CAUSE NO. D-1-GN-08-001381

DUANE BOONE, STEPHAN DAHL, ALI FECTEAU, ROBERT GRISWOLD, JOSHUA WALLACE,	§	IN THE DISTRICT COURT
Plaintiffs,	§	
v.	§	TRAVIS COUNTY, TEXAS
TEXAS STATE BOARD OF VETERINARY MEDICAL EXAMINERS; ROBERT L. LASTOVICA, DVM, in his official capacity as President of the Texas State Board of Veterinary Medical Examiners; BUD E. ALLDREDGE, JR., DVM, in his official capacity as Vice President of the Texas State Board of Veterinary Medical Examiners; PATRICK M. ALLEN, DVM, in his official capacity as Secretary of the Texas State Board of Veterinary Medical Examiners; JANIE ALLEN CARPENTER, DVM, DAVID WAYNE HEFLIN, DVM, PAUL MARTINEZ, DAWN E. REVELEY, CYNTHIA DIAZ, and GUY W. JOHNSEN, DVM, in their official capacities as members of the of the Texas State Board of Veterinary Medical Examiners,	§	
Defendants.	§	53rd JUDICIAL DISTRICT

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

TO THE HONORABLE MARGARET COOPER:

Since early 2007, horse teeth floaters in Texas have been talking about Defendants' on-going enforcement of the Board's new interpretation of the Veterinary Licensing Act. Some floaters have asked: "when are they going to find me?"

Plaintiffs are asking a different question: "how dare they take my job away?"

This Court is the only and proper place for Plaintiffs to get an answer to their question.

This Court should deny Defendants' motion to dismiss Plaintiffs' claim because this Court looks to the pleadings to determine whether it has subject matter jurisdiction. Plaintiffs' pleadings include sufficient allegations as to the uncertainty that Defendants' sudden change has caused to their livelihoods. Plaintiffs have standing to challenge Defendants' new interpretation.

This case offers more than a ripening seed of controversy. It is a full-blown dispute about whether Defendants' policy change 20 months ago was based on (1) health and safety or (2) the use of government force to fence out competitors for the economic benefit of licensed veterinarians. Now, nearly two years later, Plaintiffs' claims are ripe.

Prior to February 2007, no floater doubted her right to provide basic dental care in Texas. Post February 2007, her right no longer exists. The type of service she wants to offer has ***not*** changed. Only the Defendants' position has changed. There are ***no*** disputed facts about what Plaintiffs do. The only factual disputes are about Defendants' change in position. Only this Court can determine the constitutionality of Defendants' actions. There is no basis for Defendants to have primary or exclusive jurisdiction when (1) the factual disputes are exclusively about Defendants' actions and (2) the administrative process cannot address the constitutionality of Defendants' unilateral change to the law.

For these reasons, Plaintiffs respectfully request this Court deny Defendants' motion to dismiss.

I. RELEVANT FACTS AND BACKGROUND

In Texas, non-veterinarians had floated horses' teeth free from government regulation for decades.[1] In fact, Texas' very first veterinary licensing act, enacted in 1911, included "dentistry" as the practice of veterinary medicine, yet floaters freely provided basic dental services untouched by regulation for more than 95 years after it was enacted. *Pistole v. State*, 150 S.W. 618, 619 (Tex.Crim.App. 1912) (interpreting for the first time the scope of Texas' original veterinary licensing act). Exh. A. Letter from Ron Allen, Exec. Dir. to Randy Riedinger (Nov. 17, 2003) ("The Board has generally considered that the practice of 'teeth floating' does not constitute the practice of dentistry and thus can be done by non-licensed persons.")

In the 96th year after enactment, however, Defendants suddenly and radically changed their interpretation of the Veterinary Licensing Act in Tex. Occ. Code Ann. §§ 801.001 *et seq*. (Act). In early 2007, Defendants concluded that basic floating was instantaneously both the practice of dentistry and veterinary medicine. Exh. B. Letter from Dewey E. Helmcamp III to Carl Mitz (Feb. 23, 2007) ("…performing of dental treatments on animals, constitutes the practice of veterinary medicine without a license and is thus illegal under Texas Law. We request that you cease and desist from such practice immediately.")

