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

ELIAS ZARATE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 18-534-II**
	)	
THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS, et al.	)	
	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Elias Zarate submits this memorandum of law and facts in support of his Motion for Summary Judgment.

INTRODUCTION

This lawsuit challenges a single-sentence provision of Tennessee's licensing criteria to practice barbering. Tenn. Code Ann. § 62-3-110(b)(2), mandates a high school diploma, or equivalent, to be eligible for a master barber license (the Academic Achievement Requirement). This restriction unconstitutionally infringes on Elias Zarate's constitutional right to earn an honest living because there is no dispute in material fact that: a) subjecting barbers but not cosmetologists and other more dangerous, (Emergency Medical Responder) or lauded professions

(elected official) to the requirement that they graduate high school has no tendency to promote any public interest; and b) the Academic Achievement Requirement has no real tendency to protect the public's health and safety.

Elias Zarate is prohibited from becoming a barber, his dream job. It is not because he is unwilling to work hard or is incapable of becoming a great barber, but because he never finished high school. Due to a series of terrible personal tragedies that left him essentially homeless, and caring for his younger siblings, Elias dropped out in the middle of his senior year. SUMF ¶¶ 12-16, 19, 22, 23. This disqualifies him from becoming a barber.

The state's power to protect public health and safety through licensing is not in dispute. But the police power is not limitless. The Board's enforcement violates the Tennessee Constitution's right to equal rights, privileges, and immunities. Tenn. Const. art. I, § 8; *id*. art XI, § 8. None of the Board's interests are advanced by classifying *barbers* separately from cosmetologists when it comes to requiring a particular level of education. Doing so undermines the intended purpose of the law in the first place—harmonizing licensing restrictions for barbers and cosmetologists. The Board even admits that its justifications for the Academic Achievement Requirement are "unrelated to the requirements established by law for any other position or regulatory scheme." SUMF ¶ 244. Nor does it encourage education or facilitate legal compliance when the people who write the laws themselves–the governor, senators, representatives–do not need a high school degree. The Board lacks a real and substantial basis for the classifications of barbers.

Requiring barbers graduate high school does not advance the legitimate goal of ensuring public safety. The only difference in practice between barbers and cosmetologists involves the use of straight razors. But the state already has a rigorous licensing process in place to filter out underqualified barbers. Two (2) more years of high school has nothing to do with straight razors. Emergency Medical Responders (EMRs) perform lifesaving interventions needing only to be fluent in English.

Whatever the Board may argue, Plaintiff's ability to practice barbering without completing high school is consistent with the state's legitimate goals. Below Elias shows why the applicable legal standards and undisputed material facts compel a judgment in his favor.

LEGAL OVERVIEW

This case can and should be decided in Elias's favor on his motion for summary judgment. "Properly used, summary judgment helps strip away the underbrush and lay bare the heart of the controversy between the parties." *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993) (quoting William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 451 (1991)). The material facts here are not in dispute. The heart of the controversy is this: Is it reasonable to prohibit Elias from getting a barber license, when the practice of barbering is legally indistinguishable from other professions that do not require high school equivalency, and when there is no evidence that the Academic Achievement advances any legitimate government interest? Part I below discusses the standard under which summary judgment motions are decided. Part II discusses the constitutional standard for

claims under the similar, but not identical, state and federal jurisprudence.

I. SUMMARY JUDGMENT STANDARD.

When all the evidence points in one and only one direction, courts can and should enter summary judgment on the undisputed facts. "Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Rye v. Women's Care Ctr. of Memphis, MPLLC.*, 477 S.W.3d 235, 250 (Tenn. 2015) (quoting Tenn. R. Civ. P. 56.04). Tennessee's summary judgment standard "fully embrace[s] the standards articulated in the [federal] *Celotex* trilogy." *Id.* at 264; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 321–25 (1986) (holding summary judgment proper when movant shows there is no evidence to support nonmovant's case); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–51 (1986) (holding "substantive law" governs "which facts are material," and "genuine" disputes require "evidence" to support nonmovant's argument); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–88 (1986) (requiring nonmovant to "do more than simply show that there is some metaphysical doubt as to the material facts"); *see also Byrd*, 847 S.W.2d at 211–14 (adopting *Celotex* trilogy), *limited on other grounds by Rye*, 477 S.W.3d at 257–61 (settling confusion about the meaning of *Byrd* and subsequent Tennessee case law, and rejecting difference between Tennessee and federal summary judgment standards). When the material facts are not in doubt, the courts should apply the law.

"Tennessee courts have 'always been empowered to decide legal questions upon agreed facts.'" *Rye*, 477 S.W.2d at 262 (quoting Judy M. Cornett, *Trick or Treat? Summary Judgment in Tennessee after* Hannan v. Alltel Publishing Co., 77 Tenn. L. Rev. 305, 311–12 (2010)).

As at trial, an evidence-free defense cannot prevail over a valid, evidence-supported claim. So long as the undisputed facts entitle the plaintiff to judgment as a matter of law, summary judgment remains appropriate in cases where, as here, the movant bears the burden of proof at trial. *See* Tenn. R. Civ. P. 56.01 (authorizing summary judgment in favor of "part[ies] seeking to recover upon a claim . . . or to obtain a declaratory judgment"). In such cases, the moving party "must lay out the elements of its claim, citing the facts it believes satisfies those elements, and demonstrating why the record is so one-sided as to rule out the prospect of the nonmovant prevailing." 10A Charles Alan Wright et al., *Federal Practice & Procedure* § 2727.1 & n.19 (4th ed. 2019) (citing cases). Below, Elias lays out the elements of his claims, and demonstrates in the argument which follows that the record in this case is so one-sided as to rule out the possibility of the Board prevailing.

II. CONSTITUTIONAL STANDARD.

This Court has already recognized that Elias's constitutional right to earn a living is at issue. *See* Order Den. Mot. Dismiss at 4 (Apr. 13, 2018) (constitutional challenges may not be presented to administrative tribunals); *see also Livesay v. Tennessee Bd. of Exam'rs in Watchmaking,* 322 S.W.2d 209, 213 (Tenn. 1959) (right to earn a living is "fundamental"); *Harbison v. Knoxville Iron Co.*, 53 S.W. 955, 957 (Tenn. 1899) (liberty includes the right "to pursue any lawful calling, vocation,

trade, or profession"). The Tennessee Constitution guarantees equal "rights, privileges, [and] immunitie[s]" to all of its subjects. Tenn. Const. art. I, § 8; *id.* art. XI, § 8. It also prohibits deprivations of "liberty or property" except in accordance with the "law of the land." Tenn. Const. art. I, § 8; *id.* art. XI, § 8. In modern times, the Tennessee Supreme Court refers to these constitutional protections—the bases of Elias's two state claims—as substantive due process and equal protection, roughly equating them to his third claim based on the Fourteenth Amendment's baseline protections of liberty. *See, e.g.*, *Consolidated Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582-COA-R3-CV, 2005 Tenn. App. LEXIS 382 at *8-20 (Tenn. Ct. App. June 30, 2005) (copy of opinion previously provided). Depending on the right being infringed, Tennessee courts apply one of three levels of constitutional scrutiny. *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 153 (Tenn. 1993). The Academic Achievement Requirement infringes on two rights that the Tennessee Supreme Courts has explicitly called "fundamental" and which therefore deserve heightened scrutiny,[1] *see Livesay*, 322 S.W.2d at 213 (right to earn a livelihood*); Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012) (right to own, use, and enjoy private property), instead of the rational basis standard used in federal courts to review economic liberty claims. *See Craigmiles*, 312 F.3d at 223.

---

[1] The state has reaffirmed that the right to earn a living "is a fundamental civil right." Tenn. Pub. Ch. 1053 (2016) (enacted as Tenn. Code Ann. § 4-5-501, *et seq.*); available at: https://publications.tnsosfiles.com/acts/109/pub/pc1053.pdf. *See* Tenn. R. Evid. 202(a).

The Tennessee Constitution provides for greater protection of liberty, and that should encompass economic liberty. Unlike the federal equal protection clause contained within the Fourteenth Amendment and primarily intended to ensure full citizenship for newly emancipated slaves, *see Slaughter-House Cases*, 83 U.S. 36, 81 (1872), Tennessee's equal privileges clause was added in 1835. *See* Tenn. Const. art XI § 8. It meets the test set for providing greater protection to economic liberty. Tennessee's Constitution affords greater protection of liberty when there are "sufficient textual or historical differences" from its federal counterpart. *Nunn v. Tenn. Dep't of Corr.*, 547 S.W.3d 163, 189 (Tenn. Ct. App. 2017) (quotations omitted); *Tenn. Small Sch. Sys.*, 851 S.W.2d at 152 (quotations omitted). The textual differences are readily apparent. To determine historical differences, courts examine the proceeding of the Constitutional Convention which adopted the provision. *See Shelby County v. Hale*, 292 S.W.2d 745, 748 (Tenn. 1956). The enactment of the equal privileges clause in 1834 was well documented, and demonstrates its historical purpose.

Economic concerns animated the enactment of the equal privileges clause. The 1834 convention enacting the equal privileges clause "specif[ied] a few of the more troublesome and improper subjects," that prompted the amendment. *Journal of the Convention of the State of Tennessee* at 191 (Nashville, W. Hassell Hunt & Co. 1834) (reprinted in Forgotten Books) ("1834 Journal"). They involved licenses to "hawk and peddle, and retail liquors," operate mills or fish traps. *Id.* at 191-92 (noting waste of "much time and money in debating the propriety of authorizing mill dams and fish traps."). Unlike the Fourteenth

Amendment, Tennessee's equal protection provision was squarely aimed at *economic* inequities. The expressed purpose of the equal privileges clause was that "[a]ll such legislation will come under the ban of the recommended clause." 1834 Journal at 192. Thus, the textual and historic differences warrant departure from the federal equal protection standard.

