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

ELIAS ZARATE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 18-534-II**
	)	
THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS; ROXANA GUMUCIO, in her official capacity as executive director of the Tennessee Board of Cosmetology; RON R. GILLIHAN, 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.	)	

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Elias Zarate responds in opposition to the Motion to Dismiss filed by the Board of Cosmetology and Barber Examiners, its executive director, and individual members (collectively, the Board), who raise injury, ripeness, and exhaustion. Elias has shown actual injury from the Board's enforcement of the academic achievement requirement. He

cannot enter barber school as a result. This is a concrete injury that operates to keep him from doing anything further towards licensure. Even if he could, he does not need to do futile things like apply for a license to prove that he cannot get it, or negate far-flung future possibilities like the Board denying him a license on alternate grounds. Elias has also shown imminent injury because the Board has credibly demonstrated that it will enforce the licensure requirement against Elias again if he practices without the unconstitutional license. The matter is ripe and appropriate for judicial review. Only hardship would ensue by waiting because Elias is currently forced to choose between surrendering his constitutionally protected right to earn a living or serious penalties. And this case is certainly fit for judicial resolution without a license denial because this legal constitutional issue does not become any more focused if Elias is denied a license. Finally, predominantly constitutional challenges such as this one do not need to be exhausted administratively under the Administrative Procedures Act (APA) or any of the other causes of action. Elias accordingly asks this Court to DENY the Board's motion.

I.
Brief Statement of Facts

Elias challenges a recent statutory enactment that requires a high school degree or equivalent before a person may become a licensed master barber. Tenn. Code Ann. § 62-3-110(b)(2) (Any person desiring a certificate of registration as a master barber must submit proof that the applicant "[h]as received a high school diploma or, in lieu of a high school diploma, has received a GED(R) or HiSET(R) diploma.")

(hereinafter "academic achievement requirement"). Barber schools enforce eligibility requirements as a condition of their own license, and will not admit Elias because he has not graduated. (Compl. at 8:71-9:72-74.) Because Elias cannot get into a barber school, he cannot ever take the barber exam (Ex. 1 at 11, 14.) or even submit an application containing proof of testing. (*Id.* at 13.) The Board's enforcement of the academic achievement requirement has effectively shut down Elias's dream of becoming a barber.

Elias never finished high school, owing to a terrible series of tragedies. When he was ten (10), his mother died in a car accident that left Elias in a coma. (Compl. at 5:19-23.) At age thirteen (13), his father was deported and vanished for good. (*Id.* at 5:24-25.) Still, Elias persisted in his studies until his senior year when he took over caring for his younger siblings. (*Id.* at 6:31.) Essentially orphaned, abandoned, and tasked with caring for others, Elias was forced to drop out of high school, where he was failing regardless. (*Id.* at 6:36-37.) He tried to get an equivalent diploma but was unable to answer even half of the sample questions. (*Id.* at 16:143.) The academic achievement requirement is, therefore, an insurmountable hurdle for Elias to overcome.

Barbering is his dream job and for that, he needs a license. It would be a crime to practice without one, *see* Tenn. Code Ann. § 62-3-130, and subject him to serious civil sanctions as well. *See* Tenn. Code Ann. §§ 56-1-308, 311. Elias well knows that the Board will enforce the licensure requirement as it has already penalized him once when he practiced barbering without a valid license. (Compl. at 8:64-67.) Elias

contends that the license contains an unconstitutional criterion and cannot be enforced so long as it contains the high school academic achievement requirement.

The Board may certainly enforce a licensing regime upon barbers. However, it must do so in a way that is constitutional. Whether it has or not is the question presented by this lawsuit. Elias deserves the chance to prove that it does not.

II.
Legal Standard

Tennessee Rule of Civil Procedure 12.02(1) is a device for disposing of a complaint for a lack of jurisdiction for subject matter. The challenges presented by the Board—injury, ripeness, and exhaustion—all pertain to subject matter jurisdiction, otherwise known as standing. *See Bernard v. Metro. Gov't of Nashville and Davidson Cnty.*, 237 S.W.3d 658, 661 (Tenn. Ct. App. 2007). A motion to dismiss does not test "the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 432 (Tenn. 2011) (citing cases).

A challenge to subject matter jurisdiction may be either facial or factual. *Staats v. McKinnon*, 206 S.W.3d 532, 542 (Tenn. Ct. App. 2006). A facial complaint "considers the impugned pleading and nothing else." *Id*. A factual challenge "controverts" the facts regarding jurisdiction and "puts at issue the sufficiency of the evidence to prove facts that would bring the case within the court's subject matter jurisdiction." *Id*. at 543. A defendant does so by filing "affidavits or other competent evidentiary materials challenging the plaintiff's jurisdictional allegations." *Id*. Even

though this in effect turns subject matter jurisdiction into limited issue of fact, "it does not require the court to convert the motion into one for summary judgment." *Id.* The Court will take as true the allegations of the nonmoving party and resolve all factual disputes in its favor. *Id.* (quoting *Chenault v. Walker*, 36 S.W.3d 45, 56 (Tenn. 2001)).

By filing declarations, the defendant has lodged a factual challenge. (MTD, Ex. A, Decl. of Roxana Gumucio; Ex. B, Decl. of Hosam William.) Once the defendant raises a factual challenge, "the plaintiff may not rely on the allegations of the complaint alone but instead must present evidence by affidavit or otherwise that makes out a prima facie showing of facts establishing jurisdiction." *Staats*, 206 S.W.3d at 543 (citing *Chenault*, 36 S.W.3d at 56). Elias has deposed Ms. Gumucio and Mr. William as designees for the Board, collectively, under Tenn. R. Civ. P. 30.02(6) and submitted transcripts as Plaintiff's Exhibits 1 and 2. The depositions are therefore binding, admissible statements made on behalf of the Board. Tenn. R. Civ. P. 32.01(2) (deposition of party who was designed admissible by adverse party for any purpose).

In sum, the ultimate question is whether Elias has shown that this Court has jurisdiction when taking all the alleged facts in the Complaint and evidence presented and construing them in favor of the plaintiff.

