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**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; ROXANA GUMUCIO, et al.	)	
	)	
Defendants.	)	

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
Tenn. R. Civ. P. 56.04; Local Rule § 26.04(f)**

Plaintiff Elias Zarate showed in his opening that no rational basis exists to believe that the Board could possibly prevail on its motion for summary judgment. The Board offered nothing in its response to contradict this showing. Instead, it hopes that the deferential rational basis standard requires this Court overlook basic logic, the legislative record, and the evidence.

Part I demonstrates that this case is appropriate for summary judgment. Part II discusses what the Board gets right and wrong about the constitutional analysis. Part III demonstrates that summary judgment is appropriate in all of Plaintiff's claims.

I. This Case is Ripe for Summary Judgment Because the Material Facts Are Not in Dispute.

This case is ripe for summary judgment because "there is no genuine issue as to any material fact." Tenn. R. Civ. P. 56.04. The material facts are mostly settled, and the matter is appropriately postured for this Court to resolve on the basis of summary judgment. *Cincom Sys., Inc. v. Novelis Corp.*, 581 F.3d 431, 435 (6th Cir. 2009). While contending that the Academic Achievement Requirement is supported by a rational basis, the Board's Response ("Bd. Resp.") nowhere references Plaintiff's Statement of Undisputed Material Facts ("Pl.'s SUMF") such that any would be considered to be in dispute. Bd. Resp. 8–14. Instead the Board cites an unreliable expert and a few internet items about graduation rates and wages, none of which say anything about the effects of a licensing restriction. *Id.*

The Board cannot cure the deficiencies in Wrenn's methods exposed at her deposition with a "supplemental opinion." *See e.g., Luke v. Family Care & Urgent Med. Clinics*, 323 F. Appx. 496, 500 (9th Cir. 2009) (" Nor does Rule 26(e) create a loophole through which a party who submits partial expert witness disclosures, or who wishes to revise her disclosures in light of her opponent's challenges to the analysis and conclusions therein, can add to them to her advantage after the court's deadline for doing so has passed."); *Cedar Petrochemicals, Inc. v. Dongbu Hannong Chem. Co. Ltd.*, 769 F. Supp. 2d 269, 278 (S.D.N.Y. 2011) ("Experts are not free to continually bolster, strengthen, or improve their reports by endlessly researching the issues they already

opined upon, or to continually supplement their opinions.") (internal quotation marks omitted); *Id.* at 278 ("If an expert's report 'does not rely [on] any information that was previously unknown or unavailable to him,' it is not an appropriate supplemental report under Rule 26.'") (quoting *Lidle*, 2009 WL 4907201, at *5-6); *Akeva LLC v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002) (Supplementation under Fed. R. Civ. P. 26(e) "does not cover failures of omission because the expert did an inadequate or incomplete preparation."); *Lidle v. Cirrus Design Corp.*, No. 08-Civ.-l253 (BSJ) (HBP), 2009 U.S. Dist. LEXIS 118850, 2009 WL 4907201, at *5 (S.D.N.Y. Dec. 18, 2009) ("Rule 26(e) is not, however, a vehicle to permit a party to serve a deficient opening report and then remedy the deficiency through the expedient of a 'supplemental' report."); *Medtronic Vascular, Inc. v. Abbott Cardiovascular Sys.*, No. C-06-1066 PJH (EMC), 2008 U.S. Dist. LEXIS 112148, at *6-7 (N.D. Cal. Oct. 15, 2008) ("A party may not rely on Rule 26(e)(1) as a way to remedy a deficient expert report. …"); *Holzhauer v. Golden Gate Bridge, Highway & Transp. Dist.*, No. 13-cv-02862-JST, 2015 U.S. Dist. LEXIS 76539, at *5 (N.D. Cal. June 11, 2015) (rejecting the suggestion that "any litigant could get an expert witness ' do over' simply by claiming that her expert's original report was incomplete or incorrect ").

The attempt to slide in a "supplemental" affidavit as an exhibit to its summary judgment response should be rejected when it falls outside the discovery window. In the Court's Feb. 28, 2020 scheduling order, the parties were ordered to identify and disclose all expert witnesses and

reports on or before March 17, 2020. Depositions for expert witnesses needed to occur on or before April 24, 2020. Pursuant to an agreement between the parties, the parties agreed that all depositions would be completed by May 8, 2020. Wrenn was deposed on May 7, 2020. After her flawed methodologies were exposed, on June 3, 2020—nearly a month after, and *on* the day that dispositive motions were due—Wrenn attempted to provide a "supplemental opinion." Bd. Mot. Ex.A, Wrenn Decl. ¶¶ 12-17. This is untimely and impermissible.

Wrenn, the Board's proposed expert, is inadmissible for the reasons outlined in the motion *in limine*. Tenn. R. Evid. 56.06 requires supporting affidavits to set forth facts as would be "admissible in evidence." *See Price v. Becker*, 812 S.W.2d 597, 598 (Tenn. Ct. App. 1991). Wrenn cannot be relied upon in the summary judgment cross-motions. *See Kenyon v. Handal*, 122 S.W.3d 743, 759 (Tenn. Ct. App. 2003); *see also Stine v. State Farm Fire & Cas. Co.*, 428 Fed. Appx. 549, 550 (6th Cir. 2011) (expert opinion offered in opposition to summary judgment must be admissible and set forth specific facts from the record); *Lewis v. Citgo Petroleum Corp.*, 561 F.3d 698, 704 (7th Cir. 2009) ("rule [requiring opposition to summary judgment to be based on admissible evidence] applies with equal vigor to expert testimony"); *Major League Baseball Properties Inc. v. Salvino, Inc.*, 542 F.3d 290, 311 (2d Cir. 2008) (citations and quotations omitted) (excludable expert opinions are "inappropriate material for consideration on a motion for summary judgment").

