

**19th JUDICIAL DISTRICT COURT
FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA**

USHABEN CHUDASAMA, PANNA
SHAH, and LDGS, INC., d/b/a
the THREADING STUDIO & SPA,

SUIT NO. 650,359 SECTION 24
DIVISION "CIVIL"

Plaintiffs,

v.

LOUISIANA BOARD OF
COSMETOLOGY, STEVE YOUNG,
in his official capacity as executive
director of the Board, and
FRANCES HAND, WILLIAM
MICHAEL GRAYSON, EDWIN H.
NEILL III, JAMES WILLIAMS,
MELINDA TILLEY, MELLA
BROWN, DEIDRE DELPIT, and
ELIZA JILL HEBERT, in their
official capacities as members of the
Board.

Defendants.

**PLAINTIFFS' RESPONSE TO DEFENDANTS' EXCEPTION OF
NO CAUSE OF ACTION AND ALTERNATIVE EXCEPTION OF
NO RIGHT OF ACTION AND/OR PRESCRIPTION**

MAY IT PLEASE THE COURT:

In this memorandum, Plaintiffs respond to the exceptions of no cause of action, no right of action and/or prescription brought by Defendants. For the reasons discussed below, Defendants' arguments are unpersuasive and the exceptions should be denied.

Introduction

Plaintiffs Ushaben Chudasama, Panna Shah, and the Threading Studio & Spa seek to earn a living providing eyebrow threading services. Eyebrow threading is a South Asian method of hair removal that uses a single strand of cotton thread to remove unwanted facial hair. To provide these services, state law requires threaders to become licensed estheticians, which necessitates completing 750 hours of esthetics training and passing written and practical licensing examinations.

Although state law requires threaders to complete this training, Defendants do not require threading to be taught or tested as a condition of licensure. Pet. ¶¶ 83-99. This regulatory framework forces even experienced threaders to endure 750 hours of irrelevant and cost-prohibitive training before they can work and forces threading businesses to hire licensed estheticians who do not know how to thread eyebrows. *Id.* at ¶¶ 22-23. Virtually identical regulations were recently struck down by the Texas Supreme Court. See *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 88-89 (Tex. 2015) (holding that 750-hour training requirement for threaders violates Art. I, § 19 of the Texas Constitution).

Plaintiffs' lawsuit challenges the constitutionality of this regulatory framework and asks this Court to protect Plaintiffs' economic liberty under the Louisiana Constitution—their right to pursue their calling free from unreasonable government interference. Pet. ¶¶ 1, 110, 165; La. Const., art. I, §§ 2, 3, and 24.

Defendants fail to demonstrate that Plaintiffs have not pled a cause of action, have no right of action, or that Plaintiffs' claims have prescribed. They simply attempt to paint Plaintiffs' lawsuit as a collateral attack on a Board order entered against the Threading Studio—an order the studio has not asked this Court to review. They also mistakenly seek to invoke this order against Ushaben and Panna, even though it was only entered against the Threading Studio. Similarly, their attempts to distort Plaintiffs' equal protection claim and significant legal interest in this case fail. Plaintiffs' Petition is full of facts supporting all of their claims in this case, and they should be allowed to proceed to prove them. Finally, Defendants fail to explain how their exception of prescription applies to this case.

Plaintiffs address Defendants' arguments below. First, Plaintiffs clarify the factual background that Defendants rely on in their memorandum. Second, Plaintiffs respond to each of Defendants' exceptions and show how they fail.

Plaintiffs conclude by asking this Court to deny Defendants' exceptions in their entirety.

Factual Background

Plaintiff the Threading Studio & Spa is a licensed salon that offers eyebrow threading services. It also offers other services including makeup, facials, eyelashes and waxing. Pet. ¶ 20. The Threading Studio has always employed licensed estheticians to provide makeup, facial and eyelash services. But Lata Jagtiani, who manages the studio, has had difficulty finding licensed estheticians who know how to thread because Defendants do not require licensed estheticians to receive any training in threading. *Id.* at ¶ 113. When she has been unable to find licensed estheticians to provide threading services, she has employed unlicensed threaders, including Plaintiffs Ushaben Chudasama and Panna Shah. *Id.* at ¶¶ 34, 46, 61, 113, 127.

Plaintiffs Ushaben and Panna each have more than 25 years of experience threading eyebrows. *Id.* at ¶¶ 40, 54-56. They want to thread eyebrows for a living, but they cannot afford to stop working and to waste time and money obtaining the largely irrelevant training Defendants require. *Id.* at ¶¶ 58, 60. They both worked as eyebrow threaders at the Threading Studio until the Board disciplined the Threading Studio last year. *Id.* at ¶¶ 43-46, 60-61.

In February 2016, Defendants ordered the Threading Studio to show cause as to why its salon license should not be revoked. *Id.* at ¶ 29. The administrative hearing was held on June 13, 2016. *Id.* at ¶ 30. At the hearing, Defendants prohibited the Threading Studio from raising any constitutional arguments and stated that the Board had no authority to decide constitutional claims. *See Tr. of June 13, 2016 Administrative Hearing*, p. 13-14 (attached as Exhibit A) (citing to *ANR Pipeline Co. v. La. Tax Comm'n*, 2002-1479 (La. 07/02/03); 851 So. 2d 1145,

1151). No orders were issued against Ushaben and Panna, and they were not involved in this hearing.

