UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO.: 3:17-cv-00508

JASNA BUKVIC-BHAYANI, DAHLIA INSTITUTE OF MAKEUP ARTISTRY LLC, and JULIE GOODALL,	)
Plaintiffs,	)
v.	)
BALDWIN RAY MITCHELL, JR., WYATT JONES, JR., KRISTA ROSE, ABBY SEATS, DIANE SMITH, RENEE BYARS, in their official capacities as Members of the North Carolina Board of Cosmetic Art Examiners, and LYNDA ELLIOTT, in her official capacity as Executive Director of the North Carolina Board of Cosmetic Art Examiners,	)
Defendants.	)

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Case **Page(s)**

Statute

INTRODUCTION

Defendants' motion to dismiss Plaintiffs' complaint—which challenges North Carolina's prohibition on unlicensed makeup instruction—is filled with contradictions. First, after ordering Plaintiff Bukvic-Bhayani to cancel her makeup school's grand opening, which she did, Defendants now they say that Plaintiffs have not been injured and, thus, lack standing. Second, after correctly telling Plaintiff Bukvic-Bhayani that a North Carolina statute barred her school from operating without a state license, they have now decided that they can ignore the statute after all. (According to a non-binding declaration drafted by one defendant, Plaintiffs now, supposedly, have Defendants' blessing to talk about makeup, rendering Plaintiffs' claim unripe.) Finally, even though Defendants recognize that what Plaintiff Bukvic-Bhayani wants to do is talk about makeup, they somehow believe that her speech is not speech and, consequently, that Plaintiffs fail to state a First Amendment claim. Defendants are wrong on all counts.

First, Plaintiffs have standing. Through verbal and written communications, the Board of Cosmetic Art Examiners chilled Plaintiffs' speech by informing Plaintiffs that unlicensed makeup schools were illegal and dissuading Plaintiff Bukvic-Bhayani from opening her school. Moreover, the plain language of North Carolina's Cosmetic Art Act presents a credible threat of prosecution. Under the Act, Plaintiffs' unlicensed makeup instruction is prohibited. Because declaratory and/or injunctive relief in the instant case would redress Plaintiffs' injury, this Court has jurisdiction over Plaintiffs' claim.

Second, Plaintiffs' claim is ripe. Because Defendants already made a decision on the legality of Plaintiffs' speech, this lawsuit is fit for judicial resolution. Also, without judicial relief, the North Carolina Cosmetic Art Act itself is causing continuing hardship to Plaintiffs.

Indeed, Defendants' jurisdictional arguments are actually mootness arguments in disguise. After repeatedly threatening Plaintiffs, Defendants are now saying that they will no longer follow North Carolina's legislature's instructions to limit Plaintiffs' speech. However, Defendants' gambit cannot succeed. Defendants' (new) position that Plaintiffs' speech is legal is inconsistent with North Carolina's Cosmetic Art Act. Moreover, the position is reversible. Therefore, without a judicial ruling, Defendants cannot guarantee that they would permit Plaintiffs' speech.

Finally, Plaintiffs' complaint states a claim under the First Amendment. In arguing otherwise, Defendants improperly rely on a vacated opinion and invent an occupational-licensing exception to the First Amendment. Yet, under the controlling precedent, teaching is constitutionally-protected speech. And, in their complaint, Plaintiffs allege that they want to (and, indeed, have tried) to communicate at a makeup school, but that North Carolina will not let them do so without government permission, as North Carolina's Cosmetic Art Act makes clear. Together, these allegations plead a First Amendment violation.

FACTUAL BACKGROUND

Last year, Plaintiff Bukvic-Bhayani announced on Facebook that she would be opening a makeup school to teach students like Plaintiff Goodall. But unbeknownst to her at the time, Defendants were watching. They responded to her Facebook post by personally paying her a visit. During the visit, Defendants informed her that North Carolina barred her from opening any type of makeup school without a cosmetic-art-school license, which she does not have. Defendants' position was reiterated in subsequent conversations and email correspondence. In these communications, Defendants were enforcing the plain language of the North Carolina Cosmetic Art Act, whereby no one may open any type of makeup school without a government

license. To get this license, a school must agree to satisfy North Carolina's onerous requirements for esthetics schools. But esthetics encompasses (mostly) non-makeup subjects. Plaintiff Bukvic-Bhayani wants to just teach makeup at her school rather than these other topics, so—thanks to North Carolina's restrictions on makeup instruction and Defendants' communications—she cancelled her makeup school's grand opening and has not opened the school since.

For over a year, Plaintiff Bukvic-Bhayani tried to reason with Defendants. She explained that she was not trying to help people obtain esthetician licenses. Compl. ¶ 50. Instead, she just wanted to teach hobbyists and other individuals who either already possessed a license or do not need one. *Id*. ¶¶ 27-28. But Defendants said that did not matter. *Id*. ¶ 51. After all, the law is the law. And Defendants' reading of North Carolina's applicable statute was right.

But Plaintiff Bukvic-Bhayani kept trying, to no avail. After Plaintiff Bukvic-Bhayani emailed the Board and asked whether she could operate a makeup school, the Board's Executive Director—Lynda Elliott—replied that she "cannot just teach makeup application." *See* Decl. of Jasna Bukvic-Bhayani in Supp. of Pls.' Mot. for Prelim. Inj. ("Bukvic-Bhayani Decl."), ECF No. 4, ¶ 13, Ex. A-1 at 1. In subsequent emails, Plaintiff Bukvic-Bhayani reiterated that her school would not be for students seeking esthetician licenses and that she just wanted to teach makeup artistry. *Id*. at ¶ 14. For instance, in one email to the Board's Enforcement Processor, Tanya Wortman, dated February 24, 2017, Plaintiff Bukvic-Bhayani asked: "Do I need my school to be licensed before I can teach makeup artistry to students who do not want to become licensed estheticians?" *Id*. at ¶ 14, Ex. A-2 at 1. After she followed up, Defendant Lynda Elliott replied on April 14, 2017 and said: "If you are providing education to anyone that does not hold a

current license with this cosmetic art board you must obtain a school license and teach the full [Board-mandated] curriculum[.]" *Id.* at ¶ 16, Ex. A-3 at 1.