Regardless of Wrenn's admissibility as an expert, the Board still believes this Court could "consider the substance of [Ms. Wrenn's] opinion … be it an expert's opinion or a layman's common sense." Bd. Resp. 17–18. If Wrenn is inadmissible, it strains credulity to ask that the Court grant it any validity. Even if she were an expert, an expert is plainly disqualified from baldly stating that the Academic Achievement Requirement is "reasonable." Bd. Mot. Ex.A ¶ 17. The Board cannot skirt the rule that experts must do more than make a conclusory assertion about the ultimate legal issues. *See Brainard v. American Skandia Life Assur. Corp.*, 432 F.3d 655, 663–64 (6th Cir. 2005). If anything, the Wrenn Report is presumptively prejudicial, making Wrenn's opinions worse than useless. As a "layman," her opinion that the Academic Achievement Requirement is "reasonable" is based on her personal opinions and is not helpful to any fact at issue. A statute does not have a rational basis because the guy at the end of the bar says so.

The only question for this Court is whether the Plaintiff is "entitled to a judgment as a matter of law." *See* Tenn. R. Civ. P. 56.04. As explained below, he is.

II. The Constitutional Standard in This Case Makes Summary Judgment Proper.

The Board begins with a proposed framework. Bd. Resp. 2–8. The Board is correct that rational basis is the appropriate standard of review. *Id.* at 5. The Board is incorrect that the state and federal rational basis standards are one and the same. *Id.* at 2. The Board is incorrect that rational basis review requires this Court to blindly defer

to legislative determinations or ignore relevant facts and logic that rebut the Board's asserted justifications.

A. Rational Basis is the Appropriate Framework for Reviewing Plaintiff's Claims.

Plaintiff has consistently acknowledged that this is a rational basis case, brought under state and federal law. Although Plaintiff has correctly pointed out that the rights to earn a living and acquire property are both characterized as "fundamental" by the Tennessee Supreme Court, (Pl.'s Mot. 6), he has not asked this Court to apply any form of judicial review other than the well-established form of rational basis review used so often by Tennessee courts in the recent past. *Id.* at 8–12 (citing *Tester*, *Small Sch. Sys.*, *Whitehead*).

Plaintiff has not conflated the equal privileges and substantive due process questions. Bd. Resp. 2, 6, 11. Rather, Plaintiff took care to outline the related, but distinct standards, (Pl.'s Mem. Supp. Summ. J. Section II.A&B), before then framing the questions and separately answering them. *Id.* at Section III.A&B. The equal privileges analysis asks what characteristics of barbering have a real and substantial basis to promote the Board's interests. *Id.* at Section III.A. The substantive due process standard asks how requiring barbers to graduate high school has a real tendency to promote those interests. *Id.* at Section III.B. Those standards, while deferential, do entail a meaningful judicial evaluation of whether the asserted justifications are "real" in light of logic and the facts made known.

The Board states that the interests it provided in its interrogatory were particular to "substantive due process," and thus, Plaintiff confuses things when arguing under equal privileges that the Board's interests obviously have nothing to do with barbering. Bd. Resp. 11–12. The Board's interests are relevant to both analyses. The classifications made under a statute have to relate to the asserted interests. *See State v. Tester*, 879 S.W.2d 823, 828 (Tenn. 1994) ("[C]haracteristics which form the basis of the classification must be germane to the purpose of the law."). Whatever purposes are served by the challenged law must also be served by the classifications made under the law. Far from the two analyses being irrelevant to each other, they intersect. The Board's admission that they are unrelated is proof, *per se*, that there is not "some good and valid reason" for the classification of barbers "which bears a natural and reasonable relation to the object sought to be accomplished." *Id.* (quoting *State v. Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. 773, 776 (Tenn. 1910)).

B. Tennessee Rational Basis Requires "Real" Justifications.

Even as the Board asks to be directed to any proof that the Tennessee rational basis standard is any different from the federal standard, (Bd. Resp. 3), the Board ignores altogether the Tennessee cases cited to by Plaintiff that provide a more rigorous rational basis standard. Pl.'s Mem. Supp. Summ. J. 9–13. A classification must have a "real and substantial basis" relevant to the asserted interests. *Tester*, 879 S.W.2d at 829. An exercise of the police powers must have a "real

tendency" to promote its asserted interest. *Livesay v. Tenn. Bd. of Exam'rs in Watchmaking,* 322 S.W.2d 209, 213 (Tenn. 1959); *see State v. Smith*, 6 S.W.3d 512, 519 (Tenn. 1999) ("A legislative enactment will be deemed valid if it bears a real and substantial relationship to the public's health, safety, morals or general welfare and it is neither unreasonable nor arbitrary."). The key word distinguishing Tennessee rational basis–"real"–was typed by the Board only once to quote Plaintiff, who was, after all, just quoting the Supreme Court in *Tester*, 879 S.W.2d at 829. Bd. Resp. 6 (quoting Pl.'s Mem. Supp. Summ. J. 24). Nowhere does the Board actually claim its law has a "real" tendency to promote a public interest. In fact, the Board completely refused to address *Tester*, but the decision shows that in Tennessee the courts do not halt their analysis once the state articulates an interest.

