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

TAMMY NUTALL-PRITCHARD, Plaintiff, v. THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS, *et. al.* Defendants.	)	Case No. 16-0455-II

RESPONSE TO MOTION TO DISMISS UNDER TENN. R. EVID. 12.02(6) FOR FAILURE TO STATE A CLAIM

COMES NOW Tammy Nutall-Pritchard, the plaintiff in this case ("Ms. Pritchard") to respectfully respond to the motion of the defendant ("the State") to dismiss under Tenn. R. Civ. P. 12.02(6), and supporting memorandum ("Memorandum").

I.
Introduction

The State is not entitled to dismissal because the constitutionality of its shampoo licensing laws cannot be established as a matter of law, even if this were the pertinent standard. The State argues, essentially, that the facts do not matter because this case is governed by the rational basis test, a test

so lenient that it is impossible for the government to lose. The problem is that the State fails to recognize that the Tennessee Supreme Court recognizes the right to earn a living as a fundamental right, and that even under the federal rational basis test the analysis is guided by the binding circuit precedent of *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). The facts do matter, and blatantly unnecessary and protectionist economic laws are unconstitutional.

The State thinks that its economic laws, no matter how arbitrary or overbearing, are above the scrutiny of this Court because the State's judgment in the economic realm is unassailable. This is wrong, per *Craigmiles.* This Court certainly has the authority to meaningfully scrutinize the State's laws. Absent altogether is an explanation as to how requiring a person to go to a school when that school does not exist could *ever* be rational. Worse, the State even defends pure economic favoritism as simple "politics," to use its quote (State's Memorandum, p. 24), advancing a position that was explicitly rejected in *Craigmiles.* And rather than taking the complaint as true, the State breezily asserts that the public health concerns posed by unregulated *shampooing*, a feat managed every day by children, are "self-evident." (State's Memorandum, p. 26).

The State's arguments go to the merits of the claims, not whether they are sufficiently pled. The only question is whether there is a justiciable controversy. This the State has implicitly conceded.

II.
Legal standard

Tenn. R. Civ. P. 12.02(6) is a device for disposing of legally insufficient claims. The standard is:

> A motion to dismiss for failure to state a claim upon which relief can be granted "challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (citations omitted). "The motion admits the truth of the factual allegations in the complaint but asserts that the alleged facts fail to establish a basis for relief." *Stewart v. Schofield*, 368 S.W.3d 457, 462 (Tenn. 2012) (citation omitted). Resolution of the motion is determined solely by an examination of the pleadings, and when considering a motion to dismiss, "courts must construe the assertions in the complaint liberally[.]" *Leggett v. Duke Energy Corp.*, 308 S.W.3d 843, 851 (Tenn. 2010) (citations omitted). The motion should be granted only when "it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief[.]" *White v. Revco Dis. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000) (citations omitted).

In re Conservatorship of Starnes, -- S.W.3d --, 2014 Tenn. App. LEXIS 797, *7-8 (Tenn. Ct. App. Dec. 10, 2014).

The question is whether the complaint provides the defendant with notice. *Webb*, 346 S.W.3d at 426-27 ("the primary purpose of pleading is to provide notice of the issues presented to the opposing parties and court."). *See also* Tenn. R. Civ. P. 8.05(1), 8.06 (LexisNexis 2015). The more restrictive "plausibility" standard required in federal pleadings is not the law of Tennessee. *Webb*, 346 S.W.3d at 430. The likelihood of prevailing on the

merits is immaterial. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (quoted with approval in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). A claim should only be dismissed if, under no circumstances would the allegations establish a cause of action. *Webb*, 346 S.W.3d at 426.

The pleading standard for a declaratory judgment is lower still, requiring only that the complaint present a justiciable controversy. Declaratory actions are intended to "afford relief from uncertainty with respect to rights, status, and other legal relations." *Cannon Cnty. Bd. of Educ. v. Wade*, 178 S.W.3d 725, 730 (Tenn. Ct. App. 2005) (citing *Snow v. Pearman*, 436 S.W.2d 861, 863 (Tenn. 1968)). Dismissal is "rarely appropriate" for a declaratory action. *Id.* Even if the party seeking declaratory relief would lose, that "does not mean the parties are not entitled to the relief from uncertainty that a declaratory judgment affords." *Id.* A complaint "is not required to allege facts in its complaint demonstrating that it is entitled to a favorable decision." *Id.* (citing *Maguire v. Hibernia Savings & Loan Soc'y*, 146 P.2d 673, 678 (Cal. 1944)). Ms. Pritchard need only show the existence of an actual controversy.

