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

ELIAS ZARATE, **Plaintiff,** **v.** **THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS; ROXANA GUMUCIO, in her her official capacity as executive director of the Tennessee Board of Cosmetology; RON R. GILLIHAN II, KELLY BARGER, NINA COPPINGER, JUDY MCALLISTER, PATRICIA J. RICHMOND, MONA SAPPENFIELD, FRANK GAMBUZZA, AMY TANKSLEY, ANITA CHARLTON, YVETTE GRANGER, JIMMY BOYD, BRENDA GRAHAM, and REBECCA RUSSELL, in their official capacities as members of the Board.** **Defendants.**	**No. 18-534-II**

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Both Plaintiff and Defendants have moved this Court for summary judgment pursuant to Tenn. R. Civ. P. 56 as to all issues in this case. Defendants now file this reply in support of their motion. Both parties have made extensive arguments on the issues in this case in two memoranda and responses to each. Defendants will thus limit this reply to only the most fundamental issues implicated by Mr. Zarate's response.

Mr. Zarate asserts three flaws in Defendants' motion: (1) a purported failure to support their motion with material facts, (2) a purported failure to explain a governmental interest served

by treating barbers and cosmetologists differently, and (3) purportedly ignoring material facts that preclude judgment as a matter of law. Pltf. Resp. at 1. None of these assertions is correct.

I. THE ANALYTICAL FRAMEWORK FOR THIS CASE.

The legal framework for analyzing Mr. Zarate's challenge is far simpler than he is willing to admit. The analyses of substantive due process and equal protection are the same under both the United States and Tennessee constitutions. And both claims are reviewed under a deferential rational basis standard.

"Article I, section 8 of the Tennessee Constitution states, '[N]o man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land.'" *Hughes v. Bd. of Probation and Parole*, 514 S.W.3d 707, 715 (Tenn. 2017). The Tennessee Supreme Court has "determined that this provision of the Tennessee Constitution is 'synonymous' with the Due Process Clause of the Fourteenth Amendment." *Id*. (quoting *Gallaher v. Elam*, 104 S.W.3d 455, 463 (Tenn. 2003)). In addition, the Tennessee Supreme Court "has concluded that Article I, section 8 and Article XI, section 8 of the Tennessee Constitution provide 'essentially the same protection' as the Equal Protection Clause of the United States Constitution." *Id*. (quoting *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993)).

These are direct quotations from a Tennessee Supreme Court decision rendered barely three years ago, quoting decisions going back several years. Plaintiff claims that, simply by citing the Tennessee Supreme Court's own words in 2017 describing the relationship between the federal and state constitutions, Defendants "wrongly argue" the point. Pltf. Resp. at 5. His only authority for this is a case from 2000, *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1

(Tenn. 2000), which Plaintiff insists "forecloses" Defendants' reliance on *Hughes*. *See id*. Plaintiff's argument on this point is simply not an honest reflection of the relevant authorities.

Defendants have never denied that the Tennessee Supreme Court reserves the right to interpret the Tennessee Constitution as providing greater protections than the United States Constitution on a variety of fronts. *See* Def. Resp. at 2-3. But this is the exception. And nothing could illustrate that more clearly than the Tennessee Supreme Court continuing to use terminology such as "synonymous" and "essentially the same" seventeen years after its decision in *Planned Parenthood*, which found one of those exceptional circumstances in which the State constitutional protections were greater. But, as Defendants have already explained at length, the present situation is not one of those. *See* Def. Resp. at 3-6 (section I(B)).

Similarly, Mr. Zarate has no basis to state that "the Tennessee Constitution is [not] in lockstep with the federal rational basis jurisprudence." Pltf. Resp. at 7. There is extensive Tennessee jurisprudence on the rational basis standard specifically because it is adapted from federal jurisprudence. After all, "more interpretive case law is generated in regard to the federal constitution." *See Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 12 (Tenn. 2000). There are not two rational basis tests—what is rational in the country as a whole is rational in Tennessee. The Tennessee Supreme Court has specifically stated that, "when analyzing the merit of an equal protection challenge, this Court has utilized the three levels of scrutiny—strict scrutiny, heightened scrutiny, and reduced scrutiny, which applies a rational basis test—that are employed by the United States Supreme Court depending on the right that is asserted." *Hughes*, 514 S.W.3d at 715.

