

**FILED**  
IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE  
TWENTIETH JUDICIAL DISTRICT  
PART II, AT NASHVILLE

2018 JUN 13 PM 2:30  
DAVIDSON CO. CHANCERY CT.

**ELIAS ZARATE,**

Plaintiff,

v.

No. 18-534-II

**THE TENNESSEE BOARD  
OF COSMETOLOGY AND BARBER  
EXAMINERS; ROXANA GUMUCIO, in her  
her official capacity as executive director of the  
Tennessee Board of Cosmetology; RON R.  
GILLIHAN II, KELLY BARGER, NINA  
COPPINGER, JUDY MCALLISTER,  
PATRICIA J. RICHMOND, MONA  
SAPPENFIELD, FRANK GAMBUZZA,  
AMY TANKSLEY, ANITA CHARLTON,  
YVETTE GRANGER, JIMMY BOYD,  
BRENDA GRAHAM, and REBECCA  
RUSSELL, in their official capacities  
as members of the Board.**

**Defendants.**

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**MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

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Defendants have moved this Court under Tenn. R. Civ. P. 12.02(1) to dismiss this "Complaint for Declaratory and Injunctive Relief" on the grounds that the claims stated are not justiciable because Mr. Zarate has never actually been denied a master barber certification on either the basis of the challenged statute—a requirement that he have a high school diploma or its equivalent—or any other. He thus cannot show the sort of actual or imminent injury necessary to establish his standing to sue, much less connect it to specific government conduct or establish that his conjectural injury can actually be redressed by this Court. Nor is his challenge ripe because the

Board has never actually taken a position on the question at the center of this suit: Mr. Zarate's eligibility for a master barber certification. And, finally, this suit is not justiciable because Mr. Zarate's failure to apply for certification represents a failure to exhaust his administrative remedies. For these reasons, this suit is not justiciable, and should be dismissed for lack of subject matter jurisdiction.<sup>1</sup>

### **BACKGROUND**

According to the complaint,<sup>2</sup> Elias Zarate wishes to become a licensed master barber in Tennessee. Complaint at ¶ 12. Without a proper certificate of registration, it is unlawful to practice barbering in this State. *See* Tenn. Code Ann. § 62-3-107. The eligibility requirements for a certificate include having "received a high school diploma or, in lieu of a high school diploma, ... a GED® or HiSET® diploma" (hereafter, the "academic achievement requirement") along with being at least 17 years old, and completing the 1,500 hours of course work required at a registered

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<sup>1</sup> Standing, as a doctrine of justiciability, is a jurisdictional requirement. *See West v. Schofield*, 460 S.W.3d 113, 130 (Tenn. 2015) (citing *Campbell v. Sundquist*, 926 S.W.2d 250, 257 (Tenn. Ct. App. 1996) for the proposition that "[t]he existence of a justiciable controversy is also a jurisdictional prerequisite to the maintenance of an action under the [Declaratory Judgments] Act." and noting that *Campbell* was abrogated on other grounds by *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 853 (Tenn. 2008)). The proper procedural vehicle for the dismissal of this suit is thus Tenn. R. Civ. P. 12.02(1).

On a "motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading," Tenn. R. Civ. P. 12.02 requires that the "motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The Board does rely, for this motion, on matters outside the pleading (*see* Declarations of Roxana Gumucio and Hosam William, attached as exhibits to the motion to dismiss). While the motion asserts only lack of subject matter jurisdiction as a defense, the Board has chosen—out of an abundance of caution and a desire to avoid any unnecessary procedural disputes – to provide notice sufficient to comply with Rule 56 as well as a statement of undisputed material facts pursuant to Tenn. R. Civ. P. 56.03.