Defendants made this unilateral change in 2007 despite the fact that the Legislature considered granting specific rulemaking authority to Defendants to regulate horse teeth floaters two years earlier. Exh. C. The bill was heard but died in the House Agriculture and Livestock Committee. The Legislature denied giving Defendants the requested power and, instead, left unchanged the long-standing freedom for floaters to practice. Exh. D.

[1] "Floating" is the filing down of a horse's teeth in order to remove naturally forming points on the inside of lower teeth, the outside of the upper teeth, and the front incisors. Left untreated, these points may block the lateral movement of a horse's chewing motion causing food to be improperly chewed and digested.

Undeterred by the legislative rebuff, Defendants forged ahead in 2007 and unilaterally changed the regulation of floaters, Moreover, it appears that Defendants acted without any study, public meeting or process to assess the need for or likely impact of their new interpretation of the Act on the one million horses and the 275,000 horse owners in Texas. Exh. E. Bd. Meeting Minutes. p.5. Agenda Item C.3 (June 14, 2007).

Defendants' unstudied change also occurred without considering the fact that horse teeth floating is (a) a livestock management practice or (b) not significantly different, in requisite training or inherent risks, from other livestock management practices—such as castrating a male animal, dehorning cattle and shoeing a horse—that are exempted from the Act's requirements. Tex. Occ. Code Ann. § 801.004.

Following their change in interpretation, Defendants issued cease-and-desist letters to non-veterinarian equine dental practitioners including Carl Mitz, Dena Corbin, Randy Riedinger and Brady George in late February 2007.

On August 28, 2007, Mitz, Corbin, Riedinger and George joined with a trainer and a breeder, Gary Barnes and Tony Greaves, and filed suit, Cause No. D-1-GN-07-2707, against Defendants. They raised three causes of action under the Texas Constitution: (a) Deprivation of Liberty Due Course of the Law of the Land (Art. I. § 19), (b) Prohibition against Monopolies (Art. I. § 26), and (c) Equal Protection (Art. I. § 3). The six *Mitz* plaintiffs also requested from the 419th Judicial District Court in Travis County a declaratory judgment and a temporary and permanent injunction for these constitutional violations.

On September 26, 2007, Defendants sent a second cease-and-desist letter to the *Mitz* plaintiffs.

On October 15, 2007, Judge Paul Davis denied the *Mitz* plaintiffs' request for a temporary injunction.

On January 30, 2008, Judge Lora Livingston (a) denied Defendants' Plea to the Jurisdiction on the bases of ripeness, standing, failure to join necessary parties and exclusive agency jurisdiction and (b) granted Defendants' Plea to the Jurisdiction on the bases of failure to exhaust administrative remedies and primary agency jurisdiction. Judge Livingston abated the case until Defendants render a final agency determination following contested case hearings involving each of the four dental practitioners.

Defendants did not appeal Judge Livingston's denial of Defendants' Plea to the Jurisdiction on the bases of ripeness, standing, failure to join necessary parties, and exclusive agency jurisdiction.

On February 6, 2008, the *Mitz* plaintiffs appealed Judge Livingston's ruling that they had to exhaust administrative remedies and that Defendants had primary jurisdiction to the Third Court of Appeals on an expedited basis arguing, inter alia, that the district court erred in abating the fully-justiciable claims in favor of an administrative process that does not have jurisdiction over Barnes and Greaves, the trainer and breeder, and is incapable of ruling on the constitutional claims raised by all six *Mitz* plaintiffs.

Since the initial filing of the appeal, Defendants requested and were granted three extensions in order to respond to Plaintiffs' appeal of the abatement in *Mitz*. Having ultimately received all briefs, the Court of Appeals notified the parties that the appeal was set for submission on briefs without oral argument for August 29, 2008 before Justices Patterson, Waldrop and Henson. To date, the Court of Appeals has not ruled on the appeal.

