

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI**

Jackson Division

DIPA BHATTARAI; and TYLER)	
BARKER,)	
)	
<i>Plaintiffs,</i>)	
)	
vs.)	Civil Action No.: 3:19-CV-560-DPJ-FKB
)	
JIM HOOD, in his official capacity as)	
Attorney General for the State of)	
Mississippi; DOROTHY ENNIS;)	
DARLENE SMITH; HILDA BILLS;)	
DEBORAH COKER and FRANCES)	
ROBERTSON, all in their official capacities)	
as Members of the Mississippi State Board)	
of Cosmetology; and SHARON CLARK in)	
her official capacity as Executive Director of)	
the Mississippi State Board of Cosmetology,)	
)	
<i>Defendants.</i>)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF RESPONSE TO SHARON CLARK’S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURSDICTION**

COME NOW THE PLAINTIFFS, Dipa Bhattarai and Tyler Barker, through their undersigned counsel, and file this Memorandum in Support of their Response to Defendant Sharon Clark’s Motion to Dismiss. For the reasons set forth, Defendant Clark’s motion should be denied.

INTRODUCTION

The fact that Defendant Clark is a proper party to this suit is perhaps best illustrated by the fact that in virtually identical litigation, all of the Defendants in this case, in their official capacities, have admitted that the Executive Director of the Mississippi State Board of Cosmetology is a proper party. Even without Defendants’ admissions in prior litigation, it is clear that Defendant

Clark is a proper party to this case. First, Plaintiffs have Article III standing to assert their claims against Defendant Clark, as they have suffered an injury in fact; their injuries are fairly traceable to Defendant Clark's conduct; and a favorable decision against Defendant Clark will redress Plaintiffs' injuries. Second, the Eleventh Amendment does not bar Plaintiffs' claims against Defendant Clark for declaratory and injunctive relief, as Defendant Clark has a sufficient enforcement connection to the challenged statutes and regulations, and there is no requirement for Defendant Clark to have threatened enforcement. Defendant Clark's remaining arguments concerning Plaintiffs' nominal damages claim is moot, as the parties have submitted an agreed order dismissing that claim.

BACKGROUND

Plaintiffs Dipa Bhattarai and Tyler Barker are entrepreneurs who wish to engage in the business of eyebrow threading for a living without having to needlessly spend hundreds of hours and thousands of dollars to obtain an irrelevant esthetician's license. Pls. Complaint ("Compl.") (ECF No. 1) ¶¶ 2-27. Plaintiffs seek a declaration that Mississippi's eyebrow threading licensing requirements violate the Due Process, Equal Protection, and Privileges or Immunities Clauses of the 14th Amendment to the United States Constitution, as well as Article 3, Section 14 and 32 of the Mississippi Constitution, an injunction prohibiting Defendants from enforcing the eyebrow threading licensing requirements, nominal damages, attorneys fees, costs and expenses. *Id.*, pp. 31-41.

Defendant Sharon Clark (Defendant Clark) seeks dismissal of the Complaint against her, raising four arguments: 1) standing; 2) Eleventh Amendment immunity from Plaintiffs' declaratory and injunctive claims; 3) Eleventh Amendment immunity from Plaintiffs' nominal damages claim; and 4) that she is not a "person" subject to suit under 42 U.S.C. § 1983. *See*

Defendant Clark's Motion to Dismiss (Def. Motion) (ECF No. 11) ¶ 4. Her first three arguments are raised under Federal Rule 12(b)(1) and her fourth argument appears to be raised under Federal Rule 12(b)(6). *See* Defendant Clark's Memorandum in Support of Motion to Dismiss ("Def.'s Mem.") (ECF No. 12) 3-4.

While the remaining Defendants have filed a separate motion to dismiss Plaintiffs' nominal damages claim, none of those Defendants have challenged Plaintiffs' claims for declaratory and injunctive relief. *See* Other Defendants' Motion to Dismiss (ECF No. 13). Thus, Defendants have not requested that the Court entirely dispose of this action at this stage of the proceedings.