<sup>2</sup> "[W]hen a defendant asserts a facial challenge to a court's subject matter jurisdiction, the factual allegations in the plaintiff's complaint are presumed to be true." *Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445-46 (Tenn. 2012).

barber school. Tenn. Code Ann. § 62-3-110(b). Mr. Zarate has not met the academic achievement requirement. *See* Complaint at ¶ 141.<sup>3</sup>

Mr. Zarate contends that, but for the academic achievement requirement, he would be willing and able to attend barber school and obtain his certificate. *See* Complaint at ¶¶ 144-145. But this ignores the more immediate impediment to his licensure: his previous use of a fraudulent license to practice barbering.

Sometime before the filing of this suit, Mr. Zarate worked as a barber in a licensed shop, displaying a “bogus license.” Complaint at ¶ 55. In January 2017, an inspector from the Board inspected the shop at which Mr. Zarate worked and cited Mr. Zarate for providing barber services without a license. Complaint at ¶¶ 56-57. After this inspection, Assistant General Counsel Allison Renfro, on behalf of the Tennessee Department of Commerce & Insurance, filed a “Notice of Hearing and Charges” dated April 19, 2017, that notified Mr. Zarate of charges brought against him before the Board regarding violations of the Tennessee Barber Laws, Tenn. Code Ann. §§ 62-3-101, *et seq.* *See* Declaration of Hosam William (“William Decl.”) at ¶ 5 and Exh. I. That notice was sent to Mr. Zarate under cover of a letter from Ms. Renfro on the same date. *See id.*; *see also* Complaint at ¶¶ 58.

The Notice of Hearing and Charges describes Mr. Zarate’s conduct and accuses him of violating Tenn. Code Ann. § 62-3-107 (“[n]o person shall practice or attempt to practice barbering in this state . . . without a valid certificate of registration issued pursuant to this chapter by the state board of cosmetology and barber examiners.”). The notice asserts that Mr. Zarate’s violation of

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<sup>3</sup> He has also not attended barber school, which he contends is only because he has not met the academic achievement requirement. *See* Complaint at ¶¶ 71-73.

this statute subjected him to “administrative discipline including, but not limited to[,] revocation of, suspension or *refusal to issue* or renew a master barber license for” Mr. Zarate as well as the assessment of civil penalties and investigatory costs. *See* William Decl. at Exh. I (emphasis added). The notice further advised Mr. Zarate that “the Board or its duly authorized representative will hear proof on whether to suspend, revoke or refuse to renew Respondent’s license and/or whether to impose other lawful disciplinary action on Respondent, including civil penalties and all costs authorized by law.” *See id.*

The administrative law judge assigned to this contested case, Elizabeth D. Cambron, entered a “Pre-Hearing Order” dated April 26, 2017. *See* William Decl. at ¶ 6, Exh. II. This order set the contested case hearing for June 12, 2017, and set forth the procedures under which the hearing would be conducted, including references to the relevant statutes and rules governing the proceeding. After this hearing, Judge Cambron issued an “Initial Order” on August 22, 2017. *See* William Decl. at ¶ 7, Exh. III; *see also* Complaint at ¶ 67. The order made the following findings of fact:

- Mr. Zarate did not hold a valid license at any time relevant to the contested case proceeding;
- On January 18, 2017, a Regulatory Boards Field Representative (“inspector”) visited a barber shop called Revolution Salon, located at 109 S. Front Street, Memphis, Tennessee 38103, to conduct an inspection of the premises, and to determine whether the shop was operating in compliance with applicable law;
- During this inspection, the inspector observed Mr. Zarate cutting a client’s hair in the shop;
- Mr. Zarate had posted what appeared to be a valid master barber license: it displayed “his name, a license number, an expiration date, and the Department of Commerce and Insurance seal.”

- But when the inspector performed a search of the Board's license database, the license posted for Mr. Zarate did not come up in the search.
- Mr. Zarate "told the inspector that [he] had never been to barber school."
- Mr. Zarate "obtained the license from a source other than the Board . . . , but would not name the source."
- Mr. Zarate "knew a barber shop was unlikely to hire him if he did not have a license" and Revolution Salon "asked to see a license before hiring him."

