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

ELIAS ZARATE, **Plaintiff,** **v.** **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.**	**No. 18-534-II**

REPLY IN SUPPORT OF MOTION TO DISMISS

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 not been denied a master barber certification on the basis of the challenged statute, which requires that he have a high school diploma or its equivalent, or any other basis, and because the relief sought—the invalidation of this academic achievement requirement—would not necessarily redress Mr. Zarate's alleged injury. Nothing in Mr. Zarate's "Response in Opposition to Motion to Dismiss" ("Resp.") refutes either of these grounds for dismissal. The motion to dismiss should therefore be granted.

Specifically, Defendant's motion seeks to dismiss this suit under the justiciability doctrines of standing, ripeness, and exhaustion of administrative remedies. These doctrines all revolve around the fundamental fact that, because the Board has not actually passed on Mr. Zarate's eligibility for a license, this Court does not have a proper and fully ripened administrative process to review. This deprives the Court of knowledge essential to answering the question of whether Mr. Zarate's suit can provide redress for his claimed injury—an inability to practice barbering.

In response to Defendants' standing argument, Mr. Zarate asserts that he "has shown actual injury because the academic achievement requirement operates to deny him entry into barber school." Resp. at 9. Because he has never actually sought a master barber certificate, he goes to great lengths to assert this formulation as his injury, implicitly acknowledging that "statutory ineligibility" cannot be seen as "the sole injury" because it may not yet be "actualized," given that he has not yet applied for or been denied a license. *See* Resp. at 11.

By his own pleading, Mr. Zarate did not file this suit so that he could attend barbering school. "Barbering is Elias's dream job." Complaint at ¶ 3. Upon discovering that performing this job in Tennessee requires a high school diploma, Mr. Zarate describes his dream as being "crushed." *Id*. In describing his "injury" in the complaint, Mr. Zarate says he is "willing to invest the time and cost into attending barber school *to start his career*." Complaint at ¶ 145 (emphasis added). He "loves barbering and finds it fulfilling, and rewarding on both a financial and personal level," Complaint at ¶ 148, he "wants to use the experience to become an owner of a barbershop," Complaint at ¶ 149, and believes that "[o]nly barbering offers [him] a career path that he knows to be stable, lucrative, dignified, fulfilling," and which he could perform with his current level of education. Complaint at ¶ 151. There can be no doubt, from the complaint, that the injury that Mr.

Zarate complains of is the effect of the academic achievement requirement on his ability to pursue his dream job.[1]

After all, denial of entry to barber school could only injure someone because these schools serve as gatekeepers to the trade. Barber school alone represents nothing more than an expenditure of time and money unless Mr. Zarate also obtains a master barber certificate that would allow him to utilize that training. The real injury—the injury that is actually meaningful to Elias Zarate as an aspiring barber—must therefore be the academic achievement requirement's bar to his practice of barbering. An injury can hardly be called "concrete," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), if it does not actually hinder the complainant. But even invalidating the academic achievement requirement through this suit might not redress this injury.

In their initial memorandum, Defendants explained that Mr. Zarate was previously cited by the Board for practicing barbering with a fraudulent license, Memo. at 3. The administrative law judge in that proceeding determined that the license was fraudulent, that Mr. Zarate displayed it knowing that it was fraudulent, and that he refused to name the source of the fraudulent license, other than to say that it was not from the Board (which is, of course, the only valid source for a master barber certification). Memo. at 4-5. For this conduct, the administrative law judge determined that Mr. Zarate had engaged in "immoral and unprofessional conduct." Memo. at 5. "Immoral and unprofessional conduct," not coincidentally, happens to be one of the bases on which the Board is empowered to deny a license to an otherwise-qualified applicant. *See* Tenn. Code Ann. § 62-3-121(6).

[1] And even in the response to this motion, Mr. Zarate occasionally cuts to the chase and identifies the real claimed injury: "The Board's enforcement of the academic achievement requirement has effectively shut down Elias's dream of becoming a barber." Resp. at 3.

Had Mr. Zarate gone to the Board, perhaps through a petition for a declaratory order, then there would be an administrative record establishing exactly where he stands vis-à-vis his potential to obtain a master barber certificate. If the Board had determined to exercise its authority under Tenn. Code Ann. § 62-3-121(6) to deny Mr. Zarate a license for his past immoral and unprofessional conduct, that would have rendered this suit—as presently framed—moot.

In its current state, this challenge is the definition of a speculative enterprise. Neither the Court nor the litigants can know whether the constitutionality of the academic achievement requirement actually controls Mr. Zarate's eligibility for a license. And that control is essential to establishing standing: otherwise, a plaintiff cannot establish that their "injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. Imagine, for a moment, that this case proceeds and that Mr. Zarate prevails. That could entail additional discovery, a trial, and an appellate hearing—a substantial commitment of time and resources by the parties and the judicial system. Then imagine that Mr. Zarate applied for and took 1500 hours of training at a barber school and applied to the Board for a license, only to be denied on the basis of his past conduct. This entire judicial proceeding would have accomplished nothing for Mr. Zarate of practical consequence. He would have wasted substantial time and money on barber school. Such a result might serve the ends of the *Beacon Center*, which is providing counsel to Mr. Zarate in this case, but it would do nothing for *him*. Mr. Zarate might still challenge the denial of his license, but that would entail an entirely new judicial proceeding, and if he did not prevail in that suit, this entire experience would have been rendered useless.

