IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

TAMMY NUTALL-PRITCHARD, Plaintiff, v. THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS, *et. al.* Defendants.	)	Case No. 16-0455-II

RESPONSE TO MOTION TO DISMISS UNDER TENN. R. EVID. 12.02(1) FOR LACK OF SUBJECT MATTER JURISDICTION

COMES NOW Tammy Nutall-Pritchard, the plaintiff in this case ("Ms. Pritchard") to respectfully respond to the motion of the defendants ("the State") to dismiss under Tenn. R. Civ. P. 12.02(1), and supporting memorandum ("Memorandum").

I.
Introduction

This Court possesses subject matter jurisdiction to hear these claims. (Memorandum, p. 1). This Court is a court of general jurisdiction possessing all the powers and jurisdiction incident to a court of equity. The Declaratory Judgments Act ("DJA") expanded this Court's jurisdiction so it may consider

cases even when no other relief is to be granted other than a declaration such as this one. This jurisdiction exists except when specifically circumscribed by statute, such as the sovereign immunity statute. The sovereign immunity statute does not limit the Court's jurisdiction here because Ms. Pritchard does not seek to reach the State's treasury.

The Uniform Administrative Procedures Act ("UAPA") authorizes this Court to entertain suits such as this one. Exhaustion is not required because the suit is predominantly facial and because of equitable considerations. This Court also has jurisdiction to issue injunctions and to entertain a Section 1983 action. Under both exhaustion is not required and the State is not immune.

II.
Rule12.02(1)

Rule 12.02(1) provides for dismissal for lack of jurisdiction over the subject matter. Rule 12.02 motions come in two forms: facial, attacking the sufficiency of the pleading; and factual, which raises a factual controversy. *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007). Because the State has submitted the declarations of Roxana Gumucio and Laura Martin to show that Ms. Pritchard did not obtain a declaratory order, this is a factual hearing. This Court has discretion to consider "affidavits, documents, and even [conduct] a limited evidentiary hearing to resolve jurisdictional facts." *Id.* (citing cases).

Ms. Pritchard respectfully intends to offer limited proof on the exhaustion issue. This is necessary to more fully contextualize the declarations submitted by the State and will directly support Ms. Pritchard's argument that exhaustion was not required in this case.

III.
The Court's general jurisdiction and the Declaratory Judgment Act

This Court has original and general jurisdiction to hear constitutional claims. That jurisdiction was expanded under the Declaratory Judgments Act to cover cases where a declaration is the only remedy. Sovereign immunity is not a bar when a suit does not seek to reach the State's treasury.

A. Chancery Court jurisdiction.

Art. I, § 17 of the Tennessee Constitution provides:

> all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

The "obvious meaning" of this is that the courts shall be open to the citizens of the state to "resort for the enforcement of the rights denied, or redress of wrongs done them." *Staples v. Brown*, 85 S.W. 254, 255 (Tenn. 1905). The circuit courts of Tennessee have original jurisdiction of all cases unless the law confers jurisdiction upon another tribunal. *Id.* at 255-56. *See also* Tenn. Code Ann. § 16-11-102 (LexisNexis 2015) (chancery court has concurrent

jurisdiction with circuit court of all civil causes of action except for claims of unliquidated damages). "The right of every one to his day in court cannot be denied him." *Staples,* 85 S.W. at 255 (citing *Railroad v. Bate,* 12 Lea 577).

A chancery court has all the powers of circuit court, with a few statutory exceptions. *See* Tenn. Code Ann. §§ 16-10-101, 16-11-102(a) (Lexis 2015). It also possesses the powers and jurisdiction incident to a court of equity.). Tenn. Code Ann. § 16-11-101 (LexisNexis 2015). This means that this Court can hear any claim unless otherwise limited by statute. Constitutional suits have long been recognized as inherently within the jurisdiction of chancery. *See Lynn v. Polk,* 76 Tenn. 121, 125 (1881) (constitutional challenge—"It is an inherent power of courts of equity to prevent, as well as redress grievances. ...").

The Declaratory Judgments Act ("DJA") further vests courts of records with "the *power* to declare rights, status, and other legal relations whether or not further legal relief is or could be granted." Tenn. Code. Ann. § 29-14-102(a) (LexisNexis 2015) (emphasis added). The DJA further provides that:

> Any person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status or other legal relations thereunder.

