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

ASHLEY-ROXANNE N'DAKPRI, LYNN SCHOFIELD, and EVANGELA MICHELLE ROBERTSON, Plaintiffs, v. LOUISIANA STATE 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.	SUIT NO. 684468 SECTION: 25 DIVISION "CIVIL"

PLAINTIFFS' RESPONSE TO DEFENDANTS' EXCEPTION OF NO CAUSE OF ACTION AND ALTERNATIVE EXCEPTION OF NO RIGHT OF ACTION

MAY IT PLEASE THE COURT:

Plaintiffs, Ashley N'Dakpri, Lynn Schofield, and Michelle Robertson, are African hair braiders who do not have cosmetology licenses, as required by Defendants—the State Board of Cosmetology and its members. Plaintiffs wish to respond to Defendants' Exception of No Cause of Action and Alternative Exception of No Right of Action. As explained below, Defendants' exceptions lack merit and should be overruled.

INTRODUCTION

There is no basis for dismissing the Petition. Plaintiffs' many detailed allegations show that—regardless of whether they will ultimately prevail—they have stated a cause of action against Defendants and have a right of action.

Plaintiffs are in the business of hair braiding. Defendants have interpreted Louisiana's cosmetology laws to apply to compensated hair braiding and now are

requiring that all braiders stop work and obtain a license, which in turn requires at least 500 hours of instruction in a private cosmetology school, fees, and an examination. Plaintiffs have sued to protect their livelihoods based on two constitutional protections: (1) their state constitutional right to practice the occupation of their choosing free from unreasonable governmental interference and (2) the separation of powers required under Louisiana's non-delegation doctrine. Any fair reading of the Petition and the relevant case law shows that these constitutional claims state a cause of action and that Plaintiffs have a right of action.[1] If Plaintiffs' allegations prove true (as Plaintiffs expect they will), they are likely to succeed on the merits—a far more demanding standard than the one applicable here. Accordingly, this Court should overrule the exceptions in their entirety and allow the case to proceed.

FACTUAL BACKGROUND

Plaintiffs, Ashley N'Dakpri, Lynn Schofield, and Michelle Robertson, are braiders with decades of experience. They practice African hair braiding—a natural grooming practice that has existed, and existed safely, for thousands of years. Pet. ¶ 61. African hair braiding is typically passed from one generation to another, with children learning to braid from older family members. *Id.* It is not customarily taught in cosmetology schools. *See id.* ¶ 83.

Louisiana has regulated the conventional practice of cosmetology since the early twentieth century, but hair braiders were allowed to work without any sort of license until 2003, when the State Board of Cosmetology created the "alternative hair design permit." *See* LAC 46:XXXI.1101, 1105, 1107. This permitting

[1] In fact, in 2017, Judge Caldwell of this Court overruled similar exceptions and allowed a similar constitutional challenge to proceed against the same Defendants. *See* Judgment, *Chudasama v. La. State Bd. of Cosmetology*, Judgment, Suit No. 650,359 Section 24 (19th Judicial Dist. Feb. 10, 2017) (overruling exceptions of no right of action and no cause of action in substantive due process and equal protection challenge to a cosmetology license, but dismissing individual defendants).

requirement has caused Lynn Schofield to close her braiding salons, Pet. ¶¶ 12, 44–45; driven Michelle Robertson to relocate to Texas (where braiding does not require a license), *id.* ¶¶ 13, 55; and now threatens the livelihood of Ashley N'Dakpri and the viability of the salon she manages, Afro Touch, *id.* ¶¶ 11, 34–36. In fact, while Defendants' exceptions have been pending, the Board issued Afro Touch a notice of violation for employing an unlicensed braider (a nonparty), who received a related notice for practicing without a license.[2]

I. PLAINTIFFS ARE EXPERT BRAIDERS WHO SEEK TO EARN A LIVING BRAIDING HAIR IN LOUISIANA.

Plaintiff Ashley N'Dakpri has been braiding hair since she was a child and she has been doing so for payment for at least 16 years. Pet. ¶¶ 24, 33. Today, she is the manager of Afro Touch, a braiding salon in Gretna. *Id.* ¶¶ 21, 25. She wants to hire more braiders and expand the salon, but she is unable to do so. *Id.* ¶¶ 29–31. As a result, Ashley and Afro Touch have lost profits and customers. *Id.* ¶ 134. Although Ashley knows skilled braiders who are willing to work at Afro Touch, she is unable to hire them because they do not have braiding permits and fear being fined by the Board. *Id.* ¶¶ 26, 32–33, 35. The Board has already mailed a cease and desist letter to Afro Touch for employing an unpermitted braider, *see id.* ¶ 26, and it recently issued another notice of violation to the salon and one of its employees.