Admittedly, the Supreme Court has also said state and federal equal protection provisions confer "essentially the same protection," despite the textual differences. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 152. And yet in that same opinion, the Court unambiguously recognized that "[t]he equal protection provisions of the Tennessee Constitution and the Fourteenth Amendment are historically and linguistically different," and "this Court is always free to expand the minimum level of protection mandated by the federal constitution." *Id.* The Court then proceeded to engage in the fact-bound rational basis analysis urged by Elias. Doing anything less for the economic liberty claims advanced here would contravene the important role of the judiciary in upholding "the intentions of the persons who ratified the [1835 Tennessee] constitution." *Martin v. Beer Bd.*, 908 S.W.2d 941, 947 (Tenn. Ct. App. 1995) (citations omitted). In short, neither the text nor history can support the idea that state standards for economic liberty are equal to the federal standard.

For purposes of this motion, however, the Court need not apply heightened scrutiny because the Board cannot prevail even under the reasonableness standard used in Small Schools by which Tennessee courts typically determine whether the legislature has "correctly exercised its police power in regulating an activity." *Dial-A-Page, Inc. v.*

Bissell, 823 S.W.2d 202, 206-07 (Tenn. Ct. App. 1991) (citing *Chapdelaine v. Tennessee State Bd. of Exam'rs*, 541 S.W.2d 786 (1976)); *see also Ford Motor Co. v. Pace*, 335 S.W.2d 360 (Tenn. 1960). Elias outlines the core requirement of reasonableness and demonstrates that under Tennessee's equal protection standard, legislative classifications must be based on real and substantial differences in Section II.A. Section II.B shows that under Tennessee's due process standard, in order for laws to be reasonable, they must have a real tendency to promote the public's health, safety, and moral well-being. Section II.C then shows that under the basic protections afforded by the Fourteenth Amendment, a law and its classifications must be rationally related to a legitimate governmental interest. Laws like this only serve the purpose of protecting a discrete economic group (i.e., other licensed professionals).

A. Legislative Classifications Must Be Based on Real and Substantial Justifications Germane to the Purpose of the Law.

Classifications must be reasonable, with a specific view to whether a real and substantial basis exists for the differential treatment of the classification, in this case, barbers. "The fundamental rule" in a Tennessee equal protection case "is that all classification[s] must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law." *State v. Tester*, 879 S.W.2d 823, 829 (Tenn. 1994) (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1911)); *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (quoting *The Stratton Claimants v.*

The Morris Claimants, 15 S.W. 87, 92 (1891) (same: courts look to "the situation and circumstances which constitute the reasons for and the basis of the classification")); *Dilworth v. State*, 322 S.W.2d 219, 222 (Tenn. 1959) (classifications must relate to "the objects of the legislation"); *see also Lehr v. Robertson*, 463 U.S. 248, 265 (1983) (distinctions in classes must be relevant "to a legitimate government objective"). This "real and substantial" standard requires meaningful scrutiny of legislative classifications. When determining whether a classification is reasonable, the court must determine whether the professions are alike *in regard to the asserted interests*.

The facts determine whether a classification is reasonable. *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153 (citing *Harrison v. Schrader*, 569 S.W.2d 822, 825–26 (Tenn. 1978) (the "determinative issue is whether the facts show some reasonable basis for the disparate state action"). The facts have always mattered in a Tennessee rational basis case. *See Stalcup v. City of Gatlinburg*, 577 S.W.2d 439, 442 (Tenn. 1978) ("the question being a practical one varying with the facts in each case"); *Kree Inst. of Electrolysis, Inc. v. Bd. of Electrolysis Exam'rs.*, 549 S.W.2d 158, 160 (Tenn. 1977) (upon "a proper evidentiary showing made," a court could inquire into reasonableness of requirements for electrologists); *Chapdelaine*, 541 S.W.2d at 787–88 (rejecting the rational basis challenge to a land surveyor "purely from an evidentiary standpoint" because plaintiff failed to introduce proof of his factual assertions); *Shatz v. Phillips*, 471 S.W.2d 944, 945 (Tenn. 1971) (noting the undisputed record on which plaintiff's rational basis challenge was sustained); *Bd. of Comm'rs of Roane Cty. v. Parker*, 88 S.W.3d 916, 922 (Tenn. Ct. App.

2002) (sustaining a rational basis challenge where plaintiffs had "carried the burden of proof"); *State v. Whitehead*, 43 S.W.3d 921, 926 (Tenn. Crim. App. 2000) (reasonableness of classification "depends on the facts in each case").

Tester is illustrative. There, a Washington County criminal defendant challenged the constitutionality of a statute under which he would have been eligible for work release but for the fact that he was convicted in Washington County and not Davidson, Shelby, or Moore Counties. 879 S.W.2d at 825. The Court applied Tennessee rational basis review and held that the state's assertion of a "real and substantial distinction" with respect to overcrowding in Davidson, Shelby, and Moore Counties "ignore[d] the evidence in the record, which indicate[d] that *Washington County* ha[d] experienced serious jail overcrowding that was directly caused by the mandatory incarceration of *second time DUI offenders*" such as the defendant. *Id.* at 829. Because the evidence did not support the state's arguments for limiting the work release program to three counties, the *Tester* court declared the program's limited application unconstitutional. *Id.* at 830. *Tester* was at least the tenth Tennessee opinion to require a "real and substantial" difference in order to uphold a legislative classification under rational basis review. *See Tester*, 879 S.W.2d at 829; *Metro. Gov't of Nashville & Davidson Cty. v. Shacklett*, 554 S.W.2d 601, 608 (Tenn. 1977); *Logan's Supermarkets, Inc. v. Atkins*, 304 S.W.2d 628, 632 (Tenn. 1957); *State v. Greeson*, 124 S.W.2d 253, 256, 258 (Tenn. 1938); *In re T.M.G.*, 283 S.W.3d 318, 325 (Tenn. Ct. App. 2008); *State v. Whitehead*, 43 S.W.3d 921, 927 (Tenn. Crim. App. 2000); *Smith v. State*, 6 S.W.3d 512, 519 (Tenn. Crim. App. 1999); *Worley*

v. State, No. 03A019708JV00366, 1998 Tenn. App. LEXIS 103 at *1 (Tenn. Ct. App. Feb. 10, 1998); *Templeton v. Metro. Gov't of Nashville & Davidson Cty.*, 650 S.W.2d 743, 756–58 (Tenn. Ct. App. 1983); *Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 776.

This principle applies with full force when the government enacts laws that "exclude certain persons from engaging in [a] business while allowing others to do so." *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735, 737 (Tenn. 1956) (citing *State v. Harris*, 6 S.E.2d 854 (N.C. 1940)). In *Consumers Gasoline Stations*, the Tennessee Supreme Court struck down a municipal ordinance which prohibited the installation of underground fuel tanks, even though the ordinance was rationally related to fire prevention as "an initial proposition." *See id.* at 736. Even though the business was unquestionably "dangerous," *id.* at 737, the ordinance in question nevertheless did not apply to several other property owners with preexisting underground tanks "several times the maximum capacity provided for by the ordinance," with the "obvious effect" of "prohibit[ing] the construction of additional filling stations . . . which would compete with those [already] in existence." *Id.* at 736–37. Because of its latent underinclusiveness, the Court found that the ordinance had the "obvious effect" of "prohibit[ing] the construction of additional filling stations … which would compete with those [already] in existence." *Id.* at 736–37. This, the Court found, "unquestionably denie[d] the equal protection of the laws" in violation of the Tennessee Constitution. *Id.* (citing Tenn. Const. art. I, § 8).

The Tennessee courts have repeatedly found this same sort of underinclusiveness fatal in challenges under Tennessee's constitutional

guarantee of equal rights, privileges, and immunities. Three cases stand out. In *Shatz*, the Tennessee Supreme Court declared it arbitrary and unreasonable to prohibit "the storage and/or salvaging of junk and other used material" in a "light industry" district when the same was permitted in the "heavy industry" district across the street. 471 S.W.2d at 946–48. The junk salvaging prohibition was the only difference between the two districts under the ordinance, which otherwise allowed all "industrial" uses. *Id.* at 946. The record showed that "a casual passer would not know what business was being carried on" in the plaintiff's "modern, attractive" building, and that the plaintiff's scrapping business was "free from noise, odor, fumes, and other objectionable features." *Id.* at 945. In *Consolidated Waste*, the Tennessee Court of Appeals held it arbitrary and unreasonable to require construction-and-demolition landfills, but not other, more hazardous types of landfills, to locate at least two miles away from schools and parks. 2005 Tenn. App. LEXIS at **15–19. And in *Board of Commissioners of Roane County*, the Court of Appeals held it arbitrary and capricious to rezone one semirural property for the keeping of large exotic animals but then deny the same rezoning to another rural property. 88 S.W.3d at 921–22. The Court ruled for the plaintiffs — who kept *a tiger* on their property — even though the zoning ordinance was found to be "in the public interest, since [it was] concerned with . . . dangerous animals." *Id.* at 922. This was because the "totality of the circumstances" allowed the plaintiffs to "carr[y] the[ir] burden of proof that the refusal of the County to rezone . . . was arbitrary and capricious." *Id*. Moreover, the concern about the potential danger of plaintiffs' tigers

was mitigated by the presence of "a rigid statutory scheme" in state law with which the plaintiffs complied. *See id.* at 922–24.

In sum, the Tennessee Constitution requires a substantive inquiry into whether "all persons who are similarly situated [are] treated alike by the government and under the law." *Consolidated Waste*, 2005 Tenn. App. LEXIS at *20. Persons are similarly situated when they pose equal threats to the government's purported interests. *Id.* And those differences must be germane to the purpose of the regulation. *Id.*

As the next subsection will show, the Tennessee Constitution also requires a substantive inquiry into the purpose of the regulation itself. Elias will now discuss the standard.

B. Licensing laws must be reasonably related to the protection of the public health or safety.

In order to be valid, a regulation must have a real tendency to advance a legitimate public interest.

