

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

2016 MAY -2 AM 10:10

TAMMY NUTALL-PRITCHARD,

Plaintiff,

v.

THE TENNESSEE BOARD
OF COSMETOLOGY AND BARBER
EXAMINERS; ROXANA GUMUCIO, in
her official capacity as executive
director of the Tennessee Board of
Cosmetology; RON R. GILLIHAN II,
KELLY BARGER, NINA COPPINGER,
JUDY MCALLISTER, PATRICIA J.
RICHMOND, DIANE TEFFETELLER,
MONA SAPPENFIELD, FRANK
GAMBUZZA, AMY TANKSLEY,
ANITA CHARLTON, YVETTE
GRANGER, BOBBY N. FINGER,
BRENDA GRAHAM, in their official
capacities as members of the Board.

Defendants.

JURY DEMAND

Case No. 16-0455-II

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I.
Introduction

1. This civil rights lawsuit seeks to vindicate the right of
Tennesseans to pursue an honest living. This right has been needlessly

burdened by a state bureaucracy that endlessly lengthens its reach until it grasps into practices as routine as simple hair washing. Yet even this mundane chore, done by most Tennesseans on a daily basis, is subjected to an irrational and oppressive requirement to obtain a license. Still worse, the license is currently impossible to obtain because the state is currently unaware if any school even offers the curriculum, thus creating a pure state-sponsored monopoly. And even when the license could be obtained, it was only possible to get through a costly and senseless process that serves no public purpose, other than to substantially burden the ability of hardworking Tennesseans to make a better life for themselves and their families.

2. The plaintiff simply wishes to wash hair as a part time job but cannot because of Tennessee's arbitrary, oppressive, discriminatory, and monopolistic requirement that a person must obtain a license before engaging in the business of washing hair. Washing hair presents no threat to the public. Most children can do it. Despite any evidence of public harm or clear statutory authority, Tennessee's Board of Cosmetology and Barber Examiners ("the Board") requires a license to engage in hair washing for pay. In so doing, the Board violates the plaintiff's economic liberty, one of her most precious rights, and Tennessee's constitutional prohibition against monopolies.

II. Jurisdiction and Venue

3. The plaintiff brings this civil action under Tenn. Code Ann. §§ 4-5-225, 29-14-102 (LexisNexis 2015).

4. The plaintiff further brings this action under 42 U.S.C. § 1983 to redress the deprivation under color of law of rights secured by the U.S. Constitution. This Court has concurrent jurisdiction over the federal constitutional claims as held in *Martinez v. California*, 444 U.S. 277 (1980).

5. This Court has jurisdiction over the plaintiff and her constitutional claims pursuant to Tenn. Code Ann. §§ 4-5-225, 16-11-101, *et seq.*, 29-1-101, and 29-14-101, *et. seq.* (LexisNexis 2015).

6. Venue is proper in this Court based on Tenn. Code Ann. § 30-4-101 because the cause of action arose in part in Davidson County, and also because the Board is located there. Venue is also proper pursuant to Tenn. Code Ann. § 4-5-225 (LexisNexis 2015) because this suit seeks to test the constitutional validity of a statute or rule in a suit for declaratory judgment.

7. This Court has authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Tenn. Code Ann. §§ 4-5-225, 29-1-101, 29-14-102(a), 29-14-103 and Tenn. R. Civ. P. 65, *et. seq.* (LexisNexis 2015).

III. The Parties

8. PLAINTIFF Tammy Nutall-Pritchard is a U.S. citizen and a resident of Memphis, Tennessee. She wishes to supplement her income and have an enjoyable side job at the hair salons owned by her friends by washing hair without a license. She has been unjustly forbidden to do so by the Board of Cosmetology in violation of her constitutional right to earn an honest living.

9. DEFENDANT Tennessee Board of Cosmetology and Barber Examiners ("the Board") is empowered by the laws of the State of Tennessee enforce the Tennessee Cosmetology Act including rules, examinations, licenses and policy. *See* Tenn. Code Ann. § 62-4-103(a) (LexisNexis 2015). The Board can be served at 500 James Robertson Parkway, Davy Crockett Tower, Nashville, TN 37243.