Plaintiff Lynn Schofield is Ashley's aunt, who founded Afro Touch in 2000. Pet. ¶ 44. She is also an expert hair braider, with more than three decades of experience. *Id.* ¶¶ 40–41. At one point, Lynn operated four Afro Touch locations around the greater New Orleans area, employing approximately 20 braiders. *Id.* ¶ 44. Lynn had plans to continue expanding Afro Touch, but she was eventually forced to start closing locations. *Id.* ¶¶ 44–45. After the Board required the

[2] In light of this development, if the Court is inclined to grant the Defendants' exceptions, Plaintiffs ask that any dismissal order be entered without prejudice and with leave to file an amended petition.

braiding permit, Lynn was unable to retain staff at her salons. *Id.* ¶ 44. At first, she closed two. *Id.* In 2013, she transferred Afro Touch's Gretna location to her niece and nephew while she continued to operate a salon in Laplace. *Id.* ¶ 45. But the braiding permit has since forced Lynn to close the Laplace location, too. *Id.* She continues to braid from her home, but she does not do the kind of business or make the kind of money that she could in a commercial salon. *Id.* ¶¶ 46–47.

Plaintiff Evangela Michelle Robertson, who goes by Michelle, has been braiding hair for more than two decades. *Id.* ¶ 53. She once dreamed of opening her own braiding business in Louisiana, but she was forced to abandon that dream because of the Board's requirements. *Id.* ¶ 56. Recently, Michelle and her family relocated to Texas. *Id.* ¶¶ 52, 55. The move was prompted, in part, by the fact that the braiding permit prevented Michelle from opening her own business. *Id.* ¶¶ 58, 154. She periodically returns to Louisiana to braid hair and would do so more often if she could lawfully braid hair for payment. *Id.* ¶¶ 57, 153, 156.

II. THE COSMETOLOGY ACT AND BRAIDING PERMIT

It did not have to be this way. The Legislature requires the Board to administer cosmetology licenses; it does not require the Board to license braiding specifically, and it has provided no guidance as to the training necessary to obtain the braiding permit. In other words, the Board created this irrational license and its burdensome education requirements of its own accord.

While Louisiana has licensed cosmetology for nearly 100 years, braiders worked freely throughout the state until 2003. In 2001, the Legislature amended the cosmetology laws to allow—but not require—the Board to create specialty permits. *See* La. R.S. § 37:584(C). Two years later, the Board adopted the permit at issue here. *See* LAC 46:XXXI.1105, 1107. Initially, braiders were able to obtain permits based on a grandfathering provision. *See* LAC 46:XXI.1105(B) (2004). But

in 2011, the Board removed this provision, at the same time reducing the training requirement from 1,000 hours to 500 hours. *See* LAC 46:XXXI.1105, 1107.

Obtaining a braiding permit is hardly easy, however. First, a person must spend thousands of dollars and complete a minimum of 500 hours of training at a private cosmetology school, pass an exam, and pay several fees to the Board. Pet. ¶ 3. The only school in Louisiana that offers the course actually requires 600 hours and it is located in Monroe. *Id.* ¶¶ 6, 8. Braiding hair without a permit subjects a braider to a $5,000 penalty per violation. *See* La. R.S. §§ 37:605(B), 37:606(C). And the Board has the power to shut down businesses that it finds have violated the cosmetology laws. *See* Pet. ¶¶ 26, 28.

Even if these requirements seem reasonable in theory, they are irrational in practice. While the Board requires braiders to complete at least 500 hours of instruction and an exam, it does not require cosmetology schools to offer the course, *id.* ¶ 105, and the exam appears never to have been administered, *id.* ¶¶ 112–13. Just three of Louisiana's 50 private cosmetology schools advertise that they offer the braiding curriculum. *Id.* ¶ 5. But only one of those schools appears to actually offer it. *Id.* And that school requires 100 *additional* hours of training (600 total) and it is located a day's drive from the New Orleans area. *Id.* ¶ 6. This makes it virtually impossible for most of Louisiana's braiders, including Plaintiffs, to complete the braiding curriculum. *Id.* ¶ 8. And if a braider somehow manages to do so, she still must pass a practical exam (which has never been administered) and pay various fees. *Id.* ¶ 108. Quite apart from the practical impossibility of completing the required training, *see id.* ¶¶ 6–8, the curriculum the Board designed is insufficient to teach someone with no prior knowledge how to braid hair, *id.* ¶ 104. And the practical exam purports to test an applicant's competency in hair braiding, but does not test sanitation, safety, or first aid. *Id.* ¶ 109.

Because it is so difficult to obtain a braiding permit, few people have done so. In June 2019, when this lawsuit was filed, there were 19 active braiding permits statewide. *Id.* ¶ 98. Many—if not all—of these permitted braiders were grandfathered before 2011, when grandfathering ended, which explains how these 19 individuals managed to become licensed despite the Board having never administered the required practical examination. *See id.* ¶ 114. For context, neighboring Mississippi has a smaller African-American population, but more than 1,200 braiders. *Id.* ¶ 99. The disparity is explained by the fact that Mississippi (like Texas, Arkansas, and 24 other states) allows braiders to work without any form of license or permit. *Id.* ¶ 7. Among the 15 states where braiding *is* licensed, more than half require 50 hours of instruction or less, *id.*, reflecting the commonsense notion that braiding is safe and that the public can adequately judge whether a particular braider is competent. *See id.* ¶¶ 65–69.