Defendants have never asked this Court to "rubber stamp" the statute at issue or engage in "total deference," Pltf. Resp. at 8-9, but the rational basis standard, as applied by Tennessee courts,

indisputably *is* deferential to legislative policy choices. *See, e.g. In re: Cumberland Bail Bonding*, 599 S.W.3d 17, 24 (Tenn. 2020) (describing rational basis as a "deferential standard"); *Sutphin v. Platt*, 720 S.W.2d 455, 457 (Tenn. 1986) (admonishing reviewing courts to approach legislation under the rational basis test "in a deferential manner"); *Consol. Waste Sys., LLC v. Metro. Gov't of Nashville and Davidson Cty.*, 2005 WL 1541860, *6 (Tenn. Ct. App. 2005) (holding that "[t]he rational basis test is applied with recognition of the deference to be given legislative decisions"). Criticizing Defendants for citing and quoting a Tennessee Supreme Court decision applying the rational basis standard (*Riggs v. Burson*, 941 S.W.2d 44 (Tenn. 1997)), Pltf. Resp. at 7, only reveals how misguided Mr. Zarate's concept of the analytical framework is—he cannot prevail if this Court applies the actual dictates of the Tennessee Supreme Court.

Finally, Plaintiff is simply wrong that Tennessee courts have recognized a fundamental "right to earn a livelihood" that creates an elevated level of scrutiny. *See* Pltf. Resp. at 13-14. The Tennessee Supreme Court's jurisprudence about professional licensing makes clear that, when it regulates occupations touching upon the public health and safety, the General Assembly is entitled to rational basis deference. *See* Def. Resp. at 3-6.

II. DEFENDANTS' MOTION IS SUPPORTED BY APPROPRIATE MATERIAL FACTS.

This is a facial challenge. *See* "Memorandum and Order," Oct. 31, 2018, at 2 (denying Defendants' motion to dismiss). Not only has this Court already held this to be a facial challenge, but if it were not, the complaint would have been dismissed because Mr. Zarate never sought a declaratory order from the Board as required by Tenn. Code Ann. § 4-5-225(b), and the Court excused this requirement only because "the facial constitutionality of a statute may not be determined by an administrative tribunal due to 'the fundamental constitutional principle of separation of powers.'" *Colonial Pipeline Co. v. Morgan*, 263 S.W. 3d 827, 842-43 (Tenn. 2008).

A facial challenge is an assertion that "no set of circumstances exist[s] under which the Act would be valid." *City of Memphis v. Hargett*, 414 S.W.3d 88, 103 (Tenn. 2013) (quoting *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 525 (Tenn. 1993). *See* Def. Memo. at 6-7. As a result, the material facts under a facial challenge are those that establish the plaintiff's entitlement to bring the suit. Beyond that, the challenge consists of testing the statute against *any* set of facts to which the statute might possibly be applied. If it would be constitutional under any circumstances that can be conceived, the statute must stand.

It is obviously not possible—or necessary—to state, as material facts, every possible set of circumstances to which a challenged statute might be applied. There is a paucity of authority on this subject in Tennessee, but the federal courts have addressed it. "Since [the plaintiff] attacks the constitutional validity of the statute on its face, there are no real issues of material fact to be resolved. Under these circumstances, we agree . . . that it would be a waste of judicial resources to remand for a hearing on the merits of [the plaintiff's] constitutional claims." *Brookpark Ent., Inc. v. Taft*, 951 F.2d 710, 714 (6th Cir. 1991). *See also Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 405 (6th Cir. 1998) (citing *Brookpark* for the proposition that "no real issues of material fact are presented for resolution upon a facial challenge to a statute").

As a result, Defendants designated only a handful of facts relevant to Mr. Zarate's standing and relating to his previous involvement with the Board. The latter type of statements were recited only to preserve arguments Defendants previously made regarding standing and exhaustion that this Court rejected in denying their motion to dismiss.

Mr. Zarate is simply not correct that Rule 56.03 required Defendants to include the materials on which they have relied—including the expert opinion report of Casey Haugner Wrenn—as material facts. These materials are grounded in fact, but it is simply a mistake of

characterization to assume that this makes them facts—material or immaterial—within the meaning of Rule 56.03.

Normally if "the evidence and the inferences reasonably drawn from the evidence would permit a reasonable person to reach only one conclusion, then no material factual dispute exists, and the question can be disposed of as a matter of law." *Green v. Green*, 293 S.W.3d 493, 514 (Tenn. 2009). But under the rational basis standard, "when 'there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached.'" *In re: Cumberland Bail Bonding*, 599 S.W.3d at 23. In short, if a reviewing court reviews the law, facts, and arguments, and concludes that there *is* room for two opinions, that means the statute is constitutional. Defendants *have* cited record evidence, see Pltf. Resp. at 5, but did not submit that evidence as a material fact for the reasons given above. It would be a futility to call this a dispute over material facts and require a trial at which the same evidence would be proffered and then inevitably uphold the statute on that basis.