In fairness to Defendants, they were just doing what North Carolina's legislature has expressly commanded them to do. Under the North Carolina Cosmetic Art Act, "[n]o one may open or operate a cosmetic art school before the Board has approved a license for the school," and Defendants are forbidden from granting a license unless all of the requirements have been met. N.C. Gen. Stat. § 88B-16(b). A "cosmetic art school" is defined as "[a]ny building or part thereof where cosmetic art is taught." *Id.* § 88B-2(6). "Cosmetic art" is defined as "[a]ll or any part or combination of cosmetology, esthetics, natural hair care, or manicuring, including the systematic manipulation with the hands or mechanical apparatus of the scalp, face, neck, shoulders, hands, and feet." *Id.* § 88B-2(5). "Esthetics" includes "applying makeup." *Id.* § 88B-2(11a). Therefore, no one may open or operate a building or part thereof where applying makeup is taught unless the Board has already approved a license for the school, which the Board is prohibited from doing unless all the requirements are met.

The requirements are extremely cumbersome. In order to be allowed to teach makeup artistry at all, schools must have their future speech, and facilities, approved by the Board. Specifically, a prospective school must submit an application to the Board with several supporting documents, including a course curriculum for each discipline to be taught (and a diagram with location of equipment placement). 21 N.C. Admin. Code § 14T.0102(a), (b)(2)-(3); *id.* § 14T.0601(a). Moreover, the Board is prohibited from issuing a license to a prospective school before inspecting it to ensure compliance with its regulations, including that all mandated equipment has already been installed. N.C. Gen. Stat. § 88B-16(b); 21 N.C. Admin. Code

§ 14T.0102(c). In short, North Carolina requires that makeup schools satisfy all of the state's esthetics curriculum and equipment requirements before being allowed to open.

Worse still, the state-mandated curriculum for makeup schools has very little to do with makeup artistry.[1] For each covered subject, state regulations require "performances," which are defined as "the systematic completion of the steps for safe and effective cosmetic art services to a client." 21 N.C. Admin. Code § 14T.0604(b). In total, the rules require 40 performances for facials manual, 30 performances for facials electronic, 20 performances for eyebrow arching, 30 performances for hair removal, 30 performances for makeup application, 10 performances for eyelash extensions, and 10 performances for brow and lash color. *Id*. In other words, of the 170 performances required for the mandatory esthetics curriculum, there are only 30 makeup-application performances. As these numbers show, the overwhelming majority of the material in the one-size-fits-all esthetics curriculum is irrelevant to makeup artistry. Indeed, roughly five-sixths of the mandatory esthetics performances do not concern makeup artistry at all.

The equipment requirements are no better. State regulations require that esthetics schools be equipped with, among other things: (1) ten stations, which each must include a facial treatment chair (or treatment table) and stool; (2) a waste container at each station; (3) a facial vaporizer; (4) a galvanic current apparatus; (5) an infra-red lamp; (6) a woods lamp; (7) a

[1] It is 600 hours long and covers all of the esthetician license's disparate components. 21 N.C. Admin. Code § 14T.0604(a). An esthetics curriculum must include instruction in: (1) anatomy or physiology; (2) hygiene; (3) disinfection; (4) first aid; (5) chemistry; (6) draping; (7) facial or body treatment (cleansing, manipulations, masks); (8) hair removal; (9) basic dermatology; (10) skin care machines, electricity, and apparatus; (11) aromatherapy; (12) nutrition; (13) make-up or color theory; and (14) styles and techniques of esthetics services, including facials, makeup application, performing skin care, hair removal, eyelash extensions, applying brow and lash color, business management, and professional ethics. *Id*. Additionally, the curriculum must include practical instruction in the following styles and techniques: facials manual (skin analysis, cleansing, surface manipulations, packs, and masks), facials electronic (the use of electrical modalitus, including dermal lights, and electrical apparatus for facials and skin care including galvanic and faradic), eyebrow arching, hair removal (hard wax, soft wax, and depilatories), makeup application (skin analysis, complete and corrective makeup), eyelash extensions, and brow and lash color. *Id*. § 14T.0604(b).

magnifying lamp; (8) a hair removal wax system; (9) a thermal wax system; (10) a suction machine; and (11) an exfoliation machine with brushes. 21 N.C. Admin. Code § 14T.0303(b). Each of these items is unnecessary for teaching makeup artistry. Compl. ¶ 89. Their only plausible purpose is to facilitate instruction of esthetics skills that do not involve makeup application, such as giving facials, removing hair, or performing skin care. *Id.* ¶ 87. Moreover, purchasing all of this equipment would cost more than $10,000. *Id.* ¶ 88.

As a result of her communications with Ms. Wilder, Ms. Wortman, and Ms. Elliott—along with her review of North Carolina's Cosmetic Art Act and the Board's regulations—Plaintiff Bukvic-Bhayani has not opened a makeup school. Compl. ¶ 60. The mandatory curriculum and equipment requirements are unacceptable to her. *Id.* ¶ 58. She just wants to teach makeup.[2] Consequently, she is not seeking to obtain a cosmetic-art-school license for her school—the Dahlia Institute. *Id.* But, without a cosmetic-art-school license, she is not permitted to open the Dahlia Institute and teach willing listeners like Plaintiff Goodall at all. Indeed, a violation of the North Carolina Cosmetic Art Act constitutes a Class 3 criminal misdemeanor. N.C. Gen. Stat. § 88B-22(f). Also, Plaintiffs Bukvic-Bhayani and the Dahlia Institute could incur hundreds of dollars in fines for each violation of the pertinent regulations. 21 N.C. Admin. Code §§ 14P.0106(c), 14P.0107(c), 14P.0111(a), 14P.0113(m).