STANDARD

I. Federal Rule 12(b)(1)

In determining whether the court has subject matter jurisdiction, the court must accept as true the allegations set forth in the complaint. *Campaign for S. Equal. v. Mississippi Dep't of Human Servs.*, 175 F. Supp. 3d 691, 698 (S.D. Miss. 2016). At the pleading stage, a plaintiff need only "allege a plausible set of facts establishing jurisdiction." *Matter of Benjamin*, 932 F.3d 293, 295 (5th Cir. 2019) (quotation omitted). In determining whether the court has subject matter jurisdiction, the court may also consider matters of fact which may be in dispute, and thus may consider 1) the complaint alone; 2) the complaint supplemented by undisputed facts evidenced in the record; or 3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Crane v. Johnson*, 783 F.3d 244, 250–51 (5th Cir. 2015).

II. Federal Rule 12(b)(6)

To survive a motion to dismiss pursuant to Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 245 (5th Cir. 2010) (quoting *Ashcroft v.*

Iqbal, 556 U.S. 662, 678 (2009)). A claim is facially plausible “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft*, 556 U.S. at 678 (2009). In deciding a Rule 12(b)(6) motion to dismiss, the Court accepts all well pleaded facts as true and views them in the light most favorable to Plaintiff. *New Orleans City v. Ambac Assur. Corp.*, 815 F.3d 196, 199 (5th Cir. 2016).

ARGUMENT

Defendant Clark’s motion should be denied for several reasons. First, Plaintiffs have Article III standing to assert their claims against Defendant Clark, as they have suffered an injury in fact; their injuries are fairly traceable to Defendant Clark’s conduct; and a favorable decision against Defendant Clark will redress Plaintiffs’ injuries. Second, the Eleventh Amendment does not bar Plaintiffs’ claims against Defendant Clark for declaratory and injunctive relief, as Defendant Clark has a sufficient enforcement connection to the challenged statutes and regulations, and there is no requirement for Defendant Clark to have threatened enforcement.

Additionally, the fact Defendant Clark is a proper party to this suit is perhaps best illustrated by the fact that in virtually identical litigation, all of the Defendants in this case, in their official capacities, have admitted that the Executive Director of the Mississippi State Board of Cosmetology is a proper party.

Defendant Clark’s remaining arguments concerning Plaintiffs’ nominal damages claim is moot, as the parties have submitted an agreed order dismissing that claim.

I. Plaintiffs Have Article III Standing.

To establish standing, a plaintiff must demonstrate three elements: “(1) an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) the likelihood that a favorable decision will

redress the injury.” *Campaign for S. Equal.*, 175 F. Supp. 3d at 699 (quoting *Croft v. Governor of Tex.*, 562 F.3d 735, 745 (5th Cir.2009)).

A. Plaintiffs have suffered an injury in fact.

Defendant Clark’s memorandum addresses only the second and third prong of the standing requirements. *See* Def.’s Mem. 5. Thus, Plaintiffs’ allegations that they have suffered an injury in fact are un rebutted for purposes of Defendant Clark’s motion.

B. Plaintiffs’ injuries are fairly traceable to Defendant Clark’s conduct.

Defendant Clark claims that Plaintiffs’ injuries are not casually connected to her conduct because she does not have the authority to “independently” enforce the challenged statutes. Def.’s Mem. 5. However, Defendant Clark’s argument is misguided, as she possesses “coercive power” to injure Plaintiffs in the future, she in fact has already injured one of the Plaintiffs, and the cases she relies on to demonstrate the purported lack of causation are inapposite.

1. Defendant Clark has “coercive power” to cause injuries to Plaintiffs under the Mississippi Administrative Code.

To show causation, a plaintiff must generally demonstrate that his or her injury is “fairly traceable to the defendant’s allegedly unlawful conduct”. *Campaign for S. Equal.*, 175 F. Supp. 3d at 701 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (emphasis added). This burden is “relatively modest at this stage of the litigation.” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154 (1997)).