III.
Argument

A. The complaint alleges a live controversy.

Ms. Pritchard has shown a live controversy. A justiciable controversy is real, not theoretical. *See State v. Brown & Williamson Tobacco Corp.,* 18 S.W.3d 186 (Tenn. 2000). Her controversy is real. She wishes to wash hair without a license. (Complaint). The Board takes the position that she cannot, and the State agrees. Moreover, the complaint alleges that the Board's anti-competitive composition, the licensure requirement itself, and the method required by the State to obtain a hair-washing license were and are unconstitutional. This is plainly a live controversy.

The State's motion amounts to a legal sufficiency challenge, not a challenge for failure to state a claim.

B. Economic favoritism is not a legitimate government interest.

Economic favoritism is *not* a legitimate governmental undertaking. It is an invalid, unconstitutional purpose even under the permissive federal rational basis standard.

Defending the shampoo licensing laws, the State asserts that economic favoritism is at "the very core of the legislature's policy function." (Memorandum, p. 24). The State further adds, "much of what states do is to favor certain groups over others on economic grounds. *We call this politics.*" *Id.* (emphasis added) (quoting *Sensational Smiles LLC, v. Mullen*, 793 F.3d 281, 287 (2d Cir. 2015)). By this understanding, a law that denies Ms.

Pritchard the very ability to work in a job of her own choosing for no other reason than to favor other parties is simply "politics," and she is without legal recourse. The State has embraced an illegitimate purpose.

"[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) In *Craigmiles*, a case from Tennessee, the Sixth Circuit identified "the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that [the law's beneficiaries] extract from consumers." 312 F.3d at 229. When a law serves no function other than to bestow economic benefits on a particular group, it fails even rational basis.[1] *Id.* There is a circuit split on this matter. *Compare Craigmiles*, 312 F.3d at 224; *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2012); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n. 15 (9th Cir. 2008) *with Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir. 2004); *Sensational Smiles,* 793 F.3d at 287. Tennessee lays on the good side. Favoritism is not legitimate politics in this state.

The odious defense of the State's discriminatory shampoo laws as just "politics," (memorandum, p. 24) (quoting *Sensational Smiles*, 793 F.3d at 287), cannot stand, at least in Tennessee. "Politics is a dirty business. Hopefully Tammy's lawsuit will clean house." Nick Sibilla, *Shampooing Hair*

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[1] It bears mentioning that this is the standard for *federal* rational basis for an economic liberty case. This will be discussed at length later, but Tennessee case law does not hew precisely down the same lines. *See generally Campbell v. Sundquist*, 926 S.W.2d 250, 259 (Tenn., Ct. App. 1995) (Even when Tennessee and federal constitutions have similar or identical provisions, Tennessee may have stronger protections).

Without a License Could Mean Jail Time in Tennessee, Forbes (May 5, 2016).[2] Contrary to the State's argument, this Court does have a meaningful role to play as constitutional guardian by rejecting overt economic favoritism. Ms. Pritchard is not beholden to the tender mercies of the regulatory bodies that authored and benefit from the regulations in the first place. There exists a set of facts upon which relief can be granted.

C. Claim One asserts a basis for which relief can be granted.

In Claim One, Ms. Pritchard argues that the Board is impermissibly enforcing a licensure requirement against shampooers that has not been statutorily authorized. (Complaint, pp. 14-15). The State responds that the license is clearly mandatory and that this claim should be dismissed. (Memorandum, p. 13). The State again urges a merits standard, *see Webb*, 346 S.W.3d at 432, not a justiciability standard. And even if this Court were to scrutinize the claim on the merits, Claim One could be a cause for relief.

The structure of the shampoo laws shows that the State created a license, but did not make it mandatory. The Tennessee Cosmetology Act has a carefully constructed regime. Tenn. Code Ann. § 62-4-102 is the definitions section. It defines cosmetology, aesthetics, manicuring, natural hair styling, and shampooing separately. They are all distinct terms, separately defined. Tenn. Code Ann. § 62-4-110 sets forth the qualifications to obtain a license. Again, it defines cosmetology, aesthetics, manicuring, natural hair styling,

[2] http://www.forbes.com/sites/instituteforjustice/2016/05/05/shampooing-hair-without-a-license-could-mean-jail-time-in-tennessee/2/#6ac9921e424c(last visited on June 16, 2016).

and shampooing separately and distinctly. Significantly, nothing in Section 110 requires a person obtain any license whatsoever. That provision is separately found at Tenn. Code Ann. § 62-4-108. Here, the law states that a person must get a license to practice cosmetology, manicuring, or aesthetics. Unlike the rest of the Act, shampooing is not included. Nowhere does the Act require that a person must obtain a license to wash hair.