The right to earn an honest living is a "fundamental one, protected from unreasonable interference by both state and federal constitutions." *Livesay,* 322 S.W.2d at 213 (quotation and citation omitted); *see also Wright v. Wiles*, 117 S.W.2d 736, 738 (Tenn. 1937) (requiring a license for photographers violates fundamental right to engage in lawful work). It is "firmly established" that states may license professions under the scope of their police powers when those professions have a real relationship to health and safety. *Greeson*, 124 S.W.2d at 255 (while also striking down regulation setting prices for barbers). But all restrictions imposed as part of an otherwise valid licensure scheme are not validated by simple

inclusion in the licensing scheme. *See id.* Courts must be mindful of licensing restrictions that are unconstitutional when they are "naked attempt[s] to raise a fortress protecting the monopoly rents that [the law's beneficiaries] extract from consumers," like Tennessee has enacted in the past. *See Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir. 2002); *see* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing,* 39 Harv. J. L. & Publ. Pol'y 209, 215 (Winter, 2016) (**"**Licensing requirements have become vehicles for cronyism at the public's expense."). Thus, courts must evaluate pretextual "claim[s] of the police power rule." *Livesay*, 322 S.W.2d at 213 (quoting *Greeson*, 124 S.W.2d at 258).

In *Livesay*, the Court declared unconstitutional Tennessee's licensure requirement for watchmakers because it was an "old and 'innocuous occupation,'" that did not affect any public interest. 322 S.W.2d at 213; *see also Wright*, 117 S.W.2d at 738 (cannot license photographers); *Campbell v. McIntyre*, 52 S.W.2d 162, 164 (Tenn. 1931) (a license "is an unreasonable and arbitrary restriction" violating due process); *Greeson*, 124 S.W.2d at 253. Tennessee courts have long protected the right to earn a living from unreasonably "preventing otherwise qualified persons from seeking entry into [a] regulated field of endeavor." *Kree*, 549 S.W.2d at 161. An act is irrational if it has no real tendency to further the public safety, health, or morals. *State ex. rel Loser*, 225 S.W.2d 263, 269 (Tenn. 1949) ("In determining whether such act is reasonable 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.").

In order to be valid, the Academic Achievement Requirement must have a "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." *Spencer-Sturla Co.*, 290 S.W. at 612–13. Invalid justifications are those that can be broadly stated against many professions. *See Livesay*, 322 S.W.2d at 213 (quoting *Greeson*, 124 S.W.2d at 258). Again, in *Livesay*, the Court discounted fraud prevention as a justification because it could would justify any licensing restriction and the police powers would become a "delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint," allowing the state to license "every conceivable business." *Id*. Under its analogous Law of the Land Clause, the Texas Supreme Court recently explained when striking down a restriction on cosmetology practices that the courts must also ask an additional question: whether "the statue's effect as a whole is so unreasonably burdensome that it becomes oppressive in relation to the underlying governmental interest." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 86-87 (Tex. 2015).

It is a bedrock requirement of Tennessee constitutional law that a law must bear "*a reasonable relationship to a legitimate state interest*." *Tester*, 879 S.W.2d at 828 (emphasis preserved) (quoting *Tenn. Small Sch. Sys.*, 851 S.W.2d at 153). Ever since Tennessee began regulating barbering, it has been a judicial function to determine whether the regulation has been "exercised in a reasonable manner and so as not to interfere with private rights." *Greeson*, 124 S.W. at 183–84 (striking down the price fixing measure for barber rates) (citing *Meyer v. Nebraska*,

262 U.S. 390 (1923)). The unquestioned right of the state to regulate barbering cannot justify laws "which have no real or substantial relation to the public, health, safety, or welfare." *Id.* at 190 (citing decisions in other states); *see also Bd. of Dispensing Opticians v. Eyear Corp.*, 400 S.W.2d 734, 742 (Tenn. 1966). The state's police power cannot extend to a business or profession where there is "no connection with [the] public health, morals, comfort or welfare of the people." *Eyear*, 400 S.W.2d at 742. Courts must also ask whether a law 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." *Spencer-Sturla Co. v. City of Memphis*, 290 S.W. 608, 612–13 (Tenn. 1926) (quoting *Motlow v. State*, 145 S.W. 177, 188 (Tenn. 1911)). In sum, the Tennessee rational-basis test requires two elements: first, a legitimate interest; second, a reasonable fit.

Economic protectionism is the principle that laws that enrich private parties are not legitimate public interests. *See Spencer-Sturla Co.*, 290 S.W. at 613 (courts must ask whether "the end had in view" is for "public generally, as distinguished from those of a particular class"); *Gentry v. Memphis Fed'n of Musicians*, 151 S.W.2d 1081, 1082 (Tenn. 1940) (invalidating a law "attempted for the declared purpose and the sole purpose of profit to another group of citizens"); *Bean v. Bredesen*, No. M2003-01665-COA-R3-CV, 2005 Tenn. App. LEXIS 267 at *19 (Tenn. Ct. App. May 2, 2005); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (striking down a Tennessee law allowing only those licensed by the state as a "funeral director" to sell caskets; discussed more fully in Section II.C below).

Just as the courts evaluate legislative classification by examining the facts, the reasonableness of a law is also determined by a judicial evaluation of facts. *See Chapdelaine*, 541 S.W.2d at 787 (plaintiff "failed to carry the burden of proof" establishing that land surveying fell outside the state's police powers); *Estrin v. Moss*, 430 S.W.2d 345, 349 (Tenn. 1968) (reasonableness varies "with the facts in each case") (quotation omitted); *State ex. rel. Loser v. Nat'l Optical Stores*, 225 S.W.2d 263, 269 (Tenn. 1949) ("In determining whether such act is reasonable 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."). Moreover, while it is beyond the purview of the courts to invalidate legislation on the ground that is unwise, "it cannot be denied that a sound judicial discretion is essential" to the question of whether a licensing provision is rationally related to a public interest. *Campbell*, 52 S.W.2d at 164; *see Pack v. S. Bell Tel. & Tel. Co.*, 387 S.W.2d 789, 793 (Tenn. 1965) (A court's role is to determine whether the legislation is so unconnected to its purpose as to constitute a "manifest abuse" of discretion.). A law survives Tennessee rational-basis scrutiny if the law's reasonableness is "fairly debatable," *e.g.*, *Stalcup*, 577 S.W.2d at 442, but it is the Court's role to scrutinize the government's asserted interests and give due weight to evidence that those interests are not reasonably served by the law at issue. *Tester*, 879 S.W.2d at 829–30 (finding that the government's rational-basis argument "ignores the evidence in th[e] record"); *Tenn. Small Sch. Sys.*, 851 S.W.2d at 154–56 (rejecting legitimacy of "local control" as justification for a funding disparity between school districts); *Kree*, 549 S.W.2d at 161 (proof "failed

to demonstrate" that college level courses for electrologists was an "arbitrary or unreasonable" requirement); *Spencer-Sturla*, 290 S.W. at 612–13 (determination of reasonableness is a "judicial function"); *Consol. Waste*, 2005 Tenn. App. LEXIS 382 at **118, 132 (striking down Metro zoning ordinance based on lack of "proof" that ordinance "meets [Metro's] stated goals").

C. Under the Fourteenth Amendment, licensing laws must be rationally related to an interest other than protecting a discrete economic group.

Despite important differences in the Tennessee and federal constitutions, in both the federal and Tennessee courts, a judicial evaluation of the facts determines whether a regulation has a rational basis. From the birth of the rational-basis test until today, federal courts have recognized the necessity of considering facts when evaluating whether a purported exercise of their police power has the actual purpose and *effect* of protecting the public health, safety, or morals.

The Court has also shown that facts matter in its other rational basis cases. When it first announced the rational basis test in *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), the Court made clear that litigants have the right to introduce evidence disproving the rationality of legislation and to challenge regulations "by proof of facts tending to show that the statute . . . is without support in reason." *Id.* at 153–154. Indeed, *Carolene Products* recognized that denial of the opportunity to disprove presumed facts in a rational-basis case "would deny due process." *Id.* at 152. Later, in *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955), the Court arguably downplayed the importance of

facts when challenging rationality. But just two years later, the Court was back to considering evidence to determine whether a regulatory scheme rationally advanced the claimed government interests. *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 246–47 (1957) (Though a state has a legitimate interest in high standards of qualification for lawyers, the weight of the evidentiary record did not "rationally justif[y] a finding that Schware was morally unfit to practice law."). And more recently, the Sixth Circuit held in *Am. Express Travel Related Serv. Co. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011), that under rational basis review "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional *unless in the light of the facts made known or generally assumed* it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." 641 F.3d at 689 (quoting *Carolene Prods. Co.,* 304 U.S. at 152 (emphasis added)). And the Supreme Court itself has, on many instances in the intervening decades, struck down regulations under rational basis review—even where the government had a legitimate state interest—where the facts demonstrated the regulation was not adequately connected to that purpose.[2]

---

[2] *See, e.g., Quinn v. Millsap*, 491 U.S. 95, 108 (1989) (ability to grasp politics not logically connected to land ownership); *Allegheny Pittsburgh Coal Co. v. Cty. Com.*, 488 U.S. 336, 345 (1989) (disparities in tax rates so enormous as to be illogical); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (group home being too big not logical basis for permit denial when identical homes routinely granted permits); *Williams v. Vermont*, 472 U.S. 14, 24-25 (1985) (encouraging Vermont

Most recently, in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019), the Court again stressed the importance of facts in considering whether state action was a legitimate exercise of the police powers. As the Court noted, "'mere pretences'" have never been enough to sustain an exercise of the police powers. *Id.* at 2464 (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887)). Rather, "the Court's police-power precedents require[] an examination of the actual purpose *and effect* of a challenged law." *Id.* at 2473 (emphasis added) (citing *Mugler*, 123 U.S. at 661). Not "every statute enacted ostensibly for the promotion of the public health, the public morals, or the public safety is to be accepted as a legitimate exertion of the police powers of the State." *Id.* Rational basis review entails meaningful judicial engagement with the government's asserted justifications. While deferential, the Sixth Circuit is quick to remind that the rational basis test "is not a rubber stamp of

---

residents to make in-state car purchases not logical basis for tax on car that Vermont resident purchased out-of-state before becoming Vermont resident); *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (no rational relationship between program that distributed Alaska's oil money to residents in 1980 based on length of state residency since 1959 and state's purported objectives); *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (per curiam) (ability to grasp politics not logically connected to property ownership); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (stimulating agricultural economy not logically connected to whether people in household are related); *Mayer v. City of Chicago*, 404 U.S. 189, 196-97 (1971) (if inability to pay is no basis to deny transcript to felony defendant, then it is no basis for denying transcript to misdemeanant); *Turner v. Fouche*, 396 U.S. 346, 363-64 (1970) (no rational interest in underlying property-ownership requirement for political office).

all legislative action." *See Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000).