Ultimately, Mr. Zarate's position on Rule 56.03 is undermined by his own motion. The issue in this case is the constitutionality of the academic achievement requirement. If the fact-based arguments on which the parties rely—such as the plaintiff's repeated attempts to extrapolate universal facts from the off-the-cuff opinions and recollections based on the personal experience of witnesses[1]—are material facts, then it is literally impossible to resolve a facial challenge on summary judgment. This makes no sense because facial challenges, as the *Brookpark* and *Sam & Ali* decisions make clear, are among the least fact-intensive of all legal disputes. The facts material to this dispute are that Mr. Zarate is an aspiring barber who wishes to practice barbering but cannot

[1] See, e.g., Def. Resp. to Pltf. SUMF at 43, 58, 95, 124, 167, 169-170, 179, 180, 184, 187-191, 194, 248-250, 261-262, 264-265.

at his current level of education. By order of this Court, he is entitled to bring this suit on the basis of those facts, and those are the only facts necessary to the resolution of this dispute. Both parties have made fact-based arguments for their legal positions, but in a constitutional challenge, no set of fact-based arguments is definitive.

III. PLAINTIFF CONTINUES TO CONFLATE THE DUE PROCESS AND EQUAL PROTECTION ANALYSES.

As in his original memorandum, Mr. Zarate continues to conflate and confuse the due process and equal protection analyses, rendering much of his argument a muddle. The document is shot through with this flaw, but one example will suffice to illustrate the problem. The plaintiff cites three interests cited by Defendants in defense of Plaintiff's substantive due process claims—see Pltf. Resp. at 15—and proceeds to argue that "the Board's interests, even if valid, are statewide goals and are not furthered by singling out barbers." *Id*. at 16. But "singling out barbers" pertains to equal protection, and the Board's interests were never offered in defense of the equal protection claim.

Substantive due process and equal protection are distinct analytical constructs. They must be analyzed separately. *See* Def. Resp. at 6-7. Defendants have twice explained their equal protection argument, *see* Def. Memo. at 18-21 and Resp. at 11-14, and Mr. Zarate's use of equal protection arguments to counter due process defenses serves only to confuse the issue.

IV. THERE IS A RATIONAL BASIS FOR THE ACADEMIC ACHIEVEMENT REQUIREMENT.

Defendants' expert, Casey Haugner Wrenn, was offered to support their due process defense, not their equal protection argument. Mr. Zarate confuses this point in an effort to undermine the usefulness and credibility of Ms. Wrenn's testimony. *See* Pltf. Resp. at 21, 23.

Even when he does address Ms. Wrenn's opinion on its own merits, the Plaintiff misrepresents the evidence she brings to the case. He repeatedly refers to Ms. Wrenn's supplemental opinions—provided in her first declaration in this case—as her "third try," Pltf. Memo. at 33, but this is not accurate. Ms. Wrenn originally provided Lexile measures in her expert report that was disclosed in the course of discovery on October 18, 2019. *See* Gumucio Dep., Exh. 1 at p. 37. What Mr. Zarate means by a second try is Ms. Wrenn's deposition, in which Plaintiff's counsel had Ms. Wrenn watch, through remote technology, as counsel's associate input text samples into a free version of the Lexile Analyzer. *See* Wrenn Dep. at 41:1-104:5 and Exh. 22. This was not Ms. Wrenn's analysis, it was her watching someone else operate the software.

What Plaintiff derides as the witness's "third try" was, in fact, Ms. Wrenn responding appropriately to critiques of her work that came out in her deposition. At Ms. Wrenn's deposition, Plaintiff's counsel asked if she had used plain text files to input the text into the Lexile Analyzer. *See* Wrenn Dep. at 123:7-22. Since she had not done that previously, she then repeated her analysis by using plain text, which produced comparable results. *See* Wrenn First Decl. at ¶ 12(a) and Exh. 3. By contrast, there is no indication that the analysis conducted by Plaintiff's counsel during the deposition used plain text files for the inputs; Ms. Wrenn's supplemental work is thus more reliable in this respect. Plaintiff's counsel also questioned whether Ms. Wrenn's inputs were able to exceed a 250-character limit. *See* Wrenn Dep. at 43:24-25. But, upon revisiting the Analyzer, Ms. Wrenn clarified that her Basic+ account allowed her to input selections of up to 1,000 words, more than enough to encompass all of the selections she used. *See* Wrenn First Decl. at ¶¶ 4 and 13.[2] And she also explained during her deposition that "the Lexile measures . . . [are] constantly being evaluated, researched and updated," Wrenn. Dep. at 41:19-20, which could also explain the minor

[2] It is not at all clear why Plaintiff asserts that Ms. Wrenn did not explain how this was possible. See Pltf. Resp. at 35. She clearly did explain—she had a different and higher level account than what Plaintiff's counsel was using.

discrepancies between her original results and those Plaintiff's counsel produced during the deposition.