Now, upon being sued, Defendants have changed their tune. According to Defendants' motion to dismiss, Plaintiff Bukvic-Bhayani is supposedly permitted to teach what she wants, rendering the instant case unnecessary. On this basis, Defendants contend that Plaintiffs have no

[2] Specifically, through lectures and practical demonstrations, Plaintiff Bukvic-Bhayani intends to offer instruction in advanced color theory, different styles of makeup, different types of makeup, and different makeup-application techniques at the Dahlia Institute. Compl. ¶¶ 23, 29. To that end, Plaintiff Bukvic-Bhayani has developed lesson plans, assembled makeup materials, and prepared written handouts that she would distribute with lectures. *Id.* ¶ 30.

standing and that their claim is unripe. Defendants also claim that Plaintiffs' speech is not actually speech. As discussed below, Defendants are mistaken.

STANDARD OF REVIEW

The inquiry in a motion to dismiss is straightforward: A court must take all facts in the complaint as true (and make all reasonable inferences in favor of the plaintiffs), and determine whether the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 328 (4th Cir. 2014). Courts need not determine that a plaintiff's victory is probable—only that the facts pled would, if true, entitle the plaintiff to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

ARGUMENT

Defendants' arguments fail as a matter of law, so their motion to dismiss must be denied. In Section I, Plaintiffs show that this Court has jurisdiction. In Section II, Plaintiffs show that the controlling precedent forecloses Defendants' argument that Plaintiffs failed to state a First Amendment claim.

I. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' LAWSUIT.

In their motion to dismiss, Defendants argue that Plaintiffs' claim must be dismissed for lack of standing and ripeness. Defs.' Mem. of Law in Supp. of Mot. to Dismiss ("Defs.' Mem."), ECF No. 22, at 6-11. According to Defendants, this is because Plaintiff Bukvic-Bhayani is supposedly allowed to teach what she wants at the Dahlia Institute without a cosmetic-art-school license. *Id*. at 7. In so arguing, Defendants flatly ignore North Carolina's prohibition on unlicensed makeup schools of any kind—including the Dahlia Institute—and Defendants' own history of repeatedly threatening Plaintiffs' speech.

In this section, Plaintiffs explain why: (1) they have standing to file this lawsuit; (2) their First Amendment claim is ripe; and (3) Defendants' attempt to moot this case should fail.

A. Under The Controlling Precedent, Plaintiffs Have Standing.

Plaintiffs satisfy each of the requirements for standing. These are: (1) an injury-in-fact that is concrete and particularized, not speculative; (2) traceable to Defendants; and (3) judicially redressable. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). As the Supreme Court and Fourth Circuit have recognized, standing requirements are "somewhat relaxed" in First Amendment cases. *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013); *see also Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984) ("[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged").

In the First Amendment context, a plaintiff suffers an injury-in-fact if his or her speech is chilled. *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (a "cognizable injury under the First Amendment is self-censorship, which occurs when a claimant 'is chilled from exercising her right to free expression.'") (citing *Harrell v. Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010)). To create a First Amendment injury premised on chilling, self-censorship must be objectively reasonable, meaning that the challenged government action would "deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). As set forth below: (1) Plaintiffs have alleged objectively reasonable bases for asserting that their speech has been chilled, establishing an injury-in-fact; and (2) Plaintiffs satisfy standing's other requirements.

1. *Plaintiffs' Complaint Establishes An Injury-in-Fact.*

In their complaint, Plaintiffs allege that they have refrained from speaking about makeup at the Dahlia Institute as a result of Defendants' verbal and written statements to them and, also, as a result of the text of the North Carolina Cosmetic Art Act. Compl. ¶ 60. Either basis creates a First Amendment injury-in-fact.

As multiple Fourth Circuit precedents show, where regulators tell someone that his or her speech is illegal and he or she ceases speaking as a result, there is an objectively reasonable chilling effect. *See North Carolina Right to Life, Inc. v. Bartlett ("NCRL")*, 168 F.3d 705, 708-10 (4th Cir. 1999); *Cooksey*, 721 F.3d at 235-37. In *NCRL*, a non-profit group wrote to the State Board of Elections and inquired whether distribution of voter guides would violate North Carolina regulations. *Id*. at 709. Because the Board answered affirmatively, and the group consequently refrained from disseminating its guide, the Fourth Circuit held that the group's speech was chilled. *Id*. at 709-10. Similarly, in *Cooksey*, the Fourth Circuit held that the North Carolina Board of Dietetics and Nutrition chilled a blogger's speech where he "stopped engaging in speech" after receiving "written and oral correspondence from the State Board explaining that [his] speech violate[d] the [North Carolina Dietetics and Nutrition Practice] Act," even though the Board of Dietetics and Nutrition changed its position once litigation was filed. 721 F.3d at 237. Because the Board of Dietetics and Nutrition's actions were likely to deter a person of ordinary firmness from exercising First Amendment rights, the plaintiff had shown an objectively reasonable chilling effect. *Id*. at 236.