III. THE BOARD AND ITS ENFORCEMENT ACTIONS

The Board is composed in a way that invites irrational acts of protectionism. Members are required, by law, to be licensed cosmetologists with at least five-years' experience. La. R.S. § 37:572(B). And no more than four of the eight members can be connected, directly or indirectly, to a cosmetology school.[3] *Id.* §§ 37:571(B), 37:572(D). In other words, Board members are *required* to be licensed cosmetologists and salon owners, and some are, in fact, owners of cosmetology schools—including the schools that advertise a braiding curriculum. Pet. ¶¶ 76–78. The Board members are thus self-interested in favor of imposing licensing burdens on Plaintiffs—their competition—and enforcing the cosmetology laws against them. *Id.* ¶ 76.

[3] "Connected" is defined as "having an ownership interest, being employed by or having a contract with a school, or having an immediate family member who has an ownership interest in a school." La. R.S. § 37:572(D).

Not surprisingly then, the Board enforces the braiding permit and attendant regulations. *See id.* ¶¶ 115–24. For instance, in 2018, the Board cited a former Afro Touch employee for working without a permit. *Id.* ¶ 26. At the same time, the Board cited Afro Touch for employing the unpermitted individual and issued a cease and desist order to ensure she no longer worked there. *Id.*

Additionally, on September 11, 2019, while the Board's Exceptions were pending, a Board employee issued two notices of violation at Afro Touch—one to the salon for employing an unpermitted braider and one to the braider herself.[4]

IV. EXCEPTIONS TO THE PERMIT REQUIREMENT

There are several pertinent exceptions to the requirement that braiders obtain a permit. First, licensed barbers are exempt under the cosmetology laws, La. R.S. § 37:581(B)(3), although there is no requirement that barbers learn braiding. Additionally, no permit is required when a braider works for free. *Id.* § 37:563(6). And a braider can work for money for members of her immediate household without a permit. *Id.* § 37:581(B)(5). People who fall into any of these three exceptions are not required to have *any* formal training in or knowledge of hair braiding. Pet. ¶ 97. Together, these exceptions contradict the idea that the Board's braiding permit is necessary to protect public health and safety.

ARGUMENT

I. PLAINTIFFS HAVE THREE CAUSES OF ACTION.

The exception of no cause of action tests "the sufficiency in law of the petition." *City of New Orleans v. Bd. of Comm'rs of Orleans Levee Dist.*, 93-0690 (La. 07/05/94); 640 So. 2d 237, 241. Courts accept all the facts in the petition as

[4] Plaintiffs have requested that the Board stay administrative proceedings that may result from these notices, but Defendants have yet to respond to this request. Should it become necessary, Plaintiffs are prepared to move for leave to add the nonparty individual braider and/or Afro Touch as plaintiffs in this action in order to seek a preliminary injunction barring the Board from further enforcing the challenged regulations during the pendency of this lawsuit.

true and overrule exceptions "unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief." *Fink v. Bryant*, 2001-0987 (La. 11/28/01); 801 So. 2d 346, 349 (emphasis added). The moving party bears the heavy burden of proving that there is no cause of action. *City of New Orleans v. Bd. of Directors of La. State Museum*, 98-1170 (La. 3/2/99); 739 So. 2d 748, 755. Courts view the allegations in the petition in the light most favorable to plaintiffs and generally favor affording plaintiffs an opportunity to prove their allegations. *Badeaux v. Sw. Computer Bureau, Inc.*, 2005-0612 (La. 3/17/06); 929 So. 2d 1211, 1217. As a result, courts only grant exceptions "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. Serv. Comm'n v. La. State Legislature*, 2012-0353 (La. App. 1 Cir. 04/26/13); 117 So. 3d 532, 537 (citation omitted).

In this case, the Board's memorandum in support of the Exception of No Cause of Action does nothing to explain how "on the face of the petition . . . there is some insurmountable bar to relief." *Id.* Therefore, Plaintiffs should be given the opportunity to prove their allegations in accordance with Louisiana Supreme Court precedent. *See Badeaux*, 929 So. 2d at 1217.

A. The Braiding Permit Violates the Guarantees of the Louisiana Constitution's Due Process and Unenumerated Rights Clauses.

Plaintiffs allege that the challenged permit and regulations interfere with their right to economic liberty as protected by Article I, §§ 2 and 24 of the Louisiana Constitution. Pet. ¶¶ 158–75. The Board, however, asserts that "Plaintiffs have not alleged they have been deprived of life, liberty or property or any other constitutionally protected right by Defendants." Defendants' Mem. Supp. Exception of No Cause of Action & Officials' Alternative Exception of No Right of Action (Memo.) at 7. This one sentence represents the entirety of the Board's argument on this point. As a threshold matter, this lone sentence is insufficient to prove that

there is no set of facts that would entitle Plaintiffs to relief. *See Fink*, 801 So. 2d at 349. For this reason alone, this exception should be overruled.