The State's position is that because cosmetology includes "cleansing ... by any means" in its definition, then the requirement to get a license to practice cosmetology necessarily includes shampooing. (Memorandum, p. 13). But the definition of shampooing makes no mention of "cleansing," using instead the distinct terms, "rinsing or conditioning." Tenn. Code Ann. § 62-4-102(a)(19) (LexisNexis 2105). And if shampooing was a subset of cosmetology, under this rationale a person must obtain a full-blown cosmetology license just to shampoo hair. The legislature explicitly created a separate shampoo license, *see* Tenn. Code Ann. § 62-4-110(e)(2), but did not require a person to obtain the license in Section 108. There would have been no point to creating it in the first place if it was simply incidental to cosmetology.

The legislative history indicates the license was not supposed to be mandatory. The field of shampooing was added to the cosmetology laws in 1996 with 1995 Tenn. HB 745. This bill defined shampooing and set forth the requirements for licensure, but stopped short of including it in the licensure section *even though it otherwise amended Section 108 by inserting*

"manicuring" in the licensure provision. 1996 Tenn. ALS 897, 1996 Tenn. Pub. Acts 897, 1996 Tenn. Pub. Ch. 897, 1995 Tenn. HB 745, enacted May 8, 1996 (LexisNexis). This looks like a deliberate legislative choice. It should be deemed conclusive to the extent there is any ambiguity in the statutory scheme. *See Robinson v. LeCorps*, 83 S.W.3d 718, 722 (Tenn. 2002).

The other rules of statutory interpretation contradict the State's interpretation. The "natural and ordinary meaning" of Section 108 is that shampooing is not mandatory because it is not named. *See Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001). The State wants to insert an additional word, "shampooing," into Section 108, but that would impermissibly "extend the statute's application." *Id.* (citations and quotations omitted). The shampoo license would be pointless if it was just a subset of cosmetology, so this read would not give effect to the broader statutory scheme. To express one thing is to exclude the other. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 28-29 (2001) (recognizing principle of *expression unius est exclusion alterius*). By specifically including shampooing in the other sections, but specifically excluding it from the licensure section, it must be assumed that the legislature did not intend to require a shampoo license. *See Robinson*, 83 S.W.3d at 722.

At the very least, given the liberal construction afforded to declaratory actions, *see* Tenn. Code. Ann. § 29-14-113 (LexisNexis 2015); *Tennessee Farmers Mut. Ins. Co. v. Hammond*, 290 S.W.2d 860 (Tenn. 1956), there is

enough of a dispute to proceed at this stage. The State cannot argue that this is not a justifiable controversy or that this claim could never prevail. It is entirely possible that their past enforcement actions would put this issue into focus, contradicting the State's unnatural interpretation.

D. If the Board by its composition and practices violates the anti-monopolies provision, then Ms. Pritchard is entitled to relief. Claim Three alleges a cause for relief.

The complaint, taken as true, would demonstrate the existence of a monopoly, both with the Board and the shampoo license. A monopoly is defined as an exclusive right, granted to a few, of something that was before a common right. *Watauga v. Johnson City*, 589 S.W.2d 901, 904 (Tenn. 1979). The courts have also defined it as:

> when all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one person or set of persons, as practically to bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein.

Trails End Campground, LLC v. Brimstone Rec., LLC, 2015 Tenn. App. LEXIS 39, *23 (Tenn. Ct. App. Jan. 29, 2015) (copy of opinion attached).

According to the North Carolina Supreme Court, the "ordinary trades" are available to all as a common right, and as such, unnecessary licensure requirements can violate its anti-monopolies clause. *State v. Harris*, 6 S.E.2d 854, 864 (N.C. 1939). Because the board in question was packed with market participants, they were taking unconstitutional, anti-competitive action. *Id.* Tennessee's identical anti-monopolies clause is found in its Declaration of

Rights, which itself is based on North Carolina's. *In re Estate of Trigg*, 368 S.W.3d 483, 491 (Tenn. 2012). *See* Lewis L. Laska, *The Tennessee State Constitution,* p. 5 (1990). When a Tennessee constitutional provision is largely modeled on North Carolina's, the courts look to that state's jurisprudence on the subject. *See Helms v. Dep't of Safety,* 987 S.W.2d 545, 549-550 (Tenn. 1999) (concerning parallel jury rights).