10. DEFENDANT Roxana Gumucio is the executive director for the Board. She has enforcement authority over the laws and rules as propounded by the Board. She is sued in her official capacity only. She is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint. She can be served at 500 James Robertson Parkway, Davy Crockett Tower, Nashville, TN 37243.

11. The plaintiff also sues the members of the Board in their official capacities only, as the agents ultimately responsible for drafting the regulations pertaining to shampooing, and carrying out the enforcement of

the shampooing licensing regime. They are persons within the meaning of 42 U.S.C. § 1983 and at all times relevant to this complaint, were acting under color of state law. At the present time, the members are: Ron R. Gillihan II, Kelly Barger, Nina Coppinger, Judy McAllister, Patricia J. Richmond, Dianne Teffeteller, Mona Sappenfield, Frank Gambuzza, Amy Tanksley, Anita Charlton, Yvette Granger, Bobby N. Finger, and Brenda Graham. They can be served at 500 James Robertson Parkway, Davy Crockett Tower, Nashville, TN 37243.

IV. Factual Background

12. Tammy Nutall-Pritchard is a former natural hair braider who has extensive experience hair styling, both as a hobby and profession. Her sister, Debra Nutall, invented many of the braiding techniques and styles now widely used in the natural hair salons across the state. The plaintiff trained under her sister and worked in her salon for many years until the state of Tennessee effectively pushed that business out of state due to a separate licensure requirement. Finding herself without a job or the means to pursue her old career, the plaintiff left hair care behind and began working as a law enforcement officer. She currently works in a local Memphis school as a resource officer.

13. The plaintiff still knows many people involved in cosmetology, including one friend who operates a beauty salon. She would like to work part time for her friend. Doing so would materially advance her financial well-

being, and permit her to return to a field she loved but was forced to abandon.

Tennessee's Cosmetology Laws

14. Tennessee's statutory regime defines various jobs within the cosmetology field, including cosmetology, aesthetics, manicuring, and shampooing. *See* Tenn. Code Ann. § 62-4-102 (LexisNexis 2015).

15. Cosmetology means, among other things “[a]rranging, dressing, curling, waving, cleansing, cutting, singeing, bleaching, coloring or similar work on the hair of any person by any means.” It also includes manicuring, massaging with lotions and creams, and giving facials, applying makeup, and hair removal by tweezing, chemicals, or waxing. *See* Tenn. Code Ann. § 62-4-102(a)(3) (LexisNexis 2015).

16. Aesthetics means, among other things, “[m]assaging, cleansing, stimulating, manipulating, exercising, beautifying or similar work with hands or mechanical or electrical apparatus or by the use of cosmetic preparations, antiseptics, tonics, lotions or creams.” It also includes facials, hair removal and applying artificial eyelashes. *See* Tenn. Code Ann. § 62-4-102(a)(1) (LexisNexis 2015).

17. Manicuring means manicuring or pedicuring the nails, or performing “nail artistry.” *See* Tenn. Code Ann. § 62-4-102(a)(14) (LexisNexis 2015).

18. Shampooing simply means any brushing, combing, shampooing, rinsing or conditioning upon the hair and scalp. *See* Tenn. Code Ann. § 62-4-102(a)(19) (LexisNexis 2015).

19. Important to note is what shampooing does *not* include. It does not include cutting or hair removal, so it involves no sharp objects.

20. It does not involve singeing, waxing, curling, or waving hair, so it involves no hot objects.

21. It does not involve coloring, bleaching, hair removal, depilatories, so it involves no chemicals harsher than can be found in the shampoos and conditioners that a layperson, even a child, may purchase at a store.

22. Tennessee requires a valid license to practice cosmetology, manicuring or aesthetics. *See* Tenn. Code Ann. § 62-4-108 (LexisNexis 2015).

23. A cosmetologist must complete a course of instruction totaling at least 1,500 hours at a school of cosmetology. *See* Tenn. Code Ann. § 62-4-110(a)(2) (LexisNexis 2015).

