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

TAMMY NUTALL-PRITCHARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 16-455-II**
	)	
THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS; ROXANA GUMUCIO, in 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, DIANE TEFFETELLER, MONA SAPPENFIELD, FRANK GAMBUZZA, AMY TANKSLEY, ANITA CHARLTON, YVETTE GRANGER, BOBBY N. FINGER, BRENDA GRAHAM, in their official Capacities as members of the Board.	)	
	)	
Defendants.	)	

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MOTION TO DISMISS

Defendants—the Tennessee Board of Cosmetology and Barber Examiners as well as the Board's Executive Director, Roxana Gumucio, and its members, all sued in their official capacities—move this Court to dismiss this suit pursuant to Tenn. R. Civ. P. 12.02(1) and (6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The complaint relies on five purported bases for subject matter jurisdiction—the Uniform Administrative Procedures Act ("UAPA"), this Court's general jurisdiction at Tenn. Code Ann. §§ 16-11-101, *et seq.*, Tenn. Code Ann. § 29-1-101, the Declaratory Judgment Act, and 42 U.S.C.

§ 1983 (*see* Complaint at ¶¶ 3 and 5)—over the four numbered claims presented. *See* Complaint at ¶¶ 59-98. Plaintiff did not petition the Board for a declaratory order and thus may not proceed under the UAPA. Each of Tenn. Code Ann. §§ 16-11-101, *et seq.*, Tenn. Code Ann. § 29-1-101, and the Declaratory Judgment Act are statutes of general jurisdiction that do not expressly create a cause of action against the State and thus do not represent valid waivers of the State's inherent sovereign immunity from suit. Only 42 U.S.C. 1983 actually confers any subject matter jurisdiction on this Court but even it applies only to purported violations of federal law. Only Claim 4 is predicated such an allegation. Plaintiff's Claims 1, 2, and 3 are each predicated entirely on state law and thus § 1983 confers subject matter jurisdiction on this Court only with respect to Claim 4. The remaining claims should be dismissed under Tenn. R. Civ. P. 12.02(1) for lack of subject matter jurisdiction.

Regardless, none of Plaintiff's substantive claims state a claim upon which relief can be granted. Claim 1 alleges a lack of statutory authority for requiring a license for shampooing. This is incorrect as a matter of law under the plain meaning of the relevant statutes and should thus be dismissed regardless of the proof Plaintiff can offer. Claim 3 alleges that the Board's composition and the regulatory framework together create a monopoly in the shampooing trade, contrary to Article I, § 22, of the Tennessee Constitution. As a matter of law, this misapprehends the nature of monopolies as contemplated by the Tennessee Constitution and no proof that Plaintiff can offer could conceivably demonstrate otherwise. This claim too should be dismissed. Finally, Claims 2 and 4, under the Tennessee Constitution's Law of the Land Clause and the United States Constitution's Fourteenth Amendment, respectively, assert that the State lacks a rational basis to regulate shampooing. Under the considerable precedent construing those parallel constitutional

provisions, economic policy and the regulation of trade are uniquely within the legislative sphere and not subject to second-guessing in the courts as long as there is any conceivable basis on which to sustain such regulations. No proof that Plaintiff could introduce could negate all such conceivable bases and so those claims should also be dismissed. As a result, each of the four claims should be dismissed under Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted.

The grounds for this motion are more fully stated in and supported by the attached Memorandum and the Declarations of Roxana Gumucio (Exhibit "A") and Laura Martin (Exhibit "B") attached to this motion (but only in support of that portion of the motion relying on Tenn. R. Civ. P. 12.02(1)).

CONCLUSION

For the foregoing reasons, the Commissioner requests that this Court dismiss the complaint for a lack of subject matter jurisdiction with respect to Claims 1 through 3 and for failure to state a claim upon which relief can be granted with respect to all four claims.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

BRAD H. BUCHANAN (#23534)
Senior Counsel
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P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3198
(615) 532-2571 *fax*
Counsel for the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum in Support of Motion to Dismiss has been served upon counsel for Plaintiff via U.S. Mail addressed to:

Mr. Braden H. Boucek
Beacon Center of Tennessee
P.O. Box 198646
Nashville, Tennessee 37219
Counsel for Plaintiff

on this 1st day of June 2016.

BRAD H. BUCHANAN
Senior Counsel

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

TAMMY NUTALL-PRITCHARD,	)	
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Plaintiff,	)	
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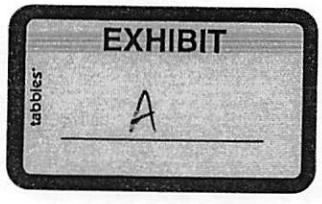
THE TENNESSEE BOARD OF COSMETOLOGY AND BARBER EXAMINERS; ROXANA GUMUCIO, in her official capacity as executive director of the Tennessee Board of Cosmetology; RON R. GILLIHAN II, KELLY BARGER, NINA COPPINGER, JUDY MCALLISTER, PATRICIA J. RICHMOND, DIANE TEFFETELLER, MONA SAPPENFIELD, FRANK GAMBUZZA, AMY TANKSLEY, ANITA CHARLTON, YVETTE GRANGER, BOBBY N. FINGER, BRENDA GRAHAM, in their official Capacities as members of the Board.	)	
	)	
Defendants.	)	

DECLARATION OF ROXANA GUMUCIO

---

1. This declaration is made under Tenn. R. Civ. P. 72. The undersigned has actual knowledge and can testify to the truth of the matters asserted herein.

2. My name is Roxana Gumucio and I am the Executive Director of the Tennessee Board of Cosmetology and Barber Examiners. The Board was created by the General Assembly (at Tenn. Code Ann. § 62-4-103) to license and regulate the practice of cosmetology in Tennessee. The Board's offices are located at 500 James Robertson Parkway, Nashville, TN 37243.



3. I have been the Executive Director of the Board since May 2013. One of my duties is to serve as the records custodian for the Board. I also oversee the staff that conducts the correspondence and business of the Board.

4. Based upon my personal knowledge and review of the records of the Board and its staff, I can state the plaintiff in the above-styled suit has not requested a declaratory order from the Board.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 31st day of May 2016.