Like the state boards sued in *NCRL* and *Cooksey*, Defendants' actions have had an objectively reasonable chilling effect. Both verbally and over email, Defendants told Plaintiff Bukvic-Bhayani that the school she wanted to open would be illegal without a cosmetic-art-

school license. Compl. ¶¶ 46-57; Bukvic-Bhayani Decl. ¶¶ 12-14, 16. Plaintiffs allege that, last year, the Chief of Enforcement for the Board of Cosmetic Art Examiners—Connie Wilder—visited Plaintiff Bukvic-Bhayani after hearing that she was planning on opening a makeup school. Compl. ¶ 46; Bukvic-Bhayani Decl. ¶ 12. During the visit, Ms. Wilder told Plaintiff Bukvic-Bhayani that unlicensed makeup instruction was illegal, even though Plaintiff Bukvic-Bhayani pled that she did not want to qualify students for licensure as estheticians. Compl. ¶¶ 47-51; Bukvic-Bhayani Decl. ¶ 12. Later, Plaintiff Bukvic-Bhayani asked for clarification over email. When she asked whether she could operate a makeup school, Defendant Elliott responded that she "cannot just teach makeup application" in light of North Carolina's cosmetic-art-school-license requirements. Compl. ¶¶ 52-53; Bukvic-Bhayani Decl. ¶ 13, Ex A-1 at 1. In subsequent emails, Plaintiff Bukvic-Bhayani reiterated that her school would not be for students seeking esthetician licenses and that she just wanted to teach makeup artistry. Compl. ¶ 54; Bukvic-Bhayani Decl. ¶ 14. On April 14, 2017, Defendant Elliott replied to Plaintiff Bukvic-Bhayani and said: "If you are providing education to anyone that does not hold a current license with this cosmetic art board you must obtain a school license and teach the full curriculum[.]" Compl. ¶ 57; Bukvic-Bhayani Decl. ¶ 16, Ex. A-3 at 1.

Having refrained from speaking based on these communications, Plaintiff Bukvic-Bhayani is in the same position as the plaintiffs in *NCRL* and *Cooksey*—she wants to speak but her speech is chilled in an objectively reasonable manner. Specifically, she wants to teach Plaintiff Goodall, and other unlicensed students, *see* Compl. ¶¶ 27-28, 101, but is (as Defendants' communications conceded) unable to lawfully do so without a cosmetic-art-school license that she does not want. A prudent businessperson in her shoes would not open a makeup school. (A non-binding declaration filed by one Defendant, in tension with North Carolina's

Cosmetic Art Act, does not present enough of an assurance on which any prudent businessperson could rely.) Unsurprisingly, Plaintiff Bukvic-Bhayani has, in light of her experience last year, not opened the Dahlia Institute. *Id*. ¶ 60.

Just as verbal and written correspondence can chill speech, so can a statute. As the Fourth Circuit has held, when a plaintiff faces a "credible threat of prosecution under a criminal statute he has standing to mount a pre-enforcement challenge to that statute." *Cooksey*, 721 F.3d at 237 (citing *NCRL*, 168 F.3d at 710). "A non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat." *Id.*

Under this standard, Plaintiffs face a credible threat of prosecution under the North Carolina Cosmetic Art. The Act is non-moribund, as evinced by Defendants' reliance on it. Defendants cited the Act in telling Plaintiff Bukvic-Bhayani that she could not open an unlicensed makeup school to teach Plaintiff Goodall and other students. Compl. ¶ 51; Bukvic-Bhayani Decl. ¶ 12, Ex A-1 at 1. Also, the Act facially restricts Plaintiffs' speech. The North Carolina Cosmetic Art Act unambiguously prohibits unlicensed makeup instruction, including at the Dahlia Institute. Under the Act, "[n]o one may open or operate a cosmetic art school before the Board [of Cosmetic Art Examiners] has approved a license for the school." N.C. Gen. Stat. § 88B-16(b). A "cosmetic art school" is defined as "[a]ny building or part thereof where cosmetic art is taught." *Id*. § 88B-2(6). "Cosmetic art" includes "esthetics," *id*. § 88B-2(5), which includes "applying makeup." *Id*. § 88B-2(11a). Reading the Act as a whole, no one may open or operate a building or part thereof where applying makeup is taught unless the Board has already approved a license for the school. Moreover, a violation of the Act is a crime. N.C. Gen. Stat. § 88B-22(f). Since Plaintiff Bukvic-Bhayani has not procured a license for the Dahlia Institute, the Act facially restricts her (and her school's) speech. Accordingly, Plaintiffs have

shown a First Amendment injury-in-fact by establishing a credible threat of prosecution under the North Carolina Cosmetic Art Act.

In contending that Plaintiffs do not have standing, Defendants simply ignore North Carolina's statutory prohibition on unlicensed makeup schools. In arguing that Plaintiffs' speech is permitted in North Carolina, Defendants erroneously cite North Carolina's licensing requirements for ***practicing*** makeup artistry—*see* Defs.' Mem. at 7 (citing N.C. Gen. Stat. § 88B-22(a))—but ignore North Carolina's licensing requirements for ***teaching*** makeup artistry. Defendants are correct that North Carolina permits unlicensed makeup ***application*** insofar as it is unpaid, but the state has no corresponding licensing exemption for unlicensed makeup ***instruction*** to students who are not seeking licensure.

Because Defendants ignore North Carolina's ban on unlicensed makeup instruction, the two cases Defendants rely on to argue that Plaintiffs lack standing—*Benham v. City of Charlotte*, 635 F.3d 129 (4th Cir. 2011), and *Gilles v. Torgersen*, 71 F.3d 497 (4th Cir. 1995)—are distinguishable. In both cases, plaintiffs were challenging restrictions that did not prohibit their speech. *Benham*, 635 F.3d at 136 (applicants for a public assembly permit were not injured by denial of the permit because they did not need a permit for their proposed activity); *Gilles*, 71 F.3d at 499-501 (the plaintiff was a preacher challenging a university's sponsorship requirement for speakers even though he was sponsored). This is not such a case—the North Carolina Cosmetic Art Act expressly prohibits the unlicensed makeup instruction that Plaintiffs want to undertake, and Defendants told Plaintiff Bukvic-Bhayani her unlicensed makeup school was illegal.