On July 31, 2008, Defendants filed formal (administrative) complaints against Carl Mitz, Dena Corbin, Randy Riedinger and Brady George at the State Office of Administrative Hearings (SOAH). Mitz, Corbin, Riedinger and George each answered the administrative complaints and raised affirmative defenses/counterclaims that Defendants failed to engaged in rulemaking before unilaterally changing Texas' 96-year- old policy allowing horse teeth floaters to freely provide their services, failed to follow the procedures and mandates of Texas' Sunrise Act, §§ 318.001 *et seq*., and violated Plaintiffs' rights as guaranteed by the U.S. and Texas constitutions.

SOAH scheduled an administrative hearing for December 15-17, 2008—22 months after Defendants sent the initial cease-and-desist letters. These hearings will likely take place unless the Court of Appeals overturns Judge Livingston's ruling that the *Mitz* plaintiffs must exhaust administrative remedies.

At its Board meeting of February 14, 2008, Defendants continued to authorize enforcement of their revised interpretation. Exactly a year after their change in interpretation, Defendants approved additional cease-and-desist orders including at least one to a person in Pinehurst, Texas for "performing equine dentistry." That individual signed Defendants' so-called "voluntary" order and was forced to stop working in Texas. Exh. F. Board Notes, at 4, (Apr. 2008).

Frustrated by not knowing their rights, five equine dental practitioners, Duane Boone, Stefan Dahl, Ali Fecteau, Robert Griswold and Joshua Wallace filed this action, on April 23, 2008, pursuant to the Texas Uniform Declaratory Judgment Act. Tex. Civ. Prac. & Rem. Code §§ 37.001 *et seq*.

In their petition, the *Boone* plaintiffs raised the same claims as the *Mitz* plaintiffs. Unlike the *Mitz* plaintiffs, however, none of the *Boone* plaintiffs received any administrative notice or cease-and-desist letter from Defendants but stepped forward to ask this Court to declare their rights to practice horse teeth floating in Texas.

Defendants moved to consolidate the *Boone* case with the *Mitz* case on June 9, 2008 and requested this Court stay all proceedings and discovery consistent with the administrative hearing in *Mitz.* This Court heard argument on Defendants' motion to consolidate on July 17, 2008. At that time, Judge Margaret Cooper said the Court would grant the motion if Defendants filed their administrative complaints against Mitz, Corbin, Riedinger and George before the end of July. Defendants filed those four complaints at SOAH on July 31, 2008.

Defendants now appear to have withdrawn their motion to consolidate without notice after taking up this Court's resources in July. Defendants now move to dismiss Plaintiffs' claims raised in *Boone* based on a lack of standing and ripeness and that Defendants have primary or exclusive jurisdiction.

Having ignored the Legislature's denial of an increase in their power to regulate horse teeth floating in 2005, Defendants now move to insulate their actions from judicial review under the Texas Uniform Declaratory Judgment Act by moving to dismiss claims raised by the *Boone* plaintiffs.

II. ARGUMENT AND AUTHORITIES

A. Standard of Review

Standing, ripeness and whether the Defendant Board has exclusive or primary jurisdiction are questions of subject matter jurisdiction. Courts look to the pleadings to determine whether they have subject matter jurisdiction. *Tex. Dep't of Ins. v. Reconveyance Servs., Inc*., 240 S.W.3d 418, 424 (Tex. App-Austin 2007, pet. filed). Pleadings are to be construed liberally, *id*., and even where an agency may have possible concurrent jurisdiction, "courts of general jurisdiction presumably have subject matter jurisdiction unless a contrary showing is made. *Id.* at 428 (internal quotations and citation omitted).

B. Plaintiffs have properly filed their petition under the Texas Uniform Declaratory Judgment Act, have standing, and their claims are ripe.

The five Plaintiffs in this case face uncertainty about their rights to practice their occupation, the very uncertainty that the Uniform Declaratory Judgment Act is intended to address.