Tenn. Code Ann. § 29-14-103 (LexisNexis 2015). The Supreme Court "is committed to a liberal interpretation of the Declaratory Judgments Act so as to make it of real service to the people and to the profession." *Hodges v.*

Hamblen County, 277 S.W. 901, 902 (Tenn. 1925). The DJA marked an expansion in trial court jurisdiction by allowing them to determine issues even when relief beyond the declaration of rights could not be granted. *See Nashville, C. & St. L. Ry. v. Wallace*, 288 U.S. 249, 259, 263 (1933). The DJA thus "grants subject matter to the Davidson County Chancery Court to address the constitutional issues." *See Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008).

B. Sovereign immunity.

The State wrongly believes that sovereign immunity prevents this suit from proceeding under any grounds *but* the Uniform Administrative Procedures Act ("UAPA"). (Memorandum, p. 6). The statute will not support this reading. It very plainly states that the State is generally immune *only* from suits that seek to reach the treasury. Tenn. Code. Ann. § 20-13-102 (LexisNexis 2015). *See Williams v. Nicely*, 230 S.W.3d 385, 388 (Tenn. Ct. App. 2007). As explained more fully below, this is how Tennessee Courts have long understood sovereign immunity, not that the State is generally immune from all suits.

There is no general grant of sovereign immunity apart from Tenn. Code. Ann. § 20-13-102 because Art. I. § 17 was not self-executing. *General Oil Co. v. Crain,* 95 S.W. 824, 826 (Tenn. 1906). The enactment of what is presently Tenn. Code. Ann. § 20-13-102 "is ample in its operation to do what the legislature intended in its passage, and that now the funds or property,

actual or *prima facie*, of the State cannot be made the subject of litigation in its courts either by making it a party directly or indirectly by suing one of its officers, save for when it has given its consent by express legislation." *Id.*

Consequently, the State is not generally immune from suits that do not seek to reach the treasury. The UAPA is not the only way to sue the state. The UAPA has not been around forever, and constitutional suits proceeded long before the UAPA so long as they did not seek to reach the State's treasury. *See Stockton v. Morris & Pierce*, 110 S.W.2d 480, 481-82 (Tenn. 1937). Courts are committed to a liberal interpretation of the DJA so as to make it "of real service to the people and to the profession." *Hodges*, 277 S.W. at 902. Immunity from any suit under the DJA except as provided for by the UAPA would be anything but.

Simply stated, this Court's jurisdiction is statutorily granted and may be statutorily limited. One such example is suits against the State, but only when they seek to reach the State's treasury. Chancery courts also lack jurisdiction over criminal matters. *See* Tenn. Code Ann. § 16-11-102(a) (chancery courts have concurrent jurisdiction with circuit courts "of all *civil* causes of action") (emphasis added). *See also J.W. Kelly & Co. v. Conner*, 123 S.W. 622, 635 (Tenn. 1909) ("Courts of equity are not constituted to deal with crime and criminal proceedings.").

This is not to say, however, that chancery courts have *no* subject matter jurisdiction, either generally or under the DJA. *See Colonial Pipeline*

Co. v. Morgan, 263 S.W.3d 827, 853 (Tenn. 2008) ("subject matter jurisdiction is not a bar."). The DJA just does not override specific, statutory limitations otherwise placed on the jurisdiction of chancery. The DJA's explicit wording is a grant of power; courts of record are vested with "the *power* to declare, rights, status, and other legal relations whether or not further legal relief is or could be granted." Tenn. Code. Ann. § 29-14-102(a) (LexisNexis 2015) (emphasis added).

C. Jurisdiction under the DJA.

The courts have long recognized that the DJA does grant additional jurisdiction to chancery. The DJA was passed in Tennessee in 1923. *Colonial Pipeline*, 263 S.W.3d at 837. Shortly after, in *Miller v. Miller*, 261 S.W. 965, 970 (Tenn. 1924), the Tennessee Supreme Court recognized "the jurisdiction conferred" by the DJA to courts of record. *See Colonial Pipeline*, 263 S.W.3d at 837, n. 3. "[T]he purpose of the act was to *enlarge* the jurisdiction of the court...." *Miller*, 261 S.W. at 971 (emphasis added). No less than the U.S. Supreme Court has said that "Tennessee[s] Declaratory Judgments Act confers *jurisdiction* on courts of record 'to declare rights ... whether or not further relief is or could be claimed . ...'". *Wallace*, 288 U.S. at 259 (emphasis added). Long before the UAPA became law, the highest courts in the land had recognized that the DJA conferred jurisdiction on chancery courts even beyond its general jurisdiction.