At the hearing, the Board found that the Threading Studio had violated the state's esthetics licensing laws and regulations by employing unlicensed eyebrow threaders and fined the Threading Studio \$4,900. Pet. ¶¶ 30-31. It also suspended the Threading Studio's salon license and placed its license on probation for a period of two years upon payment of the \$4,900 fine. *Id.* at ¶ 30. To continue operating her business, Lata paid the ordered fine. *Id.* at ¶ 32. She now operates her business under the terms of this order, which includes a prohibition against employing unlicensed threaders. *Id.* at ¶¶ 32, 46, 61, 113, 116 121-22, 127, 129. However, because Defendants do not require licensed estheticians to receive one minute of training in threading, she continues to struggle to find qualified, licensed estheticians who are able to thread. Thus, the Threading Studio is unable to effectively operate its business. *Id.* at ¶¶ 112-117.

Argument

Defendants' exceptions profoundly misunderstand Plaintiffs' lawsuit. This lawsuit is not about redressing past wrongs, as Defendants suggest, and it is not a collateral attack on the Board's order entered against the Threading Studio. This lawsuit is about Plaintiffs' *future* ability to pursue their calling free from unreasonable governmental interference, and Plaintiffs are asking this Court to protect their constitutional rights going forward. See Pet. ¶ 1, 110, 165.

I. Plaintiffs' Petition States a Cause of Action.

Defendants first contend that Plaintiffs' Petition fails to state a cause of action. Defs.' Mem. in Supp. of Exceptions 3-8 ("Defs.' Mem."). Before addressing Defendants' arguments in support of this exception, Plaintiffs explain the legal standard for determining this exception.

A. Legal Standard

An exception of no cause of action tests “the sufficiency in law of the petition.”

City of New Orleans v. Bd. of Comm’rs, 93-0690 (La. 07/05/94); 640 So. 2d 237, 241.

As the movant, Defendants bear the burden of demonstrating that Plaintiffs’

Petition fails to state a cause of action. *Kinchen v. Livingston Parish Council*, 07-

0478 (La. 10/16/08); 967 So. 2d 1137, 1138. When determining the issues raised by the exception, “the well-pleaded facts in the petition must be accepted as true.” *Id.*

(quoting *Fink v. Bryant*, 01-0987 (La. 11/28/01); 801 So. 2d 346). As a general rule, “an exception of no cause of action must be overruled . . . unless the plaintiff has no cause of action under any evidence admissible under the pleadings.” *Darville v.*

Texaco, Inc., 447 So. 2d 473, 475 (La. 1984). It may only be granted “in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief.” *La. Pub. Service Comm’n v. La. State Legislature*, 2012-0353 (La. App. 1 Cir. 04/26/13); 117 So. 3d 532, 537 (citing *Walters v. Rubicon, Inc.*, 96-2294 (La. App. 1 Cir. 12/29/97); 706 So. 2d 503, 506). When a court “can reasonably do so,” it “should maintain a petition . . . to afford a litigant an opportunity to present his evidence.” *Id.*

Defendants have not demonstrated that Plaintiffs’ Petition fails to state a cause of action because this Court has original jurisdiction over Plaintiffs’ claims. Plaintiffs have pled sufficient facts in support of their equal protection claim, and quasi-judicial immunity does not apply in this case.

B. This Court Has Original Jurisdiction Over Plaintiffs’ Constitutional Challenge.

Defendants’ exception of no cause of action argues that Plaintiffs’ lawsuit is barred because Plaintiffs failed to timely seek judicial review of the Threading Studio’s administrative order under La. R.S. § 49:964. Defs.’ Mem. 4. Simultaneously, Defendants contend that Plaintiffs had no right to seek judicial review of the Board’s order because they “voluntarily and unconditionally

acquiesced” in the Board’s order, waiving that right under La. C.C.P. art. 2085. *Id.* Defendants assert these arguments against all three Plaintiffs, even though the administrative order was only entered against the Threading Studio.

Defendants’ exception fails for three reasons. First, this Court has original jurisdiction over Plaintiffs’ constitutional claims seeking prospective relief, and the plain language of La. R.S. § 49:964(A) does not preclude Plaintiffs from seeking declaratory and injunctive relief from this Court. Second, payment of a Board-ordered fine is not acquiescence in a judgment under La. C.C.P. 2085, preventing this Court from exercising its original jurisdiction. And finally, Ushaben and Panna had no order to appeal or acquiesce in that would bar their constitutional claims.

1. La. R.S. § 49:964(A) does not bar Plaintiff Threading Studio’s constitutional challenge.

Defendants first suggest that La. R.S. § 49:964(A) bars the Threading Studio’s constitutional challenge because this lawsuit is simply a collateral attack on the Board’s order entered against the Threading Studio that it failed to timely appeal under this statute. Defs.’ Mem. 4. Defendants make this argument even though Plaintiff Threading Studio seeks prospective relief and Defendants precluded the Threading Studio from raising any constitutional claims at its administrative hearing.