The test for standing requires that there be (1) a justiciable controversy between the parties and (2) the controversy can actually be remedied by the judicial declaration sought. *See, Reconveyance Servs., Inc.*, 240 S.W.3d at 428. Given the nature of a declaratory ruling, only the "ripening seeds" of a controversy are needed to demonstrate ripeness. *Juliff Gardens, L.L.C. v. Tex. Comm'n on Envtl. Quality*, 131 S.W.3d 271, 276-77 (Tex.App.-Austin 2004).

Having met the tests for standing and ripeness, Plaintiffs seek judicial determination of their rights.

1. Plaintiffs are properly seeking a declaration of their rights.

Defendants' sudden reinterpretation and repeated enforcement of the Act to prohibit lay persons from providing basic equine dental care have caused significant uncertainty as to Plaintiffs' rights to continue to provide floating to horses.. An action under the Uniform Declaratory Judgment Act is the proper means to seek a determination of Plaintiffs' rights.

The Uniform Declaratory Judgment Act confers on Texas courts the authority to declare rights, status and other legal relations whether or not further relief is or could be claimed. Tex. Civ. Prac. & Rem. Code § 37.003. The Legislature intended the Uniform Declaratory Judgment Act to be remedial, to settle and afford relief from uncertainty with respect to rights, and to be liberally construed. Tex. Civ. Prac. & Rem. Code § 37.002.

A trial court has discretion to enter a declaratory judgment as long as it will serve a useful purpose or will terminate the controversy between the parties. *Rogers v. Alexander*, 244 S.W.3d 370, 380 (Tex.App.-Dallas, 2007) (observing the existence of another adequate remedy does not bar a party's right to maintain an action for declaratory judgment).

In fact, in suits for declaratory relief, the trial court ***has limited discretion*** to refuse a declaratory judgment, and may do so only where judgment would not remove the uncertainty giving rise to the proceedings. *James v. Hitchcock Independent School Dist.*, 742 S.W.2d 701, 704 (Tex.App.-Hous. [1 Dist.], 1987, writ denied) (reversing a trial court's grant of summary judgment because appellant's petition sufficiently stated a cause of action under Tex. Civ. Prac. & Rem. Code § 37.008 entitling her to a declaration of her status under a contract with a government agency) (emphasis added).

In *James*, a 20-year employee who worked as a librarian in the defendant school district filed a declaratory judgment action to seek determination as to whether the defendant improperly

modified her contract when it unilaterally reduced her annual work schedule from 203 days to 183 days. The District Court granted summary judgment in favor of the school district on the grounds that James' petition did not state a cause of action. In reversing the District Court, the Court of Appeals found that James' petition sufficiently stated a cause of action under the Uniform Declaratory Judgment Act and that the trial court exceeded its "limited discretion to refuse a declaratory judgment." *James*, 742 S.W.2d at 704.

As in *James*, Plaintiffs here face a government unit that has unilaterally modified the legal terms of their work and, in doing so, has created significant uncertainty as to whether each of the Plaintiffs can legally make a living providing services that up until early 2007 were unquestionably legal. Plaintiffs are asking for the same determination that was asked for in *James* and is allowed for under the Uniform Declaratory Judgment Act—a declaration of their rights.

Furthermore, judicial review of Defendants' action is doubly important here because Plaintiffs have no access to an administrative process that can address their claims. Unlike with the *Mitz* plaintiffs, Defendants have not engaged Plaintiffs here in an administrative process of any sort. Quite literally, this District Court is the only place in town for Plaintiffs to have their claims heard.

Fortunately for Plaintiffs, this Court is not only well-suited but has limited discretion to refuse, under the Uniform Declaratory Judgment Act, to hear a declaratory judgment action that will terminate this controversy. Their petition is therefore proper.

2. Plaintiffs have standing to bring their claims.

There is no dispute that Plaintiffs float horses' teeth for a living. Similarly, there should be no dispute that they have standing to raise their claims in this Court. Defendants have represented to similar practitioners that floating horses' teeth is, as of February 2007, illegal by repeatedly sending cease-and-desist letters and by forcing at least one practitioner to sign a so-called "voluntary" order to stop floating. Defendants' actions against other practitioners threaten Plaintiffs' ability to continue to offer their dental services in Texas and, as such, establish that Plaintiffs have sufficient injury for standing in a declaratory judgment action.