C. Under Rational Basis, Courts Examine the State's Justifications Using Logic, the Legislative Record, and the Facts.

The Board attacks Plaintiff's motion for summary judgment with an argument that because barbering implicates public interests, it "is *per se* 'a reasonable exercise of the police power' and within the 'exclusive determination of the legislature.'" Bd. Resp. 5 (quoting *Estrin v. Moss*, 430 S.W.2d 345, 348 (1968)). The Board misperceives both the nature of Plaintiff's claim and rational basis review. Plaintiff consistently acknowledged the state's legitimate role in regulating the barbering profession. Pl.'s Mot. 38 (citing *State v. Greeson*, 124 S.W.2d 253, 256, 258 (Tenn. 1938)). The validity of a general barbering license, however, does not justify every part of the "overall system of regulation

for barbering." Bd. Resp. 8. In *Greenson*, the Supreme Court recognized that it was "firmly established" that Tennessee can license barbering as a legitimate exercise of its police powers, but that portions of barbering regulations that were irrelevant to public safety were unreasonable; the police power "is not absolute, but one that must be exercised in a reasonable manner and so as not to interfere with private rights." *Id*. at 255.

Plaintiff asks only whether the Academic Achievement Requirement reasonably promotes public safety, not whether the state can license barbering. That question cannot be avoided by invoking the state's legitimate power to generally license barbering. Bd. Resp. at 5 (citing *Ford Motor Co.*, *Eyer* and *Estrin*, each of which concern challenges to the existence of a license itself). The question turns on reasonableness, and as the Supreme Court said in *Estrin*—the case the Board cites (Bd. Resp. 5)—reasonableness varies "with the facts in each case." 430 S.W.2d at 349.

Dismissing the role of evidence in a rational basis case, the Board suggests that Tennessee rational basis review does not require evidence. *See* Bd. Resp. 14 ("[E]vidence is not necessary to show the relationship between the statute and its purpose."). While the government presumptively does not need to show that a challenged law is rational, the challenger *must* show that the law is *irrational*. *See, e.g.*, *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 154 (Tenn. 1993) ("The burden of showing that a classification is unreasonable . . . is placed upon the individual challenging the statute. ..."). That does not

bar Plaintiff from submitting facts, or the Court from considering those facts.

Tennessee courts routinely allow challengers to rebut the government's asserted rational basis with record evidence. *See, e.g.*, *Tester*, 879 S.W.2d at 829–30 (rejecting state's rational-basis argument as "ignor[ing] the evidence in th[e] record"); *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cty.*, No. M2002-02582, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005) (striking down Metro zoning ordinance upon lack of "proof" that ordinance "meets [Metro's] stated goals"). What is more, the courts *strike down* these laws based on the record evidence. *Tester*, 879 S.W.2d at 829–30. Plaintiff has developed and presented evidence. It is telling that the Board consistently fails to engage with any of it when seeking to justify why barbers need to graduate high school but cosmetologists need no level of education.

Not even federal review mandates blind acceptance of the state's justifications. "[R]ational basis review is not a rubber stamp of all legislative action, as discrimination that can only be viewed as arbitrary and irrational will violate the Equal Protection Clause." *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000). In *Heller v. Doe*, the Supreme Court recognized that a classification must "find some footing in the realities of the subject addressed by the legislation." 509 U.S. 312, 321 (1993). The state may not make classifications if they are "unreasonable, arbitrary or capricious." *Molina-Crespo v. U.S. Merit*

Sys. Prot. Bd., 547 F.3d 651, 659 (6th Cir. 2008) (quoting *Gilday v. Bd. of Elections of Hamilton Cty., Ohio*, 472, F.2d 214, 217 (6th Cir. 1972)).

This Court already recognized that Plaintiff would be allowed to "disprove the validity of the rational bases offered." Order 6 (April 17, 2020). This Court embraced the logic employed by the Michigan District Court in *Bassett v. Snyder*, No. 12-10038, 2012 WL 13070112 (E.D. Mich. July 23, 2012), as urged by the Board. The *Bassett* case, which the Board no longer cites, illustrates that facts and logic may be used to reject the government's proffered defenses in a rational basis case. The District Court ruled that the State of Michigan's proffered cost-savings rationale for prohibiting public employers from providing benefits to cohabiting couples unless legally married, which it supported with affidavits and an expert witness, was "nothing more than a Potemkin Village; there is no substance backing up its reasoning." *Bassett v. Snyder*, 59 F. Supp. 3d 837, 852 (E.D. Mich. 2014). In other words, the district court scrutinized the state's proffered justifications in a rational basis case.

The proposition that courts must blindly accept whatever the government says in defense of infringements upon constitutionally recognized civil rights is incorrect. The U.S. Supreme Court recently reaffirmed that "'mere pretences'" are not enough to validate a law. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2464 (2019) (quoting *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Craigmiles v. Giles*, 110 F. Supp. 2d 658, 662 (E.D. Tenn. 2000) ("[T]he mere assertion of a legitimate government interest has never been enough to

validate a law.")). Legislation must have a "reasonable relation," even to a proper goal. *Nat'l Gas Dist. v. Sevier Cty. Util. Dist.*, 7 S.W.3d 41, 45 (Tenn. Ct. App. 1999). Courts do inquire into whether a regulation "has any real tendency to carry into effect the purposes designed." *State ex rel. Nat'l Optical Stores Co.*, 225 S.W.2d 263, 269 (Tenn. 1949).