Taking Ms. Pritchard's pleadings as true, she has met her burden. Shampooing is an ordinary trade. (Complaint, p. 17, para. 80). Now it is an exclusive right, only available to those with a license. *See Watauga,* 589 S.W.2d at 904. Further, it is currently impossible to obtain that license. (Complaint, p. 18, para. 86). The Board is overwhelmingly composed of interested market participants that have engaged in behaviors designed to enrich its members at the expense of the public. (Complaint, p. 17, para. 79). This fits the definition of a monopoly. This claim may proceed.

The State's argument is that because anyone can theoretically get the license, it is not a monopoly. (Memorandum, p. 16). Even if this were the standard, the claim is still a justiciable controversy. Furthermore, this argument ignores that the shampoo license can no longer be obtained. (Complaint, p. 18, para. 86).

The State's incredibly narrow definition of monopoly is not supported by the case law. In *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 338 (Tenn. 1948), the Tennessee Supreme Court struck down Johnson City's

certificate of need laws for taxi cab companies. It was not impossible to get a taxi license—it was just incredibly onerous. Likewise, *Trails End* did not use language that contemplated an absolute bar to entering a field: a monopoly exists when "all, or so *nearly all*" commerce is brought within the hands of one "set of persons, as *practically* to bring" the trade within single control. *See Trails End Campground*, 2015 Tenn. App. LEXIS *23-24. *See also Standard Oil Co. v. United States*, 221 U.S. 1, 51-52 (1911) (defining "monopoly" under Sherman Anti-Trust Act as restraining the freedom to engage in a lawful trade by an institution granted by the king to "any person or persons, bodies politic or corporate"); *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (no anti-trust immunity for state regulatory board comprised almost entirely of market participants and engaging in anti-competitive practices). The fact the license could conceivably be obtained does not matter; the insuperable obstacles placed in the way do. If the State places the bar so high and ludicrously out of proportion with the chore at hand, then it has "practically brought" the field within the hands of one set of persons.

The Tennessee Declaration of Rights reads: "monopolies are contrary to the genius of a free state, and *shall not be allowed*." Tenn. Const. Art. I, § 22 (emphasis added). These are strong words and should be taken to mean that the Constitution takes a dim view of arbitrary market interference. The argument that the State can burden a person's ability to work with obstacles as "high and cost-prohibitive" (memorandum, p. 16) as it wants so long as it

does not forbid it altogether is fundamentally inconsistent with this constitutional guarantee.

E. According to the complaint, shampooing is not a business subject to licensure. Claim Two should advance.

The complaint, taken as true, states a valid claim because the shampoo laws do not advance a legitimate governmental interest. The Tennessee Supreme Court has described the right to work, even in a technical field, as a "fundamental one, protected from unreasonable interference ...." *Livesay v. Tennessee Bd. of Exam'rs in Watchmaking,* 322 S.W.2d 209, 213 (Tenn. 1959) (quotation and citation omitted). In *Livesay*, the Court found unconstitutional an unnecessary license requirement on an "old and 'innocuous occupation,'" in that case, the making of watches. *Id.* Because this requirement did not "promote the general welfare or protect the public morals, health or safety, or have any real tendency to those ends," it violated the Tennessee Constitution. *Id.*

The complaint, taken as true, would entitle Ms. Pritchard to relief because the shampoo licensing laws have no legitimate basis. The first defense of the laws, economic favoritism, is not legitimate as a matter of federal law. *See Craigmiles,* 312 F.3d at, 224. Under Tennessee law, where the right to work is deemed "fundamental," *Livesay*, 322 S.W.2d at 213, it goes without saying that economic favoritism is an invalid purpose

The second defense of the laws seems to be health and safety. As a matter of pleading, Ms. Pritchard has stated a valid claim. The complaint

alleges that there is no legitimate reason for the laws like the ones described in *Livesay* (public morals or health, etc.). (Complaint, p. 15, para. 72). Shampooing is an ordinary occupation requiring no particular knowledge. (Complaint, p. 15, para. 70.) The shampoo laws are so irrelevant to whatever goal the laws are meant to address that they are unconstitutional. (Complaint, p. 16, para. 73-74). If this is true, Ms. Pritchard wins. Dismissal at this point would be wholly inappropriate.