It is thus impossible for Mr. Zarate to assert that "this Court can completely alleviate all of the alleged injuries." Resp. at 25. He cannot know that until he knows how the Board will appraise

his eligibility. And neither can this Court. Arguing that he has standing because he assumes that the Board will act in a particular way is the definition of speculation. And "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561. In this context, it makes no sense for Mr. Zarate to do an end-run around the administrative process. It would be counterproductive to deprive the Board—the state agency entrusted with the duty to administer the statutes in question—of an opportunity to deliberate and decide. Such a decision, after a full administrative process, would be reviewable by the courts, which could then weigh and consider all of the constitutional arguments that Mr. Zarate wishes to present.[2] The difference is that the courts would be able to consider *all* of the information pertinent to Mr. Zarate's situation adduced through the proper administrative procedures, and the judicial process need to occur only once and with all of the pertinent information available from the start.

Mr. Zarate is obviously sensitive to this fundamental flaw in his haste to seek judicial review of an unformed administrative process. He refers to "the possibility that the Board would deny [him] a license because of his prior instance of unlicensed practice" variously as "remote," Resp. at 12, or a "far-flung future possibilit[y]." Resp. at 2. But referring to this prospect as being in the "future" is, itself, begging the question of whether it should have already occurred. Whether the Board might act in this fashion is only a matter for speculation because Mr. Zarate took an impermissible route to this Court in order to cut out the Board from its proper role in administering the barbering statutes.

[2] This is entirely contrary to Mr. Zarate's flawed understanding of Defendants' position as meaning that he "could only raise a challenge once he was trained, graduated barber school, and could test." Resp. at 11.

Mr. Zarate asserts that he need only show a "'substantial likelihood' that the relief requested will redress the injury claimed" in order to satisfy standing, Resp. at 17 (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 74 n.20 (1978)), and then asserts that there is "a substantial likelihood that if [he] were eligible, then the Board would issue him a license notwithstanding his history." Resp. at 17. Mr. Zarate has no basis for this assertion. The question posed to Roxana Gumucio, the Board's executive director, during a Tenn. R. Civ. P. 30.02(6) deposition was whether the Board had "ever denied a license to a person, who otherwise meets the statutory criteria because they've previously been found guilty of practicing without a license." Gumucio Dep. at 45:5-8. Ms. Gumucio explained that an individual with a "prior history" would have to appear before the Board. *Id*. at 45:9-13. Mr. Zarate was found not only to have practiced without a license, but to have engaged in fraudulent activity constituting "immoral and unprofessional conduct."

Ms. Gumucio also testified that she was not aware of a license denial for "one violation" or "criminal history," Gumucio Dep. at 45:14-21, but that is no longer the case. At its August 6, 2018, meeting, the Board denied a license application from a previously-licensed cosmetology instructor because his earlier license was revoked for previous violations (specifically, selling invalid licenses to unqualified persons). *See* Supplemental Declaration of Roxana Gumucio (attached hereto as Exhibit "1") at ¶ 7 and Exh. A. And Ms. Gumucio now also relates factually similar cases in which applicants were denied licensure because their prospective businesses were closely related to previous businesses that had been subject to revocation. These situations make clear that it would not be inconsistent with past practice for the Board to use its authority to deny a license for "immoral and unprofessional conduct" in the case of a person who has been found to

have engaged in "immoral and unprofessional conduct" just last year (*see* Declaration of Hosam William, Exhibit B to Defendants' Motion to Dismiss, at Exh. III, pp. 1-2), and who refused to reveal to the Board the identity of the individual who broke the law by providing Mr. Zarate with a fraudulent license.

The possibility that the Board might deny licensure to Mr. Zarate even if he meets every other statutory requirement is thus not at all "remote" or "far-flung." It is absurd for Mr. Zarate to assert that that this prospect is "highly speculative," Resp. at 18, when that speculation is only necessary because he has acted to short-circuit the normal administrative process.[3] If he had petitioned the Board for a declaratory order respecting his eligibility, it would mean the difference between knowing if this suit had the potential to control his future ability to practice barbering, or would be futile. That seems a distinction worth knowing at the outset of litigation, rather than the conclusion.

Much of Mr. Zarate's insistence that he be allowed to proceed directly to this Court without first presenting his case to the Board is his argument that "the right to earn a living involves 'both a liberty and a property interest.'" Resp. at 7 (citing *State v. AAA Aaron's Action Agency Bail Bonds, Inc.*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998)). But Mr. Zarate misapprehends the law here and has misstated the holding in *AAA Aaron's*. What that court *actually* held was that "once the court grants the right to engage in such business, the right to pursue that business becomes a right" implicating both a liberty and property interest. *See AAA Aaron's*, 993 S.W.2d at 85.