The Board cites one (and only one) Tennessee case for the proposition that record evidence does not matter under rational basis review. *See* Bd. Resp. 14 (citing *Riggs v. Burson*, 941 S.W.2d 44, 52–53 (Tenn. 1997)). In *Riggs*, the Tennessee Supreme Court upheld a state statute banning heliports within nine miles of a national park. 941 S.W.2d at 54. *Riggs* was decided under the different posture of a Rule 12.02(6) motion to dismiss, and its chief contribution to Tennessee case law was its holding that "legal conclusions set forth in a complaint are not required to be taken as true." *Id.* at 47–48. The *Riggs* plaintiffs could not proceed to discovery based solely on their complaint's "legal conclusions" that the heliport ban "violated due process and equal protection," and the Tennessee Court of Appeals was reversed for ruling otherwise. *Id.* at 48. That is why the *Riggs* court wrote that "specific evidence is not necessary" to establish a rational basis. *See id.* at 52, *quoted in* Bd. Resp. 14. In other words, the state has no affirmative obligation to introduce evidence of rationality. But *Riggs* does not stand for the proposition that a rational basis challenger may not introduce evidence of irrationality to support a well-pleaded complaint such as Plaintiff's. This case is past the pleading stage. Plaintiff has taken discovery and is now presenting the proof of his allegations. It is no

answer at this stage to say that Plaintiff's proof must be disregarded, especially when the Board's classifications are so patently irrational.

The Board says Plaintiff's reliance upon the legislative record is misplaced, going so far as to say that legislative intent is "not actually relevant." Bd. Resp. 14–15. And yet elsewhere, it cites authority for the proposition that ascertainment of "the intention of the legislative body … is not controlling." *Id.* at 6 (citing *City of Kingsport v. Jones*, 268 S.W.2d 576, 578 (1954) and *Memphis St. Ry. Co. v. Byrne*, 104 S.W. 460, 464 (1907)). "Not controlling" is a long way from "not actually relevant." It is certainly correct that legislative intent is not dispositive in a rational basis case. *See FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993); *Civil Serv. Merit Bd. v. Burson*, 816 S.W.2d 725, 731 (Tenn. 1991). But courts routinely consider the legislative record, among other relevant factors, in a rational basis case. *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) ("Looking 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.). *Beach Communications* only excuses *legislatures* from "articulating [their] reasons for enacting a statute." 508 U.S. at 315. Here, the sponsors of the Academic Achievement Requirement have stated its purpose. *See* Pl.'s SUMF ¶ 244. *Beach Communications* does not affirmatively prohibit courts from considering the legislative record. The Supreme

Court still insisted that there must be "plausible reasons" for a legislative determination. *Beach Commc'ns*, 508 U.S. at 313–14. Indeed, if the Court is "to consider any conceivable justification," Bd. Resp. 18, then what the legislature actually conceived is something the Court must address.

Plaintiff is not asking the Court to litigate the wisdom of the Academic Achievement Requirement. Bd. Resp. 10. Plaintiff is not asking the Court to open up every professional standard to judicial review. *Id*. at 12. Rather, he is asking for a well-established form of review that queries whether the government's classifications rationally promote some interest. This is not a big ask; it is the sort of evaluation courts regularly conduct. As we will see shortly, the Board musters none, insisting instead on total deference even in the face of an irrational classification.

III. The Undisputed Record Shows that Plaintiff is Entitled to Judgment on All of His Claims.

The Board cannot oppose summary judgment with inadmissible evidence or a scintilla of evidence. *Braswell v. Carothers*, 863 S.W.2d 722, 729 (Tenn. Ct. App. 1993). "Whether the nonmoving party is a plaintiff or a defendant—and *whether or not the nonmoving party bears the burden of proof at trial on the challenged claim* or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888–89 (Tenn. 2019) (quoting *Rye*, 477

S.W.3d at 265) (emphasis added). In other words, Plaintiff's ultimate burden of proof under Tennessee rational basis review does not excuse the Board from opposing Plaintiff's evidence-backed showing of irrationality with something more than a scintilla of admissible evidence. But the Board instead offers only evidence that is inadmissible or of the most marginal relevance, and otherwise counts on the rational basis test to do the rest of the work.

Contrary to the Board's take, Plaintiff has marshalled both the evidence and the authority to prevail as a matter of law. This Part replies to the Board's arguments on the legal merits of Plaintiff's claims: in Part III.A, the equal privileges claim; in Part III.B, the substantive due process claim; in Part III.C the Fourteenth Amendment.

A. The Undisputed Record Shows that Plaintiff is Entitled to Judgment as a Matter of Law on His Equal Privileges Claim.

To survive Plaintiff's equal privileges claim as a matter of state law, the Academic Achievement Requirement's selective scope "must be based upon substantial distinctions which make [barbers] really different from [similarly situated cosmetologists, EMRs and elected officials]; and the characteristics which form the basis of the classification must be germane to the purpose of the [Academic Achievement Requirement]." *Tester*, 879 S.W.2d at 829 (quoting *Nashville, Chattanooga & St. Louis Ry. Co.*, 135 S.W. at 776). In his opening brief, Plaintiff demonstrated, using undisputed record evidence, that there is no real and substantial difference between barbers and

cosmetologists or other professions that equally promote the interests asserted by the Board. Pl.s' Mem. Supp. Summ. J. 24–34. The Board never substantively addresses any of it, instead dismissing the need to justify any of these classifications. *See generally* Bd. Resp.

When evaluating the differential treatment for cosmetologists, the Board practically says this Court may not question legislative classifications. The Board continues to demand that this Court accept the separate legislative classification as different because they are "separately defined and the professions governed by separate statutory and regulatory schemes." Bd. Resp. 13. This is the embodiment of an arbitrary defense. Things are not different because the legislature says they are different. *See Chapdelaine v. Tenn. State Bd. of Exam'rs for Land Surveyors*, 541 S.W.2d 786, 787 (Tenn. 1976) (The General Assembly's determinations are "not conclusive upon the courts."). Nothing about barbering is "unique and distinguishable from the same legislative problem as it presents itself" in any other profession. *State v. Whitehead*, 43 S.W.3d at 926–27 (quotation omitted). As this Court has already recognized, there must be "*some* good and valid reason" for the classification. Order 5 (April 17, 2020) (quoting *Tester*, 879 S.W.2d at 829) (emphasis added). The Board never identifies an actual reason for the classification.