The general test for standing in Texas requires that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought." *Texas Dept. of Ins. v. Reconveyance Services, Inc.*, 240 S.W.3d 418, 435 (Tex.App.-Austin, 2007, pet. filed) (noting the standing requirement stems from two limitations on subject matter jurisdiction: the separation of powers doctrine and the open courts provision).

In *Reconveyance Services,* the Texas Department of Insurance, the appellant, contended that the defendant lacked standing because Reconveyance's asserted injury was premised on the "speculative or hypothetical business losses" that title insurance agents would actually do business with the appellee if it obtained the declarations it sought. Rejecting the agency's claim, the Court of Appeals found sufficient injury in the appellee's allegations that "[t]itle insurance companies and agents in Texas have informed Reconveyance Services they would use the services of Reconveyance Services if not for the position taken by TDI which precludes the title companies from charging for those services." *Reconveyance Services*, 240 S.W.3d at 437. Business losses, properly alleged, are enough to achieve standing.

Here, as in *Reconveyance Services,* Plaintiffs have alleged in their verified petition that they face likely loss of income resulting from Defendants' sudden change in their interpretation of the law. Plaintiff Duane Boone swore in Plaintiffs' verified petition that "clients have expressed concern about whether he will be able to continue providing equine dental services" and that "he is unable to give his clients a definitive answer." Exh. G. Plaintiffs' Original Verified Petition for Declaratory and Injunctive Relief. ¶ 4. Similarly, Plaintiff Stefan Dahl swore that the "…new interpretation of the Licensing Act regarding horse teeth floating has significantly impaired" his business activities "by preventing him from advertising his services." *Id* at ¶ 6. Moreover, Defendants' "new policy regarding horse teeth floating significantly threatens" his livelihood, "both as a practitioner of equine dental services and as an instructor" according to the sworn allegations by Josh Wallace. *Id* at ¶ 16. Following *Reconveyance,* these sworn allegations are sufficient to overcome Defendants' claims that Plaintiffs have not suffered any injury or harm. (Defs.' Br. 8).

Defendants' sudden reversal of policy concerning equine teeth floating under the Act is the cause of a real controversy between the parties for another reason. Defendants' active enforcement of their freshly-minted interpretation exposes Plaintiffs to either having (1) to abandon their occupation and write off their investments in their training or (2) to uproot themselves and their families and move to a different state, like Florida, that allows them to practice. In either case, Plaintiffs will lose the value of their goodwill developed over many years with horse owners in Texas.

Should Plaintiffs not choose one of these lose-lose alternatives and continue to work, they will be subject to the same process, civil fines and risk of incarceration as the *Mitz* plaintiffs and other practitioners have endured under the Board's reinterpretation of the Veterinary Licensing

Act, Tex. Occ. Code §§ 801.503 & .504 because the Board has instructed its staff to continue to pursue lay floaters. Exh. E. Bd. Meeting Minutes. p.5. Agenda Item C.3 (June 14, 2007). And the staff has complied with the Board's mandate by continuing to issue cease-and-desist letters. Exh. F. Board Notes, at 4 (Apr. 2008).

Plaintiffs also meet the second prong of the standing requirement because their constitutional claims will "be actually determined by the judicial declaration sought." *Reconveyance Services*, 240 S.W.3d at 435. Plaintiffs seek a declaratory judgment of their constitutional rights—something that only this Court, and not SOAH, is able to provide. There is no question that such a declaration by this Court will determine Plaintiffs' rights under the law.