Not much later, the Court held that sovereign immunity was not a bar to declaratory suits that challenge the constitutionality of a statute and do not seek to reach the State's treasury. In *Stockton*, the plaintiffs challenged the constitutionality of the statute that had resulted in the seizure of their tobacco. 110 S.W.2d 480 (Tenn. 1937). Stockton, a state officer, moved to dismiss and requested a demurrer, the precursor to a Rule 12.02(1) motion. *See Gore v. Tenn. Dep't of Corr.*, 132 S.W.3d 369, 372-73 (Tenn. Ct. App. 2003). The State alleged that the court lacked subject matter jurisdiction because the state was generally immune from suits. *Stockton*, 110 S.W.2d at 481-82. This failed for two reasons, both relevant to the present case. First, the general rule of state immunity does *not* apply to suits that do not seek to reach the treasury. Such suits are not "of the inhibited class." *Id.* at 482 (quoting *Insurance Co. v. Craig*, 62 S.W 155, 157 (Tenn. 1900)). Second, an officer "executing an unconstitutional act, is not acting by authority of the State." *Id.* at 482 (quoting *Lynn v. Polk*, 76 Tenn. 121 (1881). Thus, he or she does not wear the robe of the sovereign and may not claim immunity. *See Lynn*, 76 Tenn. at 131 (constitutional challenge is not against the State "but is a suit against persons attempting to commit a wrong, and may be maintained").

This is still the rule. The *Stockton* ruling was reaffirmed by the Supreme Court in *Colonial Pipeline,* 263 S.W.3d at 853, 849-50 .The Court rejected the State's argument that the DJA did not grant subject matter

jurisdiction to chancery. "It is our view, therefore, that the Declaratory Judgment Act grants subject matter jurisdiction to the Davidson County Chancery Court to address the constitutional issues." *Colonial Pipeline Co. v. Morgan,* 263 S.W.3d at 853. As to sovereign immunity issue, it "simply does not attach," *id.* at 850, when a state official is alleged to be enforcing an unconstitutional law. Many decisions recognize that sovereign immunity does not bar suits that do not seek the State's treasury. *See Cornelius v. McWilliams*, 641 S.W.2d 508, 512 (Tenn. Ct. App. 1982) (declaratory judgment action attacking constitutionality of law not barred by sovereign immunity; chancellor correct to overrule State's motion to dismiss); *Campbell v. Sundquist,* 926 S.W.2d 250, 257 (Tenn. Ct. App. 1996) ("we view the Act as an enabling statute to allow a proper plaintiff to maintain a suit against the State challenging the constitutionality of a state statute.") (*abrogated on other grounds by Colonial Pipeline*, 263 S.W.3d at 853)). *C.f., City of Jackson v. State*, 2008 Tenn. App. LEXIS 318, *10-11 (Tenn. Ct. App. May 27, 2008) (DJA does not waive sovereign immunity such that a suit may be brought "designed to reach the state's treasury") (copy of opinion attached). This is consistent with the broader principle that Tennessee courts have "affirmative obligations to assert and fully exercise their powers ... and to fend off legislative or executive attempts to encroach upon judicial p[r]erogatives." *Anderson Cty. Quarterly Court v. Judges of 28th Judicial Circuit*, 579 S.W.2d 875, 878 (Tenn. Ct. App. 1978) (quotation omitted).

D. Sovereign immunity does not bar Ms. Pritchard's suit.

This Court has subject matter jurisdiction over Ms. Pritchard's suit. She has not asked for a dime of damages. She has alleged that the defendants have enforced unconstitutional laws that would be unprotected by the sovereign immunity per the straightforward application of *Colonial Pipeline.* 263 S.W.3d at 853.