As pointed out previously, there can be only one reason because there is only one difference between cosmetologists and barbers: the use of a straight razor. Pl.'s SUMF ¶ 225. This characteristic (never acknowledged by the Board), even if it is "substantial," fails to "disclose

the propriety," *Tester*, 879 S.W.2d at 829, of requiring that barbers obtain an additional two (2) years of high school. Nor is it "germane" to any of the Board's stated goals, or even any conceivable ones. *Tester*, 879 S.W.2d at 829.

The Board cites *City of Memphis v. Hargett*, 414 S.W.3d 88, 110 (Tenn. 2013) as support. That case, which found that in-person and absentee voters are not similarly situated, instead proves Plaintiff's point. The relevant characteristics of an in-person and an absentee voter are relevant to the asserted interest: prevention of voter fraud. Because an election official can personally compare the face and ID of an in-person voter, an absentee voter "forecloses the possibility of photographic comparison at the time the ballot is cast." *Id.* If there is anything about the lone characteristic differentiating barbers from cosmetologists that relates to any of its interests, the Board has never said.

Nor can the Board pretend that this is an instance where the legislature is attacking a problem piecemeal, (Bd. Resp. 13), when the legislature has since *dropped* the educational standard for cosmetologists. *See* 2017 Tenn. Pub. Acts 226 (enacted as Tenn. Code Ann. § 62-4-110). Moreover, the actual problem the legislature sought to address was overly burdensome licensing restrictions. Pl.'s SUMF ¶¶ 199, 216. The Board contends that the "Right to Earn a Living" preamble cannot be in conflict with the Academic Achievement Requirement since both were enacted by the 109th General Assembly. Bd. Resp. 6, n 7. The problem with this argument is that the legislature

appears to have thought that they were lowering licensing restrictions when they enacted the Academic Achievement Requirement. *See* Pl.'s SUMF ¶ 216 ("[W]e tried to move both professions to that -- to the least amount of education. In other words, to make it as easy as possible for citizens to become licensed barbers or licensed cosmetologists."). In other words, the legislature meant to act consistently. This was wrong, but it only underscores the irrationality of the law in question.

The record *does* establish that the legislative goal was to harmonize the licensing requirements between barbers and cosmetologists. *See* Bd. Resp. 14. The history is consistent with the statements of the bill's sponsors. In 2014, the boards of cosmetology and barbering were merged. Pl.'s SUMF ¶ 45. Documents created by the Department overseeing the Board recognized that the two professions "ha[d] become increasingly similar." Pl.'s SUMF ¶ 198.[1] In 2015, when enacting the Academic Achievement Requirement, the intent to "harmonize," "clean up," or "streamline" the professions was referenced over and over again. *Id.* ¶¶ 199–201, 204–206. In fact, the Board has admitted in responding to Plaintiff's SUMF that the Department described the bill as "only act[ing] to *harmonize* and clean-up existing provisions of the law. Def.'s Resp. to Pl.'s SUMF ¶ 197 (emphasis added) ("undisputed for purposes of summary judgment"). Having admitted that the Department that includes the Board described the goal as

[1] The Board claims this statement is hearsay. Def.'s Resp. to Pl.'s SUMF ¶ 198. This and other similar statements, *id.* ¶¶ 225, 230-31, are statements by party opponents as well as matters of public record. *See* Tenn. R. Evid. 803(1.2), (8).

"harmony," the Board cannot argue that the record fails to establish that harmony was the goal.

Obviously, the Academic Achievement Requirement was an irrational way to achieve this goal since it did the opposite. This problem was exacerbated when two years later the legislature removed the educational standard for cosmetologists altogether. The Senate Sponsor of the Academic Achievement Requirement was candid in 2018 that the legislature meant to unify the professional standards for both fields by using the *lesser* of the two educational requirements. *Id.* ¶ 216. The House sponsor, Antonio Parkinson, was even more direct: it "[d]oesn't take a high school diploma to be a barber or cosmetologist if you go through the cosmetology or barber training." *Id.* ¶ 213. These are comments that are not isolated to one legislator's opinion (Bd. Resp. 15); they are consistent with the larger trend of unifying the licensure requirements for barbering and cosmetology and the Board cannot direct the Court to any contrary sentiments.

Even if the only question is whether there is a rational justification for classifying barbers under the Academic Achievement Requirement, *id.*, the Board offers none. The Court is not obligated to accept the Board's non-defense or (oddly) defer to the legislature while ignoring what the legislature actually said. The classification of barbers collapses by merely resorting to logic.

Factually, the Board offers nothing that even facially supports the notion that the classification of barbers promotes any of its interests. The Board admits that educational incentivization would

apply to "any profession" (and any level of education). Bd. Resp. 12. The legislature certainly retains discretion in drawing standards, *id*., but its classifications still must have a "real and substantial basis." *Tester*, 879 S.W.2d at 829. No one has trouble justifying law school for lawyers. But that doesn't mean that it is rational to require fast food cooks to graduate high school, especially while emergency medical personnel need only speak English. That is no less true if it would have a tendency "at the margins," Bd. Resp. 12, to incentivize education in Tennessee.

Here, we are not faced with anything remotely within the realm of deference. EMRs can bandage amputations[2] with no educational standard.[3] Pl.'s SUMF ¶¶ 236–37. The governor can enforce the *same* laws with no education, Tenn. Const. art. III § 3, that barbers must follow with a high school graduation. The Court can say so when classifications are so patently irrational.