[3] It is also strange for Mr. Zarate to make this assertion about the Board's future actions when he is the person who stands to be disciplined and the prospect has been raised in a filing made by Defendants, which include the Board itself and its constituent members in their official capacities. To call Defendants' speculation about their future activity "pure conjecture," Resp. at 18, while simultaneously casting the possibility as remote and far-flung is hubristic, if nothing else.

Similarly, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), concerned the termination of public employment, and thus a deprivation of something that had actually been granted. *See Loudermill*, 470 U.S. at 544.

Mr. Zarate has never actually been granted the right to practice barbering. That leaves him with only his personal desire to do so. That is not a constitutionally-protected liberty interest. For purposes of substantive due process, fundamental rights and liberty interests include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to terminate one's pregnancy, and possibly the right to refuse unwanted lifesaving medical treatment." *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000).[4] This list "is short, and the Supreme Court has expressed very little interest in expanding it." *Id*. at 575.

Nor does Mr. Zarate have a property right in a license that he has never been granted. "[P]roperty interests . . . are not created by the Constitution." *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001). Instead, they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.'" *Baird*, 438 F.3d at 611 (citation omitted). "[T]o determine the existence of a property right protected by due process, the statute creating and defining that right is controlling." *Banks v. Block*, 700 F.2d 292, 297 (6th Cir. 1983).

[4] When the district court in *Craigmiles v. Giles* asserted that the plaintiffs had "a liberty interest in the right to pursue their chosen occupation," 110 F.Supp.2d at 661, it was misstating the protections afforded that interest and citing a variety of mostly aged decisions from the discredited heyday of *Lochner v. New York*, 198 U.S. 45 (1905). In affirming that decision, the Sixth Circuit Court of Appeals noted that it was applying the rational basis review to which any regulation is subject. *See Craigmiles v. Giles*, 312 F.3d 220, 223-24 (2002).

As a result, Mr. Zarate has caught himself on the horns of a false dilemma when he claims that he "can either comply by surrendering his liberty and property interest in becoming a barber . . . or he can risk the civil and criminal fines that come from practicing without a license." Resp. at 29. There is a third option: follow the normal administrative process while complying with the law until the constitutional question has been settled. Contrary to his assertion, this is not a "textbook example of hardship," Resp. at 29, because Defendants do not insist that Mr. Zarate submit to what he believes is an unconstitutional law. *See* Resp. at 30. Rather, they insist that he pursue his challenge in the procedurally proper way, by first submitting his case to the Board. For the reasons explained above, this is, in fact, the most efficient way of reaching the constitutional merits of the question while also ensuring that he does not pursue this litigation in futility. That this would—at this point—delay an ultimate hearing on the constitutional merits may be unfortunate, but Mr. Zarate has only himself to blame for not pursuing the proper course initially.

Finally, neither Tenn. Code Ann. § 1-3-121 nor 42 U.S.C. § 1983 can salvage Mr. Zarate's complaint. Standing and ripeness are justiciability doctrines. "Despite the absence of express constitutional limitations on the exercise of their judicial power, Tennessee's courts have, since the earliest days of statehood, recognized and followed self-imposed rules to promote judicial restraint and to provide criteria for determining whether the courts should hear and decide a particular case." *Norma Faye Pyles Lynch Family Purpose LLC v. Putnam County*, 301 S.W.3d 196, 202-203 (Tenn. 2009). These rules are the "justiciability doctrines," *id*., that form the basis for this motion. Because these rules are derived from the fundamental principle that the courts can act only when there is a case or controversy, they cannot be waived by legislative enactment.

A "distinct and palpable injury" is an element of standing. *See A.C.L.U. v. Darnell*, 195 S.W.3d at 620. Standing is a requirement for justiciability. Thus, when Mr. Zarate asserts that, under Tenn. Code Ann. § 1-3-121, the "law does not require a party be *injured*, merely that he be *affected*" (emphasis in original) and that this is somehow "an appreciably lower standard," Resp. at 27, he is making the fallacious argument that the General Assembly can amend the requirement of standing that is rooted in the Constitution. There is no authority for this proposition, and thus no authority for his argument that the Court jettison the injury requirement from its analysis.

Mr. Zarate lacks standing because his purported injury-in-fact—a bar against his practice of barbering—is a matter of speculation because he never pursued the administrative procedures that would determine his eligibility for a license. For the same reason, he has failed to exhaust his administrative remedies. And, because he has failed to pursue those avenues, he cannot satisfactorily demonstrate that his constitutional challenge would actually redress his claimed injury, and so his challenge is not yet ripe. For all of these reasons, this suit is not justiciable, and should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

/Brad H. Buchanan
BRAD H. BUCHANAN (#23534)
Senior Assistant Attorney General
Office of the Attorney General
[redacted]