Contrary to Defendant Clark’s argument, she need not possess statutory authority to “independently” enforce the Cosmetology laws in order to be a proper Defendant in this case. *See* Def.’s Mem. 5. This argument “wrongly equates injury ‘fairly traceable’ to the defendant with injury as to which the defendant’s actions are the very last step in the chain of causation.” *Id.* at 703. (quoting *Bennett*, 520 U.S. at 168–69). Rather, the Defendant must have some “coercive

power’ to cause an injury,” which may include a “coercive effect upon the action of someone else.” *Campaign for S. Equal.*, 175 F. Supp. 3d at 701, 707 (citations omitted).

The regulations implementing Mississippi’s cosmetology statutes make clear that Defendant Clark is charged with such coercive power. For example, the regulations charge Defendant Clark and others with the responsibility to conduct administrative reviews to determine whether a public complaint against a licensee or student should be dismissed or proceed to an administrative hearing:

The Board shall administratively review to determine that there is substantial justification to believe that the accused licensee has committed any of the offenses enumerated. **The administrative review agents shall consist of an investigator or a Board Member, the Board’s Executive Director, and the Board Attorney.** If the administrative review agents determine that there is not substantial justification to believe that the accused licensee has committed any of the offenses enumerated, it may present the complaint for dismissal to the Board. If the administrative review agents believe that the licensee has committed any of the offenses, the Board agents will proceed with a formal complaint under Rule 8.2(C).

30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3) (emphasis supplied).

Similarly, the regulations authorize Defendant Clark to enter into Consent Agreements – which resolve violations of the Cosmetology statutes reported by inspectors and impose sanctions without an administrative hearing:

The Licensee may invoke his or her right to an administrative hearing under Rule 8.2(C) or may waive his or her rights to an administrative hearing and accept the fine on the Board approved consent form. . . . The Board or its agent may accept or reject the Consent Agreement. . . . **The Executive Director may execute a Consent Agreement on behalf of the Board.**

30 Miss. Admin. Code Pt. 2101, R. 8.2(B) (emphasis supplied).

Defendant Clark’s actions in exercising these powers could injure Plaintiffs. In fact, Plaintiff Bhattarai has already been issued a citation by an inspector of the Board’s, charging her with violating Mississippi’s cosmetology laws. *See* Compl. ¶ 48. Thus, Defendant Clark is

currently empowered to execute a Consent Agreement with Plaintiff Bhattarai, which would impose sanctions on Plaintiff Bhattarai, or to refuse to do so and allow an administrative hearing to take place. *See* 30 Miss. Admin. Code Pt. 2101, R. 8.2(B). More importantly, if any inspector of the Board ever issues additional citations to Plaintiffs, Defendant Clark will again be empowered to exercise these enforcement powers. Thus, Defendant Clark clearly possesses “coercive power” to cause an injury to Plaintiffs.

Additionally, if in the future a complaint is received by the Board from a member of the public, which charges Plaintiffs with violating the cosmetology laws by threading without an esthetician’s license, Defendant Clark will be empowered to conduct an administrative review to determine whether such complaint should be dismissed or proceed to an administrative hearing. 30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3). This “coercive power” could clearly cause injury to Plaintiffs. Such actions by Defendant Clark could also have a “coercive effect upon the action of someone else” – namely the Board and its ability to impose sanctions against Plaintiffs. *See Campaign for S. Equal.*, 175 F. Supp. 3d at 707.

2. Defendant Clark has already caused an injury to Plaintiff Bhattarai.

Not only does Defendant Clark possess coercive power which she *could* use to cause injury to Plaintiffs – she in fact already *has* caused an injury to Plaintiff Bhattarai. In an effort to engage in the business of eyebrow threading without risking harsh penalties, Ms. Bhattarai submitted an application to sit for the esthetician licensing examination, despite not having completed the required 600 hours of training. *See* Compl. ¶ 59. Defendant Clark responded to Ms. Bhattarai’s application in a letter. *Id.* at ¶ 60. In the letter, Defendant Clark informed Ms. Bhattarai that, because Ms. Bhattarai had not met the 600 minimum hour requirement, “we are unable to fulfill your request.” *See* Letter From Defendant Clark (Exhibit “A”). Defendant Clark’s

memorandum does not deny that she sent this letter to Ms. Bhattarai. *See* Def.’s Mem. Nor is there any evidence in the record that the members of the Board ever voted to deny Ms. Bhattarai’s application to sit for the esthetician licensing examination. Rather, it appears that Defendant Clark, acting on her own, denied Ms. Bhattarai’s application.¹

