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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'S RESPONSE IN OPPOSITION TO PLAINTIFF'S 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 response to Plaintiff's motion.

A constitutional challenge of the kind brought by this plaintiff turns on whether the legislative action is reasonable, not on whether Mr. Zarate can make a credible case for a different policy choice. But Mr. Zarate's expansive motion for summary judgment amounts to just that—

an argument that the General Assembly should lower or repeal the academic achievement requirement. That argument is properly directed to the General Assembly rather than this Court.

I. THE PROPER FRAMEWORK FOR EVALUATING PLAINTIFF'S MOTION.

The complaint makes two separate claims under the United States Constitution and the parallel provisions of the Tennessee Constitution—raising both substantive due process and equal protection.[1] Tennessee law dictates that, for each of these two constitutional claims, the federal analytical framework applies to the analysis under the parallel state constitutional protections, and Mr. Zarate's arguments to the contrary are misplaced. Mr. Zarate has further muddied the waters by conflating Defendants' due process and equal protection arguments. Those claims must be analyzed under distinctive frameworks as explained below.

A. For Purposes of The Claims at Issue, the Tennessee Constitution Provides the Same Protections as the Fourteenth Amendment to the United States Constitution.

Defendants have already demonstrated that the provisions of the Tennessee Constitution on which Mr. Zarate relies[2] afford protections that are "synonymous" with the due process clause and afford "essentially the same protection" as the equal protection clause of the Fourteenth Amendment. *See* Def. Memo. at 22-23 (quoting *Hughes v. Bd. of Probation and Parole*, 514 S.W.3d 707, 715 (Tenn. 2017)).

It is true that, "[i]n the interpretation of the Tennessee Constitution, [the Tennessee Supreme] Court is always free to expand the minimum level of protection mandated by the federal constitution," *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 152 (Tenn. 1993) (quoting *Doe v. Norris*, 751 S.W.2d 834, 838 (Tenn. 1988), but Mr. Zarate must do more than just establish

[1] The complaint also makes a privileges and immunities claim, *see* Complain at ¶ 176, but that is not separately analyzed in Plaintiff's supporting memorandum. For the reasons stated in Defendants' Memorandum, there is no merit to the claim. *See* Def. Memo. at 21.

[2] Article I, § 8, and Article XI, § 8. *See* Complaint at ¶ 8.

that the Tennessee Constitution *can* be interpreted to afford greater—or different—protections than the Fourteenth Amendment; he must point to a decision from the Tennessee Supreme Court that has done so in applicable circumstances. Otherwise, the default circumstance, repeated over and over by our Supreme Court, is that these provisions "confer essentially the same protection upon the individuals subject to those provisions." *Id.*[3]

B. The Tennessee Constitution Does Not Afford Greater Constitutional Protection Than the United States Constitution in the Realm of Economic Liberty.

Mr. Zarate argues that "[t]he Tennessee Constitution provides for greater protection of liberty,[4] and that should encompass economic liberty." Pltf. Memo. at 7. Implicit in the use of the word "should" is that Mr. Zarate has no Tennessee Supreme Court authority for the proposition. Instead, he engages in a tortured discussion of how such a reading might be reached. Because the Law of the Land Clause, Tenn. Art. I, § 8, originated with the 1834 Tennessee Constitution, Mr. Zarate wishes to point to history of that original adoption of the language.[5]

Whatever "economic concerns" may have animated the Law of the Land Clause in 1834, Tennessee courts have nevertheless repeatedly described its protections as synonymous with, identical to, or essentially the same as those of the later-adopted Fourteenth Amendment. If the clause does afford greater protection to economic liberty interests than its federal counterparts, the Tennessee Supreme Court would surely, at some point, have actually held as much.

[3] Indeed, "Tennessee courts are rightfully reluctant to find greater protection from the text of the state constitution where the protections of the federal constitution suffice. As a result, more interpretive case law is generated in regard to the federal constitution." *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 12 (Tenn. 2000).

[4] As explained above, this assertion neglects to mention how rare these divergences are.

[5] Defendants presume that the plaintiff is referring to Article I, § 8, when he uses the phrase "equal privileges clause," *see* Pltf. Memo. at 7-8, a phrase that has never appeared in a reported Tennessee decision. Tennessee courts have always referred to the provision as the "Law of the Land Clause." *See Dep't of Correction v. Pressley*, 528 S.W.3d 506, 513 (Tenn. 2017) (noting that the clause "provides identical due process protections" as the Fourteenth Amendment).