Defendants misunderstand Plaintiffs’ lawsuit and the relief they seek. This lawsuit is a declaratory judgment action challenging the constitutionality of Defendants’ application of the state’s licensing laws and regulations to eyebrow threading. Pet. ¶¶ 1, 11, Prayer for Relief, A-D. Plaintiffs (including the Threading Studio) only request prospective declaratory and injunctive relief, which would clarify that they may provide their threading services without having to comply with Defendants’ largely irrelevant licensing regime. If this Court ultimately determines that the regulations in question are unconstitutional, injunctive relief

would prevent Defendants from initiating *future* enforcement proceedings against them for providing threading services without an esthetician's license.

Because Plaintiffs' lawsuit challenges the constitutionality of the state's esthetics laws and regulations, this Court has original jurisdiction over this lawsuit. In Louisiana, "the determination of whether a statute is constitutional is a purely judicial function," and "[i]t is the district court that has original jurisdiction to rule on the constitutionality of statutes." *ANR Pipeline Co. v. La. Tax Comm'n*, 2002-1479 (La. 07/02/03); 851 So. 2d 1145, 1150-51 (citing *Albe v. Louisiana Workers' Compensation Corp.*, 97-0581 (La. 10/21/97); 700 So. 2d 824, 827-28 (holding that workers' compensation hearing officers could not determine constitutional issues because doing so is a purely judicial function that an administrative agency cannot perform); *State v. Bd. of Supervisors of Elections*, 186 La. 949, 964, 173 So. 726, 731 (La. 1937) (finding that the determination of whether a statute is unconstitutional is a purely judicial function).

Even Defendants conceded this point at the Threading Studio's administrative hearing. See Tr. of June 13, 2016 Administrative Hearing, p. 13-14 ("There is case law in Louisiana, and I'm going to cite the case, . . . and I'll give you a copy of A&R Pipeline Company versus Louisiana Tax Commission, 851 So. 2nd 1145, at 1151, Louisiana Supreme Court (2003), which says that administrative agencies, and you're an administrative agency, lack the power to hold statutory provisions unconstitutional . . ."). To challenge the constitutionality of *future* enforcement, the Threading Studio did not have to appeal the Board's order under La. R.S. § 49:964(A) both because that order addresses only *past* conduct and because the Cosmetology Board did not—and could not—adjudicate Plaintiffs' constitutional claims.

Defendants ignore this Court's exclusive power to determine the constitutionality of a statute. Instead, they argue that because the Board imposed a

two-year probationary period on the Threading Studio and injunctive relief might affect that period, the Threading Studio should have raised their constitutional claims through an appeal of the Board's order. Defs.' Mem. 4. But if the Threading Studio had appealed this order, under the Administrative Procedures Act the record on appeal would have been limited to their administrative proceeding, which again did not—and could not—consider their constitutional claims. That is precisely why district courts have original jurisdiction over constitutional challenges to state laws and regulations: If plaintiffs were forced to litigate their constitutional challenges through an administrative appeals process, the administrative process would severely limit their ability to do so.

Defendants are seeking to put the Threading Studio in a Catch-22 situation: Defendants prevented the studio from raising its constitutional claims at its administrative hearing and now Defendants seek to prevent the studio from raising these claims in a declaratory judgment action. Defendants cannot ask this Court to bar Plaintiffs' constitutional claims after correctly instructing the Threading Studio that this Court had original jurisdiction over these claims.

Defendants also ignore the plain language of La. R.S. § 49:964(A). Under La. R.S. § 49:964(A)(1), “a person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review . . . *without limiting*, however, utilization of or the scope of judicial review available under other means of review, redress, relief or trial de novo provided by law.” (emphasis added). Thus, La. R.S. § 49:964(A) clearly states that if another means of review is available, Plaintiffs may utilize it. *See Jordan v. Sutton*, 401 So. 2d 389, 392 (La. App. 1 Cir. 1981) (finding plaintiff did not have to appeal under La. R.S. § 49:964 when another form of judicial review was available because “the right of judicial review therein established is not exclusive of other means of judicial review available under the law”).

Under the plain language of La. R.S. § 49:964(A), the Threading Studio did not have to seek judicial review of the constitutionality of the Board's order because it could do so through a declaratory judgment action. *See* La. C.C.P. art. 1871 (“Courts of record within their respective jurisdictions may declare rights, status, and other legal relations whether or not further relief is or could be claimed . . . [T]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.”).

This declaratory judgment action is the appropriate procedure here because Plaintiffs ask this Court to resolve uncertainty regarding their constitutional rights, to declare Defendants' application of its regulatory scheme to threading unconstitutional, and to enjoin Defendants' future enforcement of the threading regulations against Plaintiffs. Further, to prove their claims, Plaintiffs intend to engage in discovery and introduce evidence that would have been barred at the Threading Studio's administrative hearing.