III.
Elias Has Shown Actual and Imminent Injury.

Construing all the facts and inferences in his favor, Elias has shown both actual and imminent injury. The Board's enforcement of the

academic achievement requirement actually injures Elias by making it impossible for him to be admitted into barber school or do anything else towards licensure. Even if he was required to apply for a license to challenge it, Elias cannot. Enduring the expense and effort of trying to get a license the Board cannot issue him would be futile, and justiciability doctrine does not require futile exercises. The Board's insinuation that it might deny Elias a license because he previously practiced without a license does not preclude judicial review because the Board cannot deny him a license for any reason so long as the licensing regime contains an unconstitutional criterion. Additionally, the possibility that the Board would not license Elias because he previously practiced without a valid license is beyond unlikely unless the Board intends on treating Elias differently from others. Elias also has shown imminent injury from the Board's credible threat to take enforcement action against him for practicing without the unconstitutional license. Finally, even if the academic achievement requirement has not "injured" him by making him ineligible for the barber license, it has undoubtedly "affected" him. Under the private right of action law, that gives this Court an alternate basis for subject matter jurisdiction.

To prove injury, a plaintiff must plead and prove that he or she has suffered the invasion of a "legally protected interest" that is actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992);[1]

[1] Even though Tennessee's Constitution does not contain the same "case and controversy" requirement of the federal Constitution, Tennessee courts tend to "mirror the justiciability doctrines employed by the

Calfee v. Tennessee Department of Transportation, No. M2016-01902-COA-R3-CV, 2017 Tenn. App. LEXIS 463 at *22 (Tenn. Ct. App. July 11, 2017). An individual must suffer an invasion of a legally protected interest that is "concrete and particularized," and "actual and imminent," but not "conjectural or hypothetical." *Id*. At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561 (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889 (1990)). As related below, Elias has easily demonstrated both actual and imminent injury.

As a threshold matter, this case involves a legally protected interest. It affects Elias's right to earn a living. (Compl. at 2, 7, 17-18.) The right to earn a living is a "liberty" interest protected by the Fourteenth Amendment. *Lowe v. SEC*, 472 U.S. 181, 228 (1985); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 661 (E.D. Tenn. 2000) ("Plaintiffs indisputably have a liberty interest in their right to pursue their chosen occupation."). Moreover, under the Tennessee Constitution, the right to earn a living involves "both a liberty and a property interest." *See State v. AAA Aaron's Action Agency Bail Bond*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998). The issue then reduces to the question of whether the injuries to Elias's right to earn a living are either "actual or imminent." *See Lujan*, 504 U.S. at 560. It is both.

United States Supreme Court and the federal courts." *Norma Faye Pyles Lunch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 203 (Tenn. 2009).

The Complaint related the following harms to Elias's right to earn a living:

- Elias wants to become a barber, but he is statutorily prohibited from obtaining the license because of the academic achievement requirement. (Compl. at 16:142.)
- Because of the requirement, he cannot get admitted to barber school to obtain the requisite educational hours. (*Id.* at 16:144) Barber schools repeatedly told Elias that they would not even admit him because he was not a high school graduate or at least actively enrolled. (*Id.* at 2:3, 8:71-9:72-73.) Otherwise, Elias would invest the time and money involved in attending barber school. (*Id.* at 2:3; 17:145.)
- He has shown that he intends to practice barbering because he has already practiced barbering and wants to continue doing so. (*Id.* at 6:32-33; 7:55; 17:145-151.) If he continues to practice without a license, the Board will take enforcement action against him, (*id.* at 17:146) including civil and criminal penalties. (*Id.* at 16:137-139.) The Board has already punished Elias for practicing without the challenged license. (*Id.* at 8:64; 16:140.)

These well-pled facts, further supported by depositions of Roxanne Gumucio and Hosam William, (*see* Pl.'s Ex. 1, 2), show both actual and imminent injury.

A. Elias is actually injured because he cannot get into barber school.

Elias has shown actual injury. The academic achievement requirement operates to deny him entry into barber school. The Board uses the schools to screen for eligibility. Elias cannot do anything else because he needs to be admitted to get the requisite 1,500 training hours and to take the requisite exam. Even if it was possible, it would still be futile, and Elias does not have to do futile tasks like graduate and apply for a license he knows he cannot get. The Board cannot deny Elias a license for an alternate reason so long as the licensing process contains an unconstitutional criterion. Finally, Elias does not need to negate speculative possibilities like a future license denial for other reasons.

The academic achievement requirement actually injures Elias because it prevents him from being admitted to barber school until he graduates high school or obtains an equivalent degree. Elias asked Memphis-area barber schools about entry and they told him they would not admit a person who was not either a high school graduate (or equivalent) or actively enrolled. (Compl. at 8:71; 9:72-75.) Ms. Gumucio explained how this directly results from Board actions. The Board expects the schools to enforce the eligibility requirements on students before enrolling them as a condition of the school's license. (Ex. 1 at 9.) Ms. Gumucio related that the Board entrusts the schools to screen for eligibility. (*Id*. at 8) (schools "are that entry point at which has to vet the beginning documents and they become part of the student's file."). She agreed that the schools are the ones "that are the initial clearing

point for statutory criteria like the academic achievement requirement." (*Id*. at 10.) For that reason, when Elias asked after his administrative hearing how to go to barber school and become licensed, Mr. William's response was to first ask Elias about his educational level. (Ex. 2 at 17-18.) Mr. William wanted to know Elias's educational level because "in order to go to a barber school, Mr. Zarate would have to have a high school diploma or GED."[2] (Ex. 2 at 18.) Elias naturally understood this as direction to not attend barber school. (Compl. at 8:66.) Taking the facts in the complaint as true and giving Elias the benefit of all reasonable inferences, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011), Elias has easily demonstrated that the academic achievement requirement presently injures him.

Although the Board argues Elias has "put the cart before the horse," (MTD at 13) by filing this action before he applies for a license, in actuality, there is nothing else Elias can do. His inability to enroll in barber school affects his ability to complete any of the other steps to get

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[2] Because Mr. William told Elias that he would have to meet the academic achievement requirement level "in order to go to a barber school," (Ex. 2 at 18; Compl. at 8) the Board ought to be barred from faulting Elias from not making any further attempts at licensure on equitable estoppel grounds alone. *See B&B Entertainers of Wilson County, LLC v. City of Lebanon*, 318 S.W.3d 839, 849 (Tenn. 2010) (estoppel when party gains an unfair advantage by maintaining inconsistent legal positions). When Elias was told he could not get into barber school, the Board must have had "[i]ntention, or at least expectation that such conduct shall be acted upon by the other party." *Id*. (quoting *Cracker Barrel Old Country Store, Inc. v. Epperson*, 284 S.W.3d 303, 315-16 (Tenn. 2009)). The Board is therefore estopped from faulting Elias for following its advice.

licensed. To be licensed, Elias would have to get 1,500 hours in barber training, and that must happen at a barber school. *See* Tenn. Code. Ann. § 62-3-110(b)(3)(A). So if he cannot get into barber school, he cannot get trained. His inability to enter school also affects his ability to take the barber exam, another necessary step. The Board also entrusts the schools to release students for testing. (Ex. 1 at 10-11, 14.) And a student must attach testing results to make a complete application. (*Id*. at 14.) If Elias could only raise a challenge once he was trained, graduated barber school, and could test, then he could never make a challenge to the academic achievement requirement. An obvious "need for the court to act" presently exists because the refusal would "prevent the parties from raising the issue later." *B&B Entertainers*, 318 S.W.3d at 849 (quotation omitted).