This action caused injury to Plaintiff Bhattarai by denying her the opportunity to engage in the business of eyebrow threading without risking harsh penalties. Plaintiffs have standing to assert their claims against Defendant Clark, having shown that an “act of the defendants has caused, will cause, or could possibly cause any injury to them.” *Okpalobi v. Foster*, 244 F.3d 405, 426 (5th Cir. 2001).

3. The cases relied on by Defendant Clark are inapposite.

Defendant Clark relies heavily on this Court’s opinion in *Campaign for Southern Equality*, in which plaintiffs sued Mississippi’s Governor and Attorney General (among others) to enjoin a law that prohibited adoption by same sex married couples, which the Governor and Attorney General had no power to enforce. *See* 175 F. Supp. 3d 691 (S.D. Miss. 2016). In that case, the plaintiffs could “cite no adoption-related statutes, rules, or regulations” to show that the Governor had any authority over adoptions. *Id.* at 701. Instead, plaintiffs relied solely on the fact that the Governor had made statements against gay adoption, and had the authority to appoint department heads. *Id.* As to the Attorney General, plaintiffs relied solely on the fact that he had issued an advisory opinion citing the statute at issue, and the fact that he was defending the statute’s constitutionality in the lawsuit brought by the plaintiffs. *Id.* at 702.

¹ Likewise, Ms. Bhattarai applied for an esthetician’s license by reciprocity, and her license was denied. *See* Compl. ¶ 50. There is no evidence in the record that the Board ever voted to deny Ms. Bhattarai’s reciprocity application. It is possible that Defendant Clark, acting on her own, denied Ms. Bhattarai’s reciprocity application as well.

This case is a far cry from the facts of *Campaign for Southern Equality*. Plaintiffs have not sued statewide elected officials with no connection to the enforcement of the challenged statute, but rather, the executive director of the agency created to implement and enforce the challenged statutes. Plaintiffs do not rely on a defendant's public statements, appointment power, advisory opinions, or duty to defend the state in litigation, but rather, Plaintiffs cite to cosmetology-related regulations granting Defendant Clark enforcement powers over the challenged cosmetology laws. *See* 30 Miss. Admin. Code Pt. 2101, R. 8.2(B) and 30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3).

In *Campaign for Southern Equality*, this Court also found that the plaintiffs *did* have standing to assert their claims against the Executive Director of the Mississippi Department of Human Services (DHS). *See* 175 F. Supp. 3d at 704; 706. Defendant Clark is more akin to this defendant than to the Governor and Attorney General defendants discussed in Defendant Clark's memorandum. *Id.* at 704. In *Campaign for Southern Equality*, even though foster care adoptions had to be approved by a chancery court – not DHS – this Court found standing against the Executive Director of DHS. This Court based its decision on the fact that foster-care applications were the first step in the path to foster care adoptions, that DHS administered that application process, and that DHS had used the foster-care application process to “frustrate gay adoptions” by withholding approval of applications based on the challenged statute. *Id.* As discussed above, Defendant Clark has likewise used the examination application process to frustrate Defendant Bhattarai's efforts to engage in the business of threading, and has based her actions on the statutes and regulations challenged in this suit. *See* Compl. ¶¶ 50, 60. Additionally, Defendant Clark could use the enforcement powers granted to her by 30 Miss. Admin. Code Pt. 2101, R. 8.2(B) and

30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3) to prevent Plaintiffs from engaging in the business of eyebrow threading.

Defendant Clark also relies on *Okpalobi v. Foster*, in which the plaintiffs sued Louisiana's Governor and Attorney General to enjoin a law that gave women who underwent abortions a private cause of action against their doctors, which the state officials were powerless to enforce. *See Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001).