See William Decl. at Exh. III, pp. 1-2.

Judge Cambron thus concluded, as a matter of law, that Mr. Zarate's conduct violated Tenn. Code Ann. § 62-3-107, prohibiting the practice of barbering without a valid certificate of registration issued by the Board. See William Decl. at Exh. III, pp. 2-3. The judge also found Mr. Zarate's conduct to implicate Tenn. Code Ann. § 62-3-121, which provides that "[t]he board may either refuse to issue or renew or may suspend or revoke any certificate of registration for any one (1) or combination of the following causes: . . . (6) Immoral or unprofessional conduct." See William Decl. at Exh. III, p. 3.

In September 2017,<sup>4</sup> Mr. Zarate formally petitioned for a reconsideration of the Initial Order under Tenn. Code Ann. § 4-5-317.<sup>5</sup> See William Decl. at ¶ 8 and Exh. IV; see also Complaint at ¶ 68. That petition was denied by an "Order Denying Petition for Reconsideration of Initial Order" entered on September 25, 2017. See William Decl. at ¶ 9 at Exh. V. In addition, Mr. Zarate was provided with a "Notice of Denial of the Petition for Reconsideration of the Initial Order"

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<sup>4</sup> The complaint alleges that this was done on September 5, 2017, and the Department of Commerce & Insurance's records show that the petition was filed on September 6. The difference is immaterial. A petition for reconsideration must be filed with 15 days of the initial order under Tenn. Code Ann. § 4-5-317(a); that deadline in this instance was September 6, 2017. Petitions are deemed denied within twenty days after receipt under Tenn. Code Ann. § 4-5-317(c), and the denial notice was issued 20 days after the later of the two dates.

<sup>5</sup> "[A] petition for reconsideration, stating the specific grounds upon which relief is requested," may be filed within 15 days of the entry of an initial or final order. Tenn. Code Ann. § 4-5-317(a).

issued on September 25, 2017. *See* William Decl. at ¶ 9 at Exh. VI. This notice also advised Mr. Zarate that the Initial Order would become a final order unless either party filed a written appeal with the Administrative Procedures Division or the agency filed a written notice of review with the same division, in either case no later than October 10, 2017. It also provided an address and phone number for the Administrative Procedures Division. *See id.*

Mr. Zarate did not file a written appeal with the Administrative Procedures Division before October 10, 2017, or otherwise. *See* William Decl. at ¶ 10. Nor did the agency file a written notice for review. *See id.* at ¶ 11. Under Tenn. Code Ann. § 4-5-314(b), an initial order becomes a final order “unless reviewed in accordance with Tenn. Code Ann. § 4-5-315.” Under Tenn. Code Ann. § 4-5-315(b), a petitioner must file a petition for appeal from an initial order within 15 days of the entry of the initial order. That period is “tolled by the submission of a timely petition for reconsideration of the initial order pursuant to § 4-5-317, and a new fifteen-day period shall start to run upon disposition of the petition for reconsideration.” Tenn. Code Ann. § 4-5-315(b).

Because he filed no appeal from the Initial Order, it became a final order by operation of law on October 10, 2017. Mr. Zarate then had 60 days from that date to file a petition for judicial review under Tenn. Code Ann. § 4-5-322(b)(1)(A). That period expired on December 9, 2017, without Mr. Zarate ever filing a petition for review of the agency’s decision. That decision is thus now final and unappealable.