The mistake the Board makes is in viewing statutory ineligibility as the sole injury. (MTD at 10.) Regardless of whether denial of a license is an injury that has yet actualized, getting into barber school surely has. That injury was distinctly related in the Complaint. (Compl. at 16:144.) It is true that an imminent injury discussed separately below *also* exists–the enforcement actions that Elias will face for practicing without the license that he cannot obtain (*id*. at 17:144)–but even that harm is separate from the mere ineligibility. Nevertheless, the inability to get into school cannot be any more "concrete and particularized." *Lujan*, 504 U.S. at 560.

B. Elias need not apply for a license

Even to demonstrate injury from license ineligibility, Elias does not need to apply and be denied a license to show injury, despite the Board's arguments to the contrary. Making an application would be futile. No doubt surrounds its denial because he has not met the statutory requirements. The Board's contention that Elias might not get licensed for other reasons is legally misguided because even subjecting him to a licensing regime that contains any unconstitutional criterion would be another injury. Finally, the possibility that the Board would deny Elias a license because of his prior instance of unlicensed practice is so remote that it does not defeat standing in any event.

1. To show injury, Elias does not need to apply for a license he cannot get.

Even if Elias could get into barber school and apply for a license, it would be futile and not a requirement for standing. Futile tasks like applying for a license are not prerequisites for standing. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 622 (2001) ("ripeness rules do not require submission of further and futile applications with other agencies"); *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 776 n.11 (1988) ("nothing is gained by requiring one actually denied a license to bring the action."); *City of Chicago v. Atchison, Topeka, & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958) (company "was not obligated to apply for a certificate of convenience and necessity and submit to the administrative procedures incident thereto before bringing this action."); *Pac. Frontier Pleasant Grove City*, 414 F.3d 1221, 1228 (10th

Cir. 2005) ("[A]pplying for and being denied an license or an exemption is not a condition precedent to bringing a facial challenge to an unconstitutional law.") (citation and quotations omitted); *Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012) ("Plaintiffs who challenge a permitting system are not required to show that they have applied for, or have been denied, a permit."); *Merrifield*, 547 F.3d at 981 n.1 (plaintiff has standing to challenge a license as unconstitutional because he cannot practice without it); *Hamilton v. Pallozzi*, 848 F.3d 614, 621 (4th Cir. 2017) (No requirement that a person apply for a permit that might be denied for alternate reasons because "plaintiffs are not required to undertake futile exercises in order to establish ripeness, and may demonstrate futility by a substantial showing."); *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1201-02 (2d Cir. 1977) (plaintiff need not present and be denied a bid when "it would have been futile to do so since it is obvious that they could not have been awarded a contract."); *Bruner v. Zawacki*, 2013 U.S. Dist. LEXIS 25035 at *16 (E.D. Ky. Feb. 25, 2013) ("there is no requirement that a plaintiff in a § 1983 action subject themselves to the statutes they allege are unconstitutional.").

When there is no possibility that a litigant can ever get the license they wish to challenge, completing training and making a futile application are tasks that embody futility. In *Sammon v. New Jersey Bd. of Med. Exam'rs*, 66 F.3d 639 (3d Cir. 1995), the plaintiffs wished to challenge a license to become midwives. Like Elias (Compl. at 17:145), the midwives "allege[d] that but for the 1800-hour study and the physician-indorsement requirements, they would be come licensed

midwives." *Id.* at 642. The court determined that the midwives were injured because were ineligible from their chosen career, and the "statutory scheme has deterred them from taking any steps towards reaching their goals." *Id.* The court was not persuaded by the argument that the injuries were speculative because the midwives had not applied for licenses or done any of the things necessary to become eligible. *Id.* at 643. When "there is no indication that the aspiring midwives could obtain a license or a physician's endorsement without first" satisfying the objectionable statutory requirement, it "would serve no purpose" to make them do so. *Id.*

The futility doctrine applies here. Attending school and applying for a license would epitomize futility because, first, he cannot get in, and second, there is no doubt that the Board must deny Elias a license even if he could. Ms. Gumucio was forthright that she cannot ignore a statutorily mandated criterion, nor was she aware of the Board ever having done so. (Ex. 1 at 12, 18-19.) Forcing Elias to attend a barber school before he can bring his claims would be an expensive gesture to boot. Ms. Gumucio testified that barber school "could be in excess of $10,000" for individuals who do not get barber training in high school. (Ex. 1 at 15.) While in some cases, an actual application might prevent "premature adjudication," *Abbott Labs*, 387 U.S. at 148, this is not one of them. The result is a certain denial because it is statutorily mandated that Elias meet the academic achievement requirement. To require Elias to apply for a license that the Board cannot give him only after he has spent tremendous amounts of money and time attending barber school "serve[s] no purpose," *Sammon*, 66 F.3d at 643, and turns

the injury requirement into an insurmountable obstacle because no person would ever incur the cost to train for a job that they cannot practice.

Elias's situation is just like midwives and many others. For instance, in *Craigmiles*, the plaintiffs were casket store operators who sued Tennessee officials over a state law that forbade the selling of caskets without a funeral directors license. 312 F.3d 220, 222 (6th Cir. 2002). The store operators did not seek a license. Indeed, there was not even any indication that they could not get the license, unlike Elias. *Id.* They just argued they should not have to and instead ceased operations when they received a cease-and-desist letter. Yet they successfully brought an action proving that the license violated their Fourteenth Amendment rights because it was not rationally related to any legitimate interest. *Id.* at 229. In *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the plaintiff challenged a pest control-licensing requirement. Merrifield did not apply for a license, instead bringing a Section 1983 action for declaratory and injunctive relief. *Id.* at 982. The court ruled that Merrifield "ha[d] standing because he cannot engage in his trade unless he first satisfies the current licensing requirement or receives an exemption." *Id.* at 981 n.1. In each instance, plaintiffs were able to challenge a license without applying for it because there was no doubt that they needed it to practice and would be denied if they applied without satisfying the statutory criteria. Elias likewise may challenge the license as unconstitutional, even if he has yet to actually apply for it. He does not have to take futile steps just to prove the

obvious and indisputable fact that he cannot become a barber because of the academic achievement requirement.