This case is also distinguishable from does *Okpalobi v. Foster*. This case does not involve a statute providing only civil remedies to private parties, but rather, a statute providing administrative and criminal penalties enforceable by the state. Unlike the Governor and Attorney General involved in *Okpalobi v. Foster*, Defendant Clark is not powerless to enforce the challenged statute, but rather, is charged with specific enforcement powers. *See* 30 Miss. Admin. Code Pt. 2101, R. 8.2(B) and 30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3).

C. A favorable decision against Defendant Clark will redress Plaintiffs injuries.

To establish standing, a plaintiff must also demonstrate that the defendant's unlawful conduct will likely be redressed by the requested relief. *Campaign for S. Equal.*, 175 F. Supp. 3d at 701 (quoting *Allen v. Wright*, 468 U.S. at 751). As with the causation prong of the standing analysis, "the burden 'is relatively modest at this stage of the litigation.'" *Id.* (quoting *Bennett v. Spear*, 520 U.S. at 170–71). To establish redressability, a plaintiff "need not show that a favorable decision will relieve his every injury". *Id.* (quoting *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982)). Rather, standing is proper if the defendant has enforcement authority sufficient to redress at least some of plaintiff's injury. *See, e.g., K.P. v. LeBlanc*, 729 F.3d 427, 437 (5th Cir. 2013).

Defendant Clark's redressability argument is unpersuasive for the same reason as her causation argument: it is based on her incorrect assertion that she lacks enforcement power.

Plaintiffs' Complaint seeks an injunction prohibiting Defendants from enforcing the cosmetology statutes and regulations against threaders, including Plaintiffs. Compl. at 41. Such an injunction would prohibit Defendant Clark from using the enforcement powers granted to her by 30 Miss. Admin. Code Pt. 2101, R. 8.2(B) and 30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3) to injure Plaintiffs, as discussed above.

While an injunction against the remaining Defendants would be necessary to provide complete relief to Plaintiffs, this does not defeat standing. *See e.g., K.P. v. LeBlanc*, 627 F.3d 115, 123 (5th Cir. 2010) (finding redressability as to Louisiana's Patients' Compensation Fund Oversight Board, despite finding that "the Board [was] far from the sole participant in the application of the challenged statute" and in fact "litigants may bypass the Board and proceed directly in the courts.").

II. The Eleventh Amendment does not Bar Plaintiffs' Claims for Declaratory and Injunctive Relief.

The Eleventh Amendment bars suits by private citizens against a state in federal court. *Okpalobi*, 244 F.3d at 415 (citing *Hutto v. Finney*, 437 U.S. 678, 700 (1978)). However, under *Ex parte Young*, plaintiffs may sue state officials to halt the enforcement of an unconstitutional state statute, provided the state official has "some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908); *Okpalobi*, 244 F.3d at 415.

A. Defendant Clark has a sufficient enforcement connection.

Ex Parte Young's "some connection" requirement is unsettled in the Fifth Circuit. Compare *Okpalobi*, 244 F.3d at 413–16 (lead plurality requiring a "close connection" or "special relation" to "threatened enforcement"), with *K.P.*, 627 F.3d at 124 (explicitly declining to follow the *Okpalobi* plurality's "close connection" or "special relation" standard).

In *Campaign for Southern Equality*, this Court employed the standard articulated in *K.P.*:

What constitutes a connection to the enforcement of the statute is not entirely clear. *Okpalobi* required a “close connection” or “special relation.” 244 F.3d at 413. But that portion of the opinion failed to convince a majority of the court. Later, in *K.P. I*, the Fifth Circuit noted that “[e]nforcement’ typically involves compulsion or constraint.” 627 F.3d at 124–25 (citing Webster’s Third New International Dictionary 751 (1993)). And this “required ‘connection’ is not ‘merely the general duty to see that the laws of the state are implemented,’ but ‘the particular duty to enforce the statute in question *and a demonstrated willingness* to exercise that duty.’” *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir.2014) (emphasis added) (citing *Okpalobi*, 244 F.3d at 414–15 (quoting *Ex parte Young*, 209 U.S. at 157, 158, 28 S.Ct. 441)).

