSM-5* at 3-4 (2013), available at http://www.psychiatry.org/file%20library/practice/dsm/dsm-5/insurance-implications-of-dsm-5.pdf.

providers cannot use the same methods of evaluation and diagnosis of a patient's condition.[43]

Public health statistics and research. DSM-5 diagnoses are also used by public health authorities for compiling and reporting morbidity and mortality statistics. Another important role of DSM is to establish diagnoses for research on mental disorders.[44] "Only by having consistent and reliable diagnoses can researchers determine the risk factors and causes for specific disorders, and determine their incidence and prevalence rates."[45]

Insurance reimbursement. "In the past 50 years, a mental disorder diagnosis has generally become mandatory if medical insurance is to reimburse for treatment. Accurate diagnosing is important because the insurance carrier often allows only a certain number of treatments per a particular diagnosis."[46] Thus, one important

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[43] Crisis Point at 5; *see generally Integration of Health and Behavioral Health Workgroup, Report to the 81st Texas Legislature* at 20 (August 2010), available at http://www.hhsc.state.tx.us/reports/2010/IntegrationReport_73010.pdf.

[44] Am. Psychiatric Ass'n, *Insurance Implications of DSM-5* at 3 (2103), available at http://www.psychiatry.org/file%20library/practice/dsm/dsm-5/insurance-implications-of-dsm-5.pdf; http://www.dsm5.org/about/Pages/Default.aspx ("In addition to supplying detailed descriptions of diagnostic criteria, DSM is also a necessary tool for collecting and communicating accurate public health statistics about the diagnosis of psychiatric disorders.").

[45] Am. Psychiatric Ass'n, *Insurance Implications of DSM-5* at 4 (2013), available at http://www.psychiatry.org/file%20library/practice/dsm/dsm-5/insurance-implications-of-dsm-5.pdf; Am. Psychiatric Ass'n, *DSM*, available at http://www.psychiatry.org/practice/dsm ("It [the DSM] is also a necessary tool for collecting and communicating accurate public health statistics.").

[46] EDWARD NEUKRUG & R. FAWCETT, ESSENTIALS OF TESTING AND ASSESSMENT: A PRACTICAL GUIDE FOR COUNSELORS, SOCIAL WORKERS, AND PSYCHOLOGISTS, ch. 3 (2014), available at ww2.odu.edu/~eneukrug/dsm5/dsm5.doc & https://books.google.com/books?isbn=1305161831; Am. Psychiatric Ass'n, *Insurance Implications of DSM-5* at 4 (2013), available at http://www.psychiatry.org/file%20library/practice/dsm/dsm-5/insurance-implications-of-dsm-

practical effect of the decision below will be that Licensed MFTs will no longer be able to use diagnosis codes for insurance reimbursement. If mental health professionals cannot be compensated for their work, they are unlikely to remain in practice in Texas, further worsening the critical shortage of mental health access in Texas.

B. Licensed MFTs are educated and trained—consistent with national standards—in diagnosing mental disorders.

Texas's educational, training, and licensing examination requirements for Licensed MFTs make clear that diagnosis is integral to a Licensed MFT's practice. Texas's requirements for licensure, which adhere to national standards of training and examination, require that Licensed MFTs have training and competency in diagnosis using the DSM and ICD.

The Occupations Code establishes certain requirements for licensure as a marriage and family therapist, including (1) a master's or doctorate degree in marriage and family therapy (or related field as determined by the Board)[47] from an accredited institution or program, (2) clinical training and experience, and (3) a licensing examination.[48] The Commission on Accreditation for Marriage and Family Therapy

5.pdf ("Clinicians use DSM-5 diagnoses to communicate with their patients and with other clinicians, and to request reimbursement from insurance organizations.").

[47] A master's degree or doctorate degree in a related mental health field, such as psychology, may also qualify if it includes a planned course of study in marriage and family therapy as described by the code. 22 TEX. ADMIN. CODE §§801.112(a)(3), 801.113(d)&(e), 801.114.

[48] TEX. OCC. CODE §502.252(b). Further, the legislature gave the Board authority to set the specific accreditation and examination requirements. TEX. OCC. CODE §502.151(1); TEX. ADMIN. CODE § 801.112(a)(1).