The Sixth Circuit's *Craigmiles* opinion is the guiding opinion on rational basis review of a Tennessee licensing restriction. In *Craigmiles*, the Sixth Circuit used a rational basis test that was deferential, but fact-bound. The state of Tennessee required a funeral director's license to sell caskets. *Craigmiles*, 312 F.3d at 222–23. Notably, because the Court determined that the law did not impact a fundamental right, the Court employed the rational basis test. *Id.* at 223–24. The Court analyzed the state's proffered public health and safety justifications for the license, rejecting them all as bogus. *Id.* at 225–26. Because the state could not actually articulate a convincing safety rationale in *Craigmiles*, the Sixth Circuit found that the law had only one improper justification: illegitimate protectionism. *Id.* "[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id.* at 224. The Court was therefore left to conclude that the license had "no rational relationship to any of the articulated purposes." *Id.* at 228.[3] As such, the Tennessee license failed. *Accord St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (analyzing evidence of irrationality to hold that Louisiana law permitting only licensed funeral directors to sell caskets did not rationally relate to any articulated legitimate interest).

[3] Separately, the *Craigmiles* court observed that the license instead was "very well-tailored" to the "obvious illegitimate purpose" of protecting funeral directors from economic competition, which is not a legitimate interest. 312 F.3d at 224, 228-29.

In short, the facts matter, even in federal court. Federal courts are increasingly subjecting cosmetology/barbering licensure laws to meaningful scrutiny. *See, e.g., Waugh v. Nev. State Bd. of Cosmetology*, 36 F. Supp. 3d 991, 1022 (D. Nev. 2014) (requiring makeup artists to attend cosmetology school when most of the curriculum has nothing to do with sanitation is irrational); *Brantley v. Kuntz*, 98 F. Supp. 3d 884, 894 (W. D. Tex. 2015) (forcing African hair-braider teacher to meet barber school regulations is irrational); *see also Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 91 (Tex. 2015) (striking down requirement that eyebrow threaders obtain cosmetology license under Texas Law of the Land Clause).

Furthermore, the federal standard only sets a constitutional minimum. *See Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992) (Tennessee is "always free to expand the minimum level of protection mandated by the federal constitution."). States, including Tennessee, may and do provide more protection as set forth above. *See Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 14–15 (Tenn. 2000); *Patel*, 469 S.W.3d at 91 (Texas Law of the Land Clause bolsters rational basis standard); *Ladd v. Real Estate Comm'n*, 2020 Pa. LEXIS 2764 (Penn. May 19, 2019) (citing *Patel* and relying on state rational basis standard to strike down real estate license) (copy of opinion provided) . But the federal constitution sets a floor that equally involves judicial review of proffered justifications that remain fact bound.

ARGUMENT

The Academic Achievement Requirement serves no legitimate interests. The Board asserts that it serves four (4). *See* Def.s' Statement

of Undisputed Material Facts (SUMF) ¶ 241. But, as shown in Part III below, all of these interests would apply equally to other professions, and certainly to cosmetology, which is virtually identical to barbering. That should end the Court's inquiry. Part IV demonstrates that two (2) additional years of high school has no real tendency to promote these interests when it is piled atop the rigorous existing licensing scheme, to include 1,500 mandated hours in barber school and licensing examinations. Part V shows that even under the federal rational basis standard, the circuitous route in which the state chose to backstop the existing regulatory regime's function in filtering out underqualified licensees is too irrational to survive.

III. THE ACADEMIC ACHIEVEMENT REQUIREMNT CLASSIFIES BARBERS WITHOUT ANY REAL AND SUBSTANTIAL BASIS.

No real and substantial basis exists for the classification of barbers under the Academic Achievement Requirement. The characteristics of barbering "are not germane" *Tester*, 879 S.W.2d at 829 (quotation omitted), to any state interest. Section III.A demonstrates that the Board's proffered justifications for the Academic Achievement Requirement fail to justify the singling out of barbers. Section III.B shows that the General Assembly's intended purpose of equating licensing standards with cosmetology and easing licensing restrictions is *undermined* by the Academic Achievement Requirement. Section III.C then addresses any remaining conceivable justifications, showing that they would apply with equal or greater force to cosmetologists, EMRs, or elected officials.

A. The Board's reasons do not justify classifying barbers under the Academic Achievement Requirement.

The Board identified four (4) ways by which the Academic Achievement Requirement purportedly promotes the public's health, safety, morals or welfare. SUMF ¶ 241. They were:

- Reason B: ensuring barbers have the reading comprehension skills to understand the academic materials used in barbering school and the testing materials for the licensing exam. *Id*. ¶3B (reading comprehension for licensure).
- Reason C: ensuring barbers have the reading comprehension skills to understand the relevant laws and regulations governing the practice of barbering. *Id*. ¶3C (reading comprehension for practice).
- Reason D: ensuring barbers have the math skills necessary to use, measure, and do math and fractions, mix solutions and chemical compounds and be tested on such. *Id*. ¶3D (math skills).

SUMF ¶ 241. Even assuming the validity of these interests, none are conceivably advanced by singling out barbers, let alone under an evidentiary standard requiring a "real and substantial basis" for the classification.

The Board's justifications are not germane to the characteristics of barbering. *See Tester*, 879 S.W.2d at 829. This is not in dispute. Elias asked how any of the Board's reasons were promoted by requiring a higher degree of schooling from barbers than other professions. *See* SUMF ¶ 244. The Board conceded that its classification of barbers was "unrelated" to any other profession. *Id*. In other words, the Board admitted that its justifications are unrelated to the practice of barbering. Admitting that it lacks a reason to classify barbers under the Academic

Achievement Requirement is *per se* evidence that there are no "reasonable and substantial differences in the situation and circumstances of the persons placed in different classes *which disclose the propriety and necessity of the classification*." *Tester*, 879 S.W.3d at 829 (emphasis preserved). This is the sort of claim made for summary judgment.

It should not be a surprise that the Board cannot muster a defense of a classification that requires more education out of the person cutting the governor's hair than the governor himself. That is a surprising reality. The Board's reasons fare no better when taken individually.

Reason A, incentivizing education, *see* SUMF ¶ 241, 242, could apply to literally every profession. The characteristics of barbering are not "germane to [this] purpose." *Tester*, 879 S.W.2d at 829. No conceivable reason exists for why *barbering* uniquely incentivizes *education*, any more than all other professions. This too is not in dispute. The Board's executive director frankly admitted as much. SUMF ¶¶ 247, 248. There is "nothing different" about barbering that would not "be there for many professions." *Id.* at ¶ 247. If the state imposed a requirement to graduate high school (or college, for that matter) as a condition of *any* profession, it would equally serve this goal. The state does not even require its students to graduate high school in the first place. SUMF ¶ 245. This justification would certainly apply equally to cosmetology. *Id*. at ¶ 249 ("I can't think of any. … I believe the goal of education is there for both. A need for one versus the other, couldn't say.").

If any job was uniquely positioned to promote the goal of education, one would think it would be governor, or other elected office holder.

SUMF at ¶ 250 ("The main sort of requirements of their roles, I would imagine a requirement to graduate from high school could be there for many professions."). Yet no elected state office holder needs to have *any* particular level of education.[4] SUMF ¶ 240; *see also* Tenn. Const. art. II. § 10 (qualifications for senator), § 9 (representative), art. III § 3 (governor). Even a profession as vital and glamorized as Emergency Medical Responder only requires an individual to read, write, and speak English, *see* Tenn. Comp. R. & Regs. R. 1200-12-01-.04(1)(a)(5),[5] a limitation that exhibits a true rational relationship to the classification itself (i.e., a person administering lifesaving medical interventions needs to communicate with the patient).

Justifications are invalid when they sweep this broadly. The Tennessee Supreme Court has held that justifications that could be said of every profession cannot justify a licensing restriction, lest the police powers become a "delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint," allowing the state to

---

[4] This very point was made in 2018 when the Senate debated a repeal of the Academic Achievement Requirement. SUMF ¶¶ 217, 219. Although it prompted an audible chuckle, (http://tnga.granicus.com/MediaPlayer.php?view_id=354&clip_id=1489&meta_id=337014, at timestamp 1:46:32-42), no one bothered to muster a defense of this double standard requiring barbers, but not state senators, to complete high school. *Id*. ¶220. The notion that barbers need to graduate high school but not cosmetologists is a laughable proposition–literally–and this Court should not hesitate to recognize it.

[5]The state details the qualifications to become an EMR here: https://www.tn.gov/content/dam/tn/health/events/Initial%20Certification%20for%20Emergency%20Medical%20Responder.pdf.

license "every conceivable business." *Livesay*, 322 S.W.2d at 213 (quoting *Greeson*, 124 S.W.2d at 258) (fraud prevention is not a legitimate justification). Encouragement of education cannot be a legitimate interest because it could justify any level of education for any profession. The decision to make barbers alone carry this burden goes to the heart of the constitutional concern over subjecting only some classes of citizens to "certain disabilities, duties, or obligations not imposed upon the community at large." *Tenn. Small Schs. Sys.* 851 S.W.2d at 152-53 (quoting *Stratton*, 15 S.W. at 92).