In one of the handful of decisions in which our Supreme Court *has* found greater protections in the Tennessee Constitution than in their federal counterpart provisions, the Court engaged in a review of decisions finding divergent protections. None of these decisions concerned economic liberty. *See Planned Parenthood*, 38 S.W.3d 1, 12-14 (Tenn. 2000).

The *Planned Parenthood* Court did not mention *Livesay v. Tennessee Board of Examiners in Watchmaking*, 322 S.W.2d 209 (Tenn. 1959), in its discussion. This is the decision on which Mr. Zarate relies in arguing that the "right to earn a living" is "fundamental." Pltf. Memo. at 5. The court itself does not actually say that, though it does quote 34 A.L.R.2d 1326, in which the author says that "[t]he right to engage in work of one's own choosing is a fundamental one." *See Livesay*, 322 S.W.2d at 213. Our Supreme Court ultimately joins with a variety of courts in concluding that "the regulation[6] of watch repairing purported to be required by this Tennessee Statute is an unconstitutional regulation." *See id*. This is the actual holding of the case,

Whatever approval for the "fundamental right" language one might infer from the *Livesay* Court's quotation is undermined and withdrawn by later decisions of the Tennessee Supreme Court. The question is whether the regulatory scheme touches on "public health, morals, comfort or welfare." "[W]here the Legislature seeks to regulate a business or profession that has no connection with public health, morals, comfort or welfare of the people, it is not subject to regulation by the application of the State's police power." *Bd. of Dispensing Opticians v. Eyear Corp.*, 218 Tenn. 60, 76, 400 S.W.2d 734, 742 (1966). The Court made this statement in upholding the regulation of opticians and specifically in declining to hold that *Livesay* controlled the disposition of the case.

[6] The challenged statute and regulations required that watch repairers be licensed, which required a demonstration of good character and the passage of an examination. *See Livesey*, 322 S.W.2d at 210-211.

But "[i]f the legislation is for the beneficial interest of the public health, then it constitutes a reasonable exercise of police power, *and is exclusively for the determination of the legislature*." *Estrin v. Moss*, 221 Tenn. 657, 664, 430 S.W.2d 345, 348 (1968) (emphasis added). In *Estrin*, the Court upheld the constitutionality of regulations governing the business of termite eradication. *See also Ford Motor Co. v. Pace*, 206 Tenn. 559, 564, 335 S.W.2d 360, 362 (1960) (upholding regulation and licensure of motor vehicle dealers). Each of *Ford Motor Company*, *Eyear*, and *Estrin* not only came after *Livesay* was decided, but each specifically mentions and distinguishes *Livesay*.

Barbering clearly implicates "public health, morals, comfort or welfare." Its practitioners come into direct and personal contact with the general public. Under *Estrin*, the General Assembly's decision to regulate such a profession is *per se* "a reasonable exercise of the police power" and within the "exclusive determination of the legislature." It is not to be second-guessed by the judiciary.

Mr. Zarate argues that the academic achievement requirement, in particular, is not related to public health and safety. *See, e.g.*, Pltf. Memo. at 16. But the immediate issue is whether *Livesay* stands for a proposition that the Tennessee Constitution recognizes a fundamental right to work that would accord professional regulation a heightened level of scrutiny. The Tennessee Supreme Court's subsequent decisions make clear that it does not. Instead, the academic achievement requirement must be reviewed under the Tennessee Constitution by the same standards as it is under the Fourteenth Amendment—the rational basis test. "The Legislature has the right to enact such an Act and if there are any facts which reasonably can be conceived which sustain it, it is our duty to sustain it." *Eyear Corp.*, 400 S.W.2d at 742.