2. Plaintiffs did not acquiesce in the Board's Order.

Defendants next argue that Plaintiffs had no right to appeal the order because “the Threading Studio acquiesced in the Cosmetology Board's order.” Defs.' Mem. 4. Defendants seek to rely on La. C.C.P. art. 2085, which provides that “[a]n appeal cannot be taken by a party . . . who voluntarily and unconditionally acquiesced in a judgment rendered against him”

Defendants' reliance on La. C.C.P. art. 2085 is misplaced. As explained above, this action is not an appeal from the order. In order to voluntarily and unconditionally acquiesce in a judgment, a party must show an unequivocal intention to abandon her right to appeal. *See Scott v. Scott*, 48 So. 2d 899, 901-02 (La. 1950) (finding that the appellant's payment of alimony payments, which were ordered under a judgment, before seeking an appeal “did not . . . show any

acquiescence whatsoever on his part in the judgment or an intention to abandon his right of appeal”).

First and foremost, the Threading Studio is not appealing this order, so this argument is irrelevant. But assuming for the sake of argument that this case sought to attack the order (which it does not), the Threading Studio did not voluntarily and unconditionally acquiesce in the Board’s order by paying a fine. It did not voluntarily enter into a consent decree. And Defendants imposed a \$4,900 fine on the studio, which the Threading Studio was forced to pay to continue operating its business. By paying this fine, the Threading Studio did not unequivocally abandon its right to appeal. *See Scott*, at 901-02.

3. The Board cannot invoke the Threading Studio’s order against Ushaben and Panna to bar their constitutional challenge.

Lastly, Defendants suggest that Ushaben and Panna also failed to timely seek judicial review of the Board’s order entered against the Threading Studio and thereby acquiesced in that order. Ushaben and Panna were not parties to the Threading Studio’s administrative hearing; the Board’s order was not entered against them; and it cannot be used against them now.

Defendants’ contention that Ushaben and Panna acquiesced in the Board’s order entered against the Threading Studio contradicts the plain language of La. C.C.P. art. 2085, which states that a party can only waive his right to appeal by acquiescing in “a judgment *rendered against him*.” (emphasis added). Here, there is no judgment against Ushaben and Panna to which they could acquiesce.

C. Plaintiffs Have a Cause of Action for Violation of Equal Protection under the Louisiana Constitution.

Defendants next assert that Plaintiffs have failed to state a cause of action under Article I, Section 3 of the Louisiana Constitution, which guarantees equal

protection of the law.¹ Defs.' Mem. 4-6. In support of this argument, Defendants contend that Plaintiffs' Petition does not allege sufficient facts that show that classifying threaders as estheticians fails to suitably further any legitimate state interest. *Id.* at 5.

This argument misapplies Louisiana's standard for analyzing an exception of no cause of action and ignores the crux of Plaintiffs' equal protection claim: Requiring threaders to become licensed estheticians while not requiring licensed estheticians to learn how to thread fails to suitably further any legitimate governmental interest. Pet. ¶¶ 149-53.

To prevail on an equal protection claim challenging a classification that is not enumerated in Article I, Section 3, the challenger must demonstrate that the classification "does not suitably further an appropriate state interest." *State v. Granger*, 2007-2285 (La. 05/21/08); 982 So. 2d 779, 790 (citing *Sibley v. Bd. of Supervisors of La. State Univ.*, 477 So. 2d 1094 (La. 1985)). Plaintiffs do not have to satisfy this burden at this stage of the litigation. See *La. Chem. Ass'n v. State*, No. 2012-0230 at *6-7 (La. App. 1 Cir. 01/09/13); 2013 La. App. Unpub. LEXIS 9 (concluding that plaintiffs pled a cause of action for violation of equal protection even though they face a high burden in later proving that the classification does not advance any appropriate state interest because the facts pled in their petition must be accepted as true and viewed in the light most favorable to them). They need only allege facts that if, taken as true, could show that they have been denied equal protection of the law.

Plaintiffs have alleged ample facts that demonstrate that they have stated a cause of action under Article I, Section 3 of the Louisiana Constitution. These facts include (among others):

¹ Defendants only argue that Plaintiffs have failed to state a cause of action for a violation of their right to equal protection and have not challenged Plaintiffs' substantive due process or unenumerated rights claims. As a result, this case will go forward regardless of the Court's determination of this issue.