The Board's other stated reasons–reading comprehension of barber texts, laws/regulations, and math–SUMF ¶ 241–also fail. Even assuming the validity of these reasons in the first place,[6] cosmetologists perform all of the same tasks that require these skills. Cosmetologists also need to understand their own regulations. SUMF. ¶¶ 181, 182, 183. Cosmetologists are also engaged in mixing color and disinfecting, which implicates the same basic math barbers perform.[7] SUMF ¶ 263. In fact,

---

[6] As argued in the contemporaneously filed motion *in limine* to exclude Casey Wrenn (Section III), complexity of the laws and rules that the state itself enacts is not a legitimate justification. In this section, Plaintiff shows that even if text complexity was a valid justification, it would nevertheless fail under Tennessee's equal privileges standard.

[7] These are actually more relevant and important skill sets for cosmetologists. Coloring and therefore mixing, is more common among cosmetologists. SUMF ¶ 55. Most of the sanitation infractions implicating public health and safety related to nail care, another practice more typically performed by cosmetologists. SUMF ¶¶ 58, 150, 151, 152, 153. There are far more cosmetologists–around 44,000–than barbers–around 5,000–in the state. SUMF ¶¶ 47, 50.

the sanitation concerns for cosmetologists are indistinguishable from those for barbers. *Id*. at ¶ 194.

Cosmetologists need to understand barbering laws, even if there was a meaningful difference between the two regulations. Both barbers and barber shops are required to be overseen by a manager. *Id*. at ¶ 172. Cosmetologists are allowed to manage barbers in dual licensed shops to ensure regulatory compliance, despite not being able to practice. *Id*. § 62-4-118(d); SUMF ¶¶ 175, 177. That manager "shall be responsible" for ensuring that those operating in the shop adhere to "any rules duly promulgated under this chapter." Tenn. Code Ann. § 62-4-119(3). All managers must also be licensees who understand the rules and regulations just like the licensed barbers that they supervise. *Id*. at ¶¶ 173, 174. Therefore, the need to understand *barbering* rules is equally present for cosmetologists. The Board's executive director had seen no evidence that indicated cosmetologists supervising barbers could not oversee the regulatory compliance, mixing of chemicals, and sanitation requirements of a barber. *Id*. at ¶178. Cosmetologists aren't any more literate, or better at math than barbers, *id*. at ¶¶ 262, 265, and the Board does not draft either set of regulations to be more difficult to understand in the first place. SUMF ¶ 128.

The Court can easily discern from hours requirements for barber and cosmetology schools that barbering and cosmetology are, from a health and safety standpoint, indistinguishable. Cosmetologists have the same number of overall hours: 1,500. Tenn. Code Ann. § 62-4-110(a)(B). Cosmetologists are not expected to complete more hours to compensate for the additional two (2) years of high school required of barbers. Within

those 1,500 hours of schooling, the Board requires cosmetologists complete *more* chemical hours–600 versus the 360 hours required for barbers, *compare* Tenn. Comp. R. & Regs. 0400-01-.03(3)(a)(2) *with id.* 0200-01-.02(2)(b)–a recognition of the reality that cosmetologists more frequently handle chemical processes involving perms, relaxers, more hair coloring and chemicals related to different types of manicures. SUMF ¶ 55. Instruction in sanitation is taught as part of general hours. SUMF ¶ 79. Again, cosmetologists must complete more hours (300) than barbers (240), *compare* Tenn. Comp. R. & Regs. 0400-01-.03(3)(a)(1) *with id.* 0200-01-.02(2)(a) (barbers), a reflection of the fact that most of the Board's few sanitation-related disciplinary actions pertain to nail care, SUMF ¶ 142-143, and manicuring is more typically performed by cosmetologists. *Id.* ¶¶ 58, 152, 153. These hours are all set by the Board, *see* Tenn. Code Ann. § 62-4-105(e), belying any possibility that the interests in regulatory compliance or math are implicated to a greater degree by barbers.

Further proof that this interest is equally implicated with cosmetologists is found in the procedures for addressing blood spills, where the Board's interest is at an apex. SUMF ¶ 192. A demonstrated competency in blood spill procedures is required of practitioners in both fields. SUMF ¶ 193. Tellingly, the blood spill procedures for both are identical. SUMF ¶ 57.

Finally, even if none of this was true and the barber regulations required a particular reading level to understand and comply, then the people who wrote those laws and rules (elected officials) would obviously

need to understand them as well. Yet they are not so required. SUMF ¶ 240. These justifications fall under their own illogic.

The Board relied on the testimony of their purported expert, Casey Wrenn, to support Reasons B–D. SUMF ¶ 243. Wrenn should be excluded for the reasons explained in the *motion in limine*. Alternatively, even if her testimony is admissible, Wrenn does not create a material dispute in fact why barbers, *but not* cosmetologists, would need such advanced reading or mathematics skills.[8] She admitted she never considered cosmetologist texts prior to her deposition. (Wrenn Dep. 100:15-16, 178:3-14). Yet the practice of cosmetology overlaps entirely with barbering in all respects save one, the usage of the straight razor. SUMF ¶¶ 225, 231. Using a straight razor involves neither reading nor math. It is not required at any level of high school education. SUMF at ¶ 80. Barbers are extensively trained in the practice in barber school. To ensure competency with the razor, they are tested on their ability to *shave a balloon* without popping it. *Id*. ¶¶ 101, 102. And in 2018, Gumucio and the Board endorsed allowing cosmetologists to use the straight razor with any additional training coming from their place of employment. SUMF ¶¶ 226, 227.

Wrenn's Lexile analysis provided no basis for classifying barbers and cosmetologists separately. She opined that several selected portions

---

[8] Section IV.B demonstrates that textual complexity and math skills are not justifications that are implicated in the practice of barbering because the Board does not require those skills, nor do barbers actually need advanced algebra to test or practice. This Section only shows that these reasons—assuming they are real—would apply equally to cosmetology.

of barbering text necessitated a higher degree of reading comprehension than an average 10th grader. (Gumucio Dep. Ex. 1, Defs.' Suppl. Resp. Interrogs. ¶¶ 25-26.) This was, however, also true of cosmetologists. In fact, she registered more instances where cosmetology texts produced higher scores than analogous barber texts: 8 of 19 measurements attributed higher scores to cosmetology texts versus the 4 instances she found where the barbering texts were higher. (Wrenn Dep. Ex. 1.)[9] Her Lexile scores do not support the barber classification.

A deeper comparison of those numbers worsens the Board's case. Of those four (4), only one actually suggests a higher level of difficulty for barbers, when fully contextualized. No. 13, Milady's Introduction and Bacteriology, was higher for barbers than cosmetologists, but still scored far below the high school level. (Wrenn Dep. Ex. 1 No. 7.) No. 8, dealing with deactivating a license, was above the high school standard, *id*., but as Gumucio recognized (SUMF ¶¶ 134, 135), the Board's website relayed precisely the same information to both barbers and cosmetologists at the same time, just using simpler language and achieving a substantially lower score. (Wrenn Dep. Ex. 22.) The Board certainly allows practitioners to figure out how to deactivate a license by looking to the more easily understood explanation, as evidenced by its own website. In any event, the website related that same information to cosmetologists

[9] Wrenn initially completed her expert report using a significantly outdated version of the Milady's barbering textbook from 1993. Wrenn Dep. 19:9-14. The editions currently in use are 2011 and 2017. SUMF ¶ 250.

at the same time. This tracks with the testimony that the Board does not try to make its rules more difficult for cosmetologists than barbers. *Id*. at ¶ 128. Wrenn actually undermines the Board's interest in classifying barbers to a different educational standard than cosmetologists.

As for math, the only actual application Wrenn identified came from the barbering sanitation regulations, (Wrenn Dep. 208:10-209:2) and pertained to formulating and using disinfectants.[10] *See* Tenn. Comp. R & Regs. 0200-03.05(4),(5). Subjecting cosmetologists to a lower educational standard does not promote the legitimate goal of ensuring proper sanitation. The practices of cosmetology and barbering involve the *same* set of math skills. Gumucio acknowledged the "bottom lines" for sanitation concerns are the same for barbers and cosmetologists. SUMF ¶ 194. The practical applications involve disinfecting and mixing hair color. SUMF ¶ 263. Cosmetologists are more frequently are called upon to mix colors. SUMF ¶ 55. Cosmetologists also need to mix disinfectants under the Board's rules. *See* Tenn. Comp. R. & Regs. 0440-02-.13(2)(a) (disinfectants "mixed and used according to manufacturer's instructions"); 0440-020.13(2)(b) ("effective against HIV-1 and human Hepatitis B Virus and is mixed according to the manufacturer's direction."). While Gumucio noted that barber sanitation regulations required them to have 70% alcohol disinfectant, that requirement is

[10] Section IV.B demonstrates that basic sanitation does not require advanced algebra. This Section is limited to demonstrating that the interest in ensuring proper sanitation is not advanced by classifying barbers separately from cosmetologists.

specific to manicuring, *see* Tenn. Comp. R. & Regs. 0200-03-.5(4), (5), which Gumucio acknowledged is more typically performed by cosmetologists. SUMF ¶ 58. Nothing about barbering provides a basis to expect them to know any more math than cosmetologists.

Finally, even indulging the farfetched assumption that barbers really do need such a demanding level of education in order to follow the laws and rules–more on this in Section IV.A–it is only more important that the persons who write and enforce those laws must understand them to the same degree as the citizens who are expected to follow them. And yet, no elected is disqualified on this basis. SUMF ¶ 240. That is irrational on its face.

The stated justifications do not "disclose the propriety and necessity of the classification." *Tester*, 879 S.W.3d at 829. Again, the Board has not tried. SUMF ¶ 244 (justifications are "unrelated" to these other professions).

B. The justifications envisioned by the General Assembly legislature are *undermined* by singling out barbers.

The legislative purpose of the Academic Achievement Requirement was to make entry into the professions of barbering and cosmetology equal and easier. It accomplished the opposite. This provides a clear basis to rule that it is irrational.