E. The *Zirkle* precedent changes nothing.

The State relies on *Zirkle v. Kingston*, 396 S.W.2d 356, 363 (Tenn. 1965) in arguing that this Court lacks subject matter jurisdiction. (Memorandum, p. 6). *Zirkle* concerned a governmental taking of land without just compensation, which obviously entails reaching the State's treasury. The *Zirkle* case found that the DJA was an improper procedural vehicle because Tennessee's reverse condemnation statute provided for aggrieved plaintiffs to "sue for damages in the ordinary way." *Zirkle,* 396 S.W.2d at 361. *Zirkle* represents nothing useful; courts of equity long have lacked jurisdiction over condemnation proceedings unless the remedy at law is inadequate. *Id.* at 361-62 (citing cases). The other causes of relief failed for similar reasons. *See id.* (no injunctive relief because reverse condemnation action only allows for money damages; unjust enrichment was a claim for unliquidated damages). This case reaffirms that the DJA does not trump specific, statutory jurisdictional limits placed on chancery courts, such as criminal matters. *See Clinton Books, Inc. v. Memphis*, 197 S.W.3d 749, 754 (Tenn. 2006). But in a

case such as this one, courts of equity do, unlike in condemnation proceedings, have original jurisdiction over constitutional claims, and generally retain it unless it has been specifically circumscribed, such as in suits seeking to reach the State's treasury.

In any event, the precedential value of *Zirkle* is seriously questionable. The State acknowledges that the courts have recognized subject matter jurisdiction for chancery courts under the DJA in some cases, but maintains that this is limited to criminal statutes. (Memorandum, pp. 7-8). In actuality, there is a fundamental disagreement over whether the Court has departed from *Zirkle* altogether. *Compare Blackwell v. Haslam*, 2012 Tenn. App. LEXIS 23, *14-15 (Tenn. Ct. App. Jan. 11, 2012) (copy of opinion attached) (*Zirkle* not explicitly overruled; but the Court has "clearly departed from the unequivocal" rule and discussing cases) *with Memphis Bonding Co. v. Crim. Court of Tenn. 30th Dist.*, 2015 Tenn. App. LEXIS 930, at *20 (Tenn. Ct. App. 2015) (disagreeing that Supreme Court has "clearly departed" from the *Zirkle* rule) (copy of opinion attached). Whatever remains of *Zirkle*, it is indisputable that chancery courts do have jurisdiction when an unconstitutional criminal statute also affects property rights. *See Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520, 522 (Tenn. 1993); *Erwin Billiard Parlor v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927).

The State erroneously sees this as limited to criminal statutes, (memorandum, pp. 7-8) but it only comes up in that context because chancery

courts otherwise do not have jurisdiction over criminal cases. Regardless, that does not matter because the State *has* criminalized unlicensed shampooing so it would fit even the exception as the State understands it. (Complaint, p. 11, para. 48) (citing Tenn. Code Ann. § 40-35-111(e)(2) (LexisNexis 2015)). This "crime" is intertwined with her property rights so Ms. Pritchard's case meets even this standard. *State v. AAA Aaron's Action Agency Bail Bonds, Inc.,* 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998) (citing *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 543 (1985) (right to work in a chosen career is both a liberty and property interest)). No matter how *Zirkle* is understood, this Court does have subject matter jurisdiction.

IV.
This Court's jurisdiction, the UAPA, and exhaustion.

This suit also proceeds under the UAPA. While ordinarily a plaintiff must exhaust administrative remedies under the UAPA, this is not required for suits such as this one. The proof will show that equitable considerations prevent exhaustion from barring Ms. Pritchard's access to the courts. Moreover, facial constitutional challenges like this one cannot be brought before an administrative agency.

A. The UAPA.

The Court recognizes that the UAPA is "remedial legislation and, as such, should be liberally construed, and any doubt as to the existence or the extent of a power conferred *shall be resolved in favor of the power.*" *Colonial Pipeline,* 263 S.W.3d at 841 (citations and quotations omitted) (emphasis

added). The UAPA provides that a prospective plaintiff must first petition for a declaratory relief with an agency. *Colonial Pipeline*, 263 S.W.3d 840-41. Only once denied, may that plaintiff file a suit in Chancery Court of Davidson County. *Id.* at 841-42 (citing Tenn. Code Ann. § 4-5-225)).[1] Ordinarily, the failure to exhaust the available remedy before the Board will deprive the courts of jurisdiction. *Stewart v. Schofield*, 368 S.W.3d 457 (Tenn. 2012).