- “Although state law requires threaders to attend cosmetology school, Defendants do not require cosmetology schools to teach threading. Nearly every minute of instruction in cosmetology school does not relate to the practice of threading. Defendants therefore require threaders to complete hundreds of hours that are completely irrelevant to threading.” Pet. ¶¶ 87-88.
- “To the extent any licensed cosmetology schools provide instruction that actually relates to threading, such as general hair removal or sanitation training, this instruction makes up only a small fraction of the 750 hours required, and students do not learn how to thread in the process. Still, it would take a threader more than four and half months to complete this irrelevant course of instruction, even if she attended cosmetology school for 40 hours per week, every week.” *Id.* at ¶ 89.
- “Licensing examinations are required to ‘include practical demonstrations and written and oral tests’ and ‘to reflect the subjects normally taught in approved schools in the course required for the appropriate certificate of registration.’ La. R.S. § 37:586(B). Just as Defendants do not require the state’s cosmetology schools to teach threading, the esthetician’s licensing examinations do not test threading.” *Id.* at ¶¶ 93-94. Plaintiffs make these same allegations for the state’s two additional examinations. *Id.* at ¶¶ 97-99.
- “Requiring threaders to attend cosmetology school and obtain an esthetician’s license, while not requiring instruction or training in threading, is not rationally related to any legitimate governmental interest.” *Id.* at ¶ 150.
- “Although threading is the Threading Studio’s most popular and profitable service, Lata has had great difficulty finding employees who are both licensed estheticians and expert eyebrow threaders. When Lata has been able to hire licensed estheticians, they have required training in eyebrow threading, and they have never been as skilled in the technique as the business’s unlicensed employees. *Id.* at ¶ 23.

Defendants, however, ignore Plaintiffs’ detailed factual allegations and focus solely on Plaintiffs’ allegations that (1) safely providing threading services requires washing their hands, using a clean piece of thread, and maintaining a clean work station, see *id.* at ¶ 68, and (2) the cosmetology curriculum teaches a minimal amount sanitation. Defs.’ Mem. 5-6. According to Defendants, these two allegations defeat all other allegations pled by Plaintiffs to support their equal protection claim because Plaintiffs have conceded that the esthetics curriculum includes a small amount of instruction on sanitation, which Defendants assert promotes public health and safety.

Defendants are wrong. Plaintiffs have specifically pled that any training that may arguably relate to threading, such as sanitation, makes up only a small fraction of the 750 hours required, does not teach students how to thread and still forces threaders to spend more than four months completing irrelevant training. Pet. ¶ 89. This allegation, and the allegations quoted above, sufficiently show that a small amount of training in sanitation does not suitably further a legitimate governmental interest under Article I, Section 3. Indeed, the Texas Supreme Court recently held just that under Article I, Section 19 of the Texas Constitution. See *Patel v. Tex. Dep't of Licensing and Regulation*, 469 S.W.3d 69, 88-90 (Tex. 2015) (holding that sanitation training composing as much as 58% of the 750-hour training program did *not* sufficiently further a legitimate governmental interest).

Plaintiffs have alleged more than enough facts that demonstrate that the state's classification of threaders as estheticians fails to further *any* legitimate governmental interest, including the factual allegations discussed above and the specific allegation that "[r]equiring threaders to attend cosmetology school and obtain an esthetician's license, while not requiring instruction or training in threading, is not rationally related to *any* legitimate governmental interest," "is arbitrary and capricious" and "has no real and substantial relationship to public health, safety or welfare." Pet. ¶¶ 149-51 (emphasis added). Accepting these allegations as true and construing them in the light most favorable to Plaintiffs, the petition in this case more than adequately states a cause of action for equal protection. Therefore, Plaintiffs should be allowed to proceed to prove their claim.

D. The Cosmetology Board and Its Members Are Not Immune from the Louisiana Constitution.

Defendants assert that the Board and its individual members are entitled to quasi-judicial immunity for (1) the Board's enactment of state regulations, and (2) the Board's enforcement of state laws and regulations. Defendants also suggest that they are entitled to quasi-judicial immunity because Plaintiffs seek damages. Defs.'

Mem. 6-8. Defendants further contend that the Board's adjudicative role includes every power and duty granted to the Board, including "making necessary rules and regulations to carry out the purposes and enforce the provisions of the cosmetology laws" and "establishing and enforcing compliance with professional standards and rules of conduct of cosmetology." *Id.* at 6-7.

Again, Defendants are incorrect. Louisiana courts may only extend quasi-judicial immunity to boards and their individual members "for actions taken and decisions made in their adjudicative role." *Talbert v. La. State Bd. of Nursing*, 2003-0258 (La. App. 1 Cir. 12/31/03); 868 So. 2d 729, 730-31 (citing *Durousseau v. La. State Racing Comm'n*, 98-0442 (La. App. 4 Cir. 12/09/98); 724 So. 2d 844, 846, *writ denied*, 99-0034 (La. 02/12/99); 738 So. 2d 582); *see also Amato v. Office of the La. Comm'r of Securities*, 94-0082 (La. App. 4 Cir. 10/03/94); 644 So. 2d 412, 418. Quasi-judicial immunity "is justified and defined by the functions it protects and serves." *Id.* (quoting *Forrester v. White*, 484 U.S. 219, 227 (1988)). It only applies when the action challenged is adjudicatory in nature, which may involve investigating the existence of facts, holding hearings, drawing conclusions from hearings, and exercising judicial discretion. The policy behind extending quasi-judicial immunity to adjudicatory decisions is to "preserve[] the independence of judgment of the adjudicators by foreclosing any possibility of intimidation or deterrence through the threat or actuality of suits for damages." *Talbert*, 868 So. 2d at 731.