Defendants argue Plaintiffs lack standing because Defendants have not sent them cease-and-desist letters or been subjected to any administrative, civil or criminal penalties under the Act. (Defs. Br. 8). But that is simply irrelevant. The Board's actions against similarly situated practitioners pose an on-going threat to Plaintiffs' occupations because Plaintiffs are unable to assure their existing clients in Texas that they will be able to continue providing dental services in the future. Moreover, Plaintiffs are unable to advertise their services to potential new customers given Defendants' enforcement history regarding advertising of services by non-veterinarians. *See* Exh. B. Both are concrete injuries.

Finally, Defendants point to *Brown v. Todd,* 53 S.W. 3d 297, 305 (Tex. 2001), for the proposition that standing requires "a distinct injury to the plaintiff." *Brown* involved a voter and a city council member's standing to challenge an executive order issued by Houston Mayor Lee Brown. In rejecting the voter's claim for standing, the Supreme Court observed that "[n]o Texas court has ever recognized that a plaintiff's status as a voter, without more, confers standing to challenge the lawfulness of governmental acts." *Id.* at 302. Similarly, in rejecting the city

council member's claim, the Court noted the member "does not and cannot challenge the anti-discrimination policy's actual operation because it does not apply to him." *Id.* at 305.

The instant case is easily distinguishable from *Brown* because the facts are clearly inapposite. Not only are Plaintiffs not voters or city council members, Defendants' reinterpretation of the Act actually applies *directly* to them.[2]

Plaintiffs have standing to bring their claims because there is a real controversy between the parties that can only be determined by a declaratory judgment.

3. Plaintiffs' claims are ripe.

Defendants suggest that Plaintiffs' claims are not ripe because Defendants themselves have not engaged Plaintiffs in an administrative process. (Defs.' Br. 9). Defendants are using the wrong test for ripeness that, here again, attempts to insulate their actions from review. Ripeness is a question of law that cannot be controlled by Defendants' own decisions regarding the enforcement of the Act.

A justiciable controversy need not be a fully ripened cause of action in order to confer jurisdiction upon a court. Instead, to confer jurisdiction, the fact situation must merely manifest the ***ripening seeds of a controversy.*** *Texas Dep't of Pub. Safety v. Moore*, 985 S.W.2d 149, 153 (Tex.App.-Austin 1998) (emphasis added).

In *Moore*, a candidate not selected for promotion sued the Department of Public Safety, under the Uniform Declaratory Judgment Act, not only on the grounds that the Department racially discriminated against him on four occasions but also on the grounds that the Department adopted rules that would discriminate against him when he applied for ***future promotions***.

[2] Oddly, in all the other standing cases listed in Defendants' brief, courts found that all but a single plaintiff in one case had standing. There is generally no basis in these cases to support Defendants' claim Plaintiffs lack standing.

Focusing on the long-term implications of the Department's rules, the Court of Appeals concluded that Moore's interest in being treated fairly ***in the future*** under the Department's newly created promotional rules implicated the Uniform Declaratory Judgment Act's purpose of clarifying rights. Specifically, the *Moore* Court stated:

> It ***is not necessary that a person*** who seeks a declaration of rights under the Uniform Declaratory Judgment Act shall ***have incurred or caused damage or injury*** in a dispute over rights and liabilities, but it has frequently been held that an action for declaratory judgment would lie when the fact situation manifests the presence of ***'ripening seeds of a controversy.***' Such appear where the claims of several parties are present and indicative of ***threatened litigation in the immediate future which seems unavoidable***, even though the differences between the parties as to their legal rights have not reached the state of an actual controversy. *Moore*, 985 S.W.2d at 153-154 (emphasis added).

Here, as in *Moore,* Defendants have newly formulated an interpretation of a statute to discriminate against competent lay practitioners who float horses' teeth. Defendants have so much confidence in the correctness of their reinterpretation that the Board concluded it need not explain their change or present their justification at a public meeting and instead "directed staff to (continue to) enforce the rule …" Exh. E. Bd. Meeting Minutes. p.5. Agenda Item C.3 (June 14, 2007) . For all practical purposes, Defendants have carved their new policy in stone.