2. *The North Carolina Cosmetic Art Act Caused Plaintiffs' Injury, And Judgment Would Redress It.*

Having established an injury-in-fact, Plaintiffs also easily satisfy the other two elements of the standing inquiry—causation and redressability. Causation is satisfied where a plaintiff's alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct." *Lujan*, 504 U.S. at 590. The redressability requirement is satisfied where there is a "a non-speculative likelihood that the injury would be redressed by a favorable judicial decision." *Frank Krasner Enters. v. Montgomery Cnty.*, 401 F.3d 230, 234 (4th Cir. 2005).

The injuries in this case—chilling of Plaintiffs' speech and a credible threat of prosecution—are directly traceable to the challenged statute (and Defendants' enforcement of it). Plaintiffs allege that Defendants verbally told Plaintiff Bukvic-Bhayani that the statute prohibited her from opening her unlicensed makeup school and that Defendants emailed her with warnings that she could not operate a school open to unlicensed students without a cosmetic-art-school license. Compl. ¶¶ 46-57. Plaintiffs also allege that these communications stopped Plaintiff Bukvic-Bhayani from opening an unlicensed makeup school. *Id*. ¶ 60. Therefore, Defendants' communications chilled Plaintiffs' speech. Moreover, the plain language of the North Carolina Cosmetic Art Act facially restricts Plaintiffs' speech. Thus, the Act's credible threat of prosecution is also traceable to Defendants.

In addition, a favorable decision on Plaintiffs' behalf would redress their injury. It would mean that Defendants would be enjoined from enforcing the North Carolina Cosmetic Art Act's prohibition on unlicensed makeup instruction (and that the prohibition would be declared unconstitutional). *Id*., Req. Relief ¶¶ A, C. In that case, Plaintiffs would find full redress, as makeup instruction at the Dahlia Institute could commence without fear of penalty. *Id*. ¶¶ 97, 101, 107.

Because Plaintiffs have alleged an injury-in-fact traceable to Defendants and redressable by this Court, Plaintiffs' action cannot be dismissed for lack of standing.

B. Plaintiffs' First Amendment Claim Is Ripe.

Defendants' ripeness defense is also unavailing. In determining whether a claim is ripe for adjudication, a court must consider two questions: (1) is the controversy sufficiently mature that it is fit for judicial determination; and (2) would the parties suffer hardship were the court to delay adjudication? *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). As a practical matter, courts recognize that there is often little difference between standing and ripeness. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) ("Analyzing ripeness is similar to determining whether a party has standing.") Moreover, "[m]uch like standing, ripeness requirements are also relaxed in First Amendment cases." *Cooskey*, 721 F.3d at 240. Plaintiffs' First Amendment claim satisfies both ripeness requirements.

First, Plaintiffs satisfy the ripeness inquiry's maturity prong. A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties. *Miller*, 462 F.3d at 319. For example, in *Arch Mineral Corp. v. Babbitt*, the Fourth Circuit found that—after one Department of Interior office sent a company correspondence saying that it was presumed statutorily responsible for remediation of a mine—the company's legal challenge to this determination was ripe for adjudication. 104 F.3d 660, 663, 669 (4th Cir. 1997). Though the office could have reached a different conclusion later in official administrative proceedings, the Fourth Circuit recognized that "[f]or all practical purposes," its final "decision ha[d] been made." *Id*. at 666. Like the correspondence at issue in *Arch Mineral*, Defendants' correspondence on the legality of unlicensed makeup instruction and in-person visit stopping Plaintiff Bukvic-Bhayani's speech constituted a final decision on the

legality of her speech. *See also Cooskey*, 721 F.3d at 240-41 (holding that the case was ripe even after the Board tried to change its position because "[n]o further action from the Board [wa]s needed; it ha[d] already, through its executive manifested its views that the [applicable statute] applie[d] to [the plaintiff's] website").[3] The finality of this decision is amplified by the North Carolina Cosmetic Art Act's text. After all, even if Defendants wanted to grant Plaintiffs an exemption from the state's ban on unlicensed makeup instruction, the Act expressly prohibits them from doing so. N.C. Gen. Stat. § 88B-16(b) ("The Board ***shall not*** issue a license before a cosmetic art school has been inspected and determined to be in compliance with the provisions of this Chapter and the Board's rules.") (emphasis added).

Second, Plaintiffs also satisfy the ripeness inquiry's hardship prong. Because the denial of speech rights is an irreparable harm, *see Newsom v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003), Plaintiffs will suffer hardship if there is delay in adjudicating their First Amendment claim.

In arguing that Plaintiffs' claim is not ripe, Defendants rely on *International Academy of Oral Medicine & Toxicology v. North Carolina State Board of Dental Examiners*, 451 F. Supp. 2d 746 (E.D.N.C. 2006). Defs.' Mem. at 9. In that case, a dental organization sued the state's board of dental examiners based on a low-level employee's informal "Do's and Don'ts" article for the board's newsletter, describing advertisement of metal-free dentistry as a "Don't." *Id*. at 749. In that case, "[n]o North Carolina regulation or statute deal[t] expressly with what dentists

[3] Defendants try to distinguish *Cooksey* on the grounds that they have, purportedly, "not requested that Plaintiffs alter their planned curriculum" or "mandated that Plaintiffs adjust their conduct." Defs.' Mem. at 10. This is inconsistent with the facts as set forth in Plaintiffs' complaint, which must be accepted as true at this juncture. Plaintiffs allege that—in person and over email—Defendants told Plaintiff Bukvic-Bhayani that she could not open her desired makeup school without a cosmetic-art-school license, which, in turn, required teaching the Board's 600-hour esthetics curriculum. Compl. ¶¶ 46-57. As a result of these communications, Plaintiffs have—like the plaintiff in *Cooksey*—adjusted their conduct, having not opened an unlicensed makeup school out of fear of penalty. *Id*. ¶¶ 60, 105-06.

can and cannot advertise or say concerning mercury-related issues in dentistry." *Id*. at 750. The court dismissed the dental organization's lawsuit on ripeness grounds, ruling that there was no indication that the "Don't" described in the newsletter could be imputed to the dental board. *Id*.