The challenged action in this case—Defendants' application of the state's esthetics licensing laws to threading—does not involve an adjudicative action, such as determining whether a particular person violated particular rules and the punishment that may be imposed. Plaintiffs' lawsuit simply does not threaten this function. Defendants suggest that the injunction Plaintiffs seek would affect their adjudicative role. But if an injunction were granted here, it would enjoin the Board's

future enforcement of an unconstitutional regulatory scheme, and quasi-judicial immunity only applies to actions and decisions that have already been taken or made by the Board in its adjudicatory role. See *Talbert*, 868 So. 2d at 731.

Defendants attempt to bolster their argument by stressing that Plaintiffs seek nominal damages. But Plaintiffs' request for nominal damages does not make quasi-judicial immunity applicable to this case. It does not change the nature of the challenged action, and the possibility of an award of nominal damages does not threaten a judicial function of the Board or the Board's impartiality.² In summary, the Board and its members have not demonstrated that they are entitled to quasi-judicial immunity in this case.

II. Plaintiffs' Petition Shows Defendants' Regulations Seriously Affect Their Rights.

Alternatively, Defendants contend that Plaintiffs have no right of action. Defs.' Mem. 8-9. Before turning to Defendants' arguments in support of this exception, Plaintiffs first explain the applicable legal standard governing this exception.

A. Legal Standard

An exception of no right of action tests "whether the plaintiff has a real and actual interest in the action." *La. Paddlewheels v. La. Riverboat Gaming Comm'n*, 94-2015 (La. 11/30/94); 646 So. 2d 885, 888 (citing La. C.C.P. art. 927(a)(5)). "The exception of no right of action assumes that the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation. A person can challenge the constitutionality of a statute only if the statute seriously affects his or her rights." *Id.* "Injury in fact, including competitive injury, is sufficient to vest standing in plaintiffs to bring an action to contest governmental action." *La. Independent*

² Even if the Court were to disagree and hold that quasi-judicial immunity applies to Plaintiffs' claim for nominal damages, the appropriate remedy would be for the Court to deny nominal damages on that basis only *after* the case has been litigated and Plaintiffs have prevailed.

Auto Dealers Ass'n. v. State, 295 So. 2d 796, 799 (La. 1974) (overruling the state's exception of no right of action to plaintiffs' declaratory judgment action because plaintiffs suffered a substantial economic disadvantage under the challenged regulation).

"To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or the legal capacity to proceed with the suit." *Falcon v. Town of Berwick*, 2003-1861 (La. App. 1 Cir 06/25/04); 885 So. 2d 1222, 1224 (finding that the trial court erred in requiring the plaintiff to show that he belonged to the class of persons who could bring a wrongful death and survival action) (citing *Jackson v. Slidell Nissan*, 96-1017 (La. App. 1 Cir. 05/09/97); 693 So. 2d 1257, 1261).

B. Plaintiffs Have Been Substantially Harmed by Defendants' Actions.

Defendants contend that Ushaben and Panna have no right of action because (1) they have not alleged that they applied to the Board for a license to practice esthetics; (2) 'Plaintiffs admit that 'the Threading Studio's Services . . . include makeup, facials, eyelashes and waxing,' . . . [and that they] have violated the laws applicable to esthetics salons by employing individuals who are not licensed to perform esthetics to perform threading'; and (3) the Board has not taken action against Ushaben and Panna. Defs.' Mem. 9 (quoting Pet. ¶¶ 20, 42).

Defendants' contentions overlook extensive allegations by Ushaben and Panna that demonstrate injury-in-fact and show that their rights have been substantially harmed by Defendants' application of the state's esthetics laws and regulations to threading. See Pet. ¶¶ 46-50, 118-123 (Injury to Ushaben), ¶¶ 58-63, 124-130 (Injury to Panna). These allegations include:

Injury to Ushaben

- "Because Defendants disciplined the Threading Studio and ordered it to terminate all of its unlicensed threaders, Ushaben can no longer thread at the Threading Studio." Pet. ¶ 46.

- “She now works part-time as a receptionist in the business but earns less in this position and does not receive the tips she used to receive when she was threading. She misses the financial security and stability she enjoyed when she was threading.” Pet. ¶ 47.
- “Unable to earn a living threading, Ushaben has had to pursue additional work to support herself and her family. She presently works as a part-time receptionist for the business and works in a second job in retail earning less than she could earn threading. Ushaben finds this work unsatisfying and would much prefer to return to threading full-time.” Pet. ¶ 48.
- “If Ushaben did not have to obtain an esthetician’s license, she would work full-time at the Threading Studio and would be able to better provide for her family.” Pet. ¶ 49.
- “Defendants’ application of the state’s licensing laws against threading businesses and threaders prevents Ushaben from pursuing a well-paying trade and threatens her ability to support herself and her family.” Pet. ¶ 50.
- “Although Ushaben is fully proficient in the art of threading and has devoted substantial time and effort to developing her trade, Defendants require Ushaben to obtain an esthetician’s license to legally thread eyebrows.” Pet. ¶ 119.
- “To attend cosmetology school, Ushaben would have to stop working. She cannot afford to spend thousands of dollars to attend a cosmetology school to learn skills that are irrelevant to threading.” Pet. ¶ 120.
- “Because of Defendants’ actions, Ushaben can no longer work as a threader at the Threading Studio and now works as a part-time receptionist for the business. As a receptionist, Ushaben earns less than she did as a threader and no longer receives tips. She also works a second job in retail to support her family.” Pet. ¶ 121.
- “But for Defendants’ application of the state’s cosmetology laws to threading, Ushaben would work full-time as a threader at the Threading Studio and would enjoy increased financial stability and security. She would also have more time for her family.” Pet. ¶ 122.
- “Defendants’ actions and the state’s licensing requirements deprive Ushaben and other threaders in Louisiana from pursuing their calling and lawfully providing their services to the public.” Pet. ¶ 123.