24. An aesthetician must complete a course of instruction totaling at least 750 hours at a school of cosmetology. *See* Tenn. Code Ann. § 62-4-110(d)(2) (LexisNexis 2015).

25. A manicurist must complete a court of instruction totaling at least 600 hours at a school of cosmetology. *See* Tenn. Code Ann. § 62-4-1102(b)(2) (LexisNexis 2015).

26. A shampooer must complete a course of instruction totaling at least 300 hours at a school of cosmetology. *See* Tenn. Code Ann. § 62-4-110(e)(2) (LexisNexis 2015).

27. A cosmetologist, but not a manicurist or aesthetician, may also shampoo. *See* Tenn. Code Ann. § 62-4-102(a) (LexisNexis 2015). In fact, a recently passed bill explicitly included shampooing as falling within the meaning of cosmetology. *See* An Act to amend Tennessee Code Annotated, Title 62, Chapter 3 and Title 62, Chapter 4, relative to the cosmetology and barber examiners board, HB2373/SB2374, Section 6 (signed by Governor on Apr. 27, 2016) (amending definition of cosmetology by adding shampooing).

Shampooing licensure

28. According to the Board's website, an applicant must complete instruction of "not less than 300 hours on the *theory and practice of shampooing* at a school of cosmetology."¹ (emphasis added).

29. Tennessee is one of only five states to impose any kind of a licensing requirement on shampooing at all.

30. Of the other four states, two (Texas and Alabama) have no educational requirement whatsoever.

31. Tennessee's educational requirement of 300 hours doubles the next most onerous state: New Hampshire.

¹ <https://www.tn.gov/commerce/article/cosmo-shampoo-technician> (last viewed Apr. 26, 2016).

32. The Board is authorized to set the curriculum for a school of cosmetology by rules and regulations. See Tenn. Code Ann. § 62-4-120(k) (LexisNexis 2015).

33. The Board has crafted regulatory requirements for schools. They are found at TENN. COMP. R. & REGS. R. 0440-01.05 (LexisNexis 2016). The Board even details the kits that a shampooing student must purchase. See TENN. COMP. R. & REGS. R. 0440-01.07(4) (LexisNexis 2016).

34. The Board does not require that schools teach shampooing in the first place.

35. In fact, as of March 8, 2016, the Board was unaware of any school in Tennessee that even offers the curriculum in shampooing.

36. If there is no school, then there is no method of obtaining the educational prerequisites for a shampooing license. The only method of legally washing hair would be to obtain a full cosmetologist license in order to legally wash hair.

37. The rules and regulations contain the educational requirements for a shampoo license.² The 300 hours are apportioned with 100 hours of general, 50 hours of chemical, and 150 physical training. TENN. COMP. R. & REGS. R. 0440-01.03(d) (LexisNexis 2016).

² The cosmetology regulations can also be found here: <http://share.tn.gov/sos/rules/0440/0440.htm> (last viewed on April 26, 2016).

38. The regulations compel the study of subjects like shampooing theory, rinsing material from the hair, or answering the phone. TENN. COMP. R. & REGS. R. 0440-01.03(d)(1), (3) (LexisNexis 2016). They also compel the study of subjects like chemistry and composition of shampoo, OSHA requirements and shop management. TENN. COMP. R. & REGS. R. 0440-01.03(d)(2), (3) (LexisNexis 2016).

39. Although as of March the State was unaware of a school currently offering a shampooing program, even when a course was available it was expensive. One school charged \$3,225 for the program in 2014.³ The school offered no financial aid, and the course was not accredited.

40. An applicant must also, in addition to completing the required coursework, pass two examinations and pay a fee to the state. TENN. COMP. R. & REGS. R. 0440-01-.09, 0440-01.13(d)(2)(e) (LexisNexis 2016).

41. Each examination likewise requires payment of a fee.

42. One examination is on “theory.” The other examination is “practical.”

43. The two examinations are not administered by the Board. The Board has contracted with an outside vendor, PSI Services, LLC, (“PSI”) to develop and administer the examinations.