Even if the Board had argued in favor of this exception, however, a review of the Petition demonstrates that it cannot be granted. The Due Process Clause of the Louisiana Constitution provides that "[n]o person shall be deprived of life, liberty, or property, except by due process of law." La. Const. art. I, § 2. For more than a generation, Louisiana courts have recognized that the Due Process Clause protects the right to earn an honest living and conduct business free from unreasonable government interference. *See, e.g.*, *City of Crowley Firemen v. City of Crowley*, 280 So. 2d 897, 902 (La. 1973) (calling the "right to work" a "basic individual freedom[]" and ruling unconstitutional an ordinance interfering with firefighters' economic liberty); *City of Lafayette v. Justus*, 161 So. 2d 747, 749 (La. 1964) (recognizing right to economic liberty and ruling unconstitutional an ordinance that interfered with business owner's ability to earn income); *Banjavich v. La. Licensing Bd. for Marine Divers*, 111 So. 2d 505, 511 (La. 1959) ("This court, buttressed by authorities of the Supreme Court of the United States, has recognized that the right to engage in a lawful calling is of such a basic nature that the curtailment of the right by oppressive or arbitrary legislation effectuates a depravation of the complainant's property without due process and denies him equal protection of the law."); *Schwegmann Bros. v. La. Bd. of Alcoholic Beverage Control*, 43 So. 2d 248, 253 (La. 1949) (recognizing right to economic liberty and holding unconstitutional statute that unreasonably interfered with that right); *State v. Chisesi*, 175 So. 453, 457 (La. 1937) (same); *Banelli v. City of New Orleans*, 478 So. 2d 1370, 1372 (La. App. 4 Cir. 1985) (same).

Likewise, the Unenumerated Rights Clause provides that the "enumeration in [the Louisiana] constitution of certain rights shall not deny or disparage other

rights retained by the individual citizens of the states." La. Const. art. I, § 24. Thus, the Unenumerated Rights Clause protects the right to economic liberty, too.

Because the right to economic liberty is afforded constitutional protection, any infringement of the right must bear a real and substantial relation to public health, safety, or welfare. *See City of Lafayette*, 161 So. 2d at 749; *Schwegmann Bros.*, 43 So. 2d at 258. Even where a law relates to public health, safety, or welfare, its operation "must not be so oppressive or unreasonable as to outweigh the desired benefits." *City of Crowley Firemen*, 280 So. 2d at 900. A law or regulation that is "unreasonable or arbitrary in accomplishing its objective" is unconstitutional under this standard. *Id.*

Plaintiffs have properly alleged a cause of action under Article I, §§ 2 and 24 of the Louisiana Constitution. Specifically, they have pleaded:

- Braiding is inherently safe and thus is beyond the legitimate scope of government regulation. Pet. ¶¶ 1, 65, 69, 166–67.
- The Braiders are unable to stop working, attend cosmetology school, and fulfill the requirements necessary to obtain a braiding permit. Pet. ¶¶ 43, 54, 129.
- To attend cosmetology school and earn a braiding permit, the Braiders would be forced to stop working and spend thousands of dollars to learn skills they have already mastered. Pet. ¶¶ 129, 144, 153.
- The Braiders are currently unable to fully support themselves because they fear that the Board will impose fines on them for braiding without a braiding permit. Pet. ¶¶ 36, 41, 44, 47, 58–59, 132.
- But for the braiding permit requirement, Plaintiff Ashley N'Dakpri would grow Afro Touch, the braiding salon she manages. Pet. ¶¶ 122, 133–34, 139.

- But for the braiding permit requirement, Plaintiff Lynn Schofield could braid full time and earn more money, or she could teach others how to braid. Pet. ¶¶ 148–49.
- But for the braiding permit requirement, Plaintiff Michelle Robertson might still live in Louisiana and, at the very least, could spend more time in Louisiana braiding her clients' hair for money. Pet. ¶¶ 154, 156.
- Even if braiding posed a risk to the public (which it does not), the challenged regulations do not protect against such risks. Pet. ¶ 168.
- Even if braiding were the type of activity that could be regulated (which it is not), the system adopted by the Board is irrational. Pet. ¶ 173.
- The Board's only interest in regulating braiding is the illegitimate interest of protecting licensed cosmetologists and the cosmetology business from competition. Pet. ¶ 170.

Simply, Plaintiffs have alleged more than enough to survive the Board's exception. Plaintiffs allege that the braiding permit interferes with their ability to earn an honest living. They further allege that the braiding permit has no real and substantial relationship to public health, safety, or welfare and that the Board's chosen means of regulating hair braiders is irrational in relation to any purported goal to be achieved by regulating braiders. Therefore, the exception for no cause of action for Plaintiffs' due-process and unenumerated-rights claims should be overruled.

B. The Braiding Permit Violates the Equal Protection Clause.

The Board next asserts that Plaintiffs have failed to state a cause of action under the Louisiana Constitution's Equal Protection Clause. Memo. at 7. The Clause prohibits government from creating regulatory classifications that are unrelated to a legitimate governmental interest in health, safety, or welfare. *La. & Ark. Ry. Co. v. Goslin*, No. 50859 (La. 1971), 246 So. 2d 852, 854. In deciding

whether a particular classification or exemption is constitutional, courts must "determine whether the distinction is arbitrary or is based on practical and reasonable grounds with relation to the public purpose sought to be achieved by the legislation." *Id.*

Here, Plaintiffs have sufficiently alleged that the classifications created by the braiding permit—*i.e.*, those who need a braiding permit to braid as opposed to those who can braid without a braiding permit—are not based on practical or reasonable grounds and do not achieve any legitimate state interest. In support of their equal-protection claim, Plaintiffs have alleged:

- Natural hair braiding is safe. Pet. ¶¶ 65, 66, 68, 69.
- The Braiders are all experts at what they do and have years or decades of experience braiding hair. Pet. ¶¶ 24, 40, 53.
- To legally braid in Louisiana, a braider must obtain a braiding permit. Pet. ¶ 90.
- To obtain a braiding permit, an individual must complete 500 hours of instruction at a cosmetology school, pass an exam, and pay permitting fees to the Board annually. Pet. ¶¶ 2–3.
- The Board's curriculum is insufficient to teach hair braiding to someone with no prior knowledge of braiding. Pet. ¶ 104.
- The braiding exam does not test sanitation, safety, or first aid. Pet. ¶ 109.
- Several classes of people may braid in Louisiana without a braiding permit, including: (1) licensed barbers; (2) hair braiders who braid for free; and (3) hair braiders who braid the hair of members of their immediate household for payment. Pet. ¶¶ 95, 96.
- The three classes of individuals who can braid in Louisiana without a braiding permit are not required to have any training in or knowledge of hair braiding. Pet. ¶ 97.

- "If braiding were the type of activity that affected public health, safety or welfare (which it is not), the exemptions would pose a direct threat to public health, safety, or welfare." Pet. ¶ 183.

Accepted as true (as they must be at this stage), these allegations demonstrate that the three exceptions to the braiding permit are not rationally related to any legitimate interest in public health, safety, or welfare. Stated differently, because braiding is safe, there is no rational reason for requiring some people to have a permit to braid, while exempting others with no training. After all, a practice that is safe does not suddenly become dangerous when a person is paid.

The Board goes one step further and argues that the Braiders' equal-protection claim should be dismissed because "services performed for members of an individual's immediate household do not impact public health, safety and welfare." Memo. at 7. Even if that were true, it goes to the merits. It is not something that the Court can resolve at this stage because it is a factual assertion directly contrary to Plaintiffs' allegations, which must be taken as true

That the Board is prematurely disputing the merits illustrates why the exceptions should be overruled and Plaintiffs should be afforded the opportunity to prove their allegations. *See, e.g., La. & Ark. Ry. Co.*, 246 So. 2d at 856 (overruling exception of no cause of action while declining to consider merits arguments); *La. Chemical Ass'n v. State*, 2012-0230 (La. App. 1 Cir. 1/19/13); 2013 WL 105023, at *4 ("[W]hether [a plaintiff] will be able to meet its burden of proof to show that no appropriate state interest is met by [a regulation] is not appropriate on an exception of no cause of action."); *Albarado v. Abadie*, 97-478 (La. App. 5 Cir. 11/12/97); 703 So. 2d 736, 739 ("Since trial of the exception of no cause of action is solely on the face of the pleadings, the court may not go beyond the petition to the merits of the case."). The many detailed allegations in the Petition, combined with the relevant

case law, show that the Board's exception to the equal protection claim should be overruled.

C. The Braiding Permit Violates the Separation of Powers.

The Board next argues that Plaintiffs have not stated a cause of action for a violation of the separation of powers required by Article II, §§ 1–2 and Article III, § 1 of the Louisiana Constitution. Memo. at 7–8. Once again, the Board fails to carry its heavy burden to prove "beyond doubt" that it will be impossible for Plaintiffs to prove facts that could entitle them to relief. *See Fink*, 801 So. 2d at 349. Indeed, the only substantive point that the Board makes goes to the merits of Plaintiffs' separation of powers claim; it does not go to the present question: whether the Petition alleges a cause of action. *See* Memo. at 8.

To properly plead a separation of powers claim, a plaintiff must allege that the Legislature has impermissibly delegated power to an administrative agency. All grants of authority from the Legislature to an administrative agency must: (1) contain a clear expression of legislative policy; (2) prescribe sufficient standards to guide the agency in the execution of that policy; and (3) be accompanied by adequate procedural safeguards to protect against an abuse of discretion by the agency. *State v. Alfonso*, 99-1546 (La. 11/23/99); 753 So. 2d 156, 161. "When delegated authority is unfettered, its exercise becomes legislative, not administrative, in nature, and contravenes the mandates of Articles II, § 2 of the Louisiana Constitution that no branch of government shall exercise power belonging to another branch." *Mid-City Auto, L.L.C. v. Dep't of Pub. Safety & Corr.*, 18-0056 (La. App. 1 Cir. 11/7/2018); 267 So. 3d 165, 177.

Plaintiffs have adequately alleged a violation of the separation of powers. In support of their claim, they allege:

- "One purpose of the separation of powers is to ensure that politically accountable actors are making policy decisions on behalf of the people of the

State, so that the people may remove those individuals who are not carrying out their policy preferences." Pet. ¶ 199.