Injury to Panna

- “After the Board disciplined the Threading Studio for employing unlicensed threaders, the Threading Studio had to terminate Panna.” Pet. ¶ 61.
- “Panna wants to someday open her own threading business and, until

then, she wants to thread full-time at the Threading Studio, but she is unable to do either of those things because she cannot afford to stop working and obtain an esthetician's license." Pet. ¶ 62.

- "Defendants' actions have greatly affected Panna's ability to support herself and her family. If she did not have to obtain an esthetician's license to thread, she would start her own threading business, thread full-time and have increased financial security and stability." Pet. ¶ 63.
- "Panna is unable to take time away from work and her family to complete the state's irrelevant licensing requirements. If she attended cosmetology school, she would have to stop working. She cannot afford to spend thousands of dollars to attend a cosmetology school to learn skills that do not relate to her trade." Pet. ¶ 126.
- "Because of Defendants' actions, Panna was terminated by the Threading Studio. She has had to work in retail to support her family. She earns substantially less in this position and does not receive tips. She is dissatisfied with this position and would rather work as a threader." Pet. ¶ 127.
- "Panna wants to open her own threading business where she can thread full-time, but she is unable to do so because of the state's cosmetology laws." Pet. ¶ 128.
- "But for Defendants' application of the state's cosmetology laws to threading, Panna would go back to work for the Threading Studio at least until she can open her own business. Threading full-time would allow Panna to do what she loves, while giving her increased financial stability and security." Pet. ¶ 129.
- "Defendants' actions and the state's licensing requirements deprive Panna and other threaders in Louisiana from pursuing their calling and lawfully providing their services to the public." Pet. ¶ 130.

Despite these allegations, Defendants contend that Ushaben and Panna have no right of action because they failed to seek a license and challenge the denial of their license. In other words, Defendants want Ushaben and Panna to apply for a license under the licensing scheme they are challenging even though it would be futile to do so. But Louisiana courts do not force litigants to first exhaust their administrative remedies before bringing a declaratory judgment action when they can show that the administrative process would be inadequate. *ANR Pipeline Co. v. La. Tax Comm'n*, 2002-1479 (la. 07/02/03); 851 So. 2d 1145, 1151 (holding that taxpayers did not have to obtain a final adjudication from the tax commission before bringing their declaratory judgment action because doing so would be futile and

wasteful); *Hichell v. Louisiana State Bd. of Optometry Examiners*, 128 So. 2d 825, 827 (La. App. 3d Cir. 1961). A plaintiff can show the administrative process is inadequate if “there are substantial allegations that the administrative agency’s actions are upon their face without legal or constitutional authority.” *Hichell*, 128 So. 2d at 827.

For example, in *Hichell*, a licensed optometrist filed a declaratory judgment action challenging a regulation adopted by the State Board of Optometry Examiners prohibiting optometrists from accepting corporate employment. *Id.* at 826. At the time of the action, the optometrist was working at a private corporation, and if discovered, could have had his license suspended or revoked by the Board and could have been punished and enjoined from practicing optometry. *Id.* However, when the optometrist filed his lawsuit, the Board had not taken action against him. *Id.* The Board argued that the optometrist failed to exhaust his administrative remedies because he had not had his license revoked or suspended and had not appealed such a decision. *Id.*

The court of appeals disagreed. The court found that the optometrist did not need to exhaust his administrative remedies before seeking a declaratory judgment because “the sole issue . . . [wa]s whether the regulation in question [wa]s a valid and constitutional exercise of regulatory power—an issue which is peculiarly within the competency of the courts and not of the board itself to determine.” *Id.* at 828. The court reasoned that a board hearing was not an adequate means to test the validity of the regulation and expressed concern that if the optometrist were forced to exhaust his administrative remedies, during that time he “w[ould] have lost temporarily, or perhaps permanently, his right to earn a living by his profession,” which would have substantially prejudiced the optometrist. *Id.*