44. The Board does not have a copy of the examinations PSI administers.

³ <http://www.franklinacademy.edu/consumer-information/programs/shampoo-technician.htm> (last viewed April 26, 2016).

45. Nor does the Board have any documents that would show the content of the examinations.

46. PSI's candidate information bulletin reveals some details. A candidate must:

- a. bring a blood spill kit and demonstrate responding to a blood spill incident.
- b. Drape a model using a clean towel or cape.
- c. Brush the hair of a model using one-inch subsections until entire hair has been brushed.

Unlicensed shampooing

47. The defendants take the position that unlicensed shampooing is prohibited. They rely upon, *inter alia*, Tenn. Code Ann. § 62-4-108 (LexisNexis 2015) (requiring a license to practice cosmetology, manicuring, or aesthetics).

48. A violation of the Tennessee Cosmetology Act is a crime punishable by incarceration of up to six months in prison and/or a \$500 criminal fine. Tenn. Code Ann. §§ 40-35-111(e)(2), 62-4-129 (LexisNexis 2015).

49. The defendants also take the position that unlicensed shampooing constitutes unlawful invasion of the field of practice, in violation of Tenn. Code Ann. § 62-4-127 (LexisNexis 2015).

50. Under this authority, the Board can also assess civil penalties of up to \$1,000 per day for each unlicensed act of shampooing, as well as the cost of investigation and prosecution (including fees, transcripts, court reporters, travel, lodging and “all investigator time”), the hearing, and license suspension or revocation. *See* Tenn. Code Ann. § 62-4-127 (LexisNexis 2015), Tenn. Code Ann. §§ 56-1-308(a), 311(a) (LexisNexis 2015), TENN. COMP. R. & REGS. R. 0440-01.03(d) (LexisNexis 2016).

51. The Board employs investigators who inspect beauty shops looking for violators of the licensing laws.

52. When its investigators find incidents of unlicensed shampooing, they will cite it as an infraction.

53. A staff attorney will then notify the accused by letter. The staff attorney’s notice will include the accusations and relate possible consequences of being found guilty.

54. In lieu of formal administrative proceedings, the staff attorney will offer to settle the matter by consent order. As a prerequisite to avoiding an administrative proceeding, the accused must pay a civil penalty and sign and date a consent order.

55. The consent order requires the accused to admit the truth of the allegation. The accused must also expressly waive any right to seek judicial review or challenge or contest the consent order in any way.

Harm to plaintiff

56. Although she previously left the cosmetology field, the plaintiff hopes to return in a limited capacity because she can no longer make it a career. She maintains many close friendships in the business and would greatly benefit from the opportunity to work as a shampooer part-time in a salon. The ability to do so would mean additional money to help cover her healthcare expenses and save for her retirement, as well as the ability to work in a stress-free environment surrounded by friends in a field that she loves, a much-needed departure from her physically and mentally stressful full-time job.

57. At all times, a licensed cosmetologist would supervise her. She has no interest in engaging in the business of running the shop and would not attempt to do so.

58. The plaintiff does not have the ability to undergo prolonged and expensive schooling, even if such a school existed. She has another job. The small income shampooing would provide would not justify the expense or hassle. If she had to get a license to shampoo, she would not shampoo.

V. Claims

A. Claim One-Lack of Jurisdiction.

59. The plaintiff hereby repeats all of the preceding allegations and incorporate them here by reference as though fully set forth herein.

60. At all times relevant, the defendants have required and continue to require a person to obtain a license before shampooing hair.

61. At all times relevant, the defendants acted under color of state law.

62. The defendants possess no authority except for authority that is expressly delegated to them by Tennessee statute.

63. The defendants do not have statutory authority to require a license to wash hair. Shampooing requires no license. Under Tenn. Code Ann. § 62-4-108, a license is required to practice “cosmetology, manicuring or aesthetics.”

64. Shampooing is not mentioned in the section granting the Board its authority to require a license, though it is included in other portions of the statutory regime.

