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

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

REPLY

Ms. Tammy Nutall Pritchard respectfully replies to the response filed by the Board to her request for preliminary injunction. She does so to point out the major errors therein. They begin with first principles but continue throughout the substantive claims. This Court would be perfectly within constitutional limits were it to recognize the likely illegitimacy of the law. The limited evidence has already confirmed what should be common sense: shampooing is about as safe as any human endeavor can be. If it can be regulated based on the amount of minimal amount of risk it involves, there are no intelligible limits upon the government's ability to burden the right to pursue an honest job. This protectionist and monopolistic law made it no secret that its true intent was economic favoritism. This Court can and should recognize that the law is likely unconstitutional.

I. The Board has a faulty vision of the proper role of the judiciary, the Tennessee Constitution, and the legislature.

The Board has a model of constitutional order that is fundamentally flawed, viewing it as a pyramid with a legislative enactment, assuming it was one, like the shampoo license at the apex. The spheres of the legislature, judiciary, and the Tennessee Constitution are instead held in delicate balance by their mutual weight. The Board would deny all the gravity of all three, instead attaching paramount importance on Tennessee's unconstitutional shampoo law.

A. The judiciary is essential in evaluating laws burdening economic liberty.

The Board contends this Court would be impermissibly second-guessing the wisdom of the legislature were it to identify this law for what it is. Def's Resp. at 12. But the identification of the Tennessee legislature's impermissible purpose is precisely what the Sixth Circuit did in *Craigmiles v. Giles*, 312 F.3d 220, 224, 227 (6th Cir. 2002). It must be observed that in *Craigmiles* there was not, unlike here, direct evidence in the legislative record that the law was intended to bestow economic favors, and the generous liberty protections found in the Tennessee Constitution were not a factor. The Fourteenth Amendment is a constitutional minimum, and it permits this Court to identify the purpose of the legislature.

The courts appropriately identify illicit legislative motivations. *See United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("a bare [legislative]

desire to harm a politically unpopular group" will invalidate a law); *St. Joseph Abbey v. Castille*, 700 F.3d 154, 165 (5th Cir. 2012) ("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"); *Merrifield v. Lockyer*, 547 F.3d 978, 989 (9th Cir. 2008) ("the singling out of a particular economic group, with no rational or logical reason for doing so, was strong evidence of an economic animus with no relation to public health, morals or safety.").

The Board misreads *FCC v. Beach Communications*, 508 U.S. 307 (1993), in relying on it to argue that the legislature's motivations are irrelevant. Def's Resp. at 20. There, the Supreme Court held that the *absence* of legislative facts was irrelevant, not that actual legislative facts have no import. *FCC*, 508 U.S. at 315 (emphasis added) (quotation omitted). Courts presume that judicial intervention is generally unwarranted "absent some reason to infer antipathy." *Id.* at 314 (quotation omitted). Here, there is reason to infer an illegitimate, animating purpose. Courts are not institutionally incapable of doing something as mundane as identifying it when the legislature was so free in expressing their motivations.

Nor is this Court limited to solely determining whether the legislature had the power to act as the Board maintains. Def's Resp. at 27 ("Once it is determined that the General Assembly has the power to act, the judicial

inquiry is at end.") This unhinged rationale would allow for any burden, no matter how outrageous, so long as the legislature had jurisdiction. This is not the law; "the mere assertion of a legitimate government interest has never been enough to validate a law." *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000). Tennessee courts have said legislation must have a "reasonable relation" to a proper goal. *National Gas Dist. v. Sevier County Utility Dist.*, 7 S.W.3d 41, 45 (Tenn. Crim. App. 1999). The challenged law must utilize a means that are rationally related to whatever the legitimate goal is. *See Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014). Tennessee courts likewise recognize that without substituting policy preferences, courts should decide whether a challenged law "has any real tendency to carry into effect the purposes designed." *State ex rel. Nat'l Optical Stores Co.*, 225 S.W.2d 263, 269 (Tenn. 1949). So the means matter as much as the goal. The Board omits half the analysis.

Even under the permissive standard articulated in federal jurisprudence, this Court does have a meaningful role to play. The federal standard, however, is a mere constitutional floor. The Tennessee Constitution accords more protection to Ms. Pritchard's economic liberty.

B. The Tennessee Constitution provides greater protection of the right to pursue an honest living.

The Tennessee Constitution is similarly relegated to an irrelevancy under the Board's vision of the constitutional order because it maintains the state and federal due process protections are synonymous. Def's Resp. at 23-

24. To talk of synonymy flatly makes no sense given that this case involves the anti-monopolies clause, which has no federal analogue.

It is no longer up for legal dispute whether Tennessee's due process protections are greater in light of *Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d. 1 (Tenn. 2000). There, the Court applied greater scrutiny to an abortion restriction because of the Law of the Land Clause. The Court stated that statements about synonymy are "not dispositive." *Id.* at 14. Tennesseans are not relegated "to the lowest levels of constitutional protection." *Id.* at 15 (citation and quotation omitted). Tennessee courts have extended constitutional protections past federal boundaries. *See, e.g., id.* at 10-11 (abortion rights and citing cases); *Merchant's Bank v. State Wildlife Resources Agency*, 567 S.W.2d 476, 478-79 (Tenn. Ct. App. 1978) (due process claim proper under Tennessee Constitution but not federal). The question is not if state liberty protections are greater, but when.

Earning a living is an example. According to the Court, "[t]here is no exhaustive list," but Tennessee provides more protection to activities that are "of the utmost personal and intimate concern." *Sundquist*, 38 S.W.3d at 10-11. The "fundamental" right to earn a living and provide for one's family is exactly that. *See Livesay v. Tenn. Bd. of Exam'rs in Watchmaking*, 322 S.W.2d 209, 209 (1959 (calling it fundamental); *Harbison v. Knoxville Iron Co.,* 53 S.W. 955, 957 (Tenn. 1899) (recognizing liberty to pursue any lawful calling). As a fundamental right, earning a living "receive[s] special

protection." *Sundquist*, 38 S.W.3d at 11. These cases recognize that the right to earn a living is of the utmost personal and intimate concern, even if federal courts consider them second-class.

Thus, under the Law of the Land Clause this Court should use a higher standard. The Tennessee Supreme Court already has recognized classes of professions like watch making, house painters or horse shoers so innocuous as to be beyond the state's police powers. *See Ford Motor Co. v. Pace*, 335 S.W.2d 360, 363 (Tenn. 1960) Tennessee courts have not had a chance to react to it, but this Court should use a standard like the one used by the Texas Supreme Court in applying its similar Law of the Land Clause in *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015) by asking whether the burden is oppressive in relation to the underlying interest. This would further undermine the Board's arguments as they try rely on extreme interpretations of federal case law that permit it to rely on speculation, not facts, and the legislature's stated purposes are irrelevant. Indeed, existing Tennessee case law undercuts many of the Board's arguments.

The Board argues that its law is valid if any rational basis exists "regardless of what the legislature actually considered" by relying on extreme interpretations of federal case law.[1] Def's Resp. at 20. Under the Tennessee Constitution, merely connecting the law to the police powers is not enough,

[1] Even in *FCC v. Beach Communications*, 508 U.S. 307, 313-14 (1993), the Court said there must be "plausible reasons" for Congress's actions.

and the law must have an actual tendency to carry into the purposes intended. *See Consumers Gasoline Stations v. Pulaski*, 292 S.W.2d 735 (Tenn. 1956) (violates Art. I, § 8: "Although the city may have the right to regulate the filling station business, it does not have the right to exclude certain persons from engaging in the business while allowing others to do so."); *Checker Cab Co. v. Johnson City*, 216 S.W.2d 335, 337 (Tenn. 1948) (violates Art. I, § 22: "The courts decide merely whether it has any real tendency to carry into effect the purposes designed – that is, the protection of the public safety, the public health, or the public morals – and whether that is really the end had in view.") (citations and quotations omitted). The Board must *actually* have had a well-founded concern over public safety. It may not manufacture them, *post hoc*. The Court should reject contrived standards.

C. The legislative is important enough that its actual history matters.

The Board cannot quite figure out how it feels about the legislature, on the one hand deriding its reasons for passing laws as "entirely irrelevant," and the statements of legislators as "constitutionally irrelevant." Def's Resp. at 20. With the other hand the Board argues that the legislature is so institutionally suited to devising policy in the economic realm that its laws are beyond the ability of this Court to question, trotting out shopworn admonitions over the resurrection of *Lochner v. New York,* 198 U.S. 45 (1905). *Id.* at 10-12. The Board's reverence for the infallibility of the legislature in the face of the actual legislative history requires willful

blindness. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. Pa. L. Rev. 1093, 1110 (2014) (unlike other regulatory bodies, licensing boards became dominantly comprised of practitioners themselves. … self-dealing is inevitable when the regulated act as regulators."). Ms. Pritchard does not ask this Court to enact any particular "Social Statics," *id.* at 13 (quoting *Lochner,* 198 U.S. at 75 (Holmes, J., dissenting)), but merely for the basic level of scrutiny guaranteed by the Sixth Circuit in *Craigmiles*, 312 F.3d at 227, augmented by the more fact-based inquiry required under Tennessee law, which likewise asks if the licensure regimen is unreasonably oppressive as a whole.

Trying to skirt the ugly, actual history of the law, the Board maintains this is not the same legislation because it was sent to a study commission after the 1995 legislative session and came back in a revised form only to be passed a year later. Def's Resp. at 20-21. But it is beyond question that this is part of the legislative history. Indeed, these are its origins. This is also might matter more if the legislature's motives had changed when it reconvened. But it was not any more worried about shampooing safety the legislators in 1996 than it was in 1995. Smith Declaration, Ex. A, pp. 15-20. The Board cannot identify any statements where concerns over shampooing safety were even articulated. Whatever amendments might have been made, the 1996 bill was still described as an agreement "by everyone in the industry," *id.* at p. 20, so

it remained a creature of self-interested parties. By its very terms those yet not in the industry were a non-factor. This Court should not hesitate to name the law on its expressed terms.

In our finely calibrated constitutional system the courts and the Tennessee Constitution should not have a subordinate role to, of all things, a misguided economic measure like the shampoo law. This Court has a role to play just as the Tennessee Constitution not merely surplusage.

II. Ms. Pritchard has shown that she will prevail, even on the Board's facts and evidence.

A. The shampoo license unconstitutionally restricts Ms. Pritchard's economic liberty.

On the likelihood of prevailing, the question is straightforward: was there a legitimate safety concern over shampooing or was the law a form of economic protectionism? Even at this stage, two facts make short work of these questions: the absence of evidence of any actual harm and the legislative history. The Board's response fails to show the presence of harm worth burdening the exercise of a fundamental right. It also fails to distinguish the *Craigmiles* case.

1. *The Board has not shown a sufficient threat to public safety.*

The Board's purported safety concerns founders upon the fact that it has only been able to muster up the slightest of evidence that unlicensed shampooing has ever actually harmed anyone, despite assurances that safety concerns were "self-evident." Def's Resp. at 15. The Board only propounds

two, bad examples of an actual harm.[2] Putting aside the merits of these examples momentarily, two examples of harm would never qualify as a rational fear.[3]

As matter of Tennessee law, some professions are too innocuous as to fall within the state's police powers. *See Ford Motor Co.*, 335 S.W.2d at 363. The standard is not absolute zero risk if the right is to exist in any practical sense. Life involves some degree of tolerable risk, when shaking hands or sending children to the playground. The government cannot license upon vanishing risks of harm. "[W]e do not apply such standards to filling station attendants, cooks, and many others exposed to similar dangers, which are comparable to a thousand others from which no ordinary occupation is entirely free." *State v. Harris,* 6 S.E.2d 854, 864 (N.C. 1940). A person can cause great harm in teaching dancing, painting a house, or shoeing a horse, but these fields are too innocuous to license. *See Ford Motor Co.*, 335 S.W.2d at 362. Babysitters need no license. There is a very real risk that cooks can spread communicable diseases through foodborne illness, but the idea of licensing fast food workers is ludicrous. If the Board could require a license

[2] At one point the Board seems to imply that there could potentially be more; the two (2) incidents were the limited response to a discovery question. Def's Resp. 16, n. 7. If there are more incidents, they should have been disclosed in response to Ms. Pritchard's request to admit the absence of harm posed by shampooing. Furthermore, Ms. Gumucio swore that are all that they are aware of other incidents. Gumucio Decl. at ¶ 12. The possibility that other incidents might exist if the Board had better organized records is of no concern because evidence, not guesswork, is what matters.

[3] The Board says the lack of incidents is irrelevant otherwise nuclear power plants would not need safety checks since Three Mile Island only happened once. Def's Resp. at 16. Of course, the threat of harm posed by nuclear power plants is quite different. Children do not safely split the atom in bathtubs. Nor would a mistake level entire cities.

based on such minimal, speculative risk of harm, then there is no way to stay the regulatory hand. "[T]he Legislature may well regulate every conceivable business," and "the claim of the police power rule would … become … a delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint." *Livesay*, 322 S.W.2d at 213 (citation omitted). By laboring to justify such a burdensome license for such an innocuous field on such meager evidence, the Board is asserting nothing less than the supreme sovereignty of the state feared by the Court in *Livesay*.

The process of shampooing is so harmless that it is beyond the reach of the Board. It inherently includes washing the only part of the body that comes into contact with a customer with soap and water making it belong on the *Ford Motor Co.* list. 335 S.W.2d at 363. Furthermore, the Board ignores the safety checks that otherwise ensure sanitation. A licensed practitioner must actively manage the shop. Tenn. Code Ann. §§ 62-4-118(c), (d) (LexisNexis 2016). A cosmetology shop must have a manager on duty at all times who must also be licensed. Tenn. Code Ann. § 62-4-118(c) (LexisNexis 2016). They must comply with an entire, separate series of statutory and regulatory rules, which are more than sufficient to guarantee safety. *See, e.g.*, Tenn. Code Ann. § 62-4-125(a) (LexisNexis 2016); TENN. COMP. R. & REGS. 0440-02 (LexisNexis 2016). In *Craigmiles*, 312 F.3d at 228, the State tried to argue that there were services like providing psychological care that funeral directors, but not casket retailers, would have. This was rejected, because

anyone needing a casket would still have need of a funeral director who would provide those services. *Id.* ("This justification is very weak, indeed"). Likewise with shampooing, the redundancies serve to further undermine the purported safety rationales. The public is protected.

The Board also ignores the argument that even if there are non-contrived safety concerns, the shampooer regulatory regime is nonetheless constitutionally excessive. Tennessee requires only eight hours of sanitation instruction and requires no license to practice for hair wrappers. *See* Tenn. Code Ann. § 62-4-109 (LexisNexis 2016). So little of the regulations bear a rational relationship to even theoretical safety goals. Answering the phone, anatomy, hair massage, and state law are flatly unrelated. Hair wrappers are not required to learn EPA regulations, or shop management. TENN. COMP. R. & REGS 0440-01-.03(d) (Lexis 2016). What a shampooer needs to know is shown by the PSI bulletin, which details the proper sanitation procedure. Using hand sanitizer, wiping the counter and throwing away waste do not require 300 hours at a for-profit beauty school.[4] In other words, "the statue's effect as a whole is so unreasonably burdensome that it [is] oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 87.

The Board tries to explain that the chemicals hours, which include knowledge of OSHA and EPA requirements, go to safety. Def's Resp. at 19. Why a person needs to know this to know any of this to apply commercially

[4] The PSI candidate information bulletin: https://candidate.psiexams.com/bulletin/display_bulletin.jsp?ro=yes&actionname=83&bulletinid=140&bulletinurl=.pdf

available products, especially ones as sure to be as FDA tested as shampoo, remains a mystery. Thus, it should come as no surprise that the Board's proffered examples of harm do not actually involve shampooers.

Appearing to acknowledge that the practitioner who scaled a customer's scalp with hair color was a licensed cosmetologist, the Board tries to rehabilitate the example by speculating that this *could* have happened if a shampooer had rinsed out the color. Def's Resp. 15, 16, n. 7; Ex. C, Discovery Items, TN_0001. Of course that is not what *actually* happened. It seems an especially misplaced concern since Ms. Pritchard, who wants to work in a natural hair salon, Pritchard Decl. at ¶ 11, will not use chemicals. If there were appreciable risk, one would expect to find an actual example instead of a made-up one. This was a cosmetologist's mistake. No one denies a shampooer can rinse, Def's Resp. at 14, but any rinsing of chemicals must have been chemicals that were applied by a cosmetologist in the first place. *See* Tenn. Code Ann. § 62-4-102(a)(3)(A) (LexisNexis 2016). What happened in the Board's example was that a cosmetologist burned a customer's scalp while applying chemicals. The cosmetologist must properly drape before applying the color in the first place, even if a shampooer could later rinse the color out. Assuming the cosmetologist had done his or her job correctly in the first place, rinsing would not harm the customer. That this actual incident occurred in spite of a much more rigorous licensure requirement, management supervision and the safety standards imposed on this shop,

undercuts the idea that a shampoo license is the way to prevent such incidents.

The second incident, a 2015 head lice scare that took place, ironically, at a cosmetology school is also not evidence because it had nothing to do with shampooing. If is an example of anything, it is that even within the safe confines of a hairdressing school, where dual-licensed cosmetologists instruct licensee applicants at a licensed school on material they are required to know for licensure, there is still some risk. The double irony of this situation is that the instructors still did not even properly identify the problem—the bug causing all the fuss was lice, not scabies. *See* Ex. B, Def's Resp. to Admis. and Produc. 3. This illustrates quite nicely that life is not foolproof, and that the Board may not base the need for a mandatory license on such a slender reed.

Even though Ms. Richmond theorizes about the possible spread of lice, Def's Resp. at 13-14, again, there is no evidence it has ever happened, and the only part of the shampoo testing that could have theoretically prevented the transmission of hair-borne pests would be the use of hand sanitizer. It might be helpful if a shampooer identified lice or scabies so they can inform the customer, but neither shampooers nor cosmetologists list treatment in their job duties. Safety is only implicated by the *transmission* of the disease, and that can evidently be thwarted by the simple application of hand sanitizer, hardly worth a 300-hour license.

2. *The Board has not distinguished* Craigmiles *and* Bah *is not applicable.*

The Board's assertion that, unlike in *Craigmiles,* Tennessee is interested only in protecting the public cannot be taken at face value given the lengths it goes to argue the legislative history is irrelevant. Def's Resp. at 17. The State made the same arguments in defending its casket laws. *Craigmiles*, 312 F.3d at 225-6. It was contrived then and now. The Sixth Circuit saw through this even in the absence of an ugly legislative record as in here. So should this Court identify the claim of to be protecting safety pretextual, a relatively simple matter of taking the legislature at its word when it enacted the law and examining the absence of actual evidence.

The Board is unable differentiate from *Craigmiles* by pointing out that anyone can still sell shampoos unlike the casket makers. Def's Resp. at 17. The operative principle was the restraint on the trade; the Sixth Circuit placed no significance on the fact of the trade being in sale. The shampoo law "close[s] off the market," Def's Resp. at 18, just as much as the casket law. The casket makers could still sell the caskets. They just had to become licensed funeral directors first. That there was an available avenue was no excuse because the time and cost of education and training was "undoubtedly a significant barrier to entering the Tennessee casket market." *Craigmiles*, 312 F.3d at 224-25. This could very well be said about shampooing especially given how few have managed to overcome the burdens of the law. Just as in

Craigmiles, the burdens of getting the shampoo license are irrational even if this Court were to use the minimalistic federal test only.

In the end, *Craigmiles* decides the Fourteenth Amendment question because a full-blown licensure requirement is the sort of "circuitous path" to legitimate ends of which courts should be leery. *See Craigmiles*, 312 F.3d at 227. The direct path would be to simply mandate a shampooer wash their hands and wipe the counter. Assuming this needs to be taught, the Board cannot explain how a hair wrapper can do it in eight hours but a shampooer needs 300. Everything else in the 300-hour program and two tests is a completely roundabout way to achieve the goals of safety. Like *Craigmiles*, we are left with the "more obvious illegitimate purpose to which licensure provision is very well tailored." *Id.* at 229.

The answer is the same under equal protection. The Board tries to avoid the equal protection issue by relying on another, unpublished case. Def's Resp. at 21 (citing *Bah v. Attorney General*, 2015 U.S. App. LEXIS 7882 (6th Cir. 2015) (unpublished) (copy of opinion attached)). Based on *Bah*, the Board contends that *Craigmiles* was really not an equal protection case because the claim involved different classes being treated the same, instead of the similar classes being treated differently. *Id.* The Board is trying to re-litigate its motion to dismiss claim, which it already lost. And unless a Supreme Court case requires modification, under no circumstances could a later panel of the Sixth Circuit overrule a published case unless it was sitting

en banc. *Darrah v. City of Oak Park*, 255 F.3d 301, 310 (6th Cir. 2001). Finally, this is at best a purely academic critique of *Craigmiles* because Ms. Pritchard maintains she is similarly situated to licensed shampooers/cosmetologists because she is just as safe as they are, and is being treated differently because she may not wash hair without it being a crime while they can. There is no natural and reasonable relation, *see State v. Nashville, Chattanooga & St. Louis Ry. Co.,* 135 S.W. 773, 775 (Tenn. 1910), between protecting the public and the educational and testing regime.

Besides, *Craigmiles* was clearly an equal protection case.[5] 312 F.3d at 224 ("While feared by many, morticians and casket retailers have not achieved the protected status that requires a higher level of scrutiny under our Equal Protection jurisprudence."); *see also Craigmiles v. Giles*, 110 F. Supp. 2d at 665, 667 (violates equal protection and due process). This is how other courts have viewed *Craigmiles* in *published* and unpublished cases alike. *See, e.g.*, *St. Joseph Abbey v. Castille*, 700 F.3d 154, 161 (5th Cir. 2012) *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 n. 8 (E.D. Ky. 2014).

In generally analogizing this case to *Bah*, Def's Resp. at 12-13, the Board misses four things: 1) the lower court distinguished *Craigmiles* on the ground that the plaintiffs never alleged that the license was enacted as a form of protectionism, 2014 U.S. Dist. LEXIS 79121, at *42 (W.D. Tenn. 2014); 2) the plaintiffs never challenged the legitimacy of the state's safety

[5] Ms. Pritchard continues to acknowledge that the privileges and immunities claim has been foreclosed by the *Slaughterhouse* cases. *See Craigmiles*, 312 F.2d at 229. She wishes to preserve the claim for the record.

goals, 2015 U.S. App. Lexis 7882, at *7; 3) or the required general instructions, 2014 U.S. Dist. LEXIS 79121 at *32-33; and, 4) *Bah* never considered the question under Tennessee Constitutional law. *Id.* at *50-51. Ms. Pritchard is likely to prove protectionism. She does challenge the legitimacy of safety as a goal. She also is likely to prove the instructions are completely unnecessary or excessive, and this Court has original jurisdiction over the Tennessee Constitutional claims. Beyond the specious similarity of both cases being challenges to Tennessee cosmetology laws, they are not comparable.

B. The shampoo license is appropriately described as a monopoly.

By arguing that because the license is theoretically obtainable so it is not a monopoly, the Board misunderstands the meaning of the term "monopoly" at a profound and fundamental level. Def's Resp. at 9-10. This position is without legal support and oblivious to the reality of how harsh ever-expanding licensure laws are on those most need of work. An originalist, textualist analysis of history and federal, Tennessee and North Carolina case law demonstrates that when the Founders used the term, "monopoly," they were contemplating precisely the sort of state-created oligopolies in the workplace that are at issue here.

In a practical sense, the Board's position is oblivious to the economic reality of many Tennesseans. Just because Tennessee has erected an obstacle course instead of a wall does not make it any less of a monopoly. At some

point in time, licensing restrictions can be come so burdensome as to amount to "as strict legal barriers to entry." Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing,* 39 Harv. J.L.& Publ. Pol'y 209, 211 n. 3 (Winter, 2016). Just as how at some point burdens on the right to vote are tantamount to a bar on the right to vote, burdens on entering a field are at some point a total bar. The fact remains that the Board has succeeded in keeping the number of shampooers to 36, Gumucio Decl. at ¶ 9, and they have far and away the highest wages of any shampooers in the country. This looks to all the world like exclusivity. A high enough hurdle looks no different from a wall to the person asked to jump it.

The recognized examples of a monopoly in the case law also demonstrate its applicability here. The North Carolina Supreme Court held that a board that tried to license dry cleaning violated its identical anti-monopolies clause. *See Harris*, 6 S.E.2d at 864. It did not matter that the license was available to all. North Carolina's dental board was recently denied state immunity in a licensing case because its Board was packed with market participants engaging in patently anti-competitive behavior. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). The Tennessee Court invalidated Johnson City's restrictions on taxicabs. *See Checker Cab*, 216 S.W.2d at 337. Those restrictions took the form of a certificate of need—restrictive, but not a barrier *per se*. *Id.* The *Craigmiles* Court characterized

the licensure scheme they struck as colleting "monopolistic profits." 312 F.3d at 228. The case law is in accord with Ms. Pritchard's position

The Board's position is not historical. In ascertaining the meaning of the term, "monopoly," the proper question is the intent of those who wrote it. *See Barrett v. Tenn. Occupational Safety & Health Review Comm'n*, 284 S.W.3d 784, 787 (Tenn. 2009). To understand "the founding generation's immediate source of the concept," one must resort to the common law and the Anglo-American tradition. *See Crawford v. Washington*, 541 U.S. 36, 43 (2004) (discussing the Confrontation Clause). The term, "monopoly," and its variants, originates in the common law and was well understood at the time of the founding. *Standard Oil Co. v. United States*, 221 U.S. 1, 51 (1911). Lord Coke, Adam Smith, and William Blackstone all support the idea a monopoly would include restraints on trade like a license.

In an exhaustive historical analysis by the Supreme Court on the definition of a monopoly, the Court observed that Lord Coke recognized a monopoly as restraint on the freedom to engage in a lawful trade by an institution granted by the king to "any person or persons, bodies politic or corporate." *Id.* at 51-52; Lord Coke "exerted a strong influence on colonial law. … [c]onsequently American lawyers [at the time of the Revolution] were well-informed about English constitutional principles, including … Bonham's case." *see also* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and*

the Fifth Amendment, 58 Emory L.J. 585, 600, 614 (2009) (describing Dr. Bonham's case). The Tennessee Supreme Court has long looked to Lord Coke's opinions in considering the definition of a monopoly. *See Memphis v. Memphis Water Co.* 52 Tenn. 495, 529 (1871) ("We know of no better definition of a monopoly, than that given by Lord Coke. …"). The Court recognized that as used in the Sherman Act, "[u]ndoubtedly," the term includes "every act" intended diminish competition and enhance prices through restraints on the right to pursue a calling because of its common law meaning. *Standard Oil*, 221 U.S. at 57, 61.

Likewise, Adam Smith referenced "statutes of apprenticeship, and all those laws which restrain, in particular employments, the competition to a smaller number than might otherwise go into them" when he described "*a sort of enlarged monopolies*" that artificially inflate prices and "exclude many people from his employment."[6] Adam Smith was a key figure in the Scottish Enlightenment that deeply influenced James Madison, the principle author of the Constitution. *See* Iain McLean & Scott Peterson, *Adam Smith at the Constitutional Convention*, 56 Loy. L. Rev. 95, 120 (Spr. 2010). In sum, there is a tremendous of evidence that when the drafters used the term, "monopoly" in the 1796 Constitution, they were referencing restraints upon the free pursuit of employment. The Board produces zero evidence that

[6] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, 26 (Edward Cannon, ed., William Benton 1952).

the drafters would have limited the usage of the term to situations that were total prohibitions.

Blackstone likewise recognized that at common law "every man might u[s]e what traded he plea[s]ed." Blackstone outlined the case for and against the precursor to licensure, apprenticeships, as being a prerequisite to enjoy the exclusive right to practice a trade. 1 William Blackstone, *Commentaries on the Laws of England*, 422, 427 (1771) (copy attached). He described mandatory apprenticeships as creating a monopoly: "the adver[s]aries to which provis[s]ion [s]ay, that all re[s]trictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it alledge [sic], that un[s]kilfulne[s]s [sic] in trades is equally detrimental to the public, as monopolies." *Id.* The Board's position is flatly contradicted by a historical analysis.

In telling us how few people have gotten the license—36—it is as if the Board strives to show that it has practically brought the field under single control. Gumucio Decl. at ¶ 9, Ms. Gumucio infers this is lack of interest in shampooing. In actuality, she has mustered overwhelming evidence that the licensure requirement has resulted in the practical suppression of effective business competition and to control prices to the public harm.

Because the Board's license fits neatly within the definition of a monopoly, this Court employs the legitimate relationship test. Unlike under federal Fourteenth Amendment law, the Court must assess the motivation of

the legislature. *See Checker Cab*, 216 S.W.2d at 337. The Tennessee Constitution prohibits monopolies "conferred *because of* favoritism to the donee." *Leeper v. State*, 52 S.W. 962, 965 (Tenn. 1899) (emphasis added). This Court should look to the stated concerns of the legislature in passing this law because it was done because of favoritism.

This is a monopoly. The Board's definition is without historical or legal support. And it is one that the Board does not even try to justify it as passing the legitimate relation test. Ms. Pritchard does not maintain that the anti-monopolies clause would forbid all licenses, including doctors. Def's Resp. at 9. They just must have a legitimate relationship to an actual moral or health concern.

C. *The Board has no jurisdiction over shampooing.*

The Board's "umbrella" theory of shampoo licensure—that is, that since cosmetology includes shampooing and cosmetology requires a license, shampoo requires a license, Def's Resp. at 7—cannot be defended. First, under that logic, a person would need to get a cosmetology license to shampoo. The Board cannot point to anywhere in the text that supports the notion that a shampooing license is an acceptable alternative. Shampooing either requires a cosmetology license or nothing at all, and the Board seems to agree that a cosmetology license is not necessary to shampoo. *Id.*

Second, if everything under the umbrella of "cosmetology" requires a license, then that would mean that a practice as innocuous as brushing hair,

see Tenn. Code Ann. § 62-4-102(a)(21) (LexisNexis 2016) (including "brushing" in shampooing) requires a cosmetology license. A child who massages her grandfather's foot for a nickel would need to go to school for 1,500 hours. *See* Tenn. Code Ann. § 62-4-102(a)(3)(D) (massaging feet with hands). The sort of footbath Jesus administered to his disciples in John 13: 2-12 would require a license. *See id.* (cleansing/beautifying feet with hands). If this Board is assuming such unprecedented and intrusive powers, it should clearly say so. The very possibility underscores the importance of court intervention.

Third, the umbrella theory is undercut by fact that other fields under the umbrella of cosmetology are explicitly set aside for licensure in Tenn. Code Ann. § 62-4-108. Manicuring, aesthetics, natural hair styling are all, like shampooing, defined under the umbrella of shampooing, but unlike shampooing, are included in Section 108. The Board barely addresses this fatal flaw in their argument. Def's Resp. at 7, n. 3. More than "inelegant," *id.,* it would mean that the legislature meant to impose a license for shampooing without ever explicitly mentioning it, but only for shampooing and not in any other instances. There is no support for the idea that the legislature meant to employ this curiously coy and oblique way of licensing but only in exactly one case that the Board happens to be now defending. This strains credulity past its breaking point.

II. The ongoing violence to Ms. Prichard's constitutional rights is an irreparable harm and other factors.

The Board first argues that since Ms. Pritchard is not actively in the shampoo trade, she will not suffer a loss of income. Def's Resp. at 5. The loss of constitutional rights for any period of time is an irreparable harm. This does not only apply to the loss of First Amendment freedoms as suggested in Def's Resp. at 3. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 578 (6th Cir. 2002) (citing cases); *De Leon v. Perry*, 975 F. Supp. 2d 632, 663-64 (W.D. Tex. 2014) (equal protection/due process rational basis). The reason Ms. Pritchard is not shampooing is because it is illegal to do so. The Board would place her in a classic dilemma. She need not subject herself to civil and criminal sanctions before her family's future is important enough to protect. The sooner Ms. Pritchard can supplement her income, the quicker her retirement grows and she can upgrade her family's standard of living. This is a very real concern for her that should not be so lightly brushed aside.

While the Board is correct that ordinarily the temporary loss of a job is not irreparable, Def's Resp. at 3, the Board ignores the reason why. Income is compensable through monetary damages, so a victorious plaintiff may recoup later. *See Overstreet*, 305 F.3d at 578. Ms. Pritchard, however, may not recover funds because of state immunity, *see* Tenn. Code. Ann. § 20-13-102 (LexisNexis 2016), and *Overstreet* otherwise recognized that a harm is

irreparable if it is not fully compensable by monetary damages. 305 F.3d at 578. Ms. Pritchard does have a financial interest that she cannot reclaim.

The same can be said with the other factors. The public interest is never in the enforcement of an unconstitutional act. *Am Freedom Def. Initiative v. Suburban 15 Mobility for Reg. Transp.*, 698 F.3d 885, 896 (6th Cir. 2012). The interest in "the process of representative democracy," Def's Resp. at 4, quails before the Constitutions, which are, after all, counter majoritarian by their very nature. Besides, voters ratified those by much wider margins. *See De Leon*, 975 F. Supp. 2d at 664. Now that we know what an actual barrier the shampoo law is, with only 36 people licensed in the whole state the burden on the public has to be considered substantial. The period of "uncertainty," Def's Resp. at 4, is not a public harm. Anyone who theoretically would shampoo during this period will only have been financially better for it, even if they later have to quit. And the Board's balancing argument is a rehash addressed above. Def's Resp. at 5.