2. To show injury, Elias need not subject himself to an unconstitutional licensing regime or disprove that the Board might deny his license for other reasons.

Nor is it correct that the Board could deny him a license for other reasons as long as the licensing regime contains the unconstitutional academic achievement requirement. (MTD at 11.) The Board reveals here that it misconstrues the nature of the alleged injury. Elias does not assert that he has been injured by the wrongful denial of a license, or that he is certainly entitled to one. He alleges that the academic achievement requirement is embedded in an arbitrary evaluation scheme mandated by an unconstitutional statute that would apply to any application he would submit. Even submitting an application that would include any unconstitutional requirement is an injury in itself, which is why persons need not submit to a licensing process to challenge it. In *PUC of the State of Cal. v. United States*, 355 U.S. 534, 540 (1958), the Supreme Court held that a plaintiff could challenge the constitutionality of a licensing requirement that included an unconstitutional criterion without first applying for a license: "'[F]ailure to apply for a license under an ordinance which on its face violates the Constitution does not preclude [judicial] review.'" 335 U.S. at 540 (quoting *Staub v. Baxley*, 355 U.S. 313, 319 (1958)). If the Board were to subject Elias to any licensure process containing an unconstitutional criterion, then it would inflict a wholly separate injury. This does not

mean, however, that the Board is not already or imminently inflicting other injuries.

Nor will the Board deny Elias a license if he was otherwise eligible. The Board insinuates that it might forever debar Elias from licensure for his single prior instance of unlicensed practice, and that thus he cannot show that the academic achievement requirement is the only reason he cannot obtain a license. (MTD at 11.) This does not affect standing for two reasons. First, the injuries alleged are not the denial of a license, which after all, Elias has not applied for. Elias was injured by the academic achievement requirement by being denied school admission, as well as the credible threat of enforcement for practicing without the unconstitutional license, an injury explained more fully below. Both injuries exist, even if the Board was ultimately to deny him a license for some other reason and thus, this speculative possibility is of no consequence. The Board cannot deny Elias a license for any reason so long as the licensing regime includes an unconstitutional requirement without inflicting an independent harm.

Second, the possibility of the Board denying Elias a license because he was once found to have practiced without a license is not a barrier to standing. The courts require "no more than a showing that there is a 'substantial likelihood' that the relief requested will redress the injury claimed to satisfy the second prong of the constitutional standing requirement." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 n. 20 (1978) (citing cases). The Supreme Court does not require "a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to

demonstrate the likely effectiveness of judicial relief." *Id.* at 78. Defendants cannot defeat injury by suggesting events that "are not probable and indeed themselves highly speculative." *Thomas More Law Center v. Obama*, 651 F.3d 529, 537 (6th Cir. 2011) (abrogated on other grounds by *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012)).

There is, to say the least, a substantial likelihood that if Elias were eligible, then the Board would issue him a license notwithstanding his history. Ms. Gumucio was not aware that the Board had *ever* denied an otherwise eligible applicant a license because of one prior instance of unlicensed practice. (Ex. 1 at 45.) In fact, she recognized that the Board issues licenses to individuals convicted of "very serious crimes." (*Id.* at 46.) If this punishment was to be administered, then it would have been done at the time. It did not, even though the Board notified Elias of its possible application. (*Id.* at 37, 45). It seems highly speculative that the Board will decide to impose this penalty in a future where Elias is otherwise eligible, having dutifully paid off all of his fines. (*Id.* at 46.) The Board's insistence on a tidy "but for" causality artificially heightens the standing requirement, *see Duke Power Co.*, 438 U.S. at 78-79 ("but for" causation insists on the negation of "speculative and hypothetical possibilities"); *Harrisburg Hospital v. Thornburgh*, 616 F. Supp. 699, 703-04 (M.D. Pa. 1985) ("We do not believe the plaintiffs have to show a 'but for' relationship between the challenged conduct and the threatened economic harm to establish standing."), and is nevertheless demonstrated under the current facts. Taking the facts in the strongest light in Elias's favor, *Staats*, 206 S.W.3d at 543, the possibility that that

the Board would deny him a license for his prior instance of unlicensed practice is, to borrow a phrase, "pure conjecture." (MTD at 11.)

The Board makes the same argument that failed in *Hamilton*. 848 F.3d at 620 (defendants argued that plaintiff had not applied for a permit and might be denied for other reasons making his challenge unripe). Like Hamilton, Elias is statutorily disqualified from licensure and "the Government cannot so easily avoid suit," *id*., by enacting a licensing scheme that excludes him if he were to make a truthful application. Because it is certain that the Board would deny an application from Elias that truthfully related his qualifications, "any attempt to apply for a [license]—regardless of any other reason [Tennessee may potentially have to find [Elias] ineligible would be futile." *Id*. at 621. As such and for the same reasons, Elias's "claims are ripe." *Id*.

Elias does not need to make an application for a license he knows he cannot get and that he challenges as unconstitutional. Elias has the right to review under a process that does not contain an unconstitutional criterion. He is not required to negate far-flung possibilities like the Board making him the first person to whom they have denied a license for a prior instance of unlicensed practice.

B. Elias faces imminent injury because the Board will take enforcement action against him if he practices without the unconstitutional license that he cannot get.

Elias has also shown that he faces an injury sufficiently imminent to bring a pre-enforcement challenge because the Board has credibly shown that it will take enforcement action against Elias if he practices

barbering without the unconstitutional license. That constitutes imminent injury sufficient to confer standing.