International Academy is readily distinguishable for at least three distinct reasons. First, the North Carolina Cosmetic Art Act flatly prohibits unlicensed makeup instruction whereas, in *International Academy*, the statute and regulations at issue did not facially restrict the dental organization's speech. Second, Plaintiffs' speech is chilled by the executive director and chief of enforcement for the Board of Cosmetic Art Examiners, rather than a low-level employee. Third, Plaintiffs had personalized communications with the Board—both oral and written—wherein the Board threatened enforcement, as opposed to the broadly disseminated, informal newsletter at issue in *International Academy*. For these reasons, there is— unlike in *International Academy*— no uncertainty over whether Plaintiffs' speech is allowed, which means that Plaintiffs' claim is ripe.

C. Defendants' Voluntary Cessation of Unconstitutional Activity Cannot Divest This Court of Jurisdiction.

Though Defendants invoke "standing" and "ripeness," their jurisdictional defense essentially amounts to an (unavailing) attempt to moot this case. As set forth above, Plaintiffs' complaint alleges (1) an objectively reasonable injury-in-fact that is caused by Defendants and is judicially redressable, and (2) a ripe First Amendment claim. Accordingly, on the day the instant case commenced, Plaintiffs unquestionably had standing. In trying to moot this case afterward, Defendants resorted to a post-litigation maneuver. They filed a non-binding declaration from Defendant Elliott saying that Plaintiff Bukvic-Bhayani is supposedly already allowed to open her desired makeup school—open to already-licensed estheticians and makeup hobbyists—without a license for it. Decl. Lynda Elliott ("Elliott Decl."), ECF No. 17, ¶¶ 19-24. But—even if this

Court could somehow consider extrinsic evidence in ruling on Defendants' motion to dismiss—this declaration cannot moot Plaintiffs' lawsuit.

Setting aside for the moment the fact that Defendant Elliott does not have the authority under the North Carolina Cosmetic Art Act to grant an exemption, Defendant Elliott's declaration is at best a voluntary cessation of unconstitutional activity. As noted earlier, Defendants previously stopped Plaintiff Bukvic-Bhayani from opening an unlicensed makeup school and repeatedly told her (verbally and over email) that she may not teach unlicensed students without a cosmetic-art-school license, despite Plaintiff Bukvic-Bhayani's protests that she only wanted to teach hobbyists and already-licensed estheticians. Compl. ¶ 50.

Defendants' alleged change of heart cannot divest this court of jurisdiction. *See Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012) (cautioning that post-litigation "maneuvers designed to insulate" actions from review "must be viewed with a critical eye"). "It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). As the Supreme Court recently explained: "Otherwise, a defendant could engage in unlawful conduct, stop when sued [and] then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013); *see also Knox*, 567 U.S. at 307 (holding that dismissal would "permit a resumption of the challenged conduct as soon as the case is dismissed").

Consequently, the Supreme Court has established a high bar for dismissing a case on Defendants' preferred grounds. The defendant "bears the formidable burden of showing that it is ***absolutely clear*** the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)

(emphasis added). This burden is especially high where executive cessation is—as here—not clearly legal. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 n.1 (2017) (holding that governor's announcement of change to challenged policy did not moot case).

Defendants fail by a wide margin in seeking to meet this "stringent" test. *City of Mesquite*, 455 U.S. at 289, n.10. As a threshold matter, Defendant Elliott's declaration is inconsistent with the statute the Board enforces. As explained earlier, North Carolina's Cosmetic Art Act literally prohibits Defendants from allowing unlicensed makeup instruction, even if Defendants wanted to permit it.

Moreover, nothing in Defendant Elliott's declaration permanently binds either the current Board of Cosmetic Art Examiners or any successors from stopping Plaintiffs' makeup instruction. Accordingly, ***even if*** Defendants could permit Plaintiffs speech through Defendant Elliott's declaration (and they cannot), Plaintiffs have no assurance that the Board of Cosmetic Art Examiners will continue to permit Plaintiffs' speech if they dismissed their suit.[4] As such, it falls far short of the kind of "unconditional and irrevocable" promise necessary to terminate this lawsuit. *See Already, LLC*, 568 U.S. at 93.

Courts have repeatedly held that even legislative repeal of an unconstitutional practice is insufficient to show that the "behavior could not reasonably be expected to recur." *See Friends of the Earth*, 528 U.S. at 170; *see also Ne. Fla. Chapter of Associated Gen. Contractors of Am. v.*

[4] This risk is magnified by the fact that Defendant Elliott's declaration leaves the Board leeway to require that Plaintiff Bukvic-Bhayani obtain a cosmetic-art-school license. According to the declaration, Plaintiff Bukvic-Bhayani may open a "small" school to hobbyists and continuing-education students without a cosmetic-art-school license, but not a school open to students seeking to work as professional makeup artists. Elliott Decl. ¶¶ 23-24. Essentially, Defendants have signaled that they will—allegedly—permit Plaintiffs' unlicensed speech insofar as it conforms to the speech proposed in the four corners of the complaint. But with any change in circumstances, however slight—for example, once a student intent on learning makeup artistry for the sake of, say, working professionally in another state walks through the doors of the Dahlia Institute—Defendant Elliott's declaration leaves the door ajar for Board enforcement.