Education (the "COAMFTE") recognizes "clinical assessment and diagnosis" to be one of the core competencies of a Licensed MFT.[49] Further, it will accredit only programs that require education regarding diagnosis.[50] Indeed, it is considered part of the "foundational" curriculum.[51] The COAMFTE explains that this fundamental educational requirement "facilitates students developing competencies in traditional psycho-diagnostic categories, psychopharmacology, the assessment, diagnosis, and treatment of major mental health issues as well as a wide variety of common presenting problems including addiction, suicide, trauma, abuse, intra-familial violence, and therapy for individuals, couples, and families managing acute chronic medical conditions, utilizing a relational/systemic philosophy."[52]

This "relational/systemic philosophy" is the unique perspective in which Licensed MFTs are trained. "It is a perspective about professional responsibilities and a set of professional practices that includes assessment, diagnosis, consultation, and treatment of individual or relational concerns, with a variety of mental and physical

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[49] Am. Ass'n for Marriage & Family Therapy, *Marriage and Family Therapy Core Competencies* at 1-3 (Dec. 2004), available at http://www.aamft.org/imis15/Documents/MFT_Core_Competencie.pdf.

[50] Am. Ass'n for Marriage & Family Therapy, *MFT Educational Guidelines* at 1 (Nov. 4, 2005), available at http://www.aamft.org/imis15/Documents/COAMFTE_MFT_Educational_Guidelines.pdf

[51] Am. Ass'n for Marriage & Family Therapy, *Accreditation Standards: Graduate & Post-Graduate Marriage and Family Therapy Training Programs (Version 12.0)* at 21-23 (July 15, 2014), available at http://www.aamft.org/iMIS15/Documents/COAMFTE/COAMFTE_Accreditation_Standards_Version_12.pdf.

[52] *Id.*

health issues,[53] DSM and ICD diagnoses, and other concerns presented by clients such as work- or school-related difficulties."[54]

In addition to the rigorous academic requirements, Texas law requires that prospective Licensed MFTs pass a national licensing examination administered through the Association of Marital and Family Therapy Regulatory Boards ("AMFTRB").[55] This national exam tests, among other things, the applicant's ability to "diagnose" mental health disorders.[56] In fact, it is one of six general categories tested in the national examination and constitutes 16% of the entire exam.[57]

Thus, Licensed MFTs are educated and trained to make non-medical, mental health diagnoses.

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[53] "The DSM refers to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, (DSM-5; American Psychiatric Association 2013) and is the universal authority for classification and diagnosis of mental disorders. It is used as a diagnostic tool to determine treatment recommendations and to determine payment of health care providers. The ICD refers to the International Classification of Diseases, 10th Revision (ICD-10) and is a way of classifying, processing, and presenting mortality data from death certificates. The United States uses the ICD for classification of diseases and injuries under an agreement with the World Health Organization (1992). For more Information see www.cdc.gov/nchs/icd9.htm." Am. Ass'n for Marriage & Family Therapy, *Accreditation Standards: Graduate & Post-Graduate Marriage and Family Therapy Training Programs (Version 12.0)* at 2-3 n.1 (July 15, 2014), available at http://www.aamft.org/iMIS15/Documents/COAMFTE/COAMFTE_Accreditation_Standards_Version_12.pdf.

[54] *Id.*

[55] TEX. OCC. CODE §502.252(b); 22 TEX. ADMIN. CODE §801.174(a).

[56] Ass'n of Marital & Family Therapy Regulatory Boards, *Exam Information* (last visited Feb. 11, 2015), available at http://www.amftrb.org/exam.cfm.

[57] *Id.* ("Tasks related to assessing the various dimensions of the client system, forming and reformulating hypotheses, and diagnosing the client system in order to guide therapeutic activities.").

C. Texas' rules do not allow Licensed MFTs to diagnose "any and all" mental diseases and disorders in the DSM.

Many of the TMA's professed concerns about Rule 801.42(13) appear to stem from a purposeful over-reading of the scope of diagnostic authority it grants.[58] The rules do not authorize Licensed MFTs to diagnose conditions that are outside their expertise, which would include diagnoses that require a medical evaluation. Rather, while Rule 801.42(13) authorizes Licensed MFTs to diagnose, other rules limit a Licensed MFT to services "within his or her professional competency," 22 TEX. ADMIN. CODE §801.44(r), and require referral and consultation with other providers in appropriate cases, *id.* §§801.42(12), 801.44(t). Thus, the rules do not authorize Licensed MFTs to independently diagnose every condition in the DSM. As a consequence, a particular diagnosis may be beyond a Licensed MFT's authority, in which case the Licensed MFT will only be allowed to make a particular diagnosis after consulting with a medical provider. Likewise, if the client presents with indications that a physical condition may be causing her symptoms, the Licensed MFT must refer that client to a physician for a medical evaluation.