Declaratory actions are available to stop future, threatened injuries to rights. A declaratory judgment action is proper when the enforcement of a law "*threatens* to interfere with or impair, the legal rights or privileges of the complainant." Tenn. Code Ann. § 4-5-225 (emphasis added). A case is appropriate for review when it "comes from [a] claimant who faces a choice between immediately complying with a burdensome law or risk[ing] serious criminal and civil penalties." *See West v. Schofield*, 468 S.W.3d 482, 492 (Tenn. 2015) (quotation omitted); *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (plaintiff satisfies the injury requirement by alleging, "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute and there exists a credible threat of prosecution thereunder") (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (union could challenge constitutionality of statutory election procedures it never pursued)); *Calfee*, 2017 Tenn. App. LEXIS 463 at *32-33 (citing *Lujan*, 504 U.S. at 560) (A threat to interfere "constitutes a real and concrete 'imminent' invasion of a legally protected interest sufficient to confer standing."). The threat of administrative enforcement constitutes sufficient injury to warrant pre-enforcement review.[3] *Kiser v. Reitz*, 765 F.3d 601, 609 (6th Cir. 2014). Elias must therefore show: 1) an intent to engage in constitutionally

[3] Practicing without a license is a crime as well. *See* Tenn. Code Ann. § 62-3-130 (Class B misdemeanor). In fact, the Board's notice to Elias warned him of possible criminal sanctions. (Ex. 1 at 41.)

protected conduct; 2) the conduct is proscribed; and, 3) a credible enforcement threat. He has done so.

Elias's intent to practice barbering, a constitutionally protected interest, can hardly be doubted. Plaintiffs properly allege intent to practice when they can show that they engaged in professional conduct in the past and intend on doing so again. *See Kiser*, 765 F.3d at 608. Nothing in Supreme Court precedent "requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he will in fact violate that law." *Driehaus*, 134 S. Ct. at 2345 (citing *Babbitt*, 442 U.S. at 301). When plaintiffs can show that they were fined for practicing without a license and face future fines if they continue, they have easily shown injury. *Bruner*, 2013 U.S. Dist. LEXIS 25035 at *10. Elias's desire to practice is longstanding and was on display when he took an actual job at a barbershop. (Compl. at 6-7.) Barbering has long been his dream job and pathway to entrepreneurship. (*Id*. at 2, 17.) He was practicing barbering already before he was disciplined for unlicensed practice. (*Id*. at 7.) Even at his disciplinary hearing, Elias stressed that he desired to become licensed so he could continue barbering. (Ex. 2 at 16.) Little doubt exists that he intends on practicing. *See Kiser*, 765 F.3d at 608. He must have a license to do so. (Ex. 1 at 23.) His course of conduct is affected with a constitutional interest because, as pointed out above, the right to earn a living is a constitutionally protected liberty and property interest. *See Lowe*, 472 U.S. at 228; *AAA Aaron's Action Agency Bail Bond*, 993 S.W.2d at 85. And barbering without a high school degree is unquestionably proscribed by statute. *See* Tenn. Code Ann. § 62-3-110(b)(2). The only remaining question is whether a

credible threat of enforcement exists if Elias were to engage in this conduct.

More than credible, the threat of enforcement is certain. The Complaint related that if Elias practiced without a license, the Board would take enforcement action against him. (Compl. at 17:146.) Ms. Gumucio verified this point. In response to the question, "So we can credibly say that the Board will take enforcement actions against any unlicensed practice that it encounters, just as it did with Mr. Zarate," Ms. Gumucio answered, "That is correct." (Ex. 1 at 32.) When asked with even greater specificity whether it would continue enforcement if Elias was to practice, she responded, "That sounds like it would be right." (*Id.*) This is dispositive proof of a credible enforcement threat.

This proof was bolstered by Ms. Gumucio's further testimony and past Board actions against Elias. Enforcement threats are credible "when the same conduct has drawn enforcement actions or threats of enforcement in the past." *Kiser*, 765 F.3d at 609. The Board took enforcement action against Elias personally for practicing without a valid license. (Ex. 1 at 25). The threat of enforcement "is considered especially substantial when the administrative agency ha[s] not disavowed enforcement," *Kiser*, 765 F.3d at 609 (quotation omitted), against a plaintiff in the future. The Board did not disavow further enforcement against Elias should he resume practice. (Ex. 1 at 34). The threat carries greater weight when the agency will not disavow enforcement against a particular plaintiff. *See McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016) (citing *Kiser*, 765 F.3d at 607). Nor would the Board would not ignore it if Elias practiced again. (Ex. 1 at 32.) Ms.

Gumucio affirmatively indicated they would take enforcement action against Elias. (*Id*. at 32.) Furthermore, the "prospect of issuance of an administrative cease-and-desist order or a court-ordered injunction against such prohibited conduct provides substantial additional support for the conclusion that" the enforcement threat is real. *See Babbitt*, 442 U.S. at 302 n. 13. The Board issues cease-and-desist letters warning of a possible injunction. (Ex. 1 at 23-24, 27-28.) Ms. Gumucio testified that the issuance of cease-and-desist letters are such common practice that field inspectors have them as forms on their iPads. (*Id*. at 28.) The Board, in fact, issued one to Elias. (*Id*. at 28-29) Those letters warn persons, including Elias, that the Board may pursue injunctive relief against anyone practicing without a license. (*Id*. at 30-31.) Elias demonstrated enough of a threat that he can seek prospective injunctive relief against future enforcement of the challenged license. *See Wooley v. Maynard*, 430 U.S. 705, 712 (1977).

In proving imminent injury, Elias's position is identical to that of the plaintiff in *Bruner v. Zawacki*, 2013 U.S. Dist. LEXIS 25035 (E.D. Ky. Feb. 25, 2013). Bruner sought to obtain a state issued certificate that was required before he could operate a full service moving company. *Id*. at *2. Like the Board, the defendants contended that because Bruner never submitted an application, "'it is unknown whether the Plaintiffs will ever be subject to the statutory provisions challenged in this action' and that due to that uncertainty, the plaintiffs do not have standing." *Id.* at *10. The District Court rejected this argument: "Although the plaintiffs may never actually have their application denied, the plaintiffs are undeniably subject to the

[challenged provision]." *Id*. This constituted injury "because they have been fined for providing moving services without a Certificate, and the defendants admit that the plaintiffs are subject to fines in the future if they continue to operate in the future without a Certificate." *Id*. The same is true with Elias. He has been fined in the past for practicing barbering without a license. (Compl. at 8.) The Board has indicated it would do so again. (Ex. 1 at 32.) Elias has the same injury as Bruner. He cannot engage in constitutionally protected conduct because it is proscribed by statute without a credible threat of an enforcement action. That confers standing.

The credible threat of enforcement for practicing without the unconstitutional license is a well-recognized imminent harm. Having been demonstrated here, a basis exists to conclude that Elias faces imminent injury wholly independent of the concrete, realized harm.

C. Elias has also demonstrated causal connection and redressibility.

The Complaint also meets the remaining two elements to show standing: a causal connection between the injury and challenged conduct, and a likelihood the Court can redress the injury. *See Hargett*, 414 S.W.3d at 98.