City of Jacksonville, Fla., 508 U.S. 656, 662 (1993) (holding city's repeal of challenged ordinance and replacement with new ordinance that slightly changed old one was insufficient to dismiss challenge to case). If the legislative repeal of an unconstitutional practice is insufficient to dismiss a challenge to that practice, the mere announcement of a revised legal position—let alone one that is inconsistent with applicable law—is also insufficient. *See id.*; *Houchins v. KQED, Inc.*, 438 U.S. 1, 25-26 n.13 (1978) (Stevens, J., dissenting) (cautioning courts "to beware of efforts to defeat injunctive relief by protestations of [ ] reform").

In sum, Plaintiffs' lawsuit should not be dismissed by virtue of Defendants' post-litigation maneuver. This Court had jurisdiction when Plaintiffs first filed their complaint and retains jurisdiction now.

II. PLAINTIFFS' COMPLAINT STATES A VALID FIRST AMENDMENT CLAIM.

After raising jurisdictional defenses to Plaintiffs' lawsuit, Defendants' motion to dismiss invokes an unavailing defense on the merits—according to Defendants, Plaintiffs have failed to state a claim for a First Amendment violation. In Defendants' view, even though Plaintiffs' lawsuit challenges North Carolina's prohibition on their makeup instruction, it is not a First Amendment case. Defs.' Mem. at 11-13. However, teaching—whether about makeup or anything else—is constitutionally-protected speech. Thus, Plaintiffs' complaint—which alleges that Plaintiffs seek to communicate about makeup and that North Carolina will not let them—states a First Amendment claim. In arguing otherwise, the cases Defendants cite are flatly inapposite.

A. Teaching Is Speech.

As both the Supreme Court and the Fourth Circuit have explained, teaching constitutes constitutionally-protected speech. For example, in *Holder v. Humanitarian Law Project*, the

Supreme Court held that teaching is speech. 561 U.S. 1, 28 (2010).[5] Though the case arose in a different factual context than the case at hand, its core holding is instructive. Specifically, the Court held that prohibitions on providing "training" to designated "foreign terrorist organizations"—such as the Kurdistan Workers' Party ("PKK") and Liberation Tigers of Tamil Eelam ("LTTE")—triggered First Amendment scrutiny. *Id*. at 8-9, 27. The law at issue in *Holder* defined "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." *Id*. at 12-13. Because plaintiffs' conduct triggering coverage under this law—teaching—consisted of "communicating a message," the Supreme Court held that the law regulated "speech" and not "noncommunicative conduct." *Id*. at 28.[6]

The Fourth Circuit's precedents repeatedly confirm this point. For instance, in *Edwards v. City of Goldsboro*, the Fourth Circuit held that teaching a gun-safety course is speech. 178 F.3d 231, 245-49 (4th Cir. 1999). There, a police officer alleged that a police-department policy barring him from teaching a private gun-safety class in his free time violated his right to free speech. *Id*. at 237-39. This Circuit agreed, noting that his class—which consisted of "verbal as well as some written instructions accompanied by physical demonstrations"—constituted speech. *Id*. at 247.

Similarly, in *Goulart v. Meadows*, where parents challenged a restriction on their ability to use a community center for homeschooling purposes, this Circuit applied First Amendment scrutiny. 345 F.3d 239, 247-48 (4th Cir. 2003). This Circuit held that the parents' proposed

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[5] *See also Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (declaring that academic freedom is "a special concern of the First Amendment"); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("[A]cademic teaching-freedom . . . [is within a] constitutionally protected domain."); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957) (plurality opinion) (holding that a "right to lecture" is a constitutionally-protected freedom).

[6] In *Holder*, the Supreme Court ultimately upheld the challenged prohibition on training designated foreign terrorist organizations, but applied First Amendment scrutiny in reaching this judgment. 561 U.S. at 27-39.

uses—teaching a geography class and a fiber-arts class—involved the "transmission of knowledge or ideas by way of the spoken or written word" and was, consequently, speech.[7] *Id.* at 247.

B. Plaintiffs' Allegations That They Want to Talk About Makeup And That North Carolina Will Not Let Them Suffice To Defeat Defendants' Motion to Dismiss.

Because Plaintiffs allege that they want to engage in makeup instruction and that North Carolina will not let them, they have pled a First Amendment violation. The makeup instruction Plaintiffs allege they would engage in, but for North Carolina restrictions, constitutes speech. In addition, Plaintiffs allege that North Carolina will not allow them to communicate about makeup without meeting cumbersome licensing requirements mandated by North Carolina's Cosmetic Art Act and attendant regulations. These allegations state a First Amendment claim.

The makeup instruction Plaintiffs describe in their complaint is—like other types of teaching—a form of speech. Plaintiffs' complaint alleges that Plaintiff Bukvic-Bhayani intends to offer instruction in advanced color theory, different styles of makeup, different types of makeup, and different makeup-application techniques at the Dahlia Institute. Compl. ¶ 23. This instruction would, like the training in *Holder*, seek to impart specific skills. Plaintiffs' complaint also alleges that Plaintiff Bukvic-Bhayani would like to lecture students and provide practical demonstrations in order to teach makeup at the Dahlia Institute. Compl. ¶ 29. These lessons would, like those in *Edwards*, use verbal instructions and physical demonstrations in order to communicate messages. Indeed, Plaintiffs allege that, in preparation for opening a makeup school, Plaintiff Bukvic-Bhayani has developed lesson plans, assembled makeup materials, and prepared written handouts that she would distribute with lectures. Compl. ¶ 30. Accordingly,

[7] Based on the specific facts in *Goulart*, the challenged restrictions in that case survived First Amendment scrutiny, but that does not change the fact that First Amendment scrutiny was applied. 345 F.3d at 246-60.

Plaintiff Bukvic-Bhayani's makeup instruction would, like the lessons in *Goulart*, aim to transmit knowledge by way of spoken and written word.