Wrenn, even if not excluded, did not provide a valid basis for subjecting barbers to a higher level of education than cosmetologists. Wrenn at first did not assess analogous cosmetology texts because the Board did not ask. (Wrenn Dep. 100:15–16, 178:3–14.) When she was asked at her deposition, she found *more* instances where cosmetology texts scored higher. (Wrenn Dep. Ex. 1; Pl.'s Mem. Supp. of Mot. Summ. J. 32.) She therefore supports *Plaintiff's* argument that no basis exists

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[2]Available at: https://www.tn.gov/content/dam/tn/health/healthprofboards/ems/PH-3677.pdf.

[3] Available at: https://www.tn.gov/content/dam/tn/health/events/Initial%20Certification%20for%20Emergency%20Medical%20Responder.pdf.

to demand that barbers get a higher level of education. That makes up 2/3 of the complaint. Compl. (Claims 2 & 3).

The Board's lack of response as to how the classification of barbers and the imposition of this educational requirement on only barbers promotes its goals concedes Plaintiff's affirmative evidentiary showing that there is no real, substantial difference between other professions and barbers.

B. The Undisputed Record Shows that Plaintiff is Entitled to Judgment as a Matter of Law on His Law of the Land Claim (Claim One).

To survive Plaintiff's Law of the Land claim as matter of state law, the Academic Achievement Requirement must have "a real tendency" to further public safety, health, or morals. *Livesay,* 322 S.W.2d at 211; *see also Smith*, 6 S.W.3d at 519 ("real and substantial" relationship); *Greeson*, 124 S.W.2d at 190. Just as with the equal privileges claim, the Board does not so much as acknowledge the "real tendency" standard, long a fixture in Tennessee. In his opening brief, Plaintiff demonstrated that the Board's interests 1) are not legitimate, and 2) that the Academic Achievement Requirement does not reasonably relate to any of the interests asserted. Pl.'s Mem. Supp. Summ. J. 40–52. The Board never squarely defends the legitimacy of its interests. The Board's evidence does not create a material dispute in fact that any of its goals are furthered by requiring barbers to graduate high school. As for Plaintiff's arguments regarding the insufficiency and unreliability of Wrenn, the Board nevertheless asks the Court to rely on her Lexile measurements, even if she is excluded. Bd. Resp. 17.

Subpart 1 shows that the Board has never established that any of its justifications are valid ones. Subpart 2 shows that, even if they are valid justifications, the Board fails to show that its proof can rise to the level of a "real tendency" to promote those interests. Subpart 3 shows that Wrenn does not create a dispute in fact.

1. The Board Does Not Show that Any Justification is Valid.

None of the Board's justifications are legally legitimate. The Tennessee Supreme Court ruled in *Livesay* that a justification that would allow the Legislature to "regulate every conceivable business" would render the constitutionally recognized right to earn a living meaningless. *Id.* Incentivization of education and professional competency are goals that would apply to any profession. The Board cannot rely on justifications like these that would make the state's legitimate use of the police powers to regulate a profession a "delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint." *Id.* The Tennessee Supreme Court expressly rejected the idea that ensuring professional competency was a valid *public* justification. 322 S.W.2d at 213 (Incompetence "does not directly affect the public, but affects only the parties thereto."). The Board cannot promote a statewide goal by irrationally targeting one profession without it escaping the Court's notice. *See Canale v. Steveson*, 458 S.W.2d 797, 800 (Tenn. 1970) ("If the legislature had in fact intended to prohibit fortune-telling statewide, then it would have tried to do just that.").

Text complexity is an invalid justification as well. The choice of language is wholly within the government's control. The state has laws governing laundries. *See* Tenn. Code. Ann. § 62-10-101, *et seq*. If the state chose to draft laundry laws at the post-graduate level and then demanded PhDs to wash clothes, it would make a laundry license more irrational, not less. The state has regulations for fast food restaurants.[4] Tenn. Comp. R. & Regs. 1200-23-.01. These rules are complex, defining Enterohemorrhagic Escherichia coli, and containing tables that really do require math. *See id*. 36, 115(b) Table A&B. It would be irrational to demand that the fry cooks, who do clean bathrooms and handle food, be expected to read at the grade level of the most complex portion of the rules. Enforcement of an interest cannot be the rational basis for the interest. Otherwise any interest, no matter how illegitimate, would always pass the rational basis test.

The Board's interest lies in ensuring that licensees *comply* with the rules designed to protect the public, not that they *read* rules at any particular level. If the state is making it harder for licensees to comply, then it would only be further evidence of the irrationality of the state's licensing scheme. It would be irrational to demand fry cooks graduate college so as to understand the rules instead of just comply with valid sanitation and safety standards. Likewise, there is no reason why a barber, stumped by an unfamiliar word, cannot resort to a dictionary, or ask someone for help. The Board assists practitioners in safely doing

[4] Available at: https://publications.tnsosfiles.com/rules/1200/1200-23/1200-23-01.20150716.pdf.

their jobs. Pl.'s SUMF ¶ 131. When licensees have trouble understanding, the Board makes itself available to assist. *Id.* ¶ 131. The Board offers examinations in foreign languages; it doesn't demand foreign language speakers learn to read at a high school level. *Id.* ¶ 132. When individual practitioners have infractions, the Board disciplines them, and assists them. *Id.* ¶ 140. It has never sent them back to high school for additional learning. *Id.* ¶ 141. Reading the rules as they are written is not something that the state can rationally claim barbers need to do.

For Wrenn's part, she fails to provide an actual basis for believing that the barbering texts she measured promoted health and safety in and of themselves. She paid no attention to this critical question. Wrenn Dep. 134:17-135:11; 137:1-9, 22-23. The Board makes no effort to justify why its barbering rules should be phrased with such complexity, assuming they are.