Mr. Zarate also points to the non-binding preamble to 2016 Tenn. Pub. Acts 1053, by which the General Assembly established new procedures for certain types of regulations affecting entry into a field. In that preamble, the legislature expressed the sentiments that "the right of individuals to pursue a chosen business or profession, free from arbitrary or excessive government interference, is a fundamental civil right" and that "the freedom to earn an honest living traditionally has provided the surest means for economic mobility." *See* Pltf. Memo. at 6, n.1 (hyperlink within) and 45. "It is well settled that the caption or preamble of a statute or ordinance may be looked to and considered in ascertaining the intention of the legislative body," *City of Kingsport v. Jones*, 196 Tenn. 544, 549, 268 S.W.2d 576, 578 (1954), but it is "not a part of the statute and not controlling." *Memphis St. Ry. Co. v. Byrne*, 119 Tenn. 278, 104 S.W. 460, 464 (1907). Regardless, whether the Tennessee Constitution protects any fundamental right is a matter of constitutional interpretation, and no act of the General Assembly may dictate such an interpretation to the courts. The preamble to the bill in question thus changes nothing about Defendants' analysis of the case law above.[7]

C. The Distinct Analytical Frameworks for Substantive Due Process and Equal Protection.

"Generally, due process and equal protection analyses merit separate consideration." *Hughes v. Bd. of Probation and Parole*, 514 S.W.3d 707, 714 (Tenn. 2017). But Section III of Mr. Zarate's memorandum purports to make the argument that "[n]o real and substantial basis exists for the classification of barbers under the Academic Achievement Requirement." Pltf. Memo. at 24. But in this sentence and throughout the section, the plaintiff repeatedly conflates the

[7] Moreover, the same General Assembly, the 109th, passed both 2016 Tenn. Pub. Acts 1053 and the academic achievement requirement. The most basic canons of construction dictate that this General Assembly could not possibly have viewed the academic achievement requirement as being the sort of "arbitrary or excessive government interference" that it disparaged in 2016 Tenn. Pub. Acts 1053.

substantive due process and equal protection analyses. This makes it impossible to parse his attacks on Defendants' previously-proffered arguments in defense of the statute. The two clauses are analytically distinct and must be considered separately and on their own terms.

As previously explained, *see* Def. Memo. at 8, "[s]ubstantive due process claims may be divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions by the government which are 'arbitrary[ ] or conscience[ ]shocking in a constitutional sense.'" *In re: Walwyn*, 531 S.W.3d 131, 138-39 (Tenn. 2017) (internal citations omitted). Because Mr. Zarate cannot allege that he has been deprived of any particular constitutional right,[8] his claim is that the academic achievement requirement is so arbitrary that it lacks a rational basis. This substantive due process claim requires us to focus on barbers regardless of how other classes are treated.

Equal protection, by contrast, applies to situations in which similarly-situated persons are treated disparately. *See* Def. Memo. at 18 (citing *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011). In the present case, the equal protection issue is whether requiring a high school diploma for barbers but not others is a disparate treatment of similarly-situated persons without a rational basis.

Defendants' expert witness, Casey Haugner Wrenn, was retained to opine on whether the academic achievement requirement was a reasonable action of the legislature, not to compare its reasonableness to the General Assembly's treatment of other professions. Once that is understood and Mr. Zarate's claims are addressed under the appropriate analytical framework, his attacks on Ms. Wrenn's opinion and Defendants' other arguments lose all of their steam.

[8] Having dispensed with Plaintiff's misguided reading of *Livesay* and the Law of the Land Clause above.

II. THE ACADEMIC ACHIEVEMENT REQUIREMENT IS SUPPORTED BY A RATIONAL BASIS.

Contrary to Mr. Zarate's assertion, *see* Pltf. Memo. at 38, concerns for public health and safety do, in fact, support the academic achievement requirement. This educational requirement is only part of an overall system of regulation for barbering as a commercial practice and profession, and it is bound up in the rational basis for the entire regime. The General Assembly, in its wisdom, has chosen to regulate commercial barbering. Once that decision is made, a cascade of subsequent decisions follows, which includes the choice of whether to establish a particular level of general education. The creation of this system of regulation was an organic process occurring over many decades[9] and divided between the General Assembly itself, in its enactment and amendment of the governing statutes, and the Board, which has provided additional administrative detail through its rules and regulations.

Defendants' expert witness, Casey Haugner Wrenn, has provided her expert opinion that, based on the use of MetaMetrics's Lexile Analyzer, the complexity of this regulatory regime—along with that of a standard textbook in the field—justifies the General Assembly's use of a high school diploma as a reasonable proxy for the level of education appropriate to expect of someone able to acquire and successfully maintain a barber license. This was detailed in the defendants' original memorandum in support of their motion. *See* Def. Memo. at 15-17.