## ARGUMENT

### **THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE THE COMPLAINT DOES NOT PRESENT A JUSTICIABLE CASE OR CONTROVERSY**

The complaint generally challenges the General Assembly's authority to require licensed barbers to have obtained a high school diploma, GED, or HiSET diploma (*see* Tenn. Code Ann. § 62-3-110). It seeks relief under three numbered claims:

- Claim 1 – that the educational requirement abridges Mr. Zarate's "right to earn an honest living," purportedly guaranteed by Article I, Section 8 of the Tennessee Constitution. *See* Complaint at ¶¶ 152-163;
- Claim 2 – that the educational requirement violates Mr. Zarate's right to equal treatment under the law secured by Article I, Section 8, and Article XI, Section 8, of the Tennessee Constitution. *See* Complaint at ¶¶ 164-174;
- Claim 3 – that the educational requirement violates Mr. Zarate's rights to due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution, as well as its protection of the privileges and immunities of citizens. *See* Complaint at ¶¶ 175-182;

But before the court can address the merits of any of these contentions, Mr. Zarate must first establish that he has brought a justiciable claim. He cannot do so.

#### **I. MR. ZARATE LACKS STANDING BECAUSE HE HAS NOT SUFFERED A CONCRETE AND PARTICULARIZED INJURY.**

Mr. Zarate has not actually sought a master barber certificate from the Board. *See* Declaration of Roxana Gumucio at ¶ 5. He claims that he is "prohibited from becoming a licensed barber in Tennessee because of the academic achievement requirement." Complaint at ¶ 142, and that, "[b]ut for the academic achievement requirement," he would be willing and able to attend barber school, *see* Complaint at ¶¶ 144-145, but without actually being denied a certificate by the Board, he cannot demonstrate that he is being denied a license because of the academic achievement requirement nor that he is otherwise entitled to licensure in the absence of that



requirement. Mr. Zarate's attack on the academic achievement requirement is thus speculative in nature. He has no standing to challenge this statute, the challenge he purports to make is not yet ripe, he has not exhausted his administrative remedies, and this suit is therefore not justiciable. There is thus no subject matter jurisdiction in this Court over these claims and they should be dismissed under Tenn. R. Civ. P. 12.02(1).

"The primary purpose of the Declaratory Judgment[s] Act is 'to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. . . ." *West v. Schofield* ("*West I*"), 460 S.W.3d 113, 129 (Tenn. 2015) (quoting Tenn. Code Ann. § 29-14-113). Although the Act is to be "liberally construed and administered," Tenn. Code Ann. § 29-14-113, the Tennessee Supreme Court has identified limitations upon its operation. "For example, a declaratory judgment action cannot be used by a court to decide a theoretical question [or] render an advisory opinion which may help a party in another transaction . . . . Thus, in order to maintain an action for a declaratory judgment a justiciable controversy must exist." *West I*, 460 S.W.3d at 129-130 (citations omitted).

"To be justiciable, a case must involve presently existing rights, live issues that are within a court's jurisdiction, and parties who have a legally cognizable interest in the issues. A case is not justiciable if it does not involve a genuine, existing controversy requiring the adjudication of presently existing rights." *UT Med. Group, Inc. v. Vogt*, 235 S.W.3d 110, 119 (Tenn. 2007) (citation omitted). "For a controversy to be justiciable, a real question rather than a theoretical one must be presented and a legally protectable interest must be at stake." *West I*, 460 S.W.3d at 130. "Tennessee courts decide only 'legal controversies,' and a legal controversy exists 'when the disputed issue is real and existing, and not theoretical or abstract, and when the dispute is between



parties with real and adverse interests.” *West v. Schofield*, 468 S.W.3d 482, 490 (Tenn. 2015) (citations omitted) (hereafter, “*West II*”). This precept effectuates the principle that “the province of a court is to decide, not advise, and to settle rights, not give to abstract opinions.” *Id.*

“To determine whether a particular case involves a legal controversy, Tennessee courts use justiciability doctrines that ‘mirror the justiciability doctrines employed by the United States Supreme Court and the federal courts.’” *West II*, 468 S.W.3d at 490. The doctrines include: “(1) the prohibition against advisory opinions, (2) standing, (3) ripeness, (4) mootness, (5) the political question doctrine, and (6) exhaustion of administrative remedies.” *Id.* Without these doctrines, “the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.” *Id.* (quoting *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 620 (Tenn. 2006)). Each of the doctrines of standing, ripeness, and exhaustion of administrative remedies applies to the present case.