- The Legislature has never taken action to regulate natural hair braiding specifically. Pet. ¶ 89.
- The Legislature may not delegate its legislative power to the Board. Pet. ¶ 193.
- "Hair braiding is not specifically included in the statutory definition of cosmetology." Pet. ¶ 196.
- "Prior to 2003, hair braiders in Louisiana did not need any form of cosmetology license or permit." Pet. ¶ 88.
- In 2003, the Board created the braiding permit, "which for the first time required Plaintiffs and all hair braiders to complete training at a licensed cosmetology school and maintain a permit at all times in order to braid hair legally in Louisiana." Pet. ¶ 90.
- "The unelected members of the Board exercised the legislative power of the state by determining that natural hair braiding is the regulated practice of cosmetology and by determining that a minimum of 500 hours of instruction are necessary to safely practice natural hair braiding." Pet. ¶ 197.
- The Board has further "delegated authority to private actors by giving private cosmetology schools the power to determine the number of hours of instruction necessary to obtain an alternative hair design permit and the content of the curriculum." Pet. ¶ 198.
- The Legislature has not provided a clear expression of legislative policy for the braiding permit or training curriculum. Pet. ¶ 206.
- The Legislature has not provided sufficient standards to guide the Board in the creation of specialty permits, such as the braiding permit, and the conditions on which they will be awarded. Pet. ¶ 207.

- The Legislature has not provided procedural safeguards to protect against an abuse of discretion by the Board. Pet. ¶ 208.
- In fact, the Board's self-interest in creating the braiding permit is an abuse of discretion. Pet. ¶ 209.

These allegations are more than sufficient to plead a cause of action. Plaintiffs allege that the Board has invaded the Legislature's prerogative to set the standards by which licensed professionals are trained. It is far from "beyond doubt" that Plaintiffs might prove facts warranting relief. Rather, the allegations in the Petition show that it is plausible (if not likely) that Plaintiffs *will* prove their claims. At the very least, Plaintiffs are entitled to a determination on the merits. Again, the Court should overrule the Board's exception for no cause of action.

II. PLAINTIFFS EASILY SURVIVE THE EXCEPTION OF NO RIGHT OF ACTION.

An exception of no right of action assumes that the petition states a valid cause of action, but 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. Stated another way, the exception of no right of action "questions whether the plaintiff in the particular case has a legal interest in the subject matter of the litigation." *Id.* A plaintiff overcomes the exception in a constitutional challenge by showing that his or her rights are seriously affected by the statute or rule at issue. *Id.* "Injury in fact, including competitive injury, is sufficient to vest standing in plaintiffs to bring an action to contest governmental action." *La. Indep. Auto Dealers Ass'n v. State*, 295 So. 2d 796, 799 (La. 1974). Because Plaintiffs have each suffered and continue to suffer injury as a result of the promulgation of the challenged braiding regulations, they have an interest in the subject matter of the suit sufficient to proceed beyond the pleadings.

A. Plaintiffs Are Injured by the Board's Actions.

The Board contends that even if this Court determines that Plaintiffs have properly pleaded a cause of action, they have no right of action. The Board's position cannot be squared with the allegations in the Petition or even with the Board's own arguments: The memorandum in support of this Exception charges Plaintiffs with violating the Cosmetology Act and regulations by braiding without a permit and employing people who do the same. Memo. at 8. In other words, the Board's position is that Plaintiffs are violating the challenged statutes and regulations. This places Plaintiffs within the class of persons who would have a right to challenge the Board's interpretation of the law. That alone is enough to overcome the exception of no right of action. *See La Indep. Auto Dealers Ass'n*, 295 So. 2d at 799.

If the Court nevertheless deems it necessary to examine the allegations, they clearly show that Plaintiffs are presently suffering injuries because of the actions of the Defendants. *See* Pet. ¶¶ 125–57. These injuries include:

1. Ashley N'Dakpri

- Although Ashley is an expert hair braider, the Board requires her to obtain a braiding permit to legally braid hair in Louisiana. Pet. ¶ 128.
- To obtain the braiding permit, Ashley would have to stop working and relocate to Monroe, Louisiana, to attend cosmetology school. Pet. ¶ 6. She cannot afford to spend thousands of dollars to complete the braiding curriculum at a cosmetology school where she would learn skills that she has already mastered or that do not relate to her trade. Pet. ¶ 129.
- Every time Ashley braids hair for payment, she risks being fined up to $5,000 by the Board.[5] Pet. ¶ 130.

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[5] Indeed, on September 11, 2019, a Board inspector visited Afro Touch salon and gave the salon a Notice of Violation for employing an unpermitted braider. *See* p.3 & n.2 *above*. The unpermitted braider is not a plaintiff in this lawsuit.

- Ashley would have no way to support herself if the Board targeted her for enforcement or forced Afro Touch to cease operating. Pet. ¶ 131.
- The business Ashley manages, Afro Touch, has suffered as a result of the braiding permit. The braiding permit prevents Ashley from hiring competent hair braiders and has caused Ashley to lose the salon's most qualified hair braiders. Pet. ¶¶ 134–35.
- Ashley would like to expand Afro Touch but is unable to do so without employing unlicensed or unpermitted hair braiders. Pet. ¶ 139.
- The Board's actions and the state's cosmetology laws and requirements deprive Ashley of the ability to pursue her calling and lawfully provide her braiding services to the public. Pet. ¶ 132.