It is not rational to demand barbers graduate high school to read at a particular Lexile Level. According to the *New York Times*,[5] *see* Tenn. R. Evid. 902(6) (newspapers are self authenticating), Kant's notoriously inscrutable *Critique of Pure Reason* is approximately 1500L, 300 points *lower* than five measurements Wrenn assigned for barbers. Bd. Mot. Summ. J. Ex. A.3. *A Brief History of Time* by physicist Stephen Hawking is scored at upper high school level. The fact that the Board thinks that barbers need to read texts more complex than *A Brief*

[5] Available at: https://www.nytimes.com/interactive/2019/06/12/opinion/facebook-google-privacy-policies.html?searchResultPosition=1.

History of Time is perhaps the best evidence of the irrationality of this justification.

This case began when Elias questioned whether barbers need to understand *The Great Gasby*. Compl. ¶ 1. It turns out that he understated the irrationality of the question.

2. The Academic Achievement Requirement Does Not, on its Face, Rise to the Level of a "Real" Tendency to Promote Any of the Asserted Justifications.

Again, a regulation has to have a "real tendency" to promote a goal in order to pass Tennessee rational basis. *See Livesay*, 322 S.W.2d at 213; *Smith*, 6 S.W.3d at 519.

By the Board's description, targeting one profession only raises educational incentives "at the margins." That is insufficient on its face to be a "real tendency." Likewise, when it comes to competency, the public is already protected from incomptent barbers by a "a rigid statutory scheme." *See Bd. of Comm'rs of Roane Cty. v. Parker*, 88 S.W.3d 916, 922–24 (Tenn. Ct. App. 2002). Before a barber may practice, he or she must complete 1,500 hours of classwork and two examinations. Pl.'s SUMF ¶¶ 64, 65; *see* Tenn. Code Ann. § 62-3-110(b)(A). If a barber student cannot perform or read at the necessary level, then they will not become a barber. Board members themselves acknowledge they didn't learn anything about barbering in high school. Pl.'s SUMF ¶ 80. Even the House Sponsor acknowledged the irrelevance of high school for barbers. *Id.* ¶ 246. Whatever benefits accrue to the public from requiring only future barbers complete high school, they are negligible at best. A "marginal" tendency falls short of a

"real" justification. *See Livesay*, 322 S.W.2d at 213; *see Smith*, 6 S.W.3d at 519.

Furthermore, Tennessee requires consideration of whether the benefits are irrationally out of balance with the burdens. *State ex rel. McCormick v. Burso*n, 894 S.W.2d 739, 745 (Tenn. Ct. App. 1994) ("In determining whether a substantive due process right has been violated, we must balance the 'liberty of the individual' and 'the demands of organized society.'"). As analyzed by the Texas Supreme Court under its Law of the Land provision, rational basis requires an examination into whether "the statue's effect as a whole is so unreasonably burdensome that it [is] oppressive in relation to the underlying governmental interest." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015). The Board does not weigh whether the burdens are too oppressive in relation to the benefits. By now, it is evident that "the legislation is so unconnected to its purpose as to constitute a manifest abuse of discretion." *Pack v. S. Bell Tel. & Tel. Co.*, 387 S.W.2d 789, 793 (Tenn. 1965).

The internet printouts offered by the Board do not show that the Academic Achievement Requirement has any tendency, let alone a real one, to further the goal of incentivizing education. They purport to show that a person's income tends to increase with more education. That is beside the point. It should be obvious that if the state requires a high school diploma to have access to good jobs, then those with high school diplomas will have more access to good jobs. The Board's documents do not show even generally that mandating an unrelated educational

standard as a condition to work has any tendency to increase wages or even cause persons to stay in school. Plaintiff showed, using government studies that are official publications, *see* Tenn. R. Evid. 902(5), that licensing restrictions have negative effects on employment in wages. *See* Pl.'s Mem. Supp. Summ. J. 45–46; Pl.'s Resp. 30–31. If the Court wishes to consult non-government sources like the Alliance for Excellent Education, (Pl.'s SUMF ¶ 242), then the Court should consider evidence showing that Tennessee was the most heavily regulated state in the cosmetology/barbering field,[6] and would see tremendous growth in the field by easing entry into the profession. The most irrational way to increase employment is to erect impediments to employment for a population particularly vulnerable to unemployment. That was, after all, the point of the law. *See* Pl.'s 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 "[T]here 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.".)

3. Wrenn Does Not Create A Dispute in Fact.

Even given a do-over, Wrenn still cannot create a material dispute in fact. Exactly *one* score fell above the 10th grade band and below

[6] Available at: http://www.will-law.org/wp-content/uploads/2017/10/final.pdf.

1600L, the closest benchmark for high school graduate.[7] Bd. Mot. Ex. A.3. A single measurement qualifies as the proverbial "scintilla" of evidence that fails to create a dispute in fact. *See Braswell*, 863 S.W.2d at 729. It certainly does not provide a rational basis for connecting high school graduation and barbering. The Board "must do more than simply show that there is some metaphysical doubt as to the material facts." *Rye*, 477 S.W.3d at 265 (Tenn. 2015) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

The fact that the Board thinks it is enough to show a single observation to justify the whole regime reflects the fundamental deficiencies in the Board's argument/approach: 1) a belief that what is rational under rational basis is merely what could occur rather than what reasonably can be expected to occur; 2) that even that belief can be based on something as unscientific and methodologically flawed as Wrenn's opinions. "A fact cannot be proven by drawing an inference from an inference," as a method of asserting conclusions based on otherwise inadmissible facts. *Braswell*, 863 S.W.2d at 729 (citing *Martin v. Braid Elec. Co.,* 9 Tenn. App. 542 (1929)).