The Court need not parse the disorders in the DSM to determine which are "non-medical" and which are "medical." Although the trial court was convinced that there is a distinction, it is the role of regulatory boards, not courts, to determine if and

[58] Resp. at 1 (beginning its response with a mischaracterization of Petitioners' position as "contend[ing] that marriage and family therapists can diagnose any and all of the mental disorders and diseases listed" in the DSM).

when a line is crossed. All the Court needs to know is that the Board's rules, taken as a whole, limit the diagnostic authority of Licensed MFTs in a manner consistent with the statute. Should a Licensed MFT attempt to diagnose outside of her professional scope of practice, she can be disciplined by the Board,[59] as well as face consequences from the American Association of Marriage and Family Therapists.[60]

For this reason, Licensed MFTs, like all non-medical providers, are trained to identify circumstances where it is prudent or necessary to refer a client to another provider. And Licensed MFTs routinely do so. This often creates a fluid, interdependent relationship between therapist and physician. The therapist's clinical judgment is informed by the input and advice of the psychiatrist, who then uses the ongoing input from the therapist—who more frequently provides the psychotherapy services—to prescribe (and adjust) the client's medication. The suggestion that a client might be misdiagnosed by a Licensed MFT, or unable to receive an evaluation for a medical condition once assigned a diagnosis code by the Licensed MFT, is not only false but is also incongruent with the reality of the mutually supporting relationship among mental health providers of all levels, here in Texas and across the nation.

[59] 22 TEX. ADMIN. CODE §801.291(1)(I). Discipline may include complete revocation of an MFTs license. *Id.*

[60] *See generally* https://www.aamft.org/iMIS15/AAMFT/Content/legal_ethics/Ethics_Complaint_Process.aspx.

Even the TMA must agree that not every mental health diagnosis in the DSM requires a physical exam or medical training. TMA's own expert testified that Licensed MFTs can independently diagnose conditions like anorexia nervosa and conduct disorder.[61] And the American Psychiatric Association has concluded that Licensed MFTs are "able to independently make DSM diagnoses without supervision."[62] In fact, when the American Psychiatric Association needed mental health professionals to test the latest revisions to the DSM, it asked Licensed MFTs to participate.[63]

III. Prohibiting Licensed MFTs from diagnosing using the DSM makes Texas an outlier in the nation and jeopardizes the benefits of adhering to national accreditation and examination standards.

Adherence to national standards provides many benefits. National accreditation and examination standards ensure excellence in Texas MFT educational programs by developing accreditation and examination standards that reflect the collective experience and wisdom of the broader national community of marriage and family therapists. Further, in ensures that Licensed MFTs educated, trained, and experienced in Texas will remain competitive with Licensed MFTs trained and experienced in other states.

[61] CR389, 392.

[62] CR426.

[63] *Id.*

Yet, the court of appeals' decision—which would make Texas the only state to expressly prohibit Licensed MFTs from diagnosing non-medical mental health disorders—will undermine or eliminate these benefits.

A. The overwhelming majority of states expressly authorize Licensed MFTs to make non-medical, behavioral health diagnoses.

No other state expressly prohibits Licensed MFTs from diagnosing mental and behavioral disorders. To the contrary, the overwhelming majority of states expressly authorize diagnosis. Thirty-five states (including Texas) expressly authorize Licensed MFTs to diagnose by statute or regulation.[64] An additional six states, though not expressly authorizing diagnosis by Licensed MFTs in a statute or regulation, have regulations that require Licensed MFTs to have training and experience in diagnosis, making it clear that it is expected that Licensed MFTs may diagnose (also like Texas).[65] The remaining nine states do not expressly provide that Licensed MFTs may diagnose, but neither do the forbid it.[66] Indeed, one of these nine states, Michigan, provides that Licensed MFTs may conduct and interpret psychological testing consistent with their education and training.[67] Thus, both expressly and implicitly, the overwhelming majority of states has recognized that Licensed MFTs have the training and expertise to diagnose certain behavioral health disorders. The decision below makes Texas the

[64] *See* Chart of State Laws Governing Diagnosis by Licensed MFTs, attached as Appendix A.

[65] *Id.*

[66] *Id.*

[67] *See* MICH. COMP. LAWS §333.16901(1)(c).

only state to prohibit Licensed MFTs from performing an integral part of their profession that is essential to their ability to properly treat their clients.

B. Diverging from national standards will jeopardize the accreditation of Texas MFT programs, damage the competitiveness of Texas MFTs, and impair ongoing efforts to improve mental health education and best practices.