The safety argument rests on an assumption that the laws cannot fail to satisfy the rational basis test. First, this assumes that this is the test. Typically review of a fundamental right is far more rigorous. *See e.g.,* Sundquist, 38 S.W.3d at 11 ("fundamental rights receive special protection under both federal and state constitutions."). Second, even the federal rational basis test, while permissive, is not quite so "'toothless.'" *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). Third, as a matter of state law, economic measures have been struck down by state courts before. *See State v. Greeson*, 124 S.W.2d 253 (Tenn. 1939) (striking down regulation setting prices for barbers as violating due process and liberty of contract); *Livesay*, 322 S.W.2d 209. Even the State admits that it may not require a license if a trade does not affect public health, safety, or welfare. (Memorandum, p. 17). Obviously, this means that there are circumstances where there is a cause of action. The case must proceed to test whether the shampoo license laws accomplish those

ends. *See State ex. rel Loser v. National Optical Stores* 225 S.W.2d 263, 269 (Tenn. 1949) (courts decide if law "has any real tendency to carry into effect the purposes designed"). It is manifestly untrue that under no circumstances would "the allegations fail to establish a cause of action." *Webb*, 346 S.W.3d at 426.

As an aside, the State's contention that once it articulates a legitimate goal "the *extent* to which the General Assembly should regulate," (memorandum, p. 19) is inaccurate as a matter of Tennessee law. Legislation violates the Constitution when it is "not reasonably related to a protectable interest" or is "oppressive in its application." *Rivergate Wine & Liquors, Inc. v. Goodlettsville*, 647 S.W.2d 631, 634 (Tenn. 1983). The legislation must have "a reasonable relation to a proper legislative purpose" and must be neither arbitrary nor discriminatory. *National Gas Distributors v. Sevier County Utility Dist.*, 7 S.W.3d 41, 45 (Tenn. Ct. App. 1999); *State v. Smith*, 6 S.W.3d 512 (Tenn. Crim. App. 1999) (an enactment is valid if it bears a real and substantial relationship to the public's health, or general welfare, and it is neither unreasonable nor arbitrary). While this Court should not second-guess the wisdom of the legislature, this Court certainly has a role to play in scrutinizing nonsensical explanations.

The State's examples of cases dismissing challenges to different professions are distinguishable and only make Ms. Pritchard's point. (Memorandum, pp. 17-19). The State cites *Ford Motor Co. v. Pace*, 335

S.W.2d 360, 362 (Tenn. 1960), which had to do with regulating automobiles. In distinguishing from *Livesay*, the Supreme Court listed professions that do *not* affect the public safety:

> The Act in question does not involve watch repairers or makers, house painters, paper hangers, land surveyors, morticians, dancing schools, horse shoers, dry cleaners, layers of drain tile and things of that kind, which have been correctly held beyond the police power of the Legislature . ...

Id. at 363. Could the Court have imagined it, "shampooing" would have looked perfectly natural in that list.

Shampooing is unlike the automobile industry. The Court noted that "many, many accidents and deaths occur," as a result of the growth in the automobile industry and that it was a "complex business." *Id.* at 362. Regulation of "the entire automobile industry, an industry constituting one of the largest segment of the economy," justified the law. *Id.* at 363. Shampooing is not a new and exploding industry that is complex and dangerous and comprises a large segment of the economy.

Shampooing is also unlike optometry, the next proffered example, because it does not affect optical health. (Memorandum, p. 18) (discussing *Tennessee Bd. of Dispensing Opticians v. Eyear Corp.,* 400 S.W.2d 734, 741 (Tenn. 1966)). In fact, the Court provided the salient distinction in distinguishing *Livesay*: "This Act though regulating such things as are necessary for the eyes including the adaptation, preparation, and dispensing of glasses, special lenses, etc., leaves no question in our mind but that they

are for the public health." 400 S.W.2d at 743. Optometry involves a highly delicate body part—eyes. Hair is not. Even if cut, it regenerates. Eyes do not. Optometry also involves specialized knowledge. Everyone manages to wash his or her own hair safely at home. Optometry's specialized knowledge and connection to public health and safety demonstrate why shampooing does not need a license.

Finally, the State turns to *Bah v. Attorney General of Tennessee*, 610 Fed. Appx. 547 (6th Cir. 2015) (copy of opinion attached), an unpublished, federal case involving natural hair braiding. There are four key differences with that case and this one. These differences demonstrate precisely why Ms. Pritchard has stated a valid claim. First, the district court dismissed the complaint for failure to state a claim because the plaintiffs failed to allege economic protectionism. *Bah v. Attorney General of Tennessee*, Case No. 2:13-cv-02789, Document 37, Order Granting Motion to Dismiss, pp. 25-26 (W.D. Tenn. June 10, 2014) (copy of opinion attached). Ms. Pritchard's complaint does. (Complaint, p. 19, para. 95-96). Second, *Bah* was a federal action with heightened pleading standards. Whereas the only question here is whether a justiciable controversy exists, *see Wade*, 178 S.W.3d at 730, the district court in *Bah* required the plaintiffs to state claim of relief that was *plausible*. *Bah*, Case No. 2:13-cv-02789, Order, p. 12 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Twombly*, 550 U.S. at 570). The Sixth Circuit cited to the *Ashcroft* plausibility standard as well. *See Bah*, 610 Fed. Appx. at 552.