65. Under Tenn. Code Ann. § 62-4-110(e), a person who wishes to obtain a license must undergo the educational and testing rubric outlined above. But it never requires a license in the first place. The actual licensure requirement for Tennessee’s cosmetology law is found in Section 108, and it does not mention shampooing.

66. Accordingly, the defendants do not have jurisdiction to prohibit the plaintiff or anyone else from shampooing without a license or employing an unlicensed shampooer.

67. In prohibiting unlicensed shampooing without statutory authorization, the defendants have impermissibly deprived the plaintiff of her liberty and property while acting under color of law.

B. Claim Two-Violation of Article I, Section 8 of the Tennessee Constitution.

68. The plaintiff hereby repeats all of the preceding allegations and incorporate them here by reference as though fully set forth herein.

69. Article I, Section 8 of the Tennessee Constitution provides that “no man shall be ... disseized of his freehold, liberties or privileges ... or in any manner destroyed or deprived of his life, liberty or property, but by judgment of his peers, or the law of the land.”

70. Shampooing is an ordinary trade and occupation. It is not a learned trade requiring scientific or technical knowledge or skill.

71. The right to engage in a chosen profession is protected by this constitutional provision. So important is it that the Tennessee Supreme Court has described it as a fundamental right. *See Livesay v. Tennessee Bd. of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959).

72. Assuming, *arguendo*, that the defendants have a statutory basis to do so in the first place, there is no legitimate reason to subject shampooing to licensure and regulation.

73. The regulations and statutes have the effect of prohibiting anyone from shampooing absent training and testing that is, in the best of times, expensive, absurd and irrelevant, and in the worst of times, nonexistent.

74. The regulations and statutes far exceed whatever legitimate public health and safety requirements are necessary to protect the public in the context of unregulated shampooing.

75. For these reasons, the defendants have violated the plaintiff's constitutional right.

C. Claim Three-Violation of Article I, Section 22 of the Tennessee Constitution.

76. The plaintiff hereby repeats all of the preceding allegations and incorporate them here by reference as though fully set forth herein.

77. The plaintiff, like all Tennesseans, has a right to be protected from monopolies. This right is protected by Article I, Section 22 of the Tennessee Constitution. It provides that monopolies are contrary to the genius of a free state.

78. The defendants have violated the anti-monopolies provision in two ways: a) the Board itself is inherently anti-competitive; and b) the current licensure regime wholly excludes new competitors from entering the field.

a. The Board itself is anti-competitive.

79. The Board vested with authority over the profession is packed with competitors in the field of cosmetology/barbering. By statute, the board must contain fourteen members. All but two *must* be market participants.⁴ See Tenn. Code Ann. § 62-4-103(b) (LexisNexis 2015).

80. An ordinary and harmless trade like shampooing should be available to all by common right.

81. The trade is now under the complete control of interested market participants. As explained in more depth below, they have engaged in patently anti-competitive behavior.

82. The composition of the Board creates a monopoly, both in theory and actuality, which is designed to accrue benefits for existing market participants. Those benefits include limiting the number of competitors by requiring a license, which in turn, raises prices on consumers and limits economic opportunity for Tennesseans.

b. The licensure regime currently excludes new competitors.

83. The second way the defendants violate the anti-monopolies provision is by effectively making it impossible for the plaintiff or anyone else to ever garner the required license in the first place.

⁴ The Board's members are listed here:
<https://www.tn.gov/commerce/article/cosmo-members> (last viewed Apr. 26, 2016).

84. As outlined above, to get a license, a person must complete 300 hours of schooling. Tenn. Code Ann. § 62-4-110(e)(2) (LexisNexis 2015).

85. The defendants control the licensure and curriculum of the schools, including the rules and regulations necessary to develop courses of instruction that will satisfy the licensure requirement. Tenn. Code Ann. § 62-4-120(k) (LexisNexis 2015). TENN. COMP. R. & REGS. R. 0440-01.03, 05 (LexisNexis 2016).

86. The defendants do not require a school teach shampooing. As of March 2016, the state was not aware of a school in Tennessee that offered the required schooling. As a result, even if she had the means, the plaintiff would find it impossible to obtain a shampoo license.