As discussed above, Texas adheres to national standards for education, training, and evaluating marriage and family therapists for licensure. These national standards are valuable for a number of reasons. By combining the resources of the individual state regulatory boards, the Association of Marriage and Family Therapy Regulatory Boards is able to access resources greater than those of any individual state board for the development and continuing improvement in the licensure examination. Similarly, the Commission on Accreditation for Marriage and Family Therapy Education ensures excellence in educational programs by developing accreditation standards that reflect the collective experience and wisdom of the broader community of marriage and family therapists.[68] Further, national standards facilitate communication among state boards on issues and concerns pertaining to the regulation of marriage and family therapy within their jurisdictions, the essential purpose of which is the protection of the public.[69]

[68] Am. Ass'n for Marriage & Family Therapy, *Accreditation Standards: Graduate & Post-Graduate Marriage and Family Therapy Training Programs (Version 12.0)* at 2 (July 15, 2014), available at http://www.aamft.org/iMIS15/Documents/COAMFTE/COAMFTE_Accreditation_Standards_Version_12.pdf.

[69] *Id.* at 2.

But by creating divergent standards across the states, especially on an issue so fundamental to the practice of Licensed MFTs, the decision below will impair the development of best practices and improvements in education. Moreover, the court of appeals' decision may endanger the accreditation of Texas MFT programs and may leave graduates unprepared for the licensing exam. As discussed above, Part II.B, diagnostic training is one of the "foundational" curriculum requirements for accreditation[70] and constitutes 16 percent of the licensing examination.[71]

A prohibition on diagnosis will also impair the competitiveness of Texas-trained Licensed MFTs—who will lack the academic and experiential training to diagnose mental health disorders—for jobs in other states that require competency in diagnosis. That is, failing to educate, train, and practice using the DSM to make diagnoses will render Texas-trained MFTs and Licensed MFTs practicing in Texas unqualified to practice in other states or with the federal government. As a consequence, it will be increasingly difficult to recruit prospective students to attend Texas institutions or programs for education and practical experience as a family therapist.

C. The reasonableness of TBMFT's interpretation of its governing statute demands judicial deference to the Legislature on this policy-laden, scope of practice question.

Should Texas decide to so drastically limit the practice of Licensed MFTs, the choice is a policy one for the Texas Legislature. As shown above, Texas is on the brink

[70] *Id.* at 18.

[71] *See* Part II.B, supra.

of a mental health crisis. The court of appeals' opinion might be the tipping point. If TMA has support for its suggestion that allowing Licensed MFTs to make mental health diagnoses "pose[s] a significant risk to patients,"[72] then surely the TMA can get the Legislature's attention. After all, TMA has 23 individuals registered to lobby the Legislature[73] and reports an additional $90,000 annually in outside lobbying expenditures.[74]

As the briefing filed in this case indicates, Texas has expressly allowed Licensed MFTs to diagnose for over two decades. TMA has had at least ten legislative sessions to use its influence to end this allegedly harmful practice. Yet, in all those sessions, not one bill has been filed to prohibit diagnosis. TMA glosses over the complete lack of legislative concern, by claiming that, until 2008, it was not clear that TBMFT considered diagnoses to be within a Licensed MFT's scope of practice.[75] Even if that were true—which TMA's own briefing undercuts this view of the history of TBMFT's rulemaking—TMA has had at least three legislative sessions to use its lobbyist army to bring the purported harm to the Legislature's attention.

In the meantime, there is simply no support for the conclusion that the Legislature clearly intended to prohibit diagnosis by Licensed MFTs. TMA's position

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[72] Br. at 1.

[73] *See* http://www.ethics.state.tx.us/tedd/2015_Lobby_List_by_Concern.pdf.

[74] *See* http://www.opensecrets.org/lobby/clientsum.php?id=D000000068

[75] Br. at 2.

to the contrary depends on the assumption that only physicians diagnose. That assumption is false. Texas' statutes are replete with examples of non-physician health professionals who diagnose.[76] (Equally prevalent are references in Texas statutes to non-medical diagnoses.)[77] Even licensed social workers—who may be licensed without an advanced degree and from programs with less clinical focus—diagnose in Texas.[78] At the very least, TBMF's rule represents a reasonable interpretation of its governing statute. And the court of appeals erred in refusing to defer to that interpretation based on an overly technical view of a commonly used word. The Court should grant review and decide this important issue.

[76] TEX. OCC. CODE §351.002(6)(B) (optometrists); *id.* §251.003(a) (dentists); *see also Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Assoc.*, 375 S.W.3d 464, 466 (Tex. App.—Austin 2012, pet. denied) (chiropractors).

[77] *See, e.g.*, TEX. EDU. CODE §28.007 (referencing instruments a school district uses "to diagnose student mathematics skills"); TEX. OCC. CODE §1958.002 (referring "the diagnosis . . . of plumbing, heating, ventilation, air conditioning, electrical, or air duct systems or appliances").