ROXANA GUMUCIO

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

BRAD H. BUCHANAN (#23534)
Senior Counsel
Office of the Attorney General, Tax Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3198
(615) 532-2571 *fax*
Counsel for the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Declaration of Roxana Gumucio has been served upon counsel for Plaintiff via U.S. Mail addressed to:

Mr. Braden H. Boucek
Beacon Center of Tennessee
P.O. Box 198646
Nashville, Tennessee 37219
Counsel for Plaintiff

on this 1st day of June 2016.

BRAD H. BUCHANAN
Senior Counsel

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

TAMMY NUTALL-PRITCHARD,	)	
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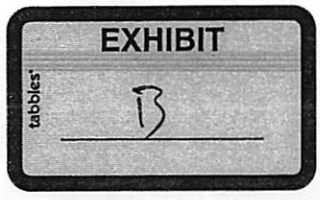
	)	
Defendants.	)	

DECLARATION OF LAURA MARTIN

---

1. This declaration is made under Tenn. R. Civ. P. 72. The undersigned has actual knowledge and can testify to the truth of the matters asserted herein.

2. My name is Laura Martin and I am Assistant General Counsel with the Regulatory Boards Division of the Legal Department of the Tennessee Department of Commerce & Insurance. In that capacity, I currently serve as counsel to the Board of Cosmetology and Barber Examiners (the "Board") and have done so since January, 2015.



3. If any petitions for declaratory orders are made to the Board, it would be my responsibility to review the petition and present it to the Board for appropriate action.

4. The plaintiff in the above-styled matter has not filed any petition for a declaratory order with the Board.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 31st day of May 2016.

Laura E. Martin
LAURA MARTIN

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

BRAD H. BUCHANAN (#23534)
Senior Counsel
Office of the Attorney General, Tax Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3198
(615) 532-2571 *fax*
Counsel for the State of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Declaration of Laura Martin has been served upon counsel for Plaintiff via U.S. Mail addressed to:

Mr. Braden H. Boucek
Beacon Center of Tennessee
P.O. Box 198646
Nashville, Tennessee 37219
Counsel for Plaintiff

on this 1st day of June 2016.

BRAD H. BUCHANAN
Senior Counsel

IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
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TAMMY NUTALL-PRITCHARD,	)	
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	)	
Defendants.	)	

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants have moved this Court under Tenn. R. Civ. P. 12.02(1) and (6) to dismiss this Complaint for Declaratory and Injunctive Relief on the grounds that the Court lacks subject matter jurisdiction and the complaint fails to state a claim upon which relief can be granted. Specifically, this Court lacks subject matter jurisdiction over most of the claims raised because of Plaintiff's failure to seek a declaratory order from the Board under the Uniform Administrative Procedures Act. And even if subject matter jurisdiction were proper in this Court, the complaint fails to state

a claim upon which relief can be granted with respect to any of its four claims and ought to be dismissed regardless of any jurisdictional basis for this suit.

The complaint seeks relief under four numbered claims:

- Claim 1 – that the Cosmetology Act does not empower the Board to impose a license requirement for shampooing. *See* Complaint at ¶¶ 59-67;

- Claim 2 – that the shampooing licensure requirement violates Plaintiff's right—under Tennessee's Law of the Land Clause—to engage in her chosen profession. *See* Complaint at ¶¶ 68-75;

- Claim 3 – that the Board and the shampooing regulations constitute an anti-competitive monopoly prohibited by Article I, § 22 of the Tennessee Constitution. *See* Complaint at ¶¶ 79-82;

- Claim 4 – that the licensure requirement violates the Fourteenth Amendment. *See* Complaint at ¶¶ 92-98.

Each of these claims will be addressed first under Tenn. R. Civ. 12.02(1) and then under Tenn. R. Civ. P. 12.02(6).

I. THERE IS NO SUBJECT MATTER JURISDICTION IN THIS COURT OVER PLAINTIFF'S CLAIMS OTHER THAN CLAIM 4.

Plaintiff cites five separate bases for subject matter jurisdiction, but only one of them confers any subject matter jurisdiction on this Court, and that over only one of the four claims set out in the complaint. Tenn. R. Civ. P. 12.02(1) requires the dismissal of claims where for "lack of jurisdiction over the subject matter" and all of the claims but one—Claim 4—should be dismissed for that reason. The five bases pled are under the Uniform Administrative Procedures Act ("UAPA") (specifically Tenn. Code Ann. § 4-5-225, *see* Complaint at ¶¶ 3 and 5), the Chancery Court's general jurisdiction (Tenn. Code Ann. §§ 16-11-101, *et seq.*, *see* Complaint at ¶ 5), Tenn. Code Ann. § 29-1-101 (*see* Complaint at ¶ 5), the Declaratory Judgment Act (Tenn. Code Ann. §§

29-14-101, *et seq.*, *see* Complaint at ¶¶ 3 and 5) and 42 U.S.C. § 1983 (Complaint at ¶ 4). This memorandum will address each basis in turn.

A. The UAPA Does Not Confer Subject Matter Jurisdiction over These Claims Because Plaintiff Failed to Request a Declaratory Judgment from the Board.

Plaintiff has not satisfied the procedural requirements for obtaining a declaratory judgment from this Court under the UAPA. The UAPA does provide for the Davidson County Chancery Court to review "[t]he legal validity or applicability of a statute, rule or order of an agency" under certain circumstances. Tenn. Code Ann. § 4-5-225(a). But it also clearly specifies that "[a] declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order." Tenn. Code Ann. § 4-5-225(b). *See also Stewart v. Schofield*, 368 S.W.3d 457, 465 (Tenn. 2012) (holding that "[i]n no uncertain terms [section 4-5-225(b)] requires a prospective plaintiff to make a request for a declaratory order with an agency before bringing an action for a declaratory judgment in the Chancery Court.") That has not happened here and so the procedures required to invoke Tenn. Code Ann. § 4-5-225 have not been followed.

Plaintiff does not even allege that she petitioned the Board for a declaratory order. *See generally* Complaint. And the Board's Executive Director, Roxana Gumucio, and its counsel, Laura Martin, both confirm that no such petition was made by Plaintiff. *See* Declarations of Roxana Gumucio and Laura Martin (attached as Exhibits A and B to the Board's Motion.[1] As a

[1] Tenn. R. Civ. P. 12.02 provides that "[i]f, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." The attached affidavits are being submitted *only* to support the subject matter jurisdiction defense and do not pertain to the Rule

result, there is no basis for Plaintiff to seek a declaratory judgment in this Court under Tenn. Code Ann. § 4-5-225 and thus no basis for subject matter jurisdiction under that statute.