B. Exhaustion.

The exhaustion requirement can be excused on both equitable and constitutional grounds. The Supreme Court ruled on equitable grounds that exhaustion is not mandatory when the agency was not empowered to grant effective relief, or when it can be shown to be biased or has predetermined the issue. *See Colonial Pipeline*, 263 S.W.3d at 845 (citations and quotations omitted). This is a proof issue. Tennessee affords a presumption that its officials act in good faith. *See West v. Schofield*, 460 S.W.3d 113, 131 (Tenn. 2015). Ms. Pritchard does not question the integrity of the relevant officials, but she does maintain they could not give her the relief she seeks, and have predetermined the issue. Ms. Pritchard understands she must carry her evidentiary burden before this Court. She intends to do so.

It is unconstitutional to require exhaustion of a facial challenge to the constitutionality of a statute. While an agency can consider challenges to its procedures, or as-applied challenges to statutes, it cannot entertain facial

[1] Ms. Pritchard does not dispute that she never formally petitioned the Board for a declaratory order. Such an action was not required, as explained below.

challenges without violating separation of powers. *Colonial Pipeline*, 263 S.W.3d at 844 (citing *Richardson v. Bd. of Dentistry*, 913 S.W.2d 446 (Tenn. 1995)). In those cases the UAPA's exhaustion requirement is unconstitutional and void as to facial constitutional challenges. *Colonial Pipeline*, 263 S.W.3d at 844-45.

This rule also extends to claims that are mixed, both facial and as-applied. The Court characterized the claims in *Colonial Pipeline* as "a mixture of constitutional challenges," including as-applied ones that could ordinarily be submitted to an agency. 263 S.W.3d at 846. Taking a look at the challenge "as a whole," the suit in *Colonial Pipeline* was best characterized as a facial attack because "the ultimate resolution depends predominantly upon whether the underlying statutes comply with constitutional mandates." *Id.* at 846.

C. Ms. Pritchard's suit is predominantly facial.

Ms. Pritchard's complaint is almost entirely facial. A facial challenge seeks to establish that the law cannot constitutionally be applied to anyone. *Tolley v. AG of Tennessee*, 402 S.W.3d 232, 237 (Tenn. Ct. App. 2012) (citations omitted). In an as-applied challenge, the proponent presumes that the statute is "generally valid," but that it is unconstitutional in "specific applications." *Id.* (citations omitted). According to the complaint, any kind of a license to wash hair violates Ms. Pritchard's constitutionally protected right to economic liberty. (Complaint, pp. 15, 19, para. 71-72, 95). This "focus[es] on

the language and effect of the statutes themselves," *Colonial Pipeline*, 263 S.W.3d at 846, not how they have been applied in her particular case. Ms. Pritchard does not "seek a judicial review of an administrative decision," *id.* at 841; in fact, the complaint even alleges that the Board composition *itself* is unconstitutional. (Complaint, p. 17, para. 82). There is no "institutional competence," *Colonial Pipeline*, 263 S.W.3d at 845 (citation and quotation omitted) of the Board that would aid the ultimate resolution of this matter. The suit flatly cannot be resolved without determining "whether the underlying statutes comply with constitutional mandates." *Id.* at 846. This is "best characterized," *id.*, as a facial suit.

The State's assessment to the contrary, (memorandum, pp. 8-9) is baffling. As for the "tenor" of the suit, (memorandum, p. 9), the complaint is unambiguous; Ms. Pritchard thinks the shampoo licensure laws need to be eliminated, root and branch. Their very existence is unconstitutional. Even *if* the State has made the license mandatory (Claim One), and even *if* a school taught the shampoo curriculum (Claim Three(B)), the licensure requirement—indeed, *the very composition of the Board* (Claim Three (A))—would be unconstitutional per the complaint. Ms. Pritchard has not equivocated. The tenor of this suit is decidedly facial in character.