87. The only possible means of legally shampooing is to get a cosmetologist license with its 1,500 educational hour requirement, a minuscule portion of which has anything to do with shampooing.

88. When this is considered in conjunction with the recently enacted legislation bringing shampooing squarely under the fold of cosmologist, *see* HB2373/SB2374, Section 6 (signed by Governor on Apr. 27, 2016), the Board has, in effect, granted cosmetologists a monopoly over shampooing.

c. This violates the constitutional right to be free from monopolies.

89. The shampooing statutory and regulatory regime has no legitimate relation to any valid public purpose.

90. The regulations and statutes as construed and applied by the Board have no actual tendency to further whatever legitimate public health and safety requirements are necessary to protect the public in the context of unregulated shampooing.

91. For these reasons, the defendants have violated the plaintiff's constitutional right.

D. Claim Four-Violation of Fourteenth Amendment to the U.S. Constitution.

92. The plaintiff hereby repeats all of the preceding allegations and incorporate them here by reference as though fully set forth herein.

93. The Fourteenth Amendment to the U.S. Constitution protects the privileges and immunities of citizens, the right to due process under law, and the right to equal protection under the law.

94. Assuming, *arguendo*, that the defendants even have a statutory basis to enforce a license requirement to shampoo hair, the defendants' actions have irrationally, arbitrarily, and excessively restricted the ability of the plaintiff to engage in a legitimate vocation.

95. There is no legitimate reason to require a shampoo or cosmetology license. The only reason is to protect from competition discrete interests who wield influence over the political process.

96. Protectionism is not a legitimate governmental interest.

97. The defendants would subject the plaintiff to a statutory and regulatory regime that does not rationally relate to her desire to do nothing more than wash hair.

98. For the foregoing reasons, the defendants' actions violate the plaintiff's constitutional rights.

VI.
Relief Sought

WHEREFORE, PLAINTIFF requests that this Court:

A. Order a speedy hearing of this action for declaratory judgment and advancing it on this Court's calendar pursuant to Tenn. R. Civ. P. 57.

B. Enter a declaratory judgment that the defendants do not have jurisdiction over the plaintiff or anyone else who wishes to shampoo without a license.

C. Enter a declaratory judgment the defendants have violated the plaintiff's state and federal constitutional rights.

D. Enter a declaratory judgment that Tenn. Code Ann. § 62-4-101, *et. seq.* and resultant regulations pertaining to shampooers are illegal and unconstitutional.

E. Enter an order permanently enjoining the defendants from enforcing a licensure requirement on shampooers.

F. Award costs, expenses and reasonable attorney's fees according to 42 U.S.C. § 1988, Tenn. Code Ann. § 29-14-111 and any other applicable laws.

G. Award any other relief as is appropriate under the circumstances.

Dated: May 2, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "BH Boucek", written over a horizontal line.

BRADEN H. BOUCEK

B.P.R. No. 021399

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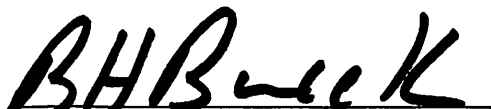
Counsel for plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served upon the following, pursuant to Tenn. R. Civ. P. 4.04(6), (9), 5.02 by the following means:

Counsel	Counsel for	Via
Herbert H. Slatery III Tennessee Attorney General's Office P.O. Box 20207 Nashville, TN 37202 Herbert.Slatery@ag.tn.gov	State of Tennessee/ Board of Cosmetology and Barber Examiners/ Individual Members	☒ United States mail, postage prepaid ☐ Hand delivery ☐ Fax ☐ Email ☐ Fed Ex ☐ CM/ECF
Laura Martin Board of Cosmetology and Barber Examiners Davy Crockett Tower 500 James Robertson Parkway Nashville, TN 37243 Laura.martin@tn.gov	Board of Cosmetology and Barber Examiners	☒ United States mail, postage prepaid ☐ Hand delivery ☐ Fax ☐ Email ☐ Fed Ex ☐ CM/ECF

On this date, May 2, 2016


BRADEN H. BOUCEK