Campaign for S. Equal., 175 F. Supp. 3d at 708.

Despite the “some connection” requirement, the Supreme Court “has reinforced *Ex parte Young*’s being a ‘straightforward inquiry’ and specifically rejected an approach that would go beyond a threshold analysis.” *Air Evac EMS, Inc. v. Texas, Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 517 (5th Cir. 2017) (citing *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997); *see also Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645, (2002).

Defendant Clark does not appear to dispute that Plaintiffs claim an ongoing violation of federal law and seek prospective relief. Def.’s Mem. 9-10. The Complaint alleges that enforcement of the challenged laws and regulations violate their constitutional rights and seeks an injunction and declaratory judgment. Compl. At 41.

Turning to the “some connection” requirement, regardless of the exact standard employed, Defendant Clark has the requisite connection to the enforcement of the challenged statutes and regulations. As discussed above, Defendant Clark is specifically charged with the responsibility to conduct administrative reviews to determine whether a public complaint against a licensee or student should be dismissed or proceed to an administrative hearing, and to execute Consent Agreements which resolve violations of the Cosmetology statutes and impose sanctions without an administrative hearing. *See* 30 Miss. Admin. Code Pt. 2101, R. 8.2(B) and 30 Miss. Admin.

Code Pt. 2101, R. 8.2(A)(3). Defendant Clark clearly has “some connection” with the enforcement of the cosmetology statutes and regulations.

Additionally, employing *K.P.*’s definition of “enforcement” as “compulsion or constraint”, Defendant Clark can both *compel* compliance with the cosmetology laws and *constrain* the ability of esthetician students to engage in unlicensed threading. Whether by determining that a complaint should proceed to an administrative hearing, or by entering a Consent Agreement, Defendant Clark has the power to expose unlicensed threaders to sanctions, thus compelling their compliance with the cosmetology laws and constraining their ability to continue in business.

Defendant Clark’s enforcement connection is similar to the connection involved in *K.P.* In that case, Louisiana’s Patients’ Compensation Fund Oversight Board served as the “initial arbiter” within a state-funded compensation system, which was statutorily prohibited from paying abortion-related claims. *K.P.*, 627 F.3d at 123. “The Board’s role start[ed] with deciding whether to have a medical review panel consider abortion claims and end[ed] with deciding whether to pay them.” *Id.* at 125. However, in Board was “far from the sole participant in the application of the challenged statute” and in fact “litigants [could] bypass the Board and proceed directly in the courts.” *Id.* at 123. Nevertheless, the Court found that, by virtue of these responsibilities, Board members had been “delegated some enforcement authority” sufficient to come within the *Ex Parte Young* exception. *Id.* at 125.

Similarly, Defendant Clark’s responsibilities require her to act as an “initial arbiter.” She may decide whether a complaint should be dismissed or proceed to an administrative hearing. 30 Miss. Admin. Code Pt. 2101, R. 8.2(A)(3). She may also resolve violations and impose sanctions without an administrative hearing. 30 Miss. Admin. Code Pt. 2101, R. 8.2(B). As discussed above, she also appears to be able to unilaterally decide whether to grant or deny an application to

sit for the esthetician examination. Just as the defendants in *K.P.*, she clearly has been “delegated some enforcement authority.” *K.P.*, 627 F.3d at 125.

Moreover, Defendant Clark has demonstrated a willingness to exercise her enforcement powers against unlicensed threaders. As discussed above, Defendant Clark sent Plaintiff Bhattarai a letter denying Ms. Bhattarai’s application to sit for the esthetician’s examination, basing her decision on the esthetician licensing statutes and regulations challenged in this lawsuit. *See* Letter From Defendant Clark (Exhibit “A”). Unlike the governor and attorney general in *Okpalobi*, Defendant Clark took specific action predicated on the esthetician licensing statutes and regulations challenged in this lawsuit, and this is a sufficient connection to enforcement to trigger the *Ex parte Young* exception. Based on this letter, there can be little doubt that, if presented with a complaint against a cosmetology student who was engaged in the business of threading without an esthetician’s license, Defendant Clark would exercise her enforcement powers to impose sanctions, either by executing a Consent Agreement, or by conducting an administrative review.