Plaintiff's counsel spent considerable time during Ms. Wrenn's deposition attempting to replicate her Lexile measures. *See* Wrenn Dep. at 41:1-104:5 and Exh. 22. This actually consisted of an associate of Plaintiff's counsel inputting various texts into the free version of the Lexile Analyzer and showing, through the remote conference software, the results. *See, e.g., id*. at 42:11-

[9] As Plaintiff notes, the original Barber Board was established in 1929. *See* Pltf. SUMF No. 40.

19. Based on this work, Mr. Zarate has argued that the Lexile scores do not justify the use of a high school diploma as an educational proxy. *See* Pltf. Memo. at 47-48.

But for all this effort, Plaintiff's attack was fatally flawed. His legal team was able to input only 250 words. *See* Wrenn Dep. at 43:24-44:27. Ms. Wrenn has a MetaMetrics account that allows her to input up to 1,000 words of text. *See* Wrenn Second Decl. at ¶ 4. Plaintiff's counsel pointed out that MetaMetrics recommends using plain text or .txt files. Although Ms. Wrenn did not do so in her initial report, she has since run the same analysis using .txt files. *See* Wrenn Second Decl. at ¶ 21 and First Decl. at ¶¶ 12-17. But there is no indication that Plaintiff's legal team used plain text in their replication efforts during the deposition. Ms. Wrenn, however, recreated her Lexile measurements in her first declaration in support of this motion using plain text, the 2011 *Milady's* textbook, and a Lexile account capable of accepting the entirety of every text selection. *See* Wrenn First Decl. at ¶¶ 12-15. Ms. Wrenn's First Declaration thus includes the definitive analysis of these texts using the Lexile Analyzer.[10] And that analysis, as explained in Defendants' original memorandum, supports the conclusion that the academic achievement requirement is reasonable.

Mr. Zarate has moved to exclude Ms. Wrenn's testimony, but his attacks on the substance of her opinion fail. From Ms. Gumucio's statement that "[t]he Board's role is shifting from enforcement to education and awareness," Plaintiff invents the conclusion that the Board "has no interest in enforcement for its own sake." Pltf. Memo. at 47. But Ms. Wrenn's opinion is about whether a high school diploma is a reasonable proxy for the expectation that barbers be able to read and understand the regulations with which they must comply. Nor did Ms. Wrenn's opinion

[10] Ms. Wrenn also pointed out that "the Lexile measures . . . [are] constantly being evaluated, researched and updated," Wrenn. Dep. at 41:19-20, which could also explain discrepancies between her original results and those in the deposition.

depend on the "speculative possibility that future rules might be too difficult to understand" for currently-licensed barbers. Plft. Memo. at 42. Ms. Wrenn's analysis was of the existing rules (and other relevant texts) and demonstrated that expecting a high school graduate level of education was not unreasonable in light of that information as it currently stands. In considering future developments, Ms. Wrenn was merely pointing out that a one-time examination does not ensure ongoing compliance because the rules can change. A high school education is, again, a proxy for a level of achievement through which the General Assembly can feel assured that licensed barbers are able to thrive and comply over the course of years of practice in a potentially fluid regulatory environment.

The other rationale offered by Defendants is that the General Assembly could reasonably expect that the academic achievement requirement would incentivize Tennesseans to complete high school, and that this would have an economic ripple effect that would increase economic growth and tax revenue. This was based on two documents retrieved from the Internet, including one from the federal Bureau of Labor Statistics. Mr. Zarate attacks these documents as "unauthenticated hearsay," Plft. Memo. at 44, but they are not hearsay at all.

Again, the plaintiff fails to understand the nature of rational basis review. This suit is not about litigating the wisdom of the academic achievement requirement and weighing the evidence for and against it. The question is whether the Legislature could have reasonably relied on information like these documents—or Ms. Wrenn's opinion (which could theoretically have been provided in a committee hearing) in order to conclude that the academic achievement requirement advanced the legitimate government interests that Defendants have identified. These documents are not being offered to prove the truth of the matter asserted (the accuracy of the statistics offered),

but to demonstrate that information is available on which the General Assembly *could* have relied—and hearsay standards do not apply to the legislature.[11]

The crux of Mr. Zarate's due process argument is his view that "[e]asing licensure restrictions is the rational way to promote a stronger shared economy, as this experience shows." Pltf. Memo. at 47. For this proposition, he relies on a variety of studies, *see* Pltf. Memo. at 46-47, which ultimately make mere policy arguments more appropriate for a legislative committee hearing rather than a courtroom.