Elias demonstrated a causal connection between each injury and the academic achievement requirement. "[T]he causation element is not onerous," and only requires a showing that "the injury to the plaintiff is 'fairly traceable' to the conduct of the adverse party." *Id*. (quotations omitted). Elias cannot enter barber school now because of the requirement. (Compl. at 8:71; 9:72-75.) The Board relies on the schools

to screen for eligibility (Ex. 1 at 8-10). Their school license depends on them enforcing the eligibility requirements on prospective students. (*Id*.) The injury of being denied entry into school is "fairly traceable" to the conduct of the Board because the schools are forced to enforce eligibility requirements. Causation is more than adequately demonstrated.

The same is true with the imminent injury of future enforcement. As related above, past and certain future enforcement of the licensure requirement is an injury that is traceable to the challenged law. *See Bruner*, 2013 U.S. Dist. LEXIS 25035, at *11 (plaintiffs have shown causal connection because "[t]his injury – the inability of the plaintiffs to operate their moving company without exposure to fines – is 'fairly traceable' to the conduct of the defendants in their enforcement [of the challenged law]."). Elias cannot practice without exposure to criminal and civil sanction. (Compl. at 16:137-139.) The only way he can practice without the threat of penalty is to obtain a license (Ex. 1 at 23) that he contends includes an unconstitutional requirement. This imminent injury is fairly traceable to the Board's ongoing enforcement of the obligation to obtain the challenged license before practicing barbering.

This Court is capable of redressing all of the injuries related above. *See Hargett*, 414 S.W.3d at 98 (injury "must be capable of being redressed by a favorable decision of the court"). Were the court to declare the academic achievement requirement unconstitutional, Elias would be statutorily eligible for school admission. Elias would not be subjected to fines for practicing without a license until the licensure process deleted the objectionable portion. *See id*. at 99 ("declaratory

judgment in [plaintiffs] favor on any of their constitutional claims would render [challenged requirement] unenforceable, thereby allowing them to exercise their right to vote free of its constraints."). In short, this Court can completely alleviate all of the alleged injuries. All of the factors necessary to establish standing are met.

Last, Elias's injuries are distinct from that of the public generally. *See Bennett v. Stutts*, 521 S.W.2d 575, 577 (Tenn. 1975). The public at large is not statutorily ineligible from a career in barbering because they never graduated high school (Compl. 16:142) ending the possibility of their dream job. (*Id.* at 2:3). The public at large have not been denied entry into barber school because they have not graduated high school (*id.* at 8:144), or sanctioned for barbering without a valid license. (*Id.* at 8:64, 70, 9:75.) They do not face the imminent prospect of further enforcement action (*id.* at 9:146) for working unless they either obtain an unconstitutional license or abandon their career. Elias has stake in this case that is all too personal.

D. The academic achievement requirement *affects* Elias, even assuming arguendo that it does not *injure* Elias.

Elias has another basis to bring this action: the newly enacted private right of action law. *See* Tenn. Code Ann. § 1-3-121. It provides direct access to the courts for affected plaintiffs to challenge unconstitutional laws without the same hurdles attending other causes of action. Elias has undoubtedly been *affected* by the academic achievement requirement now, even if he has not yet been injured.

Subject matter jurisdiction can be created by a statutory cause of action. *Dishmon v. Shelby State Community College*, 15 S.W.3d 477, 480

(Tenn. Ct. App. 1999) ("Courts derive their subject matter jurisdiction from the Constitution of Tennessee or from legislative act. …"). When looking at questions of standing, the focus should be on what the relevant statute requires. *Hargett*, 414 S.W.3d at 97 ("The proper focus of a determination on standing is a party's right to bring a cause of action, and the likelihood of success on the merits does not factor into such an inquiry."). "A court's subject matter jurisdiction in a particular circumstance depends on the nature of the cause of action and the relief sought." *Landers v. Jones*, 872 S.W.2d 674, 675 (Tenn. 1994). Standing is determined by the cause of action. Causes of action can be created or expanded by statute. Therefore, the courts must analyze a new enactment to ascertain the standing requirements.

The private right of action law, unaddressed by the Board, provides an independent basis for subject matter jurisdiction. Notably, the private right of action law does not require a party be *injured*, merely that he be "*affected*." Tenn. Code Ann. § 1-3-121. This is an appreciably lower standard. To "affect," merely means, "to produce an effect or change in." *Affect*, Random House Webster's College Dictionary (1991). By comparison, "injury" means "harm or damage done or sustained." *Injury*, Random House Webster's College Dictionary (1991). The academic achievement requirement has undoubtedly "produced an effect or change" upon Elias. It legally disqualified him from the career of his choosing. (Compl. at 2:3, 16: 142.) Even if this does not rise to the level of a legal "injury," it certainly "affected" Elias when, without any legislative explanation at all, he became ineligible for his career in 2015. (*Id*. at 10:87.) Elias has had to change livelihood and alter family

plans. (*Id.* at 2:3, 17:145) He cannot get into barber school. (*Id.* at 16:144.) These are certainly "effects" and "changes" that meet the requirement, even assuming this Court agreed that they do not yet constitute injury. The Board's motion does not address this alternate ground, providing an easy basis exists to deny it.

Elias has both actual and imminent injuries. He is not required to submit an application in futility to test the constitutionality of a license he challenges as unconstitutional. Nor must he demonstrate that the academic achievement level is the only reason why he cannot obtain a license under the proper causation standard. Finally, merely being affected by the challenged requirement is sufficient to confer standing.

IV.
Ripeness

For essentially the same reasons, Elias has shown that the case is ripe now because the injuries discussed above are actualized, and that he may also bring a pre-enforcement challenge to the barber license because the Board's threat to take enforcement action if he practices without it is credible.

This argument is largely duplicative. Ripeness and injury are synonymous issues when, as here, the challenge is based on whether the injury is real or conjectural. *See Driehaus*, 134 S. Ct. at 2341 n. 5 (2014) (quotation omitted) (standing and ripeness "boil down to the same question). Thus, this issue has largely been substantively responded to above, and is only briefly addressed below.

When analyzing ripeness, Tennessee courts use a two-part inquiry based on *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). *See*

West, 468 S.W.3d at 491. Generally speaking, the Tennessee Declaratory Judgment Act "is to be liberally construed and administered." Tenn. Code Ann. § 29-14-113. Still, it cannot be used to decide a theoretical question, render an advisory opinion, or allay fears as to what may occur in the future. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 193 (Tenn. 2000). The courts ask: 1) whether the issues in the case fit for judicial resolution; and 2) whether the court's refusal to act cause hardship to the parties. *West*, 468 S.W.3d at 491. A party suffers "hardship" when he "faces a choice between immediately complying with a burdensome law or risking serious criminal and civil penalties." *Id.* at 492 (citations and quotation omitted). A case is not fit when "it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Id.* at 491. In a case such as this one that seeks prospective relief, a plaintiff may also bring a pre-enforcement challenge to prevent a likely future injury. *See Abbbott Labs.*, 387 U.S. at 152-53.