B. There is no requirement for Defendant Clark to have threatened enforcement, and even if there is such a requirement, it has been met.

Defendant Clark argues that to come within the *Ex Parte Young* exception, a plaintiff must show there has been a “credible threat” that the defendant will attempt to enforce the statute. Def.’s Mem. 10-11. In support of this proposition, Defendant Clark cites *Okpalobi v. Foster*, as well as two cases from other circuits. However, the portions of *Okpalobi* that address *Ex parte Young* are not binding precedent, and the Fifth Circuit has never recognized a “credible threat” requirement for application of *Ex Parte Young*. *Okpalobi*, 244 F.3d at 415 (Parker, J., dissenting) (“Judge Jolly’s attempt to excessively narrow *Ex parte Young*’s scope garners only a plurality of this court, and therefore, to use his language, it ‘is not binding authority to any.’”); *see also Air Evac EMS, Inc. v. Tex., Dep’t of Ins., Div. of Workers’ Comp.*, 851 F.3d 507, 515 (5th Cir. 2017)

(declining to decide “whether *Ex parte Young* applies only when there is a threatened or actual proceeding to enforce the challenged state law”); *City of Austin v. Paxton*, 325 F. Supp. 3d 749, 755–56 (W.D. Tex. 2018) (declining to adopt “credible threat” standard for *Ex Parte Young* analysis.)

Moreover, even if the application of *Ex Parte Young* required a “credible threat” of enforcement, the requirement would be met in this case. As discussed above, Defendant Clark sent a letter to Plaintiff Bhattarai, denying her application to sit for the esthetician licensing examination, and predicated her decision on the cosmetology statutes and regulations challenged in this lawsuit. *See* Exhibit “A.” Based on this letter, Defendant Clark has not only threatened to enforce the challenged laws, she already has enforced them, by denying Plaintiff Bhattarai’s application.

III. In Prior Litigation Challenging the Same Statutes and Regulations, All of the Defendants in this Case, in the Official Capacities, Have Admitted that the Executive Director of the Board is a Proper Party.

The fact that Defendant Clark is a proper party to this suit is perhaps best illustrated by the fact that all of the Defendants, in their official capacities, have admitted as much in a prior lawsuit that was identical to the instant case in every material respect. In *Armstrong v. Lunsford*, 3:04-CV-00602 (S.D. Miss.), plaintiffs filed suit in 2004 challenging the constitutionality of Mississippi’s licensing requirements for hair-braiders, which at the time appeared in the same statutes that are currently challenged in this case.² *See Armstrong* Original Complaint (Exhibit “B”) at 2. Plaintiffs alleged that the licensing requirements for hair braiders violated the Fourteenth Amendment’s Substantive Due Process, Equal Protection, and Privileges and Immunities clauses. *Id.* at ¶¶ 82-99. There, as in this case, plaintiffs sued Mississippi’s Attorney

² The licensing requirements for hair braiders have since been legislatively repealed.

General in his official capacity, the members of the Mississippi State Board of Cosmetology in their official capacities, and the Executive Director of the Mississippi State Board of Cosmetology in her official capacity. *Id.* at 1. There, as in this case, plaintiffs brought suit pursuant to 42 U.S.C. § 1983, seeking declaratory and injunctive relief, prohibiting the defendants from enforcing the challenged statutes and their implementing regulations. *Id.* at 20-21.

At the time the *Armstrong* Complaint was filed, Section 73-7-3 of the Mississippi Code (the statute authorizing the Board to hire employees, such as the executive director) was identical to its current form. *Compare* Miss. Code Ann. § 73-7-3 with 2000 Miss. Laws Ch. 485 (H.B. 781). Additionally, Section 73-7-7 of the Mississippi Code (the statute defining the powers of the Board) was identical to its current form. *Compare* Miss. Code Ann. § 73-7-7 with 2000 Miss. Laws Ch. 485 (H.B. 781).