B. The Chancery Court's General Jurisdiction Does Not Confer Subject Matter Jurisdiction over These Claims Because It Does Not Constitute an Express Waiver of Sovereign Immunity.

The doctrine of sovereign immunity bars a suit against the State absent specific statutory authorization. In citing Tenn. Code Ann. §§ 16-11-101, *et seq.*, Plaintiff has cited a statute of only general jurisdiction. By definition, this statute cannot and does not constitute a waiver of the State's sovereign immunity.

"Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Tenn. Const. art. I, § 17. "'[T]he State' includes 'the departments, commissions, boards, institutions and municipalities of the State.'" *Davidson v. Lewis Bros. Bakery*, 227 S.W.3d 17, 19 (Tenn. 2007) (quoting *Metro. Gov't of Nashville and Davidson County v. Allen*, 415 S.W.2d 632, 635, 220 Tenn. 222 (Tenn. 1967)). Courts "will not find a waiver of the State's sovereign immunity 'unless there is a statute clearly and unmistakably disclosing an intent upon the part of the Legislature to permit such litigation.'" *Id.* (citing *Scates v. Bd. of Comm'rs of Union City*, 265 S.W.2d 563, 565, 196 Tenn. 274 (Tenn. 1954)).

As a board of the State of Tennessee, the Board of Cosmetology and Barber Examiners thus enjoys this sovereign immunity from suit except under a statute "clearly and unmistakably" establishing a cause of action against the Board. The State has waived its sovereign immunity only to the extent provided under the UAPA, as discussed in Section I(A), above, which procedures

12.02(6) defenses addressed below. The Board's reliance on these affidavits thus does not require the treatment of this motion—as pertains only to subject matter jurisdiction—under Rule 56.

Plaintiff has not followed. Tenn. Code Ann. § 16-11-101 states merely that "[t]he chancery court has all the powers, privileges and jurisdiction properly and rightfully incident to a court of equity." And no other section of Chapter 11 of Title 16 provides a specific basis for a suit against the State or one of its agencies. There is thus nothing in this statute to establish subject matter jurisdiction in this Court over these claims.

C. Tenn. Code Ann. § 29-1-101 Does Not Confer Subject Matter Jurisdiction over These Claims Because It Does Not Pertain to the Relief Sought.

Nothing in Tenn. Code Ann. § 29-1-101 purports to grant the Chancery Courts subject matter jurisdiction over claims against the State or its agencies. In its entirety, the statute provides that "[t]he provisions of this Code relating to injunctions, appointment of receivers, and other extraordinary process, apply equally to equity proceedings in any court." Plaintiff has not requested an injunction, the appointment of a receiver, or sought to avail herself of any extraordinary process. In fact, nothing in this statute purports to grant jurisdiction over *any* sort of claim, much less in derogation of sovereign immunity.

D. The Declaratory Judgment Act Does Not Confer Subject Jurisdiction over These Claims Because State Law Required Plaintiff to First Seek a Declaratory Judgment from the Board.

The only procedural vehicle expressly provided by the General Assembly for obtaining a declaratory judgment against a State agency such as the Board is to first petition for a declaratory order from the Board under Tenn. Code Ann. § 4-5-223. Under the principles of sovereign immunity discussed above, this level of specificity is required to support subject matter jurisdiction over a suit against the State and thus supersedes any general statutes that do not create express causes of action against the State.

One such general statute is the Declaratory Judgment Act, Tenn. Code Ann. §§ 29-14-101, *et seq.*, cited by Plaintiff as a fourth basis for subject matter jurisdiction. The Act grants courts "within their respective jurisdictions . . . the power to declare rights, status, and other legal relations." Tenn. Code Ann. § 29-14-102. The statute thus makes clear that an independent basis for jurisdiction is necessary to support the filing of a suit. *See also Zirkle v. Kingston*, 217 Tenn. 210, 225, 396 S.W.2d 356, 363 (Tenn. 1965) (holding that a declaratory judgment is proper in chancery court "only if chancery originally could have entertained a suit of the same subject matter"); *Watson v. Dep't of Correction*, 970 S.W.2d 494, 496 (Tenn. Ct. App. 1998) (holding that "[t]here is no evidence the General Assembly affirmatively authorized suits against the State when it enacted the Declaratory Judgment Act").

Instead of proceeding under the Declaratory Judgment Act, the General Assembly created a specific procedural vehicle at Tenn. Code Ann. § 4-5-223 under which a party may petition the pertinent agency for a declaratory order. Upon receiving such a petition, the agency has two options—to "[c]onvene a contested case hearing and issue a declaratory order" reviewable in this Court or to refuse to issue a declaratory order. *See* Tenn. Code Ann. § 4-5-223(a). Final decisions in contested cases are subject to judicial review in this Court under Tenn. Code Ann. § 4-5-322. The refusal to issue a declaratory order, as noted above, activates the petitioner's right to seek a declaratory judgment directly in this Court under Tenn. Code Ann. § 4-5-225. These are the only circumstances through which the General Assembly has created subject matter jurisdiction in this Court over declaratory relief against State agencies. This approach has the salutary policy effect of giving state agencies possessed of specific expertise in the areas entrusted to their administration the opportunity to gather evidence and use that expertise to create a record of facts for the judicial

review process. Skipping this step not only violates the law, it needlessly deprives the judicial process of that potentially-valuable injection of information and expertise by the agency.

There are limited exceptions justifying the use of the Declaratory Judgment Act in a suit against the State. Because "[a]n administrative agency has no authority to resolve facial challenges to the constitutionality of a statute," *Richardson v. Bd. of Dentistry*, 913 S.W.2d 446, 462 (Tenn. 1995), the Tennessee Supreme Court has held that suits challenging the *facial* validity of a statute may proceed under Tenn. Code Ann. §§ 29-14-101, *et seq.* In *Colonial Pipeline Company v. Morgan*, 263 S.W.3d 827 (Tenn. 2008), that Court identified three "broad categories" of constitutional disputes before agencies: "(1) challenging the facial constitutionality of a statute authorizing an agency to act or rule, (2) challenging the agency's application of a statute or rule as unconstitutional, or (3) challenging the constitutionality of the procedure used by an agency." *Id.* at 843. The *Colonial Pipeline* Court reiterated that agencies have the power to decide issues falling under the second and third categories, but not the first. *See id.* The complaint in *Colonial Pipeline* presented a "mixture" of both "facial validity and statutory application" issues, with only the latter requiring an agency petition prior to filing suit in Chancery Court. *Id.* at 846. The Court determined that suit to be, "as a whole, . . . best characterized as a facial attack challenging the validity of certain statutes and state constitutional provisions," *id.*, and thus determined that the plaintiff should not have been required to exhaust administrative remedies by proceeding under the UAPA.