“Courts employ the doctrine of standing to determine whether a particular litigant is entitled to have a court decide the merits of a dispute or of particular issues.” *Am. Civil Liberties Union of Tenn. v. Darnell*, 195 S.W.3d 612, 619 (Tenn. 2006). The doctrine is designed to preclude courts from “adjudicating ‘an action at the instance of one whose rights have not been invaded or infringed.’” *Id.* (citation omitted). It does so by restricting “[t]he exercise of judicial power . . . to litigants who can show ‘injury in fact’ from the action which they seek to have the court adjudicate.” *Id.* at 620 (citation omitted).

A showing of standing requires “three ‘indispensable elements.’” *See A.C.L.U. v. Darnell*, 195 S.W.3d at 620 (citations omitted). “First, a plaintiff must show a distinct and palpable injury: conjectural or hypothetical injuries are not sufficient” and the injury must not be to an interest the plaintiff shares in common with all other citizens. *Id.* It must be “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’”” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted). Second, there must be a “causal connection between the claimed injury and the challenged conduct.” *A.C.L.U. v. Darnell*, 195 S.W.3d at 620. (citation omitted). “The third and final element necessary to establish standing is a showing that the alleged injury is capable of being redressed by a favorable decision of the court.” *Id.* (citation omitted). None of these elements are present in this case.

Mr. Zarate’s injury is not “distinct and palpable.” Nor is it concrete, particularized, actual, or imminent. His claimed injury is that he is “prohibited from becoming a licensed barber in Tennessee because of the academic achievement requirement,” Complaint at ¶ 142, and he asserts that, “[b]ut for the academic achievement requirement,” he would be willing and able to attend barber school, *see* Complaint at ¶¶ 144-145. But Mr. Zarate has not actually been denied a license by the Board. Without that denial, there is no actual injury—nothing concrete or particular has happened to him.<sup>6</sup> Until he is subjected to a specific action by the Board denying him licensure,

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<sup>6</sup> Mr. Zarate, of course, received discipline imposed by the Board as a result of Mr. Zarate’s contested case hearing, but that decision is (a) final and unappealable in this suit or otherwise, and (b) related only to Mr. Zarate’s unlicensed practice of barbering, not to any particular reason that he did not have a license at the time of that infraction. That specific discipline is not the injury he claims in this suit.

he has the same undifferentiated interest in the validity of the statute possessed by any number of other citizens with a high school diploma who have never sought a master barber certificate.

Without having *actually* been denied a license, Mr. Zarate's assertion that his lack of education is his only impediment to barber school and, eventually, licensure is pure conjecture. There could be other reasons than the academic achievement requirement that would have prevented the Board from issuing him a license. He cannot know whether he is capable of completing the 1,500 hours of barber school, for instance. More pointedly, he cannot know whether the Board might have denied him a license for an entirely different reason. In fact, there is a very obvious alternative possibility. In the Initial Order from Mr. Zarate's contested case,<sup>7</sup> the Board found that he had used a fraudulent license to practice barbering and concluded that this constituted "immoral and unprofessional conduct" for purposes of Tenn. Code Ann. § 62-3-121(6). *See* William Decl. at Exh. III, p. 3. Under Tenn. Code Ann. § 62-3-121, such conduct is one of many possible bases under this statute for which the Board has discretion to "refuse to issue . . . any certificate of registration." Had Mr. Zarate *actually sought* a license from the Board, it may very well have denied his application on this basis instead of—or in addition to—his failure to meet the academic achievement requirement. And that would represent an entirely independent statutory basis for the denial of his license that is not affected at all by any of the constitutional challenges raised in the complaint. Mr. Zarate's purported injury is thus the definition of a "conjectural or hypothetical injur[y]" that is not sufficient to create standing.