III. THE GENERAL ASSEMBLY HAS DISCRETION TO TREAT BARBERS DIFFERENTLY FROM OTHER PROFESSIONS.

In response to discovery, Defendants identified four ways in which the "academic achievement requirement promote[s] the public's health, safety, moral or physical well-being." See Gumucio Dep., Exh. 1 at Interrogatory No. 3 (pp. 28-31).[12] Mr. Zarate summarizes these reasons, *see* Pltf. Memo. at 25-26, and attacks them through an equal protection prism. *See id*. at 25-34. The entire section conflates the due process and equal protection analyses with predictable confusion given the distinctions discussed above.

In fact, each of the four reasons goes to substantive due process, because it is substantive due process that requires a regulation be related to a legitimate public interest such as health, safety, and moral or physical well-being. Interrogatory No. 3 asked how the academic achievement requirement promoted those interests, not for a justification of the regulation in comparison to

[11] And, regardless, the Bureau of Labor Statistics information is obviously self-authenticating under Tenn. R. Evid. 902(5) as a government publication and is an exception to hearsay under Tenn. R. Evid. 803(8) as a public record. Defense counsel has now provided information affirming the origin of the document. *See* Buchanan Decl. at ¶¶ 4-5.

[12] Plaintiff attached all of Defendants' written discovery responses as the first exhibit to Roxana Gumucio's 2020 deposition. Defendant's "Supplemental Responses to Plaintiff's Interrogatory Nos. 3, 4, 7, 9, 22, and 24" begin at page 27 of that collective exhibit.

other classes. Criticizing those reasons through an equal protection prism is like putting a square peg in a round hole.

The encouragement of education is obviously a legitimate state interest. While Defendants acknowledge that raising the educational requirements of any profession would, at the margins, raise the incentive among Tennesseans to further their own education, there is still room for deference to legislative wisdom in determining what sorts of education are appropriate for what sorts of professions. There are, after all, any number of professions in Tennessee requiring varying levels of education. It would be an absurdity if every one of these determinations were subject to judicial review—this would be nothing else than subjecting legislative policy choices to a re-weighing by the judiciary. There is doubtless some play in choosing these standards—Defendants do not assert that a high school diploma is the *only* reasonable measure of education appropriate to the profession of barbering. But the discretion in determining where to draw these lines is at the heart of the legislative function.

Mr. Zarate has also neglected the core component of an equal protection claim. "The threshold inquiry is whether the classes of persons at issue are similarly situated; if not, then there is no basis for finding a violation of the right to equal protection." *City of Memphis v. Hargett*, 414 S.W.3d 88, 110 (Tenn. 2013).

Mr. Zarate has not established that barbers are similarly situated with any of his comparison classes: cosmetologists, EMRs, state legislators, and the governor. In all but the first case, the lack of similarity is plain on its face. Barbers cut and style hair and may perform other beautification functions. EMRs respond to medical emergencies. "Governor" and "legislator" are not even professions or occupations—they are political offices and their qualifications are bound up in principles of representative democracy that have nothing to do with the public protection interests

in regulating any profession or occupation that interacts directly with the public. The plaintiff is asking the Court to weigh the wisdom of the legislative choices. He contends that EMRs and elected officials exercise greater impact on public health and safety than do barbers and that the General Assembly has thus erred in requiring more education for barbers. That is just an opinion—a second-guessing of legislative choices.

Cosmetology is obviously closer to the circumstances of barbering than these other ostensible comparison classes. The definitions of the two practices—at Tenn. Code Ann. § 62-4-102(a)(3) and Tenn. Code Ann. § 62-3-105, respectively—obviously contain overlapping functions. But in assessing whether classes are similarly situated, "'[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States,' and legislatures are given considerable latitude in determining what groups are different and what groups are the same." *Doe v. Norris* 751 S.W.2d 834, 841 (Tenn. 1988) (citations omitted). But they are not identical, as is demonstrated by their practices being separately defined and the professions being governed by separate statutory and regulatory schemes. In-person and absentee voters both exercise the same fundamental function—participating in an election—but Tennessee courts have repeatedly held that they are not similarly situated for purposes of the identification required to participate in an election. *See Hargett*, 414 S.W.3d at 110.