The appellate courts have also permitted declaratory judgment actions against the State outside of the UAPA in the very narrow instance in which plaintiffs seek the judicial review of the constitutionality of a criminal statute prior to having that statute applied to them. *See, e.g.,*

Blackwell v. Haslam, 2012 Tenn. App. LEXIS 23 at *13-14 (Tenn. Ct. App. 2012) (analyzing *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993) and *Clinton Books, Inc. v. City of Memphis*, 197 S.W.3d 749 (Tenn. 2006) and concluding that the Tennessee Supreme Court had created an exception to *Zirkle* for chancery court to entertain declaratory judgment actions pertaining to to "actions for declaratory relief concerning statutes that assessed criminal penalties for violations thereof").

The present case does not fall under either of these exceptions to the requirement of first seeking a declaratory judgment under the UAPA. These are clearly not criminal statutes of the sort contemplated in *Blackwell*, *Davis-Kidd Booksellers*, and *Clinton Books*. And while some of the claims could be construed as facial attacks on the constitutionality of statutes and rules, significant elements of the complaint are clearly statutory construction challenges, which *Colonial Pipeline* would continue to direct to the agency process under the UAPA. Claim 1 accuses the Board of exceeding the authority granted to it by statute and does not even implicate a constitutional challenge. And, with Claim 3(b), Plaintiff alleges that the purported lack of schooling available to satisfy the educational requirements of a shampooing license "has, in effect, granted cosmetologists a monopoly over shampooing" in violation of the Tennessee Constitution. Complaint at ¶ 88. That allegation turns not on the face of the licensure requirements but upon a state of affairs Plaintiff alleges exists, a clear "as-applied" challenge.

Because of the non-facial claims raised by the complaint, this suit presents a mixture of facial and applied (or non-constitutional) challenges to the State's cosmetology statutes and rules. Because of the importance of Claims 1 and 3(b) to the overall thrust of the complaint, this suit cannot be "best characterized" as a facial challenge to the regulatory framework. Those claims

must be submitted to the Board for its review under the UAPA. While it is true that the Board is without power to decide the facial challenges—such as those under Claim 4—the Tennessee Supreme Court has never held that this excuses a litigant from filing any of her claims under the UAPA. Instead, upon receiving a ruling from the agency on any applied challenges, procedural challenges, or issues of statutory construction, a petitioner may then "seek judicial review of the resolved issues and of those issues that the agency refused or was without authority to consider." *Richardson*, 913 S.W.2d at 456-57.

This procedure not only has the salutary benefit of invoking the agency's fact-finding apparatus and expertise, it helps ensure that claims are adjudicated on the narrowest grounds possible. This is in keeping with the Tennessee Supreme Court's stated preference to "refrain from 'anticipat[ing] [a] question of constitutional law in advance of the necessity of deciding it.'" *ACLU v. Darnell*, 195 S.W.3d 612, 622 (Tenn. 2006) (quoting *Hinton v. Devine*, 633 F.Supp. 1023, 1030 (E.D.Pa. 1986). For instance, upon being confronted with Plaintiff's arguments, the Board here could conceivably agree that its regulations exceeded its authority or that the regulatory framework, as applied, reached an unconstitutional result. That would moot any broader facial challenge to the framework and effectuate the policy described in *Darnell*.

The procedure expressly contemplated by the UAPA and by the Tennessee Supreme Court is for a petitioner to seek a declaratory order from the pertinent agency and then file suit in Chancery Court unless the *entire* tenor of the suit is that of a facial constitutional challenge to a regulatory framework. That is not the nature of this suit and so Plaintiff is not permitted to circumvent the UAPA by filing suit under Tenn. Code Ann. § 29-14-101, *et seq*.

E. 42 U.S.C. § 1983 Provides Subject Matter Jurisdiction for Only Some of Plaintiff's Claims.

The only one of Plaintiff's proferred jurisdictional bases that actually confers subject matter jurisdiction on this Court is 42 U.S.C. § 1983, but even that statute supports jurisdiction over only one of the four claims articulated in the complaint. Section 1983 provides a cause of actions for violations of federal law, but of Plaintiff's claims, only Claim 4 implicates any violation of federal law. Section 1983 thus confers no subject matter jurisdiction over Claims 1 through 3.

Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Tennessee Supreme Court has explained that a § 1983 claim has two elements: (1) that the challenged conduct "have been committed by a 'person [acting] under color of any statute, ordinance, regulation, custom, or usage, of any State'" and (2) "that this conduct must deprive the plaintiff of 'rights, privileges, or immunities secured by the Constitution and laws [of the United States].'" *King v. Betts*, 354 S.W.3d 691, 702-03 (Tenn. 2011).

The second element of a § 1983 claim is plainly not met by this suit with respect to any of the first three Claims. Claim 1 alleges that the Board's regulations exceed the authority granted the Board under Tenn. Code Ann. § 62-4-101, et seq., a *Tennessee* statute and not a federal law. Claim 2 asserts that the licensure requirements at issue violate the protections of the *Tennessee* Constitution's Law of the Land Clause, not any provision of the United States Constitution. Under Claim 3, Plaintiff alleges that the application of the same regulations results in a violation of the

Tennessee Constitution's prohibition against monopolies, not any provision of the United States Constitution. Only Claim 4, which alleges violations of the Fourteenth Amendment of the United States Constitution, rests on any substantive federal law ground. As a result, § 1983 does not confer jurisdiction on this Court to hear any of Plaintiff's claims other than Claim 4.

F. All of Plaintiff's Claims for Relief Should Be Dismissed Under Tenn. R. Civ. P. 12.02(1) Except for Claim 4.

None of the five jurisdictional bases offered in the complaint supports subject matter jurisdiction over any portion of Claims 1 through 3. This Court thus lacks jurisdiction over those claims and should dismiss them under Tenn. R. Civ. P. 12.02(1). This Court does have subject matter jurisdiction over Claim 4, but only under 42 U.S.C. § 1983.