Even beyond this obvious statutory justification for refusing to issue Mr. Zarate a license, Tenn. Code Ann. § 62-3-121 contains any number of other grounds for refusing to issue a license:

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<sup>7</sup> As noted above, this order became the final order of the Board by operation of Tenn. Code Ann. § 4-5-314.

- (1) Conviction of a felony for the commission of an offense that bears directly on the person's fitness to practice competently, as determined by the board;
- (2) Gross malpractice or gross incompetency;
- (3) Continued practice by a person knowingly having an infectious or contagious disease;
- (4) Advertising by means of knowingly false or deceptive statements;
- (5) Habitual drunkenness or habitual addiction to the use of morphine, cocaine or other habit-forming drug;
- (6) Immoral or unprofessional conduct; or
- (7) A violation of this chapter or any rules adopted under this chapter.

There is no way to know, based on the limited information in the Initial Order and in the complaint, whether any of these other grounds might also be present and relied upon by the Board.<sup>8</sup> But what is clear is that Mr. Zarate cannot establish that the academic achievement requirement is his *only* impediment to licensure.

For the same reasons, the causal connection between Mr. Zarate's claimed injury and the challenged conduct—the academic achievement requirement—is also conjectural. Without an actual Board action specifying upon which of many possible bases the Board chose to deny Mr. Zarate a license, it is impossible to determine whether the purported injury is connected to the challenged conduct (the academic achievement requirement).

Nor is the third element met. Even if this Court were to rule that the academic achievement requirement were unconstitutional and inoperative under any of the grounds raised in the complaint, there would still be an independent grounds on which the Board could deny Mr. Zarate

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<sup>8</sup> It seems clear that Mr. Zarate's use of the fraudulent license to procure employment and to hold himself out falsely as a licensed barber could also constitute "[a]dvertising by means of knowingly false or deceptive statements" and "a violation of this chapter."

a master barber certification: his already-established immoral and unprofessional conduct. In his rush to litigate an abstract constitutional issue, Mr. Zarate has put the cart before the horse. Only after he has actually sought a license and been denied can both he and the Court know whether he has sustained an injury that the Court is capable of redressing.

It would be a waste of the time and resources of both the parties and the Court to permit this challenge to the constitutionality of the academic achievement requirement to go forward, because even were Mr. Zarate to prevail, he might then be denied a license for an entirely independent reason. This is why the standing doctrine exists—to ensure that only real, live cases and controversies—with actual, definitively redressable injuries—reach the courts. Without a denial of the thing that he seeks—a master barber certification—Mr. Zarate has no “live issue” and no “legally cognizable interest” to bring before the Court. This suit is the definition of an abstract, non-justiciable dispute.

## **II. MR. ZARATE’S CHALLENGE IS NOT YET RIPE.**

The non-justiciability of Mr. Zarate’s claim may, in the alternative, be formulated as a lack of ripeness.

Ripeness . . . requires a court to answer the question of “whether the dispute has matured to the point that it warrants a judicial decision. . . .” [I]ts basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements. . . . The central concern of the ripeness doctrine is whether the case involves uncertain or contingent future events that may or may not occur as anticipated or, indeed, may not occur at all.’

*West II*, 468 S.W.3d at 490-91 (internal citations omitted). Ripeness requires a two-part analysis “evaluating “[1] the fitness of the issues for judicial decision and [2] the hardship to the parties of withholding court consideration.” *Id.* at 491 (internal citations omitted). The claims raised in the present case are not suitable under either prong.

The “fitness for judicial decision” prong requires the court “to consider whether . . . claims are based on an existing legal controversy or on hypothetical and contingent future events that may never occur.” *West II*, 468 S.W.3d at 491. Mr. Zarate’s injury is premised on the belief that, but for the academic achievement requirement, he would be eligible for barber school and then for a certificate. But, as explained above, that is true only if the Board finds no other basis under the seven grounds in Tenn. Code Ann. § 62-3-121 to deny him a license. And it has already expressly found at least one of those grounds to exist. The contingent future event, then, is an actual application by Mr. Zarate to the Board that would fully reveal any and all bases on which the Board might choose to refuse to issue him a master barber certification. Until that occurs, there is no way to know if resolving the constitutional issues presented will actually redress Mr. Zarate’s purported injury and thus whether this litigation would produce “premature adjudication” of an “abstract disagreement.”