Even the State admits that Claims Two, Four, and half of Claim Three are facial attacks. In other words, over *half* of the suit is facial by the State's own tally. If nothing else, the preference for resolution of constitutional

issues then militates towards allowing Ms. Pritchard's case to proceed. *Colonial Pipeline*, 263 S.W.3d at 841. (UAPA intended to be "remedial," "liberally construed" and "any doubt as to the existence or the extent of a power conferred shall be resolved in favor of the power"). Owing to the importance of constitutional issues, their consideration should "rarely be foreclosed by procedural technicalities." *Id.* at 844-45 (citations and quotations omitted). It bears mentioning that the State's tally misunderstands the nature of Claim One because it too implicates the deprivation of a federal right, as will be explained in greater detail below. Yet, even under the State's characterization, this should be considered a facial challenge.

Finally, even if the State was correct, the proper remedy should only be dismissal of the as-applied claims. That would be Claim One and half of Claim Three. The rest of the claims would proceed, even by the State's reckoning.

V.
Injunctive Relief

This Court also has jurisdiction to provide for injunctive relief pursuant to Tenn. Code Ann. § 29-1-101. It provides for injunctive relief in equity proceedings. The State does not appear to dispute that this provision authorizes this Court to issue injunctions, but maintains that Ms. Pritchard has not requested an injunction. (Memorandum, p. 5). She has. Her suit is called a "complaint for declaratory and injunctive relief." (Complaint, p. 1).

She cited to this provision. (Complaint, p. 3, para. 5, 7). She has requested that this Court enter an order permanently "enjoining the defendants from enforcing a licensure requirement on shampooers." (Complaint, p. 20, para. VI(E)). This Court may entertain the suit and issue an injunction, just not, as shown above, against state law enforcement officials, which the defendants are not.

VI.
This Court and Section 1983

This suit also proceeds under the federal civil rights statute, 42 U.S.C. § 1983. The State agrees that Section 1983 vests this Court with jurisdiction but maintains that it only applies to Claim Four because it is the only federal constitutional right. (Memorandum, p. 10). This is incorrect. This Court can also hear state constitutional law claims under Section 1983. Even *federal* courts, which lack general jurisdiction, may entertain state constitutional law claims in a 1983 action by exercising supplemental jurisdiction. *See* 28 U.S.C. § 1367(a) (LexisNexis 2015). State courts, for their part, have concurrent Section 1983 jurisdiction, *see, e.g., Howlett v. Rose*, 496 U.S. 356, 367 (1990), so they have at least as much jurisdiction as a federal court. It is well established that "state courts unquestionably have jurisdiction to adjudicate 42 U.S.C.A. § 1983 claims, and ... the doctrine of sovereign immunity is not a defense to civil rights actions when they are property filed." *White v. State ex. rel. Armstrong*, 2001 Tenn. App. LEXIS 101, at *15, n. 9 (Tenn. Ct. App. Feb. 16, 2001) (copy of opinion attached) (citations omitted). State courts,

furthermore, start with *general* jurisdiction to consider Tennessee constitutional claims. *See id.* (claim lodged under 1983 "may be pursued in the circuit or chancery courts" but not juvenile court because it is of limited jurisdiction). *See generally* Tenn. Code Ann. § 16-11-101; 29-14-102 (LexisNexis 2015); *Staples,* 85 S.W. at 255. Odd indeed it would be if federal courts could hear Tennessee constitutional claims under 1983, but a state court could not.[2]

Furthermore, Claim One is a federal claim. Citizens of Tennessee have a liberty or property in a career. *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983) (when states regulated occupations through licensure, "their definitions of rights in a license...may give rise to competition rights and constraints that define property interests"). *See also Truax v. Raich*, 239 U.S. 33 (1915) ("the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."); *AAA Aaron's Action Agency Bail Bonds,* 993 S.W.2d at 85 (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985)) (Tennessee Constitution protects "the right to engage in a chosen business, occupation," as "both a liberty and property interest"). By acting without statutory authority in requiring a

[2] Notably, with a couple of exceptions not at issue here (like federal abstention issues, or federal statutory preemption issues), exhaustion of administrative and judicial state remedies is not a prerequisite to a 1983 action. *See Patsy v. Florida Board of Regents*, 457 U.S. 496, 500-01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983, and we have not deviated from that position in the 19 years since *McNeese.*").

license, the Board deprived Ms. Pritchard and countless others of their chosen career. This implicates well-recognized liberty and property interests, recognized by both federal and Tennessee courts.

VII.
Conclusion

The motion should be denied.

Dated: June 20, 2016

Respectfully submitted,

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