In Paragraph 7 of their Complaint, the *Armstrong* plaintiffs alleged that:

Nelda Lockett is the Executive Director of the Board. The Board is authorized, among other duties, to grant or deny applications for licenses, conduct examinations, and pursue violations of the Mississippi cosmetology laws. Miss. Code Ann. § 73-7-7.

Exhibit “B” at ¶ 7.

All of the *Armstrong* defendants filed an Answer to the *Armstrong* Complaint. In response to the allegations in Paragraph 7 of the Complaint, defendants responded: “The Defendants admit the averments in Paragraph 7 of the Complaint.” *See Armstrong Defendants’ Answer to Original Complaint*, (Exhibit “C”). None of the defendants filed a motion to dismiss on any grounds. *See Armstrong v. Lunsford*, 3:04-CV-00602 (S.D. Miss.).

The *Armstrong* plaintiffs also filed an Amended Complaint. The allegations in Paragraph 7 of the Amended Complaint were identical to the prior allegations. *See Armstrong Amended Complaint* (Exhibit “D”) at ¶ 7. All of the *Armstrong* defendants filed an Answer to the Amended

Complaint. The defendants' response to Paragraph 7 of the Amended Complaint was identical to their prior response. See *Armstrong* Defendants' Answer to Amended Complaint (Exhibit "E") at ¶ 7. None of the defendants filed a motion to dismiss the Amended Complaint on any grounds. See *Armstrong v. Lunsford*, 3:04-CV-00602 (S.D. Miss.).

Thus, under identical circumstances, Mississippi's Attorney General, the Members of the Mississippi State Board of Cosmetology, and the Executive Director of the Mississippi State Board of Cosmetology, in their respective official capacities, have all admitted that the Board's Executive Director is a proper party to a suit seeking to enjoin enforcement of Mississippi's cosmetology statutes and regulations.

IV. Defendant Clark's Nominal Damages Argument is Moot.

Defendant Clark asserts that the Eleventh Amendment bars Plaintiffs' claim for nominal damages. Def.'s Mem. 11. The parties have submitted an agreed order dismissing Plaintiffs' nominal damages claim. Thus, this issue is moot.

V. Defendant Clark's Section 1983 "Person" Defense is Moot.

Defendant Clark argues that she is not a "person" subject to liability within the meaning of Section 1983. Def.'s Mem. 12. In support of this proposition, Defendant Clark cites *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). However, the holding in *Will* is limited to state officials sued in their official capacity for monetary relief. *Id.* at 61. The Court in *Will* held that a state official sued in an official capacity is a suable person when sued for prospective relief. *Id.* at 71 n. 10 ("Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'). As discussed above, the parties have submitted an agreed order dismissing Plaintiffs' nominal damages claim. Thus, this issue is moot.

CONCLUSION

This Court has subject matter jurisdiction over the claims asserted against Defendant Clark. Therefore, Plaintiffs respectfully request that this Court deny Defendant Clark's motion to dismiss.

RESPECTFULLY SUBMITTED, this the 24th day of September, 2019.

/s/ Aaron R. Rice
Aaron R. Rice
MS Bar No. 103892
MISSISSIPPI JUSTICE INSTITUTE
520 George St.
Jackson, MS 39202
Tel: (601) 969-1300
Email: aaron.rice@msjustice.org

Everett White
SONES & WHITE, PLLC
MS Bar No. 101875
992 Northpark Drive, Suite C
Ridgeland, MS 39157
Tel: (601) 427-9989
Email: ewhite@soneswhite.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Aaron R. Rice, counsel for Plaintiffs, hereby certify that the foregoing document has been filed using the Court's ECF filing system and thereby served on all counsel of record who have entered their appearance in this action to date.

This is 24th day of September, 2019.

/s/ Aaron R. Rice
Aaron R. Rice