There is also very little in the way of hardship. “The prototypical case of hardship comes from the claimant who faces a choice between immediately complying with a burdensome law or ‘risk[ing] serious criminal and civil penalties.’” *West II*, 468 S.W.3d at 492. But Mr. Zarate is not legally required to be a barber, however much it appeals to him as a career. Having been disciplined once for practicing barbering without a license, we can presume that he is no longer doing so and, regardless, is not being compelled to do so at the risk of criminal or civil penalties. Indeed, it is difficult to fathom what possible hardship he would suffer from simply applying to the Board for a license or seeking a declaratory order regarding his eligibility. He could have done so at any time since the resolution of his contested case in October 2017 and he could do so now. And, until he

does so, his challenge to the constitutionality of the academic achievement requirement is not ripe for decision and thus not justiciable.

### **III. MR. ZARATE HAS FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.**

“In disputes involving a state agency, one must generally exhaust the available administrative remedies before filing a suit for declaratory relief.” *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 838 (Tenn. 2008). This justiciability doctrine “promotes judicial efficiency and protects administrative authority” in multiple ways. *Id.* These include the fact that “sometimes “[j]udicial intervention may not be necessary because the agency can correct any initial errors at subsequent stages of the process [, and] the agency’s position on important issues of fact and law may not be fully crystallized or adopted in final form.”” and that “exhaustion allows the agency to develop a more complete administrative record upon which the court can make its review.” *Id.* at 838-39 (internal citations omitted). And while the exhaustion was originally a discretionary, judge-made rule, many of its “requirements are [now] mandated by legislation” and “one claiming to have been injured must first comply with the provisions of the administrative statute.” *Id.* at 839 (citation omitted).

Though he purports to proceed, in part, under the Uniform Administrative Procedures Act, *see* Complaint at ¶ 8 (citing Tenn. Code Ann. § 4-5-225 as a jurisdictional basis), Mr. Zarate made no effort to comply with the UAPA’s procedural requirements. Tenn. Code Ann. § 4-5-225(a) provides for a suit for declaratory judgment in the chancery court of Davidson County, but only if “the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order.” Tenn. Code Ann. § 4-5-225(b). Mr. Zarate made no such petition regarding the academic achievement requirement, and so has failed to exhaust the administrative



procedures for seeking a declaratory judgment in a dispute involving a state agency.<sup>9</sup> See William Decl. at ¶ 12.

Had Mr. Zarate properly exhausted his administrative remedies in this instance, it would have had the salutary effects described by the *Colonial Pipeline* Court. It would have allowed the Board to clarify its “position on important issues of fact and law [that] may not be fully crystallized or adopted in final form” by deciding whether to bar Mr. Zarate from licensure under the “immoral and unprofessional conduct” prong of Tenn. Code Ann. § 62-3-121, thus clarifying whether the academic achievement requirement was, in fact, the only thing standing between Mr. Zarate and a legitimate barbering career. And that determination, encapsulated in some formal procedure, would have provided a specific record of that decision for this Court to review. Having failed to exhaust his administrative remedies, Mr. Zarate has succeeded only in muddying the waters surrounding his dispute and creating another obstacle to justiciability.

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<sup>9</sup> Had Mr. Zarate petitioned the Board for a declaratory order, it would have had the option to either convene a contested case to hear the matter or to deny the request for a declaratory order. See Tenn. Code Ann. § 4-5-223(a). In the latter event, Mr. Zarate could have proceeded directly to chancery court if his suit was otherwise justiciable. Under the former procedure, judicial review would have proceeded as normal under the UAPA’s contested case procedures. See Tenn. Code Ann. § 4-5-223(a)(1).