II. NONE OF PLAINTIFF'S ALLEGATIONS STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

As a result of the foregoing analysis, the only portion of the complaint that should survive this Court's application of Tenn. R. Civ. P. 12.02(1) is Claim 4, stating federal constitutional claims and traveling only under 42 U.S.C. § 1983. But even if this Court found a jurisdictional basis to hear the state law claims comprising Claims 1 through 3, it should still dismiss the entirety of this suit under Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief can be granted.

Plaintiff's claims in this suit constitute nothing more than second-guessing of policy decisions made by the General Assembly. The courts are not the proper venue to seek redress for legislative policy choices—such grievances should be directed to the General Assembly directly. Because these claims so fundamentally misapprehend the role of the courts, the legal theories

advanced by Plaintiff would not entitle her to relief under any set of facts. This suit thus fails to state any claims upon which this Court can grant relief.

In the filing of a complaint, Tenn. R. Civ. P. 8.01 requires "(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." "A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss 'admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to establish a cause of action.'" *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) (internal citations omitted). "A trial court should grant a motion to dismiss 'only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.'" *Id.* (citations omitted).

But while the complaint must be construed "liberally in favor of the plaintiff . . . by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts," *Webb*, 346 S.W.3d at 426 (quoting *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 54 (Tenn. Ct. App. 2004), the facts pleaded "*must contain direct allegations on every material point* necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested . . . by the pleader, *or contain allegations from which an inference may fairly be drawn that evidence on these material points will be introduced at trial.*" *Id.* at 427 (quoting *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 103 (Tenn. 2010); emphasis in original).

Plaintiff has not—and cannot—allege facts sufficient to show her entitlement to relief under any legal theory. As a result, this Court should dismiss each of her claims for failure to state a claim upon which relief can be granted.

A. Claim 1 – The Cosmetology Act Plainly Authorizes the Requirement of a Shampooing License.

The General Assembly has not only authorized but *requires* the Board to license those who wish to practice shampooing for compensation. There is no thus merit to this purely legal claim by Plaintiff.

"Except as otherwise provided in this chapter, no person shall practice, teach or attempt to practice or teach, cosmetology, manicuring or aesthetics in this state without a valid license issued by the board pursuant to this chapter." Tenn. Code Ann. § 62-4-108. For purposes of the Tennessee Cosmetology Act (Tenn. Code Ann. §§ 62-4-101, *et seq.*), "cosmetology" is defined to include "[a]rranging, dressing, curling, waving, *cleansing*, cutting, singeing, bleaching, coloring or similar work on the hair of any person by *any means*." Tenn. Code Ann. § 62-4-102(a)(3)(A) (emphasis added). Thus, no person may engage in the practice of cleansing hair by any means "without a valid license issued by the board." Under the plain language of the Act, shampooing clearly fits within this portion of the broader definition of cosmetology and thus, by its incorporation into the definition of cosmetology, *is* "mentioned in the section granting the Board its authority to require a license" for shampooing, Complaint at ¶ 64, contrary to Plaintiff's mistaken reading of the Act.

Because shampooing, on its own, implicates only a fraction of the disciplines covered by the practice of cosmetology, the General Assembly expressly provided for a shampooing license, setting out licensure requirements (such as being 16 years old and completing 300 hours of

education at a cosmetology school) for "[a]ny person who desires a license to practice shampooing only." Tenn. Code Ann. § 62-4-110(e).

As a matter of law, then, the Cosmetology Act expressly grants the Board the authority to administer a shampooing license and the Act itself "prohibit[s] the plaintiff or anyone else from shampooing without a license [and] employing an unlicensed shampooer." Complaint at ¶ 66. Because Claim 1 turns entirely on the construction of portions of the Cosmetology Act, there are no factual allegations that this Court need take as true and no amount of liberal construction of Plaintiff's conclusory—and mistaken—legal conclusions can serve to establish a claim upon which Plaintiff is capable of prevailing. Instead, based on a proper reading of the plain language of the Act, it is manifest that "plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief" and the Court should thus dismiss Claim 1 under Tenn. R. Civ. P. 12.02(6).

B. Claim 3 – The Cosmetology Act Does Not Establish a Monopoly Because It Does Not Grant an Exclusive Right to a Few Individuals.[2]

While the Tennessee Constitution prohibits the creation of monopolies, the regulation of this—or any other—profession does not rise to the level of a monopoly. A monopoly consolidates control of a trade or market in the hands of a defined individual or group of individuals. A licensure requirement does the opposite and so is constitutional under Article I, § 22 of the Tennessee Constitution.

"A monopoly, as enumerated in the State Constitution, is 'an exclusive right granted to a few, which was previously a common right. If there is no common right in existence prior to the

[2] The analytical overlap between Claims 2 and 4 justifies addressing them consecutively; this memorandum thus takes the claims slightly out of the order presented in the complaint.

granting of the privilege for franchise, the grant is not a monopoly.'" *Trails End Campground, LLC v. Brimstone Rec.*, LLC, 2015 Tenn. App. LEXIS 39, *23 (Tenn. Ct. App. 2015) (quoting *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338, 345 (Tenn. Ct. App. 1991). A "modern definition" used by the Court of Appeals defines a monopoly to exist "when all, or so nearly all, of an article of trade or commerce within a community or district, is brought within the hands of one person or set of persons, as practically to bring the handling or production of the commodity or thing within such single control to the exclusion of competition or free traffic therein." *Id.* Nothing alleged in the complaint suggests that the Board or the State's regulation of shampooing as a whole have a created a monopoly in this sense (or any other).

Plaintiff first alleges that the Board's composition brings the trade of shampooing "under the complete control of interested market participants" which has "limit[ed] the number of competitors by requiring a license, which in turn, raises prices on consumers and limits economic opportunity for Tennesseans." Complaint at ¶¶ 81-82. Even taking these allegations as true, they do not demonstrate a monopoly. The fact that there is a licensure requirement is not a consequence of the Board's composition but of the General Assembly's directive that shampooing be practiced in Tennessee only with a license (as described above). And a licensure requirement, while creating a barrier to entry in a literal sense, does not limit market participation to any particular, identified individual or individuals. Any person who is capable of meeting the licensure requirements may obtain a shampooing license and practice that trade, just as in other licensed professions such as law, auctioneering, barbering, and locksmithing. Because licensure remains open to anyone meeting established, objective criteria, the regulatory framework is the opposite of an "exclusive right granted to a few."