Like *Moore*, Plaintiffs are well aware of Defendants' new interpretation and are concerned about Defendants' future enforcement efforts against them based on Defendants' ongoing enforcement against similarly situated floaters. This concern about the future application of the new policy surely meets the minimal threshold test of a ripening seed of a controversy, as established in *Moore*. Accordingly, Plaintiffs do not have to wait until for Defendants to enforce the Act against Plaintiffs for Plaintiffs to bring their claims. Their claims are ripe now.

Defendants rely repeatedly on *Patterson v. Planned Parenthood of Houston and Southeast Texas,* 971 S.W.2d 439, 442 (Tex. 1998) for precedent on ripeness. In that case, the

Texas Supreme Court properly overturned, based on a lack of ripeness, a district court ruling that a rider attached to a family planning appropriation, barring the use of state funds to dispense prescription drugs to minors without parental consent, was unconstitutional.

The decision rested on the facts that the Texas Department of Health had not finalized its plans, and was in fact leaning toward a plan that would leave Planned Parenthood and its client unaffected. *Id.* at 444.

That is simply not the case here. Defendants have decided that horse teeth floating *is* the practice of veterinary medicine and have issued numerous cease-and-desist letters to numerous practitioners to enforce that decision. Plaintiffs are most certainly affected—directly—and face the most serious consequences should they continue operating as they are now.

Plaintiffs are properly raising fully justiciable claims and they face the very uncertainty about their rights that that Uniform Declaratory Judgment Act is intended to address.

C. The Board has neither exclusive nor primary jurisdiction over the *Boone* Plaintiffs.

There is a strong presumption in favor of access to the courts that must be overcome by an agency seeking to prevent—or delay—a citizen's day in court.[3] *See, e.g., Reconveyance Servs.*, 240 S.W.3d at 428 (notwithstanding an agency's possible concurrent jurisdiction, "courts of general jurisdiction *presumably* have subject matter jurisdiction unless a contrary showing is made") (emphasis added, internal quotations and citations omitted).

1. There are no factual disputes that this Court cannot address.

The heart of Defendants' argument is that "[u]ntil such time, ***if ever***, that the Veterinary Board proves via a contested case hearing that Plaintiffs are practicing veterinary medicine …

[3] Defendants' claim that they have exclusive jurisdiction here is further undermined by the fact that Judge Livingston ruled that Defendants did not have exclusive jurisdiction in the *Mitz* case—a decision Defendants did not appeal. Here, Defendants' claim of exclusive jurisdiction is even more tenuous given that, unlike in *Mitz*, they have not taken any administrative actions against the *Boone* plaintiffs.

there is simply nothing for this Court to adjudicate in this case." (Defs.' Br. at 12.) (emphasis added). In essence, Defendants are claiming that it is necessary for them to conduct an administrative proceeding when they get around to it, to determine if Plaintiffs perform horse teeth floating before Defendants' interpretation of the Act can be subjected to judicial review.

Not so. Plaintiffs freely admit that they are equine dental practitioners, and they have sworn that they "each perform certain equine dental services, known colloquially as horse teeth 'floating,' in Texas for compensation." Exh. G. Plaintiffs' Original Verified Petition for Declaratory and Injunctive Relief. ¶ 4.

In fact, it is clear that every aspect of horse teeth floating is now illegal under the Board's new interpretation of the Act. Accordingly, the entire administrative proceeding is nothing more than a giant charade designed to delay as long as possible Plaintiffs' ability to assert their claims before a tribunal that can actually do something to vindicate them.

To the extent there are disputed facts in this declaratory judgment proceeding, they pertain exclusively to the Board's conduct, not Plaintiffs'. For instance, it appears the Board conducted no studies, performed no research, held no hearings, and took no meaningful steps to determine the impact of its new policy on the well-being of Texas' one million horses, its 275,000 horse owners, and its hundreds of equine dental practitioners. Likewise, it does not appear the Board considered the fact that there are only about 600 large animal veterinarians in the entire state, few of whom possess the training or equipment necessary to properly float horses' teeth. Whether those facts are disputed or not can be determined through the civil discovery process, and they are the only categories of facts that bear on the legality of the Board's new horse teeth floating policy, which is the sole issue in these proceedings.