[78] TEX. OCC. CODE §505.0025(b).

CONCLUSION

Further review of the court of appeals' decision is imperative. Licensed MFTs cannot be prohibited from diagnosing. It is what they do. And the medical community could not possibly fill the gap that would be left if Licensed MFTs were no longer allowed to do so. The extraordinary implications of the court of appeals' decision have been a cause for concern in Texas and across the nation. CAMFT urges the Court to grant review and reverse the court of appeals' erroneous and unreasonable interpretation of the Texas Occupations Code.

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Respectfully submitted,

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APP. A

Chart of State Laws Governing Diagnosis by LMFTs

	State	LMFT authorized to diagnose	Sources
1	AK	By statute	ALASKA STAT. §08.63.900(5)
2	AZ	By statute and regulation	ARIZ. REV. STAT §32-3251(7); ARIZ. ADMIN. CODE §R4-6-101
3	CO	By statute	COLO. REV. STAT §12-43-503
4	CT	By statute and regulation	CONN. GEN. STAT §20-195a(3); CONN. AGENCIES REG. §20-195a-2(h)
5	DE	By statute	DEL. CODE ANN. §3051(d)
6	DC	By statute	D.C. CODE §3-1201.02(6A)
7	FL	By statute	FLA. STAT. §491.003(8)
8	HI	By statute	HAW. REV. STAT. §451J-1
9	IL	By regulation	ILL. ADMIN. CODE §1283.20(b)
10	KS	By statute	KAN. STAT. ANN. §65-6402
11	ME	By statute	ME. REV. STAT. §§13851(6) & 13858
12	MD	By statute and regulation	MD. CODE. ANN. §17-101; MD. CODE REGS. 10.58.08.02
13	MA	By regulation	MASS. CODE REGS. §262 CMR 3.02
14	MS	By regulation	30-1 MISS. CODE R. §1.2(Y)
15	MO	By statute	MO. REV. STAT. §337.700(7)
16	MT	By statute	MONT. CODE ANN. §37-37-102
17	NE	By statute	NEB. REV. STAT. §§38-2113 & §38-2114
18	NV	By statute	NEV. REV. STAT. §641A.080
19	NH	By statute	N.H. REV. STAT. ANN. §330-A:2
20	NJ	By regulation	N.J. ADMIN. CODE §§13:34-8.1(b)(8)
21	NM	By statute	N.M. STAT. ANN. §§61-9A-3 & 61-9A-5
22	NC	By statute	N.C. GEN. STAT. §90-270.47
23	ND	By statute	N.D. CENT. CODE §43-53-01(5)
24	OH	By statute	OHIO REV. CODE ANN. §4757.01
25	OK	By statute	OKLA. STAT §1925.2(7)
26	OR	By statute	OR. REV. STAT. § 675.705
27	SC	By statute	S.C. CODE ANN. §40-75-20(13)
28	SD	By statute	S.D. CODIFIED LAWS §36-33-1
29	TN	By statute and regulation	TENN. CODE ANN. §63-22-115(a)(5); TENN. COMP. R. & REGS. 0450-2-.02
30	UT	By statute	UTAH CODE ANN. §58-60-302
31	VT	By statute	VT. STAT. ANN. 26 §4031
32	WA	By statute	WASH. REV. CODE §18.225.010
33	WI	By statute and regulation	WIS. STAT. §457.01; WIS. ADMIN. CODE MPSW §1.02
34	WV	By statute	W.VA. CODE §30-31-3(g)
35	WY	By statute	WYO. STAT. ANN. §33-38-102(a)(vii)

Chart of State Laws Governing Diagnosis by LMFTs

	State	Not specifically authorized to diagnose, but requires education and training in diagnosis	Sources
1	CA	statute requires academic curriculum, experiential training, and continuing education in diagnosis	CAL. BUS & PROF. CODE §§4980.02, 4980.37, 4980.40, 4980.43, 4980.54
2	ID	statute mandates education in diagnosis	IDAHO CODE ANN. §54-3401(10)
3	KY	regulations require that MFTs take classes on using the DSM and obtain supervision focused on accurately diagnosing problems.	KY. REV. STAT. ANN. §335.300
4	MN	regulations require supervised experience in diagnosis and treatment.	MINN. STAT. §148B.29
5	RI	regulations require coursework in diagnosis.	R.I. GEN. LAWS §5-63.2-2
6	VA	regulations require coursework in assessment and diagnostic procedures.	VA. CODE ANN. §54.1-3500