And even if Plaintiff *did* have to obtain a cosmetology license to practice shampooing, that would not constitute a monopoly for the reasons given above. Even if a licensure requirement is high and cost-prohibitive, it by definition is not an exclusive right granted to a few. Applicants for a law license, for instance, must incur three years of intensive (and costly) education and pass the bar exam. This certainly acts as a limited barrier to entry, but it does not prevent hundreds of applicants from seeking and obtaining their law license every year. The Tennessee Board of Law Examiners—and the bar collectively—is not a monopoly and neither is the requirement that shampooing technicians be licensed to perform their services for compensation.

Finally, Plaintiff urges that "[t]he regulations and statutes as construed and applied by the Board have no actual tendency to further whatever legitimate public health and safety requirements are necessary to protect the public in the context of unregulated shampooing." Complaint at ¶ 90. Though included with Claim 3, this allegation seems more appropriate to Plaintiff's challenges to the application of the shampooing regulations under either the Law of the Land Clause (Claim 2) or the Fourteenth Amendment (Claim 4).

There is no set of facts that Plaintiff can allege to support its claim of a violation of the Tennessee Constitution's prohibition of monopolies because it has fundamentally misunderstood—as a matter of law—what does and does not constitute a monopoly. As long as the regulatory framework establishes an objective set of criteria that can be met by any willing applicant, then there is no factual basis on which Plaintiff can argue that the system is monopolistic. This Court should thus dismiss Claim 3 for failure to state a claim upon which relief can be granted.

C. Claim 2 – The Practice of Shampooing Affects the Public Health, Safety, and Welfare and Is Thus Subject to Regulation Under the Tennessee Constitution.

The General Assembly is empowered by the Tennessee Constitution to regulate any professions that affect the public health, safety, and welfare. Because shampooing is a practice that so plainly does so, no further review by the courts of the General Assembly's policy choice in this matter is appropriate.

"In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional. We must 'indulge every presumption and resolve every doubt in favor of the statute's constitutionality.'" *Gallaher v. Elam*, 104 S.W.3d 455, 459 (Tenn. 2003) (internal citations omitted).[3] The regulation of shampooing under the Cosmetology Act is thus entitled to a powerful presumption in favor of its constitutionality.

"The legislature has unlimited power to act in its own sphere, except so far as restrained by the constitution of the state and of the United States." *Bank of Commerce & Trust Co. v. Senter*, 149 Tenn. 569, 576, 260 S.W. 144, 146 (1923). The Law of the Land Clause, Article I, § 8 of the Tennessee Constitution, provides some limits on the General Assembly's power to regulate professions and occupations, but the analysis turns on whether the profession at issue affects the public health, safety, and 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). But while "[t]he

[3] The *Gallaher* Court went to note that "[t]his presumption applies with even greater force when the facial constitutional validity of a statute is challenged." *Gallaher*, 104 S.W.3d at 459. As explained above, many aspects of Plaintiff's suit involve a challenge to the application of the cosmetology statutes and rules. But to the extent that Claim 2 challenges the facial validity of the General Assembly's decision to regulate shampooing, this even "greater" presumption applies.

guarantees of the Constitution imply the absence of arbitrary restraint," they do not grant "immunity from reasonable regulations and prohibitions imposed in the interest of the people of the State." *Ford Motor Co. v. Pace*, 206 Tenn. 559, 564, 335 S.W.2d 360, 362 (1960) (upholding regulation and licensure of motor vehicle dealers). "If 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 and not subject to judicial review." *Estrin v. Moss*, 221 Tenn. 657, 664, 430 S.W.2d 345, 348 (1968) (reviewing constitutionality of regulations on the business of termite eradication). "The test for determining whether the legislature has correctly exercised its police power in regulating an activity is the rational basis test. If the legislature concludes that there is a reasonable basis for the regulatory statute and if there is some foundation in fact to justify the legislature's conclusion, then the court is powerless and may not substitute its judgment for that of the legislature." *Dial-A-Page, Inc. v. Bissell*, 823 S.W.2d 202, 206 (Tenn. Ct. App. 1991).

In *Eyear*, the Tennessee Supreme Court considered an argument very much like Plaintiff's Claim 2—"that this statute might deny some citizens their inherent right to earn a livelihood in a private field of work thus depriving them of a valuable property right without due process of law" under both the Law of the Land Clause and the Fourteenth Amendment. *Eyear Corp.*, 400 S.W.2d at 741. The plaintiff in *Eyear* argued "that the dispensing optician is not a profession because there is no school for it or course of study and things of the kind to make it a profession." *id.*, much like Plaintiff's allegation that "[s]hampooing is an ordinary trade and occupation. It is not a learned trade requiring scientific or technical knowledge or skill." Complaint at ¶ 70.

As discussed above, whether the discipline at issue is "a learned trade requiring scientific or technical knowledge or skill" is not the crux of the analysis; the issue turns on whether the discipline can affect the public health, safety, and welfare.[4] That is undeniably the case here. Shampooing necessarily involves direct personal contact between the practitioner and the client. That unavoidably implicates, at the very least, concerns about proper hygiene, an obvious element of public health, safety, and welfare. *See Bah v. Attorney General of Tennessee*, 610 Fed. Appx. 547, 553 (6th Cir. 2015) (holding that "[t]he sanitation courses . . . however basic, are rationally related to Tennessee's legitimate interest in the safety and health of their residents" in regulating natural hair styling). Even if this Court takes as true every allegation in the complaint about the "ordinariness" of shampooing, there is no way to avoid the fact that shampooing can plausibly be understood to affect public health, safety, and welfare. As long as that is the case, the General Assembly is entitled to regulate the practice.

Once it is established that the General Assembly *may* regulate a practice, the inquiry of the courts is at an end. "Our only purpose in such matters is to determine whether or not there is plausible reason for the enactment of such legislation. It is true that the Court at all times reserves the right to pass upon the constitutionality of a statute, but in doing so we do not inquire into the policy of the Legislature, that is, the factual background of why it acted as it did, if there is a plausible reason back of such legislation." *Eyear Corp.*, 400 S.W.2d at 741-42. In fact, "if there are any facts which reasonably can be conceived which sustain [the legislative act], it is our duty to sustain it." *Id.* at 742. When Plaintiff complains that "[t]he regulations and statutes far exceed

[4] Indeed, if a lack of "technical knowledge or skill" *were* the key to the analysis, the Tennessee Supreme Court surely would not have struck down the regulation of the highly-technical practice of watchmaking in *Livesay v. Board of Examiners in Watchmaking*, 204 Tenn. 500, 322 S.W.2d 209 (1959), the case on which Plaintiff relies entirely for its theory in Claim 2.

whatever legitimate public health and safety requirements are necessary to protect the public in the context of unregulated shampooing," Complaint at ¶ 74, she has asked the Court to go far beyond the role established for judicial review under the Law of the Land Clause. The question of the *extent* to which the General Assembly should regulate—as opposed to whether it *can* regulate—is "a question of public policy, public policy being the present concept of the public welfare or general good. This Court has nothing to do with questions of policy. These are considerations solely for the legislature." *Estrin*, 430 S.W.2d at 350.