2. Lynn Schofield

- Although Lynn is an expert hair braider, the Board requires her to obtain a braiding permit to legally braid hair in Louisiana. Pet. ¶ 142.
- To obtain the braiding permit, Lynn would have to stop working and travel to Monroe, Louisiana, to attend cosmetology school. Pet. ¶ 43. She cannot afford to spend thousands of dollars to complete the braiding curriculum at a cosmetology school where she would learn skills that she has already mastered or that do not relate to her trade. Pet. ¶ 144.
- Every time Lynn braids hair for payment, she risks being fined up to $5,000 by the Board. Pet. ¶ 145.
- But for the Board's application of the challenged laws and regulations, Lynn would have been able to maintain all four Afro Touch locations. Pet. ¶ 147.
- But for the Board's application of the challenged laws and regulations, Lynn could work full time as a hair braider in a commercial salon. Pet. ¶ 148.

- The Board's actions and the state's cosmetology laws and requirements deprive Lynn of the ability to pursue her calling, earn an honest living, and lawfully provide her braiding services to the public. Pet. ¶ 150.

3. Michelle Robertson

- Although Michelle is an expert hair braider, the Board requires her to obtain a braiding permit to legally braid hair in Louisiana. Pet. ¶ 152.
- To obtain a braiding permit, Michelle would need to take time away from her full-time job and her family. She cannot afford to relocate to Monroe, Louisiana, or spend thousands of dollars to complete the braiding curriculum at cosmetology school where she would learn skills that she has already mastered or that do not relate to her trade. Pet. ¶¶ 54, 153.
- But for the Board's application of the challenged laws and regulations, Michelle might not have moved to Texas. Pet. ¶ 154.
- Every time Michelle braids hair for payment in Louisiana, she risks being fined up to $5,000 by the Board. Pet. ¶ 155.
- But for the braiding permit, Michelle would spend more time in Louisiana braiding hair for payment. Pet. ¶ 156.
- The Board's actions and the state's cosmetology laws and requirements deprive Michelle of the ability to pursue her calling, earn an honest living, and lawfully provide her braiding services to the public. Pet. ¶ 157.

Together, Plaintiffs' allegations demonstrate that they are suffering real injuries because of the actions of the Board and its members. Nothing more is needed to demonstrate a right of action against them.

B. Plaintiffs Are Not Required to Apply for an Unconstitutional License.

The Board next argues that Plaintiffs do not have a right of action because they have not applied for and been denied licenses. Memo. at 8. But administrative exhaustion is not a requirement to initiate a constitutional challenge to a statute or

regulation in Louisiana. *See ANR Pipeline Co. v. La. Tax Comm'n*, 02-1479 (La. 8/2/03); 851 So. 2d 1145, 1148, 1151 (holding that plaintiffs did not have to obtain a final judgment from an administrative agency before challenging the constitutionality of a statute especially when doing so would be futile and wasteful); *Hichell v. La. State Bd. of Optometry Exam'rs*, 128 So. 2d 825, 828 (La. App. 3 Cir. 1961) (holding that plaintiff did not have to exhaust administrative remedies before seeking declaratory judgment on constitutionality of law); *see also City of Crowley*, 280 So. 2d at 898 (preenforcement challenge to constitutionality of economic regulation); *Banjavich*, 111 So. 2d at 510 (same).

In *Hichell*, an optometrist brought a constitutional challenge to a law that made it illegal for optometrists to be employed by corporations. 128 So. 2d at 826. Optometrists found in violation of the law risked having their licenses revoked, suspended, or not renewed. *Id.* As an optometrist affected by the law, plaintiff sought a pre-enforcement declaration of the law's invalidity. *Id.* The court noted that the plaintiff should not be forced to risk prosecution in order to challenge the constitutionality of the statute. *Id.* at 828. This was especially true because the sole issue was whether the challenged law was "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.* Just like the plaintiff in *Hichell*, the Braiders are not required to wait to be prosecuted by the Board to have the constitutionality of the braiding permit decided. All the more so where, as here, the Board is actively enforcing the challenged regulations. *See* p.3 & n.2 *above*.

III. DEFENDANTS' REMAINING EXCEPTIONS ARE INAPPLICABLE.

In its short memorandum, the Board touches on several doctrines that are simply irrelevant to this litigation. Although the Board has made virtually no effort to explain its arguments, Plaintiffs will address each of them in an effort to assist the Court.

A. The Doctrine of Immunity for Policymaking and Discretionary Acts is Inapplicable.

The Board briefly argues it is immune from this lawsuit. Memo. at 4–5. It relies on a tort statute, which provides:

> Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

La. R.S. § 9:2798.1(B).

The Board's immunity argument fails for two reasons. First, La. R.S. § 9:2798.1(B) offers government employees individual immunity, in limited circumstances, for tort claims only. *E.g.*, *Gregor v. Argenot Great Centr. Ins. Co.*, 02-1138 (La. 5/20/03); 851 So. 2d 959, 968 (Louisiana Department of Health was not immune pursuant to La. R.S. § 9:2798.1(B) from tort action for wrongful death); *Archon v. Union Pac. R.R.*, 94-2728 (La. 6/30/95); 657 So. 2d 987, 99 5–96 (La. R.S. § 9:2798.1(B)did not immunize state agency from tort claim for negligence). In fact, the history of the law's enactment underscores its purpose in insulating government employees from tort liability only. *See* David W. Robertson, *Tort Liability of Government Units in Louisiana*, 64 Tul. L. Rev. 857, 862–71 (1990) (chronicling the enactment of La. R.S. § 9:2798.1(B) and its application to governmental liability for torts claims). Because Plaintiffs raise constitutional claims, not tort claims, the Board's reliance on § 9:2798.1(B) is misplaced.