As Defendants have previously explained, see Def. Memo. at 20-21, "[t]he equal protection clause does not require a state legislature to choose between dealing with all aspects of a problem or not dealing with it at all." *Harmon v. Angus R. Jessup Associates, Inc.*, 619 S.W.2d 522, 524 n.2 (Tenn. 1981) (citing *Dandridge v. Williams*, 397 U.S. 471 (1970)). The General Assembly, having identified the lack of academic achievement as a problem, need not deploy every possible

remedy simultaneously. The equal protection clause does not require that sort of "[p]erfection." *See id*.

IV. PLAINTIFF'S FOCUS ON LEGISLATIVE INTENT IS MISPLACED.

Throughout this litigation, Defendants have repeated the nature of rational basis review. "[U]nder the rational basis test, specific evidence is not necessary to show the relationship between the statute and its purpose. Rather," courts ask "only whether the law is reasonably related to proper legislative interests." *Riggs v. Burson*, 941 S.W.2d 44, 52 (Tenn. 1997). The inquiry has nothing to do with the actual intent of the legislature (at least where no fundamental right or suspect classification is implicated). Instead, "[i]f some reasonable basis can be found for the classification [in the statute] or if any state of facts may reasonably be conceived to justify it, the classification will be upheld." *Id*. at 53 (citations omitted).

As a result, even if Mr. Zarate could make a definitive conclusion about "[t]he legislative purpose of the Academic Achievement Requirement" as he purports to do, *see* Plft. Memo at 34, that would hardly end the analysis, because if any other sufficient justification could be conceived by the defendants or by the court, the statute must still be sustained.

Beyond this, Mr. Zarate's attempt to concoct a cognizable legislative intent for the academic achievement requirement holds no water at all. He claims that "[t]he goal was to harmonize the barber and cosmetology licenses," but offers no citation to the record. From a Board member's testimony that barbering and cosmetology are no longer defined by gender, he extrapolates that "the two licenses were vestigial remnants of a time steeped in rigid gender expectations," Pltf. Memo. at 35, but the statement itself does not go that far.

Mr. Zarate wishes to paint a picture of the General Assembly having a "goal . . . to make it *easier* to become licensed," and that the academic achievement requirement thus "contravened

that goal." Pltf. Memo. at 36-37 (emphasis in original). But that statement is from one legislator sponsoring a bill in 2018 to reduce the academic achievement requirement at issue, enacted in 2015. Not only did the General Assembly expressly establish the high school diploma requirement in 2015, it declined to enact the legislator's 2018 bill undoing that. One legislator's opinions do not establish legislative intent in the face of actual legislative action, by the entire body, to the contrary. And, of course, legislative intent is not actually relevant to the Court's inquiry—what matters is whether some rational justification for the statute can now be conceived, regardless of the actual intent.

Mr. Zarate also conflates and confuses the General Assembly with the Board and the Department of Commerce & Insurance. He argues that the Board and Department have "endorsed eliminating the Academic Achievement Requirement." Plft. Memo. at 41.[13] While the Board might be the proper defendant for this declaratory judgment action, the challenge is to a *statute*, not any action of the Board or opinion of its members, staff, or other State officials. What matters is not whether a Board member—or any person on the street—might prefer an alternative to the academic achievement requirement, but whether a reasonable justification for it can be conceived.

V. THE ACADEMIC ACHIEVEMENT REQUIREMENT IS NOT ECONOMIC PROTECTIONISM.

In *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the Sixth Circuit Court of Appeals invalidated what it termed "the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers." *Id*. at 229. Because of the notoriety of *Craigmiles* as a rejection of a Tennessee statute by the Sixth Circuit on rational basis

[13] This refers to legislative committee testimony from the Board's Executive Director Roxana Gumucio and Deputy Commissioner Brian McCormack of the Department (see Pltf. SUMF No. 224) and Board members Ron Gillihan and Amy Tanksley.

grounds, Plaintiff seeks to draw parallels between that case and this one. *See, e.g.*, Pltf. Memo. at 22. But that case is nothing like this one.