That is a much higher standard, and one that the Tennessee Supreme Court rejected and Ms. Pritchard need not surmount it, although she does.[3] *See Webb*, 346 S.W.3d at 430.

Third, as a federal suit, the Tennessee constitutional claims went unconsidered. After rejecting the federal claims, the district court declined to exercise its supplemental jurisdiction over the state claims. *Bah,* Case No. 2:13-cv-02789, Document 37, at p. 30. Consequently, the district court declined to consider Tennessee constitutional rights such as are propounded by Ms. Pritchard.[4] This Court has original jurisdiction over these claims and will be considering them regardless of the merits of the Fourteenth Amendment claims

Fourth, the State in *Bah* offered up "a number of studies related to the health and safety risks posed by the practice of hair braiding." *Id.* at 13. Not so here. In *Bah,* the State was able to at least show that there was a concern over the need to regulate hair braiding, critical given the heightened pleading standards for federal plaintiffs. Here, the State does no more than assure the

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[3] The State notably tries to smuggle in a plausibility standard. (Memorandum, p. 19) ("there is no way to avoid the fact that shampooing can *plausibly* be understood to affect public health, safety, and welfare.") (emphasis added). The reliance on a contrived standard demonstrates why the State's motion is without merit.

[4] Elsewhere the State maintains that Tennessee and federal due process protections are identical. (Memorandum, p. 21). Perhaps not yet relevant, this statement, while commonly put forth in case law does not, strictly speaking, reflect the full picture. *See Davis v. Davis*, 842 S.W. 2d.588 (Tenn. 1992); *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d. 1, 11, 14 (Tenn. 2000); *Merchant's Bank v. State Wildlife Resources Agency*, 567 S.W.2d 476 (Tenn. Ct. App. 1978). *See also Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 955 (Tenn. Ct App. 1995) (the Fourteenth Amendment's protections "establish a minimum level of protection," but that Tennessee "courts may interpret Tenn. Const. art. I, § 8 to provide greater protection than its federal counterpart").

Court that public health concerns are "self-evident," (Memorandum, p. 26) inverting the standard requiring the acceptance of the plaintiff's allegations as true.

The dangers of unregulated shampooing are not so evident.[5] After all, only five states have any kind of shampoo license, and only two other states have any kind of educational requirement. (Complaint, p. 8, para. 29-30). Among the few states requiring such a license, Tennessee's regulations are by far the most stringent. (Complaint, p. 8, para. 30-31). Shampooing was used as an example of the "kudzu-like spread of licensure" in a successful licensure challenge to eyebrow threading before the Texas Supreme Court. *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 103-04 (Tex. 2015) (Willett, J. concurring). The shared consensus about the public health implications of unregulated shampooing simply does not exist.

Bah does provide "compelling precedent" but it does not "dispose[] of Plaintiff's substantive due process claim in this case." (Memorandum, p. 26). On the contrary, *Bah* provides important distinctions that serve to emphasize precisely why this case should proceed.

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[5] The national outcry of indignation in response to this lawsuit is a forceful rejoinder to how self-evident the need for shampoo licensure is. *See e.g.*, Glenn Reynolds, *America's Unregulated Shampooer Menace*, USAToday ("[P]rotectionist law that interfere with people's right to earn a living are a major drag on the economy and a major barrier for poor and working-class people trying to do better....Shampooers of the world, arise!"); George Leef, *You Need 300 Hours of Training and a License to Shampoo Hair?*, Forbes (May 13, 2016) ("Fortunately, the state's regulations may be swept away."). This rebuts the State's reliance on the assertion that safety concerns are self-evident, *Bah*, and the off-point studies submitted in that case.