Contrary to the Board's arguments, the mere fact that this declaratory judgment action may involve disputed facts certainly does not mean the case must be dismissed (or even abated in favor of the Board's administrative proceeding.) Both *Juliff Gardens* and *Reconveyance Services* involved the application of law to facts, and both nevertheless allowed declaratory judgment actions to proceed in the face of ongoing administrative proceedings. For instance, the main issue in *Juliff Gardens* was whether a particular topographical feature was a "canal" or a "ditch." 131 S.W.3d at 275 & n.3. Resolution of that question would certainly involve the application of law to disputed facts, but the Court of Appeals nevertheless instructed the district court to hear the plaintiffs' constitutional challenge instead of abating the proceeding in favor of an administrative hearing, as the government urged.

Reconveyance likewise involved disputed factual issues, as reflected in an e-mail from the agency's director, stating:

> I have always said that I believe the title agents should be paying for the service and not the consumers…. When we see an agent charge the fee directly to the consumer we cite the agent for a rule violation and tell him that a fee is unauthorized. We currently have pending disciplinary action (with fines recommended) against an agent for charging a fee for release tracking services.

It was not certain that the pending disciplinary action would actually result in fines. 240 S.W.3d at 427. Nor was it a foregone conclusion that the agency would file an administrative complaint against Reconveyance if the company decided to go forward with its business plan. Nonetheless, the court refused to abate the case and force Reconveyance into the administrative process.

In short, there is simply no support for the Board's claim that there is nothing for this Court to adjudicate. This Court is capable of addressing all factual disputes.

2. The Board lacks authority to resolve the constitutional claims presented in this case.

Texas law makes clear that an administrative agency's request for abatement, or, in this case, dismissal, must be denied where, as here, the agency has no power to resolve the legal claims presented in the court proceeding. As the court stated in *Juliff Gardens*, "[i]n order for either exclusive or primary jurisdiction to apply, the [Board] must have *authority* to determine the controversy at issue." 131 S.W.3d at 278. Here, Plaintiffs seek a declaration that the Board's new interpretation of the Act violates their constitutional right to earn a living free from unreasonable government interference. The Board has *absolutely no authority* to hear these constitutional claims, nor has it ever suggested that it has that authority. *See, e.g., Tex. State Bd. of Pharmacy v. Walgreen Tex. Co.*, 520 S.W.2d 845, 848 (Tex.App.-Austin 1975, writ ref'd n.r.e.) ("Administrative agencies have no power to determine the constitutionality of statutes."); *Juliff Gardens*, 131 S.W.3d at 278 ("the Commission admits it has no authority to determine the constitutionality of a statute").

Seeking to avoid that simple but fatal fact, the Board argues that this case is about an area within the Board's area of expertise. (Defs' Br. 12.) Defendants are mistaken. As noted above, the Board has already construed the Act and, at the insistence of the Board, the staff continues its efforts to enforce it.

At the heart of this case, Plaintiffs are not challenging any of the fine details of veterinary medicine. Instead, Plaintiffs are questioning the constitutionality of Defendants' unambiguous determination that "dentistry" and "veterinary medicine" now include horse teeth floating. Thus, while the Board's staff may have some expertise in the technical aspects of the practice of veterinary medicine, they are not empowered to pass upon the constitutionality of governing

statutes or the legality of the Board's interpretation of those statutes. *See, e.g., Juliff Gardens*, 131 S.W.3d at 279.

PRAYER

For the reasons stated above, Plaintiffs respectfully request that this Court deny Defendants' motion to dismiss for lack of jurisdiction. Moreover, given Defendants' apparent withdrawal of their motion to consolidate this case with *Mitz*, Plaintiffs further respectfully request that this Court set a date by which time a scheduling meeting to determine a timely resolution of Plaintiffs' declaratory judgment action be established.

Respectfully submitted this 26th day of September, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been forwarded to all counsel of record herein by way of:

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on this 26th day of September, 2008, to-wit:

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