Unfortunately for Plaintiffs, they are—as pled in their complaint—not allowed to communicate about makeup without the government's permission under North Carolina's Cosmetic Art Act, even though they want to. The statute provides that no one may open or operate a building or part thereof where applying makeup is taught unless the Board of Cosmetic Art Examiners has already approved a license for the school, which the Board is prohibited from doing unless all licensing requirements are met. Compl. ¶¶ 65-70; N.C. Gen. Stat. § 88B-16(b). These requirements are onerous. To obtain a school license for the Dahlia Institute, Plaintiff Bukvic-Bhayani would have to agree to teach a 600-hour esthetics curriculum. Compl. ¶¶ 78-79; 21 N.C. Admin. Code § 14T.0604(a). The Institute would also have to satisfy the Board's equipment mandates, which—as Plaintiffs allege—involve purchasing and installing more than $10,000 in esthetics equipment. Compl. ¶¶ 78, 86-88; 21 N.C. Admin. Code § 14T.0303(b). As Plaintiffs plead in their complaint, both the curriculum and equipment requirements are largely unrelated to makeup artistry. Compl. ¶¶ 85, 89. They allege that, as a result, Plaintiff Bukvic-Bhayani refuses to obtain a cosmetic-art-school license from the Board for her desired makeup school. *Id*. ¶ 60. Without a cosmetic-art-school license, the Dahlia Institute cannot legally open—unlicensed operation would expose Plaintiff Bukvic-Bhayani to criminal and civil sanctions. N.C. Gen. Stat. § 88B-22(f); 21 N.C. Admin. Code §§ 14P.0106(c), 14P.0107(c), 14P.0111(a), 14P.0113(m). Indeed, in both verbal and written correspondence, Defendants told Plaintiff Bukvic-Bhayani that unlicensed operation of her desired school would be illegal. Compl. ¶¶ 46-57. According to Plaintiffs' complaint, but for the challenged requirements, the

Dahlia Institute would be open, with Plaintiff Bukvic-Bhayani teaching there and Plaintiff Goodall attending. *Id*. ¶¶ 96, 101.

These allegations state a claim under the First Amendment. In short, Plaintiffs allege that they would like to communicate and are barred from doing so without a government license. Under controlling precedent, Plaintiffs have pled a First Amendment violation. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 164-69 (2002) (striking down law forbidding any door-to-door advocacy without first obtaining a permit); *Thomas v. Collins*, 323 U.S. 516, 539-40 (1945) (invalidating permit requirement for union recruitment speech).

C. Defendants' Motion to Dismiss Misstates First Amendment Doctrine.

In arguing that Plaintiffs fail to state a First Amendment claim, Defendants misstate First Amendment law in two key respects. First, Defendants argue that makeup instruction is merely non-expressive conduct outside the First Amendment's purview. But their only case supporting that argument is a ***vacated*** district-court decision holding that aspects of a similar law failed to survive even rational basis review. Defs.' Mem. at 11-12 (citing *Waugh v. Nevada State Board of Cosmetology*, 36 F. Supp. 3d 991, 1019-25 (D. Nev. 2014), *vacated*, 2016 WL 8844242 (9th Cir. 2016)). Moreover, even if *Waugh* had not been vacated, the decision would run plainly afoul of the Supreme Court's *Holder* decision, which confirmed that teaching is constitutionally-protected speech rather than non-expressive conduct, 561 U.S. at 28, and controlling Fourth Circuit precedent. *See Goulart*, 345 F.3d at 247-48; *Edwards*, 178 F.3d at 245-49.

Second, Defendants maintain that there is an exception to the First Amendment for "state regulation of professions," even though no such exception exists. Defs.' Mem. at 13-14. Federal courts across the nation have held that occupational-licensing restrictions are subject to First

Amendment scrutiny. For instance, the United States Court of Appeals for the D.C. Circuit held that the D.C. government violated the First Amendment by requiring a license to work as a tour guide. *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014). And a federal court likewise found that the Kentucky psychologist-licensing board violated the First Amendment when it attempted to end the publication of a popular advice column on the ground that the column constituted the "unlicensed practice of psychology." *Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015). As these decisions make clear, individuals do not lose their First Amendment rights when they engage in an occupation.

The cases Defendants cite in propounding an occupational-licensing exception to the First Amendment—*Accountant's Society of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988), and *Lowe v. SEC*, 472 U.S. 181 (1985)—are simply inapposite. Neither case stands for a general occupational-licensing exception to the First Amendment. The Fourth Circuit, in *Bowman*, and former Justice Byron White, in a concurrence in *Lowe*, merely said that restrictions on speech may be subject to diminished scrutiny where the speakers in question (1) personally take on a client's affairs, (2) claim to exercise judgment on their client's behalf, and (3) base that judgment on the client's individual needs and circumstances. *See Bowman*, 860 F.2d at 604; *Lowe*, 472 U.S. at 232 (White, J., concurring). In other words, *Bowman* and *Lowe* stand for (at most) a fiduciary-speech exception to ordinary First Amendment doctrine. In this case, neither party has asserted that teaching about makeup creates a fiduciary relationship. Not only is a fiduciary relationship here highly implausible, but determining which contexts give rise to a fiduciary relationship is necessarily a fact-based inquiry. *See Lumbermens Mut. Cas. Ins. Co. v. First Ins. Servs.*, 417 Fed. Appx. 247, 250 (4th Cir. 2011) (noting that the existence of a fiduciary relationship is generally a question of fact). Accordingly, even setting aside that *Bowman* and

Lowe are clearly inapplicable here, Defendants cannot rely on these cases at the motion-to-dismiss stage to evade First Amendment scrutiny for the restrictions Plaintiffs challenge.

CONCLUSION

This Court has jurisdiction over Plaintiffs' lawsuit, which alleges a valid First Amendment claim. Accordingly, Defendants' motion to dismiss should be denied.

Dated this 7th day of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2017, a true and correct copy of the foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS was served upon the following counsel of record by electronic mail to:

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