This case presents a textbook example of hardship because Elias must either comply with a burdensome law or risk serious civil and criminal penalties. *See West*, 468 S.W.3d at 492. Declaratory actions are properly maintained even prior to actual injury when property rights "would be destroyed by the enforcement of the statute." *See Erwin Billiards v. Buckner*, 300 S.W. 565, 566 (Tenn. 1927). This is Elias's case exactly. He can either comply by surrendering his liberty and property interest in becoming a barber as he cannot get the license, or he can risk the civil and criminal fines that come from practicing without a license. *See* Tenn. Code Ann. §§ 39-16-302, 56-1-308, 62-3-

130. This is the exact sort of situation that warrants pre-enforcement review. The academic achievement requirement requires Elias to either "engage in, or to refrain from [] conduct," and is therefore the sort of case that would be appropriate for pre-enforcement review. *West*, 468 S.W.3d at 492 (quoting *Texas v. United States*, 523 U.S 296, 301 (1998)).

When the Board argues that there is "very little" hardship because Elias "is not legally required to be a barber, however much it appeals to him as a career," (MTD at 14) it makes an error, but one that is illuminating. Of course submission to an unconstitutional law is an option, but that is hardly the point. Surrendering a constitutionally protected right is a hardship. "[R]efrain[ing] from" conduct because of an unconstitutional law is no different than "engag[ing] in" conduct because of an unconstitutional law, *see West*, 468 S.W.3d at 492, when it comes to understanding how a credible threat of enforcement inflicts a hardship now. The Board well illustrates how its enforcement of the academic achievement requirement presently forces Elias to choose "'between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed" in another enforcement action. *Wooley*, 430 U.S. at 710 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). In other words, abandoning his dream job *is* a hardship. The Board's dismissive attitude rather underscores the important need for this case to proceed further.

These constitutional questions are certainly fit now. Elias brings a straightforward constitutional challenge, largely legal, and it would "not be clarified by factual development." *Driehaus*, 134 S. Ct at 2347.

Awaiting another instance of enforcement would do nothing "sharpen or focus" the constitutional questions. *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 291 (6th Cir. 1997). The arguments would not change, for instance, if Elias were to graduate barber school and make an unsuccessful application to the Board because of the academic achievement requirement. He could still not get a license. (Ex. 1 at 11-12.) There is no uncertainty about how the academic achievement requirement works. Making pointless application to the board is not required, and does nothing to inform the question of whether the academic achievement requirement does or does not pass constitutional muster. *See Palazzolo*, 533 U.S. at 622 ("Ripeness doctrine does not require a landowner to submit applications for their own sake."). The point of ripeness is to prevent adjudication of "abstract disagreements." *See West*, 468 S.W.3d at 490; *see also B&B Entertainers,* 318 S.W.3d at 849 (cases are unripe when "no need for the court to act or where the refusal to act will not prevent parties from raising the issue at a more appropriate time"). When Elias can do nothing further towards licensure and the constitutional questions would not change even if he could, the disagreements are anything but abstract.

The actual and imminent injuries are ripe now. Requiring that Elias either give up his constitutionally protected right to earn a living or face penalties is precisely the sort of hardship that warrants pre-enforcement review.

V.
Elias Need Not Exhaust Administrative Remedies Under the Private Right of Action Law, 42 U.S.C. § 1983, or the APA.

Elias was not required to exhaust his administrative remedies before presenting his constitutional claims, even under the APA. First, Elias does not exclusively rely on the APA. Both the newly enacted private right of action law, *see* Tenn. Code Ann. § 1-3-121, and 42 U.S.C. § 1983 do not require administrative exhaustion. Second, even if the APA was the only cause of action, the Tennessee Supreme Court has conclusively held that administrative exhaustion cannot be applied to facial or mostly facial constitutional claims such as Elias's.

A. Elias brings this action under the private right of action law, and Section 1983. Neither requires exhaustion.

First, no exhaustion is required under the alternative causes of action. The Complaint raised two causes of action independent of the APA, both of which go unmentioned by the Board. The Complaint relied upon the newly enacted private right of action law found at Tenn. Code Ann. § 1-3-121. (Compl. at 3.) Enacted this last year, the private right of action law reads:

> *Notwithstanding any law to the contrary*, a cause of action shall exist under this chapter for any affected person who seeks declaratory and injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages.

Id. (emphasis added). This law has no exhaustion requirement and, "[i]n Tennessee, exhaustion is not statutorily required unless the statute 'by its plain words' requires it." *Thomas v. State Bd. of Equalization*, 940 S.W.2d 563, 566 (Tenn. 1997) (quoting *Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985)). Moreover, even if the APA

did require exhaustion in this case—and it does not, as will be shown below—the availability of the private right of action law would remove that requirement. "In the situation where the legislature has provided more than one method to obtain judicial review, one of which involves administrative action or levels of appeal, exhaustion of administrative remedies is not statutorily required." *B.F. Nashville, Inc. v. City of Franklin*, No. M2003-00180-COA-R3-CV, 2005 Tenn. App. LEXIS 32 *17 (Tenn. Ct. App. Jan. 21, 2005) (citing *Reeves v. Olsen*, 691 S.W.2d 527, 530 (Tenn. 1985)). As this cause of action can be invoked under the private right of action law, exhaustion under the APA is irrelevant.

The elements to invoke the private right of action law are:

1) An affected party;
2) A suit for declaratory and injunctive relief;
3) Brought regarding the legality/constitutionality of any governmental action;
4) In a suit that does not seek damages.

See Tenn. Code Ann. § 1-3-121.

Elias may invoke the private right of action law. He has certainly been "affected" by the academic achievement requirement, as it has resulted in his disqualification from his chosen career (Compl. at 16:142), kept him from going to barber school (*id.* at 16:144), caused him to abandon his career path (*id.* at 2:3), and forces him to refrain from barbering or face penalties. (*Id.* at 17:146.) This is a suit for declaratory and injunctive relief. (*Id.* at 1) Elias brought the suit to test the constitutionality of a governmental action. (*Id.*) He seeks no damages. (*Id.* at 21:A-D) He has met the elements and may bring suit.