Ms. Wrenn's supplemental work included with her first declaration (filed along with Defendants' summary judgment motion) was not simply another attempt to get things right, but a response to Plaintiff's criticisms that clarified the nature of her work and produced results designed to specifically address those criticisms. Defense counsel apparently mistyped one of her 19 measures (the first listed at Def. Memo. at 16; *see* Plft. Memo. at 33), but this only slightly alters the summary offered by Defendants. The scores of six—rather than seven—of the nineteen items (Items 6 to 8, 10, 11, and 18) are entirely above the highest end of the 10th grade range, and another eight—rather than seven (Items 1, 3 to 5, 12, and 14 to 16)—have an upper limit of 1400L, the same as for 10th grade, but the lower limit (1200L) is considerably higher than the lower limit for 10th grade readers. *See* Def. Memo. at 17. The rest of the summary stands.

With respect to equal protection, Mr. Zarate points to *State v. Greeson*, 124 S.W.2d 253 (Tenn. 1939), both for the proposition that the Tennessee Constitution provides greater protection for economic liberty than its federal counterpart, *see* Pltf. Resp. at 7, and the notion that simply being a business is enough to establish the equal protection threshold of being similarly situated. *See* Pltf. Resp. at 18-19. This citation continues Mr. Zarate's insistence on ignoring judicial history and context. The *Greeson* decision repeatedly cites with approval *Lochner v. New York,* 198 U.S. 45 (1905). *See Greeson*, 124 S.W.2d at 256, 258.

But since *Greeson* was decided in 1939, the United States Supreme Court has overruled *Lochner*, *see Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (noting that "[t]he doctrine that prevailed in Lochner . . . —that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original

constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies"). And since *Ferguson*, the Tennessee Supreme Court has repeatedly explained that the Tennessee Constitution's due process and equal protection provisions are synonymous and essentially the same as their federal counterparts. *See supra* at 2-3; Def. Memo. at 22-23. Mr. Zarate's briefing on economic liberty reads more like a Tenn. R. App. P. 11 application for permission to appeal to the Tennessee Supreme Court. That is the only court that can find such an expanded protection in the Tennessee Constitution. Absent that, *Lochner* and its kin like *Greeson* no longer reflect constitutional reality.

And, unlike *Greeson*, barbers have not been singled out as Mr. Zarate so often asserts. Barbers are one of at least a dozen professions for which the General Assembly requires a high school diploma. *See* Def. Memo. at 13, n.7. This is why the threshold inquiry of being similarly situated is so important. These occupations, along with EMRs and cosmetologists and others, are diverse and distinct. Under Mr. Zarate's rubric, a court would be required to review any profession with higher requirements against any other occupation with lower requirements—even ones as disparate as barbers and EMRs. This level of judicial micromanagement is not constitutionally required or appropriate.

Even with the one occupation identified by Mr. Zarate that is at least somewhat similar to barbering—cosmetology—the General Assembly's discretion is broad. *See* Def. Resp. at 13. As previously argued, it is permissible for the legislature to deal with a problem—like incentivizing education—in a piecemeal fashion. And it is certainly reasonable to experiment with a possible solution to a problem by first addressing the license that affects significantly fewer people (there are about 5,000 licensed barbers in Tennessee to 44,000 cosmetologists; *see* Pltf. SUMF Nos. 47 and 50).

V. THIS CASE IS PROPER FOR SUMMARY JUDGMENT.

The Tennessee Supreme Court has recently that, "under the rational basis test, legislative action should be deemed valid 'if any possible reason can be conceived to justify it'" and "when 'there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [a reviewing court] think[s] a different conclusion might have been reached.'" *In re: Cumberland Bail Bonding*, 599 S.W.3d at 23 (citations omitted).

Mr. Zarate wishes to argue the weight of the evidence, *see* Pltf. Resp. at 28-31, but that is not the Court's role in hearing a constitutional challenge. Instead, the Court's only task is to determine whether the challenged statute was a reasonable choice out of the options open to the legislature. The academic achievement requirement was adopted "honestly and upon due consideration," and both Ms. Wrenn's testimony and the other publicly-available information cited by Defendants demonstrate that a rational justification for the choice can be made. The Court should sustain the statute.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment to Defendants, holding that there is a rational basis for the academic achievement requirement and that it does not violate the due process or equal protection clauses of the United States Constitution or the parallel provisions of the Tennessee Constitution.