Here, Defendants are attempting to put Ushaben and Panna in a *worse* position than the optometrist in *Hichell*. They have already lost their right to earn

a living as eyebrow threaders. Pet. ¶¶ 46-50, 118-123 (Ushaben), ¶¶ 58-63, 124-130 (Panna). Based on the Board's actions, they have been terminated from their employment, and they have both had to pursue other employment, where they earn less money and are less satisfied with their work. *Id.* They want to earn a living as threaders moving forward, but they cannot afford to quit their jobs and to waste time and money coming into compliance with Defendants' unconstitutional requirements, the very requirements this lawsuit challenges. Pet. ¶¶ 42, 47-50, 120, 121 (Ushaben), ¶¶ 58, 61-63, 126, 128-29 (Panna). Further, like the optometrist in *Hichell*, they should not have to put their rights on hold until the Board decides to discipline them. Until this Court determines the constitutionality of Defendants' regulatory regime in this case, Ushaben's and Panna's right to earn a living in their chosen occupation is "threatened with substantial uncertainty and insecurity, even though no formal charges have yet been filed." *Hichell*, 128 So. 2d at 829.

Additionally, just as in *Hichell*, Defendants' suggested administrative remedies are wholly inadequate: To protect their constitutional rights, Ushaben and Panna should not be faced with the choice of having to comply with the regulatory regime they are challenging, or having to resume working as threaders at their own peril until Defendants take action against them. *See id.* And even if they were to wait to appeal the denial of a license or to raise their arguments in an action taken against them, both options would be futile because the Board could still not adjudicate their constitutional claims.

Lastly, Defendants seek to apply this exception against all three Plaintiffs, but their arguments only relate to Ushaben and Panna. Defs.' Mem. 9. To the extent Defendants intend to argue the Threading Studio has no right of action, they fail to demonstrate that the Threading Studio lacks a significant legal interest in this litigation.

Plaintiffs' Petition contains several factual allegations detailing the injuries that the Threading Studio has sustained because of Defendants' regulatory framework, including being forced to fire its most experienced threaders and to employ licensed estheticians who do not know how to thread, Pet. ¶¶ 112-113, and being unable to effectively function and prosper because of Defendants' actions, Pet. ¶¶ 114, 116-17. Plaintiffs further allege that the Threading Studio has suffered a loss of good will with its customers because of Defendants' actions, see Pet. ¶ 115, and that the current and future success of their business depends on their ability to employ unlicensed threaders. Pet. ¶ 24. These allegations all demonstrate that Defendants' regulatory regime seriously affects the Threading Studio's rights.

In conclusion, Plaintiffs' Petition details the extent to which Plaintiffs have been substantially harmed by Defendants' actions and demonstrates that they possess a real and actual interest in this litigation. Defendants fail to show that Plaintiffs have no right of action, and their exception of no right of action should be denied.

III. Defendants Fail to Demonstrate How Their Exception of Prescription Applies to This Case.

In their opening paragraph in their memorandum, Defendants assert an exception of prescription, see Defs.' Mem. 1; however, they have not filed this exception and their memorandum does not set forth any argument regarding the applicability of this exception to this case. This exception is therefore not properly before this Court. See *Kleinman v. Bennett*, 11-947 (La. App. 3 Cir. 12/07/11), 80 So. 3d 689, 693 ("The peremptory exception of prescription may only be raised by the urging party and it must be specifically plead . . . through a formal written exception . . . Arguing the issue either orally or in memorandum to the court does not suffice.") (citing La. C.C.P. art. 927, *Box v. City of Baton Rouge*, 2002-0198 (La. App. 1 Cir. 01/15/03); 846 So. 2d 13, 14-15).

To the extent Defendants seek to argue that the Threading Studio's claims have prescribed because they failed to seek judicial review of the Board's order within 30 days, Plaintiffs have already explained why this statute does not bar their lawsuit in Part I.B.

Conclusion

For these reasons, the Court should deny Defendants' exceptions.

Respectfully submitted,

INSTITUTE FOR JUSTICE

MEAGAN FORBES

MEAGAN FORBES, MN Bar No. 0393427*
520 Nicollet Mall, Suite 550
Minneapolis, Minnesota 55402
Telephone: (612) 435-3451
Facsimile: (612) 435-5875
mforbes@ij.org

WESLEY HOTTOT, WA Bar No. 47539*
10500 NE 8th Street, Suite 1760
Bellevue, Washington 98004
Telephone: (425) 646-9300
Facsimile: (425) 990-6500
whottot@ij.org

KOCH & SCHMIDT, L.L.C.
F. EVANS SCHMIDT, La. Bar No. #21863
650 Poydras Street, Suite 2660
New Orleans, Louisiana 70130
Telephone: (504) 208-9040
Facsimile: (504) 208-9041
fes Schmidt@kochschmidt.com

Attorneys for Plaintiffs

* admitted *pro hac vice*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Plaintiffs' Response to Defendants' Exception of No Cause of Action and Alternative Exception of No Right of Action and/or Prescription has been served upon all counsel of record by e-mail and placing signed copies thereof in the United States mail, postage prepaid, on this 3 day of January, 2017.

INSTITUTE FOR JUSTICE

Melissa Forbes

MEAGAN FORBES, MN Bar No. 0393427*

Attorney for Plaintiffs

* admitted *pro hac vice*