F. Economic favoritism is unconstitutional under the Fourteenth Amendment. Claim Four should proceed.

This answer does not change under federal rational basis either.[6] For Fourteenth Amendment purposes, the question under rational basis is whether the challenged law bears a rational relation to a legitimate state interest.[7] *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014). Economic measures carry a strong presumption of validity; a person wishing to invalidate a statute under rational basis must negative every conceivable basis. *Id.*

While deferential, rational basis is not "toothless." *Id.* (quotation omitted). Binding circuit precedent holds that economic favoritism is not a legitimate governmental interest. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (casket makers—"protecting a discrete interest group from economic competition is not a legitimate governmental purpose"). This case resulted in a trial. *See Craigmiles v. Giles*, 110 F. Supp. 2d 658 (E.D. Tenn. 2000). Notably, the Sixth Circuit meaningfully assessed whether the government's justifications were believable including, as here, the public safety arguments. *Craigmiles*, 312 F.3d at 224-28. The Court was not willfully credulous in the face of the State's explanations merely because this

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[6] Ms. Pritchard concedes that the Privileges and Immunities Clause has been "largely dormant" since the *Slaughter-House* cases, and this Court need not "break new ground," *Craigmiles*, 312 F.3d at 229, to determine the case. She wishes to preserve the issue that the *Slaughter-House* cases were wrongly decided under both the state and federal constitutions.

[7] While Equal Protection and Substantive Due Process are distinct rights, for purposes of this pleading they are considered as one "because they present the same issue," *Bruner*, 997 F. Supp. 2d at 697, n. 8, to wit, whether Ms. Pritchard has articulated a justiciable controversy and one that she would be entitled to relief.

was an economic measure, indicating rather its suspicion of the legislature's circuitous path to legitimate ends when a direct one was available. *Id.* at 227 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)).

Even if there are legitimate governmental interests at stake, the means chosen by the legislature to achieve that goal must be rationally related to those legitimate interests. *See Bruner*, 997 F. Supp. 2d at 699 (whether the stated interest "is rationally related to these legitimate interest is a different issue") (citing to *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) ("[T]he mere assertion of a legitimate interest has never been enough to validate a law.")). This Court's role in the constitutional order is not only welcome, but vital. And it cannot perform its role if, as the State requests, this case is prematurely halted at this early stage.

Ms. Pritchard has pled sufficiently to show a justiciable controversy and that she would be entitled to relief. She maintains that the State has no legitimate reason to regulate shampooing, and that the real reason for the law is illegitimate. (Complaint, p. 19, para. 95-96). Still more, she further maintains that the shampoo laws do not "rationally relate to her desire to do nothing more than wash hair." (Complaint, p. 20, para. 97). If this is accepted as true, even under the Fourteenth Amendment, Ms. Pritchard prevails, just like the plaintiffs in *Craigmiles, Bruner*, and *St. Joseph Abbey v. Castille*, 700 F.3d 154 (5th Cir. 2012). Dismissal would be inappropriate.

The State baldly responds to the assertion that there are no legitimate reasons to make people get a license to shampoo: "That is obviously not true." (Memorandum, p. 25). We cannot simply take the State's word on it, especially at this stage of the pleadings. *See Craigmiles*, 110 F. Supp. 2d at 662 ("the mere assertion of a legitimate interest has never been enough to validate a law."). At this point, this sounds exactly like the sort of irrational speculation that will fail to satisfy rational basis. Conclusory assertions that it is "obvious" or "self-evident" do nothing to make this any less speculative.

The State characterizes Ms. Pritchard's lawsuit as an attack on the wisdom of the General Assembly, asking the Court to refuse to consider any facts or evidence. (Memorandum, p. 25). This Court is not incapable of analyzing the rationality of a law, even under the Fourteenth Amendment. "The great deference due state economic regulation does not demand judicial blindness to the history of the challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth." *See St. Joseph Abbey*, 700 F.3d at 165

The State consistently relies on inapposite federal precedents. Some are like *Bah* that did not allege protectionism, and failed under the elevated (and inapposite) *Ashcroft/Twombley federal* pleading standards. (Memorandum, pp. 23-25) (citing *Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011) ("a statute can be upheld under any *plausible* justification offered by the state ....")). This is not the pleading

standard in Tennessee courts. *See Webb*, 346 S.W.3d at 430. Furthermore, as the *Bruner* Court explained, *Am. Express Travel*, was a pure substantive due process case with no equal protection concerns. 997 F. Supp. 2d at 698, n. 10. Additionally, "the statute in *American Express* was a revenue raising statute that did not touch on the economic protectionism that is of particular concern in *Craigmiles* and in this case." *Id.*

The State also relies on *Operation Badlaw v. Licking County Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059, 1066 (S.D. Ohio, 1992). (Memorandum, p. 23). This lower court dismissed under Fed. R. 12(b)(6) a rational basis claim without citation or explanation, *see id.*, so the reasoning is recondite and not attractive. In any event, it is contradicted by the State's larger argument that Ms. Pritchard must "negative every conceivable basis which might support it," (memorandum, p. 23) (citation and quotation omitted), as well as the *Craigmiles/Bruner* precedents. Obviously, if she must negate every conceivable basis for the shampoo laws, she must be afforded a chance to do so. On the face of the pleadings, she has negated every legitimate basis, attributing the laws to pure protectionism. (Complaint, p. 19, para. 95). It is impossible to do anything more to meet the State's expected burden that she negative every conceivable basis without going outside the pleadings.