Craigmiles concerned a statute that prohibited anyone other than licensed funeral directors from selling caskets in Tennessee, *Craigmiles*, 312 F.3d at 222, notwithstanding the existence of a side-industry of sales of funeral merchandise—including caskets—by merchants without this license. *See id*. at 222-23. The Sixth Circuit examined the State's rational basis arguments, found them lacking, and concluded that the only plausible explanation was that it was designed as economic protection for licensed funeral directors because the statute had "the effect, at least, of preventing individuals who are not licensed funeral directors from selling caskets, potentially at a lower price. In that case, the district court found that funeral home operators generally mark up the price of caskets 250 to 600 percent, whereas casket retailers sell caskets at much smaller margins." *Id*. at 224. The court concluded that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Id*.

It is hard to conceive how this framework fits the academic achievement requirement. If the "discrete interest group" being protected is already-licensed barbers, then their potential competitors have been only minimally decreased—88.3% of Tennesseans (using 2014 data) are still academically eligible to be certified as master barbers.[14] And that does not take into account that more aspiring barbers might be willing to finish high school in light of the new requirement. There is no side-industry of unlicensed barbering that is eliminated by the academic achievement

[14] This information comes from the 2016 Annual Report of the Tennessee Higher Education Commission, available at https://www.tn.gov/content/dam/tn/thec/learn-about/ccta/leg-reports/2016/Profiles-Trends-2016.pdf (retrieved on June 22, 2020). The data on page 5 of the report indicates that 8.1% of Tennesseans had some high school experience short of receiving a diploma or equivalent but does not distinguish between grade levels. Some portion of that 8.1% would have met the earlier 10th grade requirement, hence the range given above, so the range of eligible Tennesseans under the old academic requirement was somewhere between 88.3 and 96.4%. *See* Declaration of Brad H. Buchanan at ¶¶ 2-3 and Exh. 1. This is an official document of the State of Tennessee, is self-authenticating under Tenn. R. Evid. 902(5), and constitutes a public record excepted from hearsay under Tenn. R. Evid. 803(8).

requirement as the statute in *Craigmiles* purported to wipe out funeral merchandise stores.[15] Similarly, *Consumers Gasoline Stations v. City of Pulaski*, 292 S.W.2d 735 (Tenn. 1956), involved an ordinance that served to close off an entire line of business to new entry. By contrast, the academic achievement requirement does not close off the profession of barbering at all. Again, it only slightly reduces the population eligible to enter the industry without meeting an additional, new requirement.

Plaintiff's criticism of the "grandfathering" of barbers who met the licensure requirements when they began their careers but do not meet the academic achievement requirement is untenable. *See* Pltf. Memo. at 54. One can only imagine the cries of "right to earn a living" that would be raised if the General Assembly decided that, going forward, additional licensure requirements were in the best interest of the State and that they would disrupt the careers of decades-long professionals by requiring every licensee to meet the new requirements.

There are no monopoly rents created by the academic achievement requirement. This statute is not a "fortress" protecting a discrete interest group. And other than its generalized description of rational basis review, *Craigmiles* has no application to the case at bar.

VI. EVEN IF MS. WRENN'S EXPERT REPORT IS EXCLUDED, THE COURT SHOULD CONSIDER HER TESTIMONY.

Mr. Zarate has moved to exclude Casey Haugner Wrenn's expert opinion report. Defendants stand behind the report and Ms. Wrenn's opinion as appropriate expert testimony under the Tennessee Rules of Evidence. But even if the Court rules that the report should be excluded under Tenn. R. Evid. 702, it should still consider the substance of the opinion. The nature

[15] Perhaps the closest parallel between the sale of caskets and this case would be a ban on the sale of shampoos and clippers by anyone other than licensed barbers.

of rational basis analysis requires the Court to consider any conceivable justification for the challenged statute, be it an expert's opinion or a layman's common sense.

Whether it meets the requirements of Rule 702, Ms. Wrenn's testimony is based on her extensive experience in the field of education and on a well-researched tool used to measure the complexity of texts. It provides a clear and reasonable basis for the legislative decision to conclude that high school graduation is a reliable proxy for ensuring competent, safe barbering for the Tennessee public. The substance of her report certainly qualifies as a rationale that can be conceived to support the legislative action. This Court should consider it.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for summary judgment and instead 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.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

s/ Brad H. Buchanan
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[redacted]