A basic assessment of legislative purpose for the Academic Achievement Requirement can easily be made and discounted. Courts frequently look to the legislative justifications when evaluating whether a law has a rational basis. *See, e.g., Pack*, 387 S.W.2d at 793 (inquiring

whether legislation is so unconnected to its purpose as to constitute a "manifest abuse" of discretion); *Eyear*, 400 S.W. at 741 (courts avoid inquiring into the legislative justification, if a law has a "plausible" justification); *Hughes v. Bd. of Prob. & Parole*, 514 S.W.3d 707, 721 (Tenn. 2017) ("after reviewing the legislative history, it is clear that the purpose of the statute…."); *Bassett v. Snyder,* 951 F. Supp. 2d 939, 969 (E.D. Mich. 2013) (Under rational basis, "[l]ooking to the history and text [of challenged law], it is hard to argue with a straight face that the primary purpose–indeed, perhaps the sole purpose" was to achieve an illegitimate governmental purpose.); *see also* 2012 Tenn. Att'y Gen. Op. No. 12-59 (June 6, 2012) ("[L]egislative history … does not provide any evidence of public policy concerns that could overcome a constitutional challenge."). Even though "it is not necessary that the reasons for the classifications appear in the face of the legislation," *Stalcup*, 577 S.W.2d at 442, and legislative history is not dispositive, the legislature was explicit about its goals.

The goal was to harmonize the barber and cosmetology licenses in light of the recent merger of the two boards. Barbering and cosmetology were two professions that had become "increasingly similar." SUMF ¶ 198. While the practices were alike, the two licenses were vestigial remnants of a time steeped in rigid gender expectations, but "the days of defining barbers as having the ability to only cut men's hair and defining cosmetologist as only cutting women's hair are long past." SUMF ¶ 231. In 2014, the legislature had formally merged the two boards into one, and the legislature was continuously in the process of shaping the law to treat them as one. The Academic Achievement Requirement was part of a

"clean up bill" in light of the merger of the cosmetology and barber boards into one combined board.[11] SUMF ¶ 199.

The General Assembly's goal was to make it *easier* to become licensed. Senator Bell, the Senate sponsor of the Academic Achievement Requirement, later explained on March 20, 2018, that in enacting the Academic Achievement Requirement, he had tried to unify the professional standards for both fields by using the *lesser* of the two educational requirements. *Id.* ¶ 216 ("what we tried to do was whichever profession had the least … education requirements…we tried to move both professions … to make it as easy as possible for citizens to become

---

[11] Altogether, the word "streamline" or "clean up" and its variants were used six (6) times when enacting the Academic Achievement Requirement in 2015: SUMF ¶ 204 (Sen. Bell, "Senate Bill 964 is a cleanup of the combining of the Barbers and Cosmetologists Board bill from last year. And last year we combined the Board of Barber Examiners, the Board of Cosmetology into one board. As I said, the bill's a cleanup of the statutes governing both professions."); SUMF ¶ 197 (describing it as acting to "harmonize and clean-up."); SUMF ¶ 199 (Rep. Parkinson, "what this bill does, it cleans up parts of the code in cosmetology. In some areas we had duplication of efforts on both – on the side of the cosmetology board and on the barber board. And since those boards have been combined, it cleans up some of those areas."); SUMF ¶ 205 (Sen. Bell, "last year we combined the Board of Barber Examiners and the Board of Cosmetology into one board. This bill makes changes to the statutes governing both professions. […] This updates outdated language [and] streamlines regulations that are similar to both professions for consistency's sake."); SUMF ¶ 200 (Rep. Parkinson, "what this bill does, it cleans – it's a clean-up bill for both barber and cosmetology."); and SUMF ¶ 201 (Rep. Parkinson, the bill "updates the code for outdated language" and "streamlines regulations that are similar in both professions for […] consistency.")

licensed barbers or licensed cosmetologists."). The Academic Achievement Requirement contravened that goal, creating a higher educational standard for barbers when before they were equal. The Academic Achievement Requirement made the problem it was designed to address *worse*, making it the embodiment of an irrational classification.

The only other legislatively expressed goal was to encourage high school graduation, echoing Reason A. SUMF ¶ 218 (Comment of Senator Yager: "what kind of a message is this sending?"). Senator Niceley pointed out (again, amid audible chuckles in the legislative recording), that a person could become a *senator* without a high school diploma. It is not clear on the recording whether Senator Yager meant to prompt laughter,[12] but his concern was absurd for reasons that were quickly pointed out: "there are people who quit school for one reason or another. And for those who do, there are very limited opportunities for them to work. This is one of the things that they would be able to do. That and become a state senator." SUMF ¶ 219. Obviously, if the point was to set a good example, there's no reason to leave out the far more visible elected officials who invite and cultivate public approval. In order to be effective, the "message" should be set, first and foremost, by those setting the standard for others.

The Academic Achievement Requirement was intended to promote consistency between barbering and cosmetology. It did the opposite. It is

---

[12] Senator Yager later said that the question did not "need an answer. That was more of a rhetorical question." SUMF ¶ 220.

an obvious and, frankly, admitted instance of an irrational statute working against its stated goal.

C. Health and safety does not justify the Academic Achievement Requirement.

Remarkably, the Board has not directly asserted health and safety as a justification. They are not justifications.

No one disputes the legitimacy of measures designed to ensure safety, sanitation, and disinfection in the practice of barbering. *See Greeson,* 124 S.W.2d at 258, But any restriction designed to promote health and safety would apply equally to cosmetologists since they are now so substantially similar that the boards were merged. SUMF ¶¶ 43-45, 231. To pass muster, a restriction applying only to barbers but not cosmetologists would need to be "germane" to the characteristics of the class. *See Tester*, 879 S.W.2d at 829 (quotation omitted). That first necessitates distinguishing between the classes. The only difference is the straight razor. *Compare* Tenn. Code Ann. § 62-3-105 (barbering) *with id*. § 62-4-106 (cosmetology, to include shaving with a safety razor); SUMF ¶¶ 60-61.

The problem with the Academic Achievement Requirement is that nothing about an additional two (2) years of high school has anything to do with a straight razor. SUMF ¶ 80. Again, the Board can, and does, require proper shaving techniques be taught as part of the *1,500* hours of training and testing that all barbers must complete before they can begin practice. SUMF ¶ 64, 85, 101; *see also* Tenn. Code Ann. § 62-3-110(b)(3). Students cannot complete the 1,500 hours of barber school if they do not

learn to use a straight razor. *Id* ¶ 84. Potential barbers are tested on their ability to use a straight razor on a balloon at their exam. If it pops, the barber fails. *Id*. ¶ 102. The rigorous training and testing surrounding the use of the straight razor has proven a success. Gumucio could not relate a single instance of a complaint that related to an injury caused by a straight razor over the span of her term. SUMF ¶ 144. The final two (2) years of high school are not germane to the characteristics of the classification of barbers.

Moreover, if health and safety were the concern, there is no reason why, without any level of schooling, *id*. ¶ 237, an EMR can use a defibrillator to restart the heart of a pulseless, non-breathing patient, Tenn. Comp. R. & Regs. 1200-12-01-.16(2)(b)(1)(i),[13] but a barber cannot use a straight razor on a placid, seated customer. The Department and Board know this. They went on record for allowing cosmetologists to use a straight razor in 2018 by fully merging the two licenses. They did not demand that cosmetologists complete high school in order to use the razor; rather, cosmetologists would learn at their place of work since they had no wish to injure their customers. SUMF ¶¶ 226, 227. New techniques frequently require cosmetologists to do updates in their practices. *Id*. at ¶ 227. A high school degree has nothing to do with safely practicing barbering.

---

[13] An EMR's responsibilities include O2 administration, *bandaging from an amputation*, splinting, bleeding control and cardiac arrest management. Available at: https://www.tn.gov/content/dam/tn/health/healthprofboards/ems/PH-3677.pdf

Nothing about the legitimate health and safety concerns involved in the practice of barbering justifies treating them to a different educational standard than cosmetologists.

IV. THE ACADEMIC ACHIEVEMENT REQUIREMENT VIOLATES ELIAS'S STATE AND FEDERAL CONSTITUTIONAL RIGHT TO EARN A LIVING.

The Academic Achievement Requirement has no genuine tendency to promote a public interest. Section IV.A demonstrates that the licensing standards are themselves sufficiently rigorous to filter out unqualified barbers. Section IV.B demonstrates that the Academic Achievement Requirement has no real tendency to promote the reasons offered by the Board.

A. The Academic Achievement Requirement has no real tendency to promote public health or safety.

The evidence demonstrates that the Academic Achievement Requirement has no real tendency to advance the public's health or safety.

The rigorous licensing process filters out unqualified barbers. Students must complete 1,500 hours of classwork and two examinations before they can begin to practice. SUMF ¶¶ 64, 65; *see* Tenn. Code Ann. § 62-3-110(b)(A). In place already is a "a rigid statutory scheme" that ought to mitigate any possible threat to the public. *See Bd. of Comm'rs of Roane County*. 88 S.W.3d at 922–24. Layering two (2) additional years of high school on top has no real tendency to advance the public's health and safety. If a barber cannot read at the necessary level, then it is unimaginable that the person could complete the 1,500 hours of course

work and pass the state mandated exams. It sure would not say much for the state's tests. What could more would additional high school contribute? Students cannot complete the 1,500 hours of barber school if they do not learn to use a straight razor. *Id* ¶ 84. Then they are tested in their ability to shave a balloon before becoming licensed. SUMF ¶¶ 101, 102. Two (2) more years of high school—none of which requires study in any of the practices of barbering, *id*. ¶ 80—has no real tendency to protect health and safety.