Plaintiff cites *Livesay v. Board of Examiners in Watchmaking*, 204 Tenn. 500, 322 S.W.2d 209 (Tenn. 1959), for the proposition that "[t]he right to engage in a chosen profession is protected by [the Law of the Land Clause]" and is "a fundamental right." Complaint at ¶ 71. As is evident from the foregoing discussion, this greatly overstates the state of the law. Each of *Ford Motor Company*, *Eyear*, and *Estrin* was decided after *Livesay* and refers to it. *See Ford Motor Co.*, 335 S.W.2d at 362; *Eyear Corp.*, 400 S.W.2d at 742; *Estrin*, 430 S.W.2d at 350. In each instance, the Tennessee Supreme Court distinguished *Livesay* as addressing a practice that does not implicate public health, safety, and welfare, unlike the various practices (motor vehicle dealing, optician practice, and termite eradication) at issue in those cases.

The role of the courts is not to weigh the wisdom of the General Assembly's policy choices. Once it is determined that the General Assembly has the power to act, the judicial inquiry is at an end. In the present case the obvious health, safety, and welfare implications of the person-to-person contact necessary to the practice of shampooing bring the regulation of shampooing, as a matter of law, within the scope of the General Assembly's constitutionally-authorized police power. "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. There is no set of facts which Plaintiff could prove to demonstrate otherwise and so this Court should dismiss Claim 2 for failure to state a claim upon which relief can be granted.

D. Claim 4 – The Regulation of Shampooing Does Not Violate the Fourteenth Amendment Because the General Assembly Possessed a Rational Basis for Enacting It.

Like the Tennessee Constitution, the United States Constitution entrusts policy decisions to legislatures and does not empower courts to second-guess those choices. The federal constitution thus provides no more basis to void Tennessee's shampooing regulations than does the state constitution.

The Law of the Land Clause is a parallel provision to the Due Process Clause of the Fourteenth Amendment (and, via incorporation, the Fifth Amendment). "'The phrase 'the law of the land,' used in this section of our State Constitution, and the phrase, 'due process of law,' used in the [Fifth and Fourteenth Amendments to the United States Constitution], are synonymous phrases meaning one and the same thing." *Mansell v. Bridgestone Firestone N. Am. Tire*, 417 S.W.3d 393, 407 (Tenn. 2013). And though the Tennessee Supreme Court "is always free to expand the minimum level of protection mandated by the federal constitution, article I, section 8 has consistently been interpreted as conferring identical due process protections as its federal counterparts. Under both the state and federal constitutions, due process encompasses procedural and substantive protections." *Id.* (internal citations omitted). Thus, if the regulation at issue is permissible under the Law of the Land Clause, it is not violative of federal due process protections either. The analysis is the same.

1. Under Rational Basis Review, the Role of the Courts is Not to Second-Guess the Policy Choices of the Legislature.

Like the Tennessee Supreme Court, the United States Supreme Court has recognized that our constitutional scheme of government allows the state legislatures "broad scope to experiment with economic problems" by allowing them to condition the right to conduct business or to pursue a calling in their states. *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 107 (1978). "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud." *Liberty Coins, LLC v. Goodman*, 748 F.3d 682, 692 (6th Cir. 2014) (citing *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)). Accordingly, "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws" because they "are not concerned . . . with the wisdom, need, or appropriateness of the legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) (internal citations and quotations omitted). States typically exercise their regulatory power through occupational-licensing systems designed to "shield[ ] the public against the untrustworthy, the incompetent, or the irresponsible." *Liberty Coins*, 748 F.3d at 692 (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)), and "[v]ery many are the interests which the state may protect against the practice of an occupation." *Id.* (citing *Collins*, 323 U.S. at 545). "As a result, where a regulatory scheme neither implicates a fundamental right nor creates a suspect classification, rational basis review applies." *Id.* at 693. The shampooing regulations at issue in this case constitute a regulatory scheme meant to protect the safety and welfare of the public through the regulation of professional conduct, which does not implicate any fundamental right under the United States Constitution.

"To prevail under rational basis review, Defendants need only demonstrate that the statute's classification and the licensing requirement are rationally related to a legitimate government interest." *Liberty Coins*, 748 F.3d at 693 (citing *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). A statute reviewed under this standard is accorded "a strong presumption of validity." *Walker v. Bain*, 257 F.3d 660, 668 (6th Cir. 2001) (quoting *Heller v. Doe*, 509 U.S. 312, 319-20 (1993)). As the Supreme Court has often stressed, the rational-basis test seeks to determine only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* "This standard is highly deferential; courts hold statutes unconstitutional under this standard of review only in rare or exceptional circumstances." *Liberty Coins*, 748 F.3d at 694 (quoting *Doe v. Mich. Dep't of Police*, 490 F.3d 491, 501 (6th Cir. 2007)); *see also Am. Express Travel Related Servs. Co. v. Kentucky*, 641 F.3d 685, 689 (6th Cir. 2011). "[T]hose attacking the rationality of the . . . classification have the burden to negative every conceivable basis which might support it." *Seger v. Ky. High Sch. Athletic Ass'n*, 453 Fed. Appx. 630, 635 (6th Cir. 2011) (citing *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993)). "[T]he burden is on [the challenger] to show that there is no rational connection between the enactment and a legitimate government interest." *Am. Express Travel Related Servs. Co.*, 641 F.3d at 689.