The private right of action law was intended to provide a direct avenue for people like Elias who just wish to remedy a constitutional infraction to come directly to court without the same procedural hurdles that a plaintiff who seeks to reach the state's treasury should expect. Tenn. Code Ann. § 1-3-121 has no exhaustion requirement. Even in the event that this statute conflicted with the APA, this statute would prevail. The "notwithstanding" provision indicates that it prevails over any other conflicting provision. *See Green v. Commonwealth*, 507 S.E.2d 627, 629 (Va. Ct. App. 1998) (statute not limited "by other incongruous laws" because the term, 'notwithstanding any other provision' meant that "the General Assembly intended [the law] to function 'without obstruction.'"). This Court should effectuate the legislature's clearly demonstrated intent to allow a direct path to court for litigants who wish to test the constitutionality of a law.

The Complaint also raised 42 U.S.C. § 1983, and it too has no exhaustion requirement. (Compl. at 3.) States have concurrent jurisdiction to adjudicate Section 1983 claims. *King v. Betts*, 354 S.W.3d 691, 707 (Tenn. 2011). Exhaustion of administrative and judicial state remedies is not a prerequisite to a 1983 action. *See Patsy v. Florida Bd. 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 [v. Board of Education*, 373 U.S. 668, 671-73 (1963)]."). Thus, Elias can bring his federal constitutional claims under this provision without exhausting them.

B. The APA cannot require exhaustion for this predominantly facial constitutional suit.

Even under the APA, exhaustion of these predominantly facial constitutional claims is not required. The APA, like the DJA, 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 Co. v. Morgan,* 263 S.W.3d 827, 837, 841 (Tenn. 2008) (citations and quotations omitted). The APA requires a prospective plaintiff to first petition for a declaratory relief with an agency. *Colonial Pipeline*, 263 S.W.3d at 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)). 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, 465 n. 18 (Tenn. 2012). This requirement, however, poses no obstacle to this case.

The separation of powers doctrine prohibits an exhaustion requirement under the APA for constitutional suits such as this one. In *Colonial Pipeline,* 263 S.W.3d at 842, the Defendants argued, just as the Board does here, (MTD at 15-16), that the Plaintiff never petitioned for a declaratory order under Tenn. Code Ann. § 4-5-225(b) and thus, did not satisfy the exhaustion requirement found at Tenn. Code § 4-5-225(a). The Court rejected that same argument because administrative tribunals may not determine the facial constitutionality of a statute without running afoul of the principle of separation of powers. *See Colonial Pipeline*, 263 S.W.3d at 843-44. The Supreme Court then

proceeded to consider "a mixture of constitutional challenges" because the resolution depends "predominantly upon whether the underlying statutes comply with constitutional mandates." *Id.* at 846. Even under the APA, exhaustion cannot be imposed on certain classes of claims.

Because the claims are predominantly facial, Elias does not need to exhaust his claims administratively, even under the APA. A facial challenge argues that any application of the challenged law is unconstitutional. *See United States v. Salerno*, 481 U.S. 743, 745 ("[N]o set of circumstances exists under which the Act would be valid."). All three of the claims in the Complaint are facial. The first argues that there is *never* a constitutional reason to require barbers graduate high school. (Compl. at 17-20.) The second argues that it there is *never* a constitutional reason to treat barbers differently from cosmetologists or emergency medical responders if the goal was promote the goal of public safety, (*id.* at 19:166-69), or elected officials if the goal was to encourage high school participation. (*Id.* at 19:170, 20:171-72.) The Complaint argues, third, that the academic achievement requirement *always* violates the Fourteenth Amendment because it arbitrarily and irrationally infringes upon a person's federally constitutionally guaranteed rights. (*Id.* at 29:175-79, 21:180-182.) All three claims are facial because they maintain that the academic achievement requirement is never constitutional under the particular constitutional theory. None argue that particular facts surrounding Elias make the requirement unconstitutional. These are obvious facial attacks "because they focus on the language and effect of the statutes themselves." *Colonial Pipeline*, 263 S.W.3d at 846. Administrative exhaustion could

not be legislatively imposed without violating separation of powers. Elias did not need to go through the useless step of asking the Board to declare a law unconstitutional.

Because the Board may not consider constitutional claims, this is not even a situation where exhaustion could be imposed as a matter of judicial prudence. *See Thomas*, 940 S.W.2d at 566 n. 5 (exhaustion is a matter of judicial discretion when not statutorily required). Because the Board flatly lacks the constitutional authority to make a facial constitutional ruling, *see Colonial Pipeline*, 263 S.W.3d at 842 (quoting *Richardson*, 913 S.W.2d at 453), expecting it to would ask too much. None of the exhaustion considerations favor it. It would not promote efficiency by giving the Board the opportunity to correct is own errors. *See Thomas*, 940 S.W.2d at 566. The academic achievement requirement is a statutory enactment, *see* Tenn. Code Ann. § 62-3-110(b)(2), and the Board has never, to Ms. Gumucio's knowledge, ignored a statutory enactment. (Ex. 1 at 19.) Even if it could, it has no "experience or expertise," *Thomas*, 940 S.W.2d at 566, in adjudicating constitutional disputes. (Ex. 1 at 20.) Nothing about the constitutional questions "involve 'specialized fact-finding, interpretation of disputed technical subject matter, and resolving disputes concerning the meaning of the agency's regulations.'" *Colonial Pipeline*, 263 S.W.3d at 839 (quoting *West v. Bergland*, 611 F.2d 710, 715 (8th Cir. 1979)). The Board's expertise is in cosmetology and barbering, not constitutional law. And for those combined reasons, the Board could not compile a record that would aid judicial review. *Thomas*, 940 S.W.2d at 566. So

even if this was a matter that could be reviewed administratively, no good reason exists to do so.

Elias has adequate means to raise his challenges free of legislatively imposed exhaustion in the form of Tenn. Code Ann. § 1-3-121 and 42 U.S.C. § 1983, neither of which the Board addresses. Nevertheless, even under the APA, the Complaint is not bound by the exhaustion requirement under the straightforward application of *Colonial Pipeline*.

V.
Conclusion

Elias has demonstrated both actual and imminent injury. The case is therefore ripe now, and also suitable for pre-enforcement review. Finally, Elias is not and cannot be required to submit to an administrative exhaustion requirement before presenting his predominantly facial claims to a Tennessee court.

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Respectfully submitted,

s/ B.H. Boucek

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