Both the Department and Board have, after all, endorsed eliminating the Academic Achievement Requirement and allowing cosmetologists to engage in all of the acts constituting barbering. SUMF ¶ 224, 229. The Board further admits that it is institutionally unaware of even a *single* injury caused by non-compliance with the Academic Achievement Requirement. SUMF ¶ 157. A review of recent disciplinary actions bolsters this admission.[14] None even plausibly relate to a lack of academic credentials. In fact, only a handful relate to an actual health and safety concern like sanitation.[15] SUMF ¶ 142. Board members further provided that, while complaints have generally increased overall, barber complaints have remained static since prior to the Academic Achievement Requirement's enactment in 2015. SUMF ¶ 147. Most

---

[14] The Department's disciplinary action reports are posted on its website at: https://www.tn.gov/commerce/disciplinary-actions/regulatory-board-disciplinary-actions.html.

[15] The vast majority pertain to student loans, failure to pay child support, or unlicensed practice. *See id*.

health and safety related complaints the Board receives involve manicuring and nail infections, which Board Members and the Executive Director both testified are not about barbers. SUMF ¶¶ 151, 154. Gumucio has not perceived any statistically significant change in the nature or frequency of complaints regarding barbers since before the enactment of the Academic Achievement Requirement in 2015. SUMF ¶ 147.

The Board would only be indicting itself if it was licensing barbers who could not understand the Board's rules. The Board offers up the speculative possibility that future rules might be too difficult to understand, even to a barber who has completed the licensure process. SUMF ¶ 252. This entirely speculative fear is irrationally built upon the notion that *the Board* will start drafting rules of such complexity that a high school degree, but not barber school and barber testing, becomes useful. If so, the Board would contradict its stated intent to make the rules and regulations easily understood and to assist practitioners who have questions. SUMF ¶¶ 129, 130, 131. Making its rules hard to understand is not what it is actually doing. *Id*. ¶¶ 128-29. It even offers examinations in foreign languages, SUMF ¶ 132, rather than insist that licensees understand the rules at exactly the proficiency level in which they are written. The Board has no desire to "put the candidate to a disadvantage," *id*., because its goal is safe practice. Besides, the Academic Achievement Requirement did not affect existing licensees meaning that there are already practicing barbers who have not met the Academic Achievement Requirement. SUMF ¶ 246.

Of course, if the Board opted to work against its mission of ensuring public health, *id*. ¶ 124, by making its rules more difficult to comprehend, it would only prove irrationality of its licensing structure. The most natural way for the Board to avoid creating a wholly different constitutional problem would be for the Board to: a) draft rules with a lower Lexile score,[16] b) require additional training out of licensees; or c) alter the curriculum requirement for schools and examinations to account for any change. Requiring more secondary education that doesn't involve the actual practice would be irrational. When such a complicated regulation becomes actualized, then it may one day become an *actual* justification.

An additional two years of high school has no "real tendency," *ex. rel Loser*, 225 S.W.2d at 269, to promote the goals of public safety. And even if any negligible benefits could be shown, the substantial burden imposed by an additional two years of high school in order to be a barber "becomes oppressive in relation to the underlying governmental interest." *Patel*, 469 S.W.3d at 86-87.

---

[16] This is easily done given the disproportionate weight Lexile attaches to sentence length. For instance, one of Wrenn's highest scores was in relation to a rule, Tenn. Comp. R. & Regs. 0200-01-.05 regarding posting of licenses. (Wrenn Dep. 58:11-59:5.). Driving the score were the long compound sentences in the rule. Converting the compound sentences into distinct sentences lowers the Lexile score to well below high school graduate level. *Id*. at 59:16-25. Requiring barbers devote two more years of high school is an irrational way of promoting the ability to understand this easily revised rule.

B. The Board's stated justifications fail, both legally and factually.

The Board's proffered justifications range from the illegitimate to the disproven.

As explained in Section IIIA, Reason A, incentivization of education, SUMF ¶ 237, could apply to any profession, making it an illegitimate justification under *Livesay*. 322 S.W.2d at 213. Furthermore, the only evidentiary support the Board produced for this Reason were two stray pieces of unauthenticated hearsay: a document entitled "The Graduation Effect" put together by the Alliance for Excellent Education, and a hyperlink to a Bureau of Labor Statistics website from 2016. SUMF ¶ 242. Even though both items are inadmissible and should be disregarded,[17] they change nothing. Both purport to show that a person's income tends to increase with more education. While undoubtedly correct, it is beside the point. The question is whether the Academic Achievement Requirement promotes the stated goal of producing a better and stronger work force. This question answers itself: if the goal was to

---

[17] Both items are unauthenticated hearsay. The Board might try to claim the BLS study is a self-authenticating public document. The document lacks either a "signature purporting to be an attestation or execution," *see* Tenn. R. Evid. 901(1), or a certification from a qualified records keeper. *See* Tenn. R. Evid. 901(4). Even if the Board could authenticate the BLS document, it would still be inadmissible hearsay absent evidence that it meets the foundational predicates for a public record found at Tenn. R. Evid. 803(8). Still more, the documents appear to be hearsay upon hearsay, as Ms. Gumucio testified that she did not locate either document. Rather, they were provided to her. Gumucio Dep. 132:20-21, 134:1-14.

create better jobs and more income for the state and its residents, then creating barriers to employment works *against* that goal. SUMF ¶¶ 216 (Sen. Bell: goal was "to make it as easy as possible for citizens to become licensed barbers or licensed cosmetologists"), 219 (Sen. Bell: for those who are unable to complete high school "there are very limited opportunities for them to work. This is one of the things that they would be able to do. That and become a state senator."). That is why the state has made a legislative finding that "the surest means for economic mobility" is to protect the freedom to earn an honest living. Tenn. Pub. Ch. 1053 (2016) (enacted as Tenn. Code Ann. § 4-5-501, *et seq.*). Elias is denied the ability to work and produce more taxable income for the state *because of* the Academic Achievement Requirement. Making it harder to work in Tennessee is an irrational way to increase employment in Tennessee.

The two documents do nothing to show that licensing restrictions positively affect the job market or high school graduation rates. Defs.' Suppl. Resps. Pl.s' Interrogs. ¶ 4. Licensing restrictions have negative economic effects that are well documented in government studies: "Unnecessary or overbroad restrictions erect significant barriers and impose costs that harm American workers, employers, consumers, and our economy as a whole, with no measurable benefits to consumers or society. Based on recent studies, the burdens of excessive occupational licensing—especially for entry- and mid-level jobs-may fall disproportionality on our nation's most economically disadvantaged citizens." *See* FTC STAFF, POLICY PERSPECTIVES: OPTIONS TO ENHANCE

OCCUPATIONAL LICENSE PORTABILITY iv (Sept. 2018).[18] Gumucio stated that she did not even so much as look at the copious studies available from government or other sources that would have demonstrated the negative effects on employment and the economy created by occupational licensing restrictions. She had not considered the report from the White House and Department of Labor that was specific about the negative economic effects occupational licensing restrictions had on wages and the economy. Gumucio Dep. Ex. 19 at 4, 13-14, 62-63, Ex. 20 at 5-6.[19]

The Academic Achievement Requirement undoubtedly does increase the wages for some Tennesseans, that is, those who have the license already. By making it harder to get a license, the Academic Achievement Requirement creates an artificial wage inflation for existing licensees. This is the well documented wage gap between licensed and unlicensed. *See* FTC STAFF, POLICY PERSPECTIVES: OPTIONS TO ENHANCE

---

[18] *See*: https://www.ftc.gov/system/files/documents/reports/options-enhance-occupational-license-portability/license_portability_policy_paper_0.pdf.

[19] To the extent this Court is going to allow outside sources, this Court should prioritize the ones focused on the economic effects of licensure restrictions in Tennessee. According to the preeminent authority on licensure, Morris Kliener, licensing produces $173,000,000 in deadweight loss to Tennessee, costing Tennessee 46,068 jobs. (Gumucio Dep. 159:20-160:8, Ex. 24 at 45.) A study produced by Wisconsin Institute of Law and Liberty in 2017 found that Tennessee was *the most* heavily regulated state in fields that include cosmetology and barbering. (Gumucio Dep. Ex. 22 at 8.) The study further concluded that Tennesseans would enjoy 9.331% job growth in those fields if they merely reduced their restrictions to mirror Hawaii's. (Gumucio Dep. Ex. 22 at 8.)

OCCUPATIONAL LICENSE PORTABILITY, *supra* n. 18 at 3, n. 8; Gumucio Dep. Ex. 19 at 62-63. Elias does not dispute that the Academic Achievement Requirement is "very well tailored" to provide benefits to discrete interest groups like licensed barbers. *See Craigmiles*, 312 F.3d at 228. However, the Sixth Circuit has conclusively ruled that this goal is illegitimate. *Id*.

The state's recent history demonstrates the positive effects of cosmetology licensure reform on the state's economic growth. In 2019, the state removed the practice of hair braiding from the practice of cosmetology or natural hair styling. SUMF ¶ 51. This yielded immediate economic benefits. There are already more hair braiders than licensed natural hair stylists, even though natural hair stylists were able to start getting licensed in 1999. *Id.* Easing licensure restrictions is the rational way to promote a stronger *shared* economy, as this experience shows.

Reasons B-C, reading comprehension, are legally illegitimate for the reasons explained in the motion *in limine* and incorporated here by reference. Even if this was a legally legitimate basis, the Board does not actually require licensees read the regulations to understand how to implement them. The Board's role is shifting from enforcement to education and awareness. SUMF ¶ 131. It has no interest in enforcement for its own sake. When individual practitioners have infractions, the Board disciplines them, and assists them. *Id.* at ¶ 140. It has never sent them back to high school for additional learning. *Id.* at ¶ 141.

Wrenn's testimony, even if admissible, failed to provide a factual justification to require high school attainment from barbers. When Wrenn recreated her Lexile analysis at her deposition, she was unable to produce scores that consistently fell within the high school graduate

grade band, even among the texts that she chose. She produced scores *below* high school in 9 of the 19 instances she measured.[20] She produced scores of 1610 or higher–well *above* high school graduate level of reading–in 4 instances.[21] All in all, of the 19 texts she measured, only 4 fell within the banded grade level she assessed at 11th/12th, and only 3 fell within the banded grade level for college and career readiness. Hand selecting only 19 isolated texts out of the large body of texts that a barber or barber student might need to know, Wrenn's testimony still suggests that, if anything, a high school graduate level is *not* the rational level to assign if the goal was to protect any public interest.