Second, this statute cannot immunize government officials from a constitutional challenge. Any immunity conferred by the statute covers only actions that "are within the course and scope of [the government's] lawful powers and duties." La. R.S. § 9:2798.1(B). And here, Plaintiffs allege that the actions the Board has taken are unconstitutional. Constitutional violations, by their very nature, are outside the lawful exercise of the Board's powers and duties. *E.g.*, Pet. ¶¶ 158–212. And district courts retain "original jurisdiction to rule on the

constitutionality of statutes." *ANR Pipeline Co*, 851 So. 2d at 1151. Additionally, *all* state officials must comply with the state constitution, regardless of statutes. Therefore, this exception should be overruled.

B. The Quasi-Judicial Immunity Doctrine Is Inapplicable.

The Board next argues that Plaintiffs' constitutional claims are foreclosed by the doctrine of quasi-judicial immunity. Memo. at 5–6. The doctrine, which has not been recognized by the Louisiana Supreme Court, offers only limited immunity to government agencies for challenges to past administrative decisions made in an *adjudicative* capacity. *See Talbert v. La. State Bd. of Nursing*, 03-0258 (La. App. 1 Cir. 12/31/03); 868 So. 2d 729, 730–31. But Plaintiffs are not challenging any adjudicatory decision made by the Board; they are challenging the constitutionality of the Board's policymaking decisions and enforcement authority, and they seek prospective relief.

The cases relied on by Defendants only underscore the fact that the doctrine of quasi-judicial immunity has no relevance here. In *Talbert*, the plaintiff sought tort damages from the Board of Nursing for injuries she allegedly suffered as a result of having her nursing license suspended. 868 So. 2d at 729. In *Durousseau v. La. State Racing Comm'n*, the plaintiff challenged the commission's past refusal to reinstate his jockey license. 98-0442 (La. App. 4 Cir. 12/9/98); 724 So. 2d 844, 845. There, the appellate court held that the commission had quasi-judicial immunity specifically "as to claims for money damages based upon acts . . . in its adjudicatory role." *Id.* at 847. And in *Zeno v. Louisiana Attorney Disciplinary Board*, the appellate court held that the Attorney Disciplinary Board had quasi-judicial immunity from a claim for damages relating to its investigation of a specific attorney complaint. 13-920 (La. App. 3 Cir. 2/12/14); 2014 WL 575879, at *2. Clearly, these cases are distinguishable from this case. Unlike the plaintiffs in the cases relied upon by the Board, Plaintiffs are not challenging any discrete

adjudicatory actions and they seek prospective relief, rendering this exception for tort damages inapplicable. The Court should overrule the exception.

C. The Standard for Injunctive Relief Is Inapplicable.

The Board further argues that Plaintiffs' claims for injunctive relief should not proceed because Plaintiffs have not alleged that they are threatened with irreparable loss or injury that is without an adequate remedy. Memo. at 6. This argument appears to be premised on the mistaken idea that Plaintiffs are seeking a preliminary injunction. *See id.* (citing *Glauque v. Clean Harbors Plaquemine, L.L.C.*, 05-0799 (La. App. 1 Cir. 6/9/06); 938 So. 2d 135, 140 (describing legal standard for preliminary injunction)). But, at this juncture, Plaintiffs have not sought a preliminary injunction. Instead, they have filed this action challenging the constitutionality of La. R.S. §§ 37:563, 37:581(A), and 37:584 and LAC 46:XXXI.1101, 1105, and 1107. Because the standard described by the Board is inapplicable to this action, this Court should overrule this exception.

D. Necessity of Individual Board Members.

The Board also argues that the claims should be dismissed as to the individual members of the Board and its Executive Director. Memo. at 4. Plaintiffs initiated this action against the Board, its eight members (in their official capacities), and its executive director (in his official capacity). Pet. ¶¶ 14–16. The Board's memorandum flatly states that "there is no need to maintain this action against the nine Officials." Memo. at 4, 9. This sentence is inadequate to warrant dismissal because it does not explain how "on the face of the petition . . . there is some insurmountable bar to relief." *La. State Legislature*, 117 So. 3d at 537.

But even if the Court wishes to consider the necessity of the individual Board members being parties, Plaintiffs allege, in part, that the Defendants are self-interested and benefit financially or otherwise from the creation and enforcement of the braiding permit. Pet. ¶¶ 4, 76–78, 170, 186. The Board members are proper

parties if not necessary parties under such circumstances and including them in the lawsuit for the time being is judicially efficient. If the individual members and executive director have any specific objections to the scope of their participation, the Court can address those issues as they arise. But at the very least, the individual Defendants must do more to explain why "there is no need to maintain this action against the nine Officials." Memo. at 4, 9.

CONCLUSION

The Court should deny the Exceptions in their entirety. If the Court is inclined to grant the Exceptions, it should do so without prejudice and with leave to amend the Petition.

Respectfully submitted,

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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*** has been served upon all counsel of record by placing signed copies thereof in the United States mail, postage prepaid, on this 18th day of October 2019.

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