Additionally, the "[d]etermination of whether a legislative scheme is rationally related to a legitimate government interest is a question of law for the court to determine" and "is appropriate for decision in the context of a motion to dismiss." *Operation Badlaw v. Licking Cnty. Gen. Health Dist. Bd. of Health*, 866 F. Supp. 1059, 1066 (S.D. Ohio 1992), *aff'd without opinion*, No. 92-3795, 1993 U.S. App. LEXIS 8685 (6th Cir. April 13, 1993). The government "has no obligation to produce evidence to sustain the rationality of its action; its choice is presumptively valid and may be

based on rational speculation unsupported by evidence or empirical data." *Liberty Coins*, 748 F.3d at 694 (quoting *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005)) (internal quotation marks omitted); *see also U.S. Railroad Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (explaining that under rational-basis review, it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision." (internal quotation marks omitted)); *Am. Express Travel Related Servs. Co.*, 641 F.3d at 690 (stating that "if a statute can be upheld under any plausible justification offered by the state, or even hypothesized by the court, it survives rational-basis scrutiny") (citation omitted).

2. The Regulation of Shampooing Does Not Violate Plaintiff's Substantive Due Process Rights.

Economic regulation lies at the heart of the political process and is thus within the very core of the legislature's policy function. "Much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense." *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 287 (2nd Cir. 2015). "[T]he Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes." *Id.* at 286 (supporting citations omitted). In fact, to hold that state legislatures lack the authority to engage in economic preference in their regulation "would be to interpret the Fourteenth Amendment in a way that is destructive to federalism and to the power of the sovereign states to regulate their internal economic affair . . . Choosing between competing economic theories is the work of state legislatures, not of federal courts." *Id.* at 287.

Plaintiff's federal constitutional claims are similar to those brought in *Bah*, which concerned a challenge to Tennessee's regulation of natural hair styling, which included what the plaintiffs there

termed "African hair braiding." *See Bah*, 610 Fed. Appx. at 549-50. Both natural hair styling and the discipline at issue here, shampooing, represent subcategories of the broader trade of cosmetology for which the General Assembly has carved out a more limited license—each requiring only 300 hours of coursework (*see* Tenn. Code Ann. § 62-4-110(e) and (f)) instead of 1,500 hours for a full cosmetology license—that enables individuals to practice these more limited trades without incurring the burden of a full cosmetology education. The General Assembly had thus lessened the usual licensure requirement without removing it altogether because of the legitimate state concerns for the health and safety of its citizens. In upholding these regulations, the court noted that the legislature need not act with "mathematical precision in the fit between justification and means when enacting . . . legislation." *Bah*, 610 Fed. Appx. at 552 (citation omitted). In addition, the court saw no merit in the contention that Tennessee schools did not teach hair braiding as a separate discipline, that being "a product of what a cosmetology school *teaches*, not what the Cosmetology Rule *requires*." *Id.* at 553 (emphasis in original).

Plaintiff's substantive due process claim here amounts to no more than an attack on the wisdom of the General Assembly's decision to regulate shampooing and the specific scope of the regulations. Plaintiff insists that there is "no legitimate reason to require a shampoo or cosmetology license" other than "to protect from competition discrete interests who wield influence over the political process." Complaint at ¶ 95. That is obviously not true. Individuals who shampoo hair for compensation come into close, personal contact with the general public. That necessarily implicates concerns of hygiene and sanitation, an obvious aspect of the broader concern for the public health and safety. That is more than the "rational speculation unsupported by evidence or empirical data" that is the threshold for sustaining a legislative action under rational basis review. As in Bah,

concerns for sanitation "are rationally related to Tennessee's legitimate interest in the safety and health of [its] residents." Because the public health implications of Tennessee's shampooing regulations are self-evident, there is indisputably a "reasonably conceivable state of facts that . . . provides a rational basis," for the regulation, and thus no set of facts Plaintiff can prove that could "negative every conceivable basis which might support" the regulation.

The compelling precedent of *Bah* disposes of Plaintiff's substantive due process claim in this case. Both hair braiding and shampooing are normally parts of the broader cosmetology discipline and both invoke legitimate concerns of public health and safety. In both instances the General Assembly has carefully considered and balanced the need for regulation and public protection against practitioners' desire to engage in those trades without onerous regulatory burdens. That balancing of policy goals is the unique province of legislatures and the *Bah* Court, relying on *Ferguson*, declined those plaintiffs' invitation to second-guess the wisdom of the legislature's policy choice with regard to licensing hair braiding. *See id.* at 551. As a matter of law, then, this Court must conclude—as did the *Bah* Court—that under any set of facts Plaintiff may prove, the General Assembly had the authority to regulate shampooing and should dismiss this claim for failure to state a claim upon which relief can be granted.

3. The Regulation of Shampooing Does Not Violate Plaintiff's Entitlement to Equal Protection of the Laws.

"[E]qual protection jurisprudence has typically been concerned with governmental classifications that affect some groups of citizens *differently* than others. To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Bah*, 610 Fed. Appx.

at 553-54 (internal citations and quotation marks omitted; emphasis in original). Plaintiff has failed to adequately plead the presence of disparate treatment.

The complaint makes no allegation of disparate treatment, even though that is the "the 'threshold element of an equal protection claim.'" *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (quoting *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006)). Every individual who wishes to shampoo hair for compensation is treated precisely the same—they must obtain a license. There is also no allegation that would identify the class of persons situated similarly to Plaintiff who are treated differently. Nor could there be because there is no set of potential applicants under the law who are advantaged by the licensure requirement.

Without allegations of disparate treatment, there can be no equal protection claim. "[I]n the absence of any plausible allegation of disparate treatment, the . . . Complaint fails to state an equal protection claim under the [Fourteenth] Amendment." *Ctr. for Bio-Ethical Reform*, 648 F.3d at 380; *see also Bah*, 610 Fed. Appx. at 555 (affirming dismissal of complaint "because the complaint lacks any indication that the African Hair Braiders were treated differently from other similarly situated individuals"). This Court should thus dismiss Plaintiff's equal protection claim for failure to state a claim.[5]

4. The Regulation of Shampooing Does Not Violate the Privileges and Immunities Clause.

The limited reach of the Priviliges and Immunities Clause of the Fourteenth Amendment does not prohibit the regulation of shampooing. The Supreme Court limited the reach of the

[5] While Plaintiff's allegations do not meet even the threshold question under the equal protection analysis, note also that Plaintiff has failed to allege a suspect classification or the deprivation of a fundamental right. Without such allegations, the same rational basis review would apply under the Equal Protection Clause that applies for purposes of substantive due process and the regulation of shampooing would be upheld for the same reasons.

Privileges and Immunities Clause in the *Slaughter-House Cases*, 