Wrenn's opinions boil down to an observation that better developed readers understand more text: "I'm saying a high school graduate would understand more of the text. … [J]ust as these numbers increase, the comprehension increases." Wrenn Dep. 143:6-9, 24-25; *see*

[7] Wrenn scored Rules of the Barber Board, 0200-01-.05, at 1410-1600L. The Board erroneously relates that she also scored Tenn. Code Ann. § 62-3-109 at that level. Bd. Mem. Supp. Summ. J. 16.

also, id. at 142:7-8. This is meaningless. Her "supplemented opinion" is no better because her view that a regulation "is a reasonable one," (Bd. Mot. Ex. A), is an unsupported viewpoint that she is not qualified to offer. Deeming her an expert for relating what a free webtool spits out is no different than designating someone a spanish language translator who relies on Google Translate.

The fact that she still failed to edit the text as directed by MetaMetrics, (*see* Pl.'s Reply Supp. Mot. *In Limine*), is only continuing proof that she isn't a reliable expert for what is an irrelevant inquiry in the first place.

Not even under the Board's version of rational basis could Wrenn's evidence be sufficient to defeat Plaintiff's valid motion for summary judgment. Whether Wrenn is actually an expert seems not to matter to the Board, so long as she has "[a] conceivable justification" that the Board believes it can utilize under rational basis scrutiny. Bd. Resp. 18. But recall Wrenn's Report was offered to show "the legitimacy of the academic achievement requirement" as evidence of a "reasonable expectation" that Tennessee's barber licensing requirement furthers a governmental interest. Wrenn Report at 6. Now the Board says subjective lay opinion is enough. Not under Tenn. R. Evid. 703, or Tenn. R. Civ. P. 56.06, which *requires* experts to meet Rule 703. Forgetting for a moment that Tennessee requires a regulation to have a "real tendency" to promote its goal, governmental action must, under any understanding of the rational basis test, be *rationally* related to the purported governmental interest, just as the name suggests.

Here again, the Board flips the applicable legal standard on its head. Rational basis scrutiny is an objective legal standard that requires some set of facts "which *reasonably* can be conceived which sustain" governmental action. *See* Bd. Resp. 5 (citing *Eyear Corp*., 400 S.W.2d at 742). Under the Board's subjective "*any* conceivable justification" rational basis standard, *reasonableness* is glaringly omitted. *See* Bd. Resp. 17–18 ("The nature of rational basis analysis requires the Court to consider any conceivable justification for the challenged statute."). According to the Board, so long as someone could conceive of a justification, it's rational. If that's true, the Board doesn't need an expert opinion, much less a *reasonably* conceived justification, for the barber licensing requirements. Tennessee and federal law say otherwise.

C. The Undisputed Record Shows that Plaintiff is Entitled to Judgment as a Matter of Law on Fourteenth Amendment Claim (Claim Three).

The Academic Achievement Requirement is not even rationally related to any interest. Rational basis, under the Board's version, truly is a "rubber stamp." *See Hadix*, 230 F.3d 843 (rational basis is not a rubber stamp). The Board is unable to differentiate from *Craigmiles*. 312 F.3d 220. It tries to draw two distinctions.

First, the Board argues that not very many Tennesseans lack high school and thus, "their potential competitors have been only minimally decreased." Bd. Resp. 16, n. 14 (citing the 2016 Annual Report of the Tennessee Higher Education Commission). In *Craigmiles*, the Sixth Circuit deduced protectionism by a process of elimination;

that is, 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*. The Court was therefore left to conclude that the license had "no rational relationship to any of the articulated purposes." *Id.* at 228. The situation in this case is more obvious because the Board never explains how it promotes public health and safety to require barbers to graduate high school where they will learn nothing about barbering.

Second, the Board distinguishes *Craigmiles* by pointing out that the Academic Achievement Requirement did not eliminate an entire side-industry, unlike the casket makers. Bd. Resp. 16–17. The operative principle was the effort to provide a benefit to a discrete interest group. *Craigmiles*, 312 F.3d at 224. The Sixth Circuit placed no significance on the elimination of a side-business. The casket makers could still sell the caskets. They just had to become licensed funeral directors first. The time and cost of education and training was "undoubtedly a significant barrier to entering the Tennessee casket market." *Craigmiles*, 312 F.3d at 224–25. The Academic Achievement Requirement "close[s] off," entire populations, groups, much the casket law, even if it doesn't close off "entire lines of business." Bd. Resp. 17. Just as in *Craigmiles*, the burdens imposed by the Academic Achievement Requirement is irrational protectionism, even under the federal rational basis test.

The better analogy to *Craigmiles* decides the Fourteenth Amendment question. Requiring barbers graduate high school as a way of addressing practitioner competency is the sort of "circuitous path" to legitimate ends of which courts should be leery. *See Craigmiles*, 312 F.3d at 227. The state chose a path to bolstering the qualifications of barbers that was anything but obvious and direct. It did not increase the 1,500-hour requirement. It did not require additional training of practitioners. The Board did not reconfigure the mandated curriculum for barber schools. The roundabout way of promoting the goal of safety leaves us with, like *Craigmiles*, the "more obvious illegitimate purpose to which licensure provision is very well tailored." *Id.* at 229.

CONCLUSION

The Academic Achievement Requirement violates Plaintiff's substantive due process and equal protection rights under the Tennessee and U.S. constitutions. *See* Tenn. Const. art. I, § 8; *id.* art. XI, § 8; U.S. Const. Amend. XIV. For these reasons, Plaintiff asks the Court to GRANT his motion for summary judgment.

DATED: June 24, 2020.

Respectfully submitted,

s/ B.H. Boucek
BRADEN H. BOUCEK
[redacted]