The standard for federal pleading is better enunciated in *Bokhari v. Metro. Gov't of Nashville & Davidson County*, 2012 U.S. Dist. LEXIS 6054, at

*11 (M.D. Tenn. Jan. 19, 2012) (copy of opinion attached). There, the United States District Court for the Middle District of Tennessee, the Honorable Kevin Sharp presiding, rejected arguments identical to the State's under the *elevated* federal standard. The plaintiff must merely state:

> a plausible claim that they have been deprived of a protected liberty or property interest, and that no rational basis exists for the regulations in question. They have sufficiently done so by alleging that the new rules stemming from the Ordinance serve no legitimate public health or safety purpose, and by alleging that the Ordinance was enacted not to protect any such purpose but to protect [existing market participants] from competition.

Bokhari, 2012 U.S. Dist. LEXIS 6054, at *11 (M.D. Tenn. Jan. 19, 2012). This is precisely what Ms. Pritchard has done. (Complaint, p. 15-16, 19, para. 72, 74, 94-96). If that clears the bar in federal court, it certainly clears it in Tennessee courts.

Similarly, the State relies on a case with a completely different procedural footing, like *Liberty Coins, LLC v. Goodman*, 748 F.3d 683, 685-86 (6th Cir. 2014). That case considered the suitability of granting the plaintiff an injunction. So that Court was considering the likelihood of success on the merits, *id.* at 695, a far higher bar than a motion to dismiss.

The more fundamental mistake made by the State is the general presupposition that rational basis cases simply cannot be lost, a sentiment that peppers the State's brief. (Memorandum, pp. 25-27). By this understanding, unless a fundamental right is in play, the courts are excised from the constitutional equation altogether. The legislature's economic laws

are above questioning as a matter of law. The impropriety of dismissal before any proof can be adduced was long ago rejected. In *Nashville C & S. L. Ry. v. Baker,* 71 S.W.2d 678, 680 (Tenn. 1934), the Tennessee Supreme Court reversed the lower court, which had struck down a statute as irrational. The U.S. Supreme Court reversed in turn, because an economic regulation may be dubbed irrational when its arbitrariness is proven by "the evidence." *Nashville C & S. L. Ry. v. Walters,* 294 U.S. 405, 414-15 (1935). The Tennessee courts never fairly decided the question, so it was remanded to consider proof. *Id.* at 415-16, 428, 432. Dismissing Ms. Pritchard's complaint now would deny her the chance. The State would have this Court repeat an ancient mistake. By engaging in a rational basis analysis in the first place, the State implicitly concedes that a cause of action exists, maintaining instead that the cause will ultimately fail. The Supreme Court says that rational basis is not "a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault." *Borden's Farm Prods. Co. v. Baldwin,* 293 U.S. 194, 209 (1934). Rational basis is not the free pass the State perceives it to be.

It is a demonstrable fact that rational basis cases can be lost, as shown exhaustively above. Many equally misguided measures have failed to clear rational basis review. *See, e.g., Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 875-76, 882 (1985) (Alabama statute imposing lower tax on in-state insurance companies violates equal protection—"discriminating against

nonresident competitors is not a legitimate state purpose"); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (zoning ordinance restricting home use to mentally disabled fails rational basis scrutiny); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 345 (1989) (valuation that subjected property owners to discriminatory treatment by taxing them at much higher rate than similarly situated owners violated equal protection); *Craigmiles*, 312 F.3d at 224-25. Ms. Pritchard merely asserts the chance to proceed with her claim.

IV.
Conclusion

The motion should be denied.

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Respectfully submitted,

BRADEN H. BOUCEK
B.P.R. No. 021399
BEACON CENTER OF TENNESSEE
P.O. Box 198646
Nashville, TN 37219
Tel.: 615.383.6431
Cell: 615.478.4695
Fax: 615.383.6432
braden@beacontn.org

Counsel for plaintiff