Nevertheless, Lexile scores alone fail to provide a real measure of the difficulty of these texts. Slight variants in the phrasing of texts, such as turning a compound sentence into two sentences, dramatically affect the Lexile scores. (Wrenn Dep. 59:6-25.) Qualitative factors like reader motivation—and one's livelihood is powerful motivator—can incentivize a reader to push past their reading level. *Id*. at 158:7-159:5. There is no

---

[20] Those were items No. 2 – Display of Certificate – 1000-1100L, No. 3 – Grounds for refusal, suspension or revocation of certificate – 1010-1200L, No. 9 – Fees – 1010-1200L, No. 12 – Milady's Introduction – 810-1000L, No. 13 – Milady's Introduction and Bacteriology – 1010-1200L, No. 14 – Milady's Introduction and Color Theory – 1010-1200L, No. 15 – Milady's Faradic Current – 1010-1200L, No. 17 – Blood Spill Procedures – 810-1000L, and No. 19 – EPA Antimicrobial Sterilizers – 1010-1200L.

[21] Those were items No. 7 – Expiration of certificates of registration – 1610-1800L, No. 8 – Expiration of certificates of registration – 1810L & Above, No. 11 – Sanitation and Disinfectant – 1610-1800L, and No. 18 – EPA Registered Disinfectants – 1610-1800L.

reason why a licensee, stumped by a compound sentence and with his or her license hanging in the balance, could not nevertheless make sense of it by taking the phrase in parts. Licensees are allowed to look up the difficult words that drive up a Lexile score, or ask others for help, or even call the Board to explain it to them. *Id.* 45:17-25; SUMF ¶ 131. If practitioners are not required to comprehend the laws and rules based on their level of reading then the Lexile scores are unrelated to an actual interest.

Finally, the evidence demonstrates that the Board's final justification, math skills (Reason D), fails as well. In Wrenn's report, she provided little basis for assigning upper level high school math to barbers, gesturing obliquely in the direction: "a licensee should be well versed in measurement, fractions, and multiplying and dividing fractions to increase or decrease percentage purity of disinfectant." SUMF ¶ 267. Of course basic math like measuring and fractions are foundational and are built upon in higher levels of math. That fails to address why barbers need advanced algebra.

Wrenn's assessment of math rests on the mistaken premise that barbers need to make the mixture themselves. The regulation only requires barbers *maintain* a supply of 70% alcohol for use, not make it, *see id.* 0200-03.05(4), (5). Seventy percent (70%) alcohol solution is hand sanitizer a person can buy at a grocery store.[22] They are easily purchased

---

[22] Kroger: https://www.kroger.com/p/-max-3-kroger-aloe-vera-hand-sanitizer-bottle/0004126037308.

online.[23][24] No one needs to work out an advanced *algebraic* formula to maintain a supply of 70% alcohol.

The practical math problems the Board envisions will be faced by barbers who inexplicably decide to brew their own hand sanitizers involve mixing chemicals and solutions. SUMF ¶ 241(D). These do not require high school graduate level math skills. That is why the Board requires barber schools only train students on "[*e*]*lementary* chemistry" Tenn. Comp. R. & Regs. 0200-01-.02(2)(a) (emphasis added). Students take *high school* level chemistry in high school beginning in 10th grade, SUMF ¶ 234, when they will be performing stoichiometric calculations, (Wrenn Dep. Ex. 19 at 200; Chem1.PS1.3), vastly exceeding the math skills Wrenn cites above. Students learn numbers and operations with fractions in third–fifth grade and ratios and proportional relationships in sixth-seventh grades. Wrenn Dep. Ex. 17 at 3. They are adding, subtracting, multiplying and dividing fractions in fifth grade. *Id*. at 55. In fifth grade, students are mixing two substances to result in a change of properties, which seems to be exactly what a barber does when mixing hair coloring. Wrenn. Dep. Ex. 19 at 4, 110, 5.PS1.4. By seventh grade, students are analyzing and interpreting chemical reactions. *Id*. at 177, 7.PS1.4. The grade level where a student is expected to measure, mix and

---

[23]CVS: https://www.cvs.com/shop/cvs-health-70-isopropyl-rubbing-alcohol-unscented-prodid-1011770.

[24]Amazon: https://www.amazon.com/NRG-Alcohol-Isopropyl-Gallon-1158100/dp/B07FVJNPSB/ref=sr_1_7?dchild=1&keywords=70%25+isopropyl+rubbing+alcohol&qid=1590092477&sr=8-7.

compute fractions is well short of high school graduate. Advanced algebra is not needed to be a barber, just as it is not needed to be a cosmetologist.

It would, of course, be the opposite of promoting health and safety if the state required licensees to resort to difficult equations instead of just buying disinfectants off of Amazon. Even if they needed to, it wouldn't require abstractions or unknown variables of sufficient complexity to require A*lgebra II*. A person has alcohol and water, and mixes them together until it is 7/10 alcohol. A grade school student can do this. Wrenn was unable to explain why Algebra II was needed to make this simple mixture, and refused to even directly address whether she was concluding that Algebra II was needed to make a 70% alcohol solution. Wrenn Dep. trans. 208:2-213:5.

Potential barbers are not so much tested in math, or at least not advanced math. Gumucio acknowledged that the testing did not involve algebra, and that whatever "math" would be tested would be basic, not algebra, and pertain to percentages, disinfectants, and colors. SUMF ¶ 95. The PSI bulletin expressly states that "calculators are not allowed," pens and pencils are specifically prohibited, and presumably no one expects barbers to do Algebra II in their heads. (Ex. 6 TN0005). At the practical portion of the exam, barbers are directed to *bring* "EPA-registered disinfectant." *Id.* at TN0007-8. Gumucio verified that would-be licensees bring the disinfectants premixed. SUMF ¶ 100.

Wrenn also suggested that advanced math skills may be necessary for a barber to comply with the requirement that they have containers of sufficient size to fully submerge tools–such as combs–in disinfectant solution. Wrenn Dep. Trans. 208:2-209:2. But this too ignores that

barbers just need to have an appropriately sized container, not make one using a conversion formula. *See* Tenn. Comp. R & Regs. 0200-03.05(4),(5). Containers are easily purchased.[25] Even if barbers needed to build their own, her suggestion that it requires Algebra II defies common sense. Rather than turning to complex formulas like V = πr2h, where V is the volume, and r is the radius of a cylindrical vessel, to calculate the volume of an unknown container, barbers need only select a container large enough to hold a specific item like any layperson would–by simply placing the relevant implement, such as a comb, into the container to see if it fits. The idea that this requires advanced algebra is ludicrous. After all, cosmetologists manage the same task without advanced math. The Board has roamed far from common sense in its search for a justification.

Requiring barbers have a high school degree or equivalent has no real tendency to promote public health and safety. The creative justifications offered by the Board only underscore the irrationality of the Academic Achievement Requirement.

V. THE ACADEMIC ACHIEVEMENT REQUIREMENT VIOLATES THE FOURTEENTH AMENDMENT BECAUSE IT IS ECONOMIC PROTECTIONISM.

For Fourteenth Amendment purposes, the question under rational basis is whether the challenged law bears a rational relation to a legitimate state interest. *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 698 (E.D. Ky. 2014). Economic measures carry a strong presumption of

---

[25] For instance: https://www.sallybeauty.com/hair/barber-supplies/disinfectants-and-cleaners/disinfecting-jar/SBS-585016.html.

validity; a person wishing to invalidate a statute under rational basis must negative every conceivable basis. *Id.* In *Craigmiles*, the Sixth Circuit used a rational basis test that was deferential, but fact-bound. The State of Tennessee required a funeral director's license to sell caskets. 312 F.3d at 222-23. The Court analyzed the State's proffered public health and safety justifications, rejecting them each in turn. *Id.* at 225-26. The Sixth Circuit recognized that under rational basis scrutiny, the Supreme Court is leery of a legislature's circuitous path to a legitimate end when a direct path is available. *Id.* at 227. Still, there must be a plausible connection between the government's connection and any possible justification for the law. The State could show no such connection in *Craigmiles*, leaving only one illegitimate justification for the law. As the Court wrote, "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." 312 F.3d at 229.

Sussing out economic protectionism behind the Academic Achievement Requirement is not difficult because if it were intent on legitimately addressing any deficiencies in the competency of barbers, this would have been the most byzantine course to take. If barbers were not up to snuff on their reading or math skills, then the most direct thing to do would have been to require more hours beyond the 1,500 already mandated by the state, or to adjust the apportionment of hours in the curriculum at barber school. There is no trace of that concern anywhere when the Academic Achievement Requirement was enacted because it is not a real concern. Board members themselves acknowledge they didn't learn anything about barbering or using the straight razor in high school.

SUMF ¶ 77. Moreover, the fact that the Academic Achievement Requirement does not actually bar barbers from practicing so long as they *already had a license* when it was enacted (SUMF at ¶ 246) should strike this Court "with 'the force of a five-week-old, unrefrigerated dead fish.'" *Craigmiles*, 312 F.3d at 225 (quoting *United States v. Searan*, 259 F.3d 434, 447 (6th Cir. 2001)). This is not, to use the shopworn phrase, "second-guessing the wisdom of the legislature." This is what courts are supposed to do. Judicial deference does not mean that "property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more." *Patel*, 469 S.W.3d at 104-05 (Willett, D., concurring).

The Academic Achievement Requirement fails even the deferential rational basis test used in federal courts.

CONCLUSION

This Court should grant Plaintiff's motion for summary judgment.

DATED: June 3, 2020.

Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK
B.P.R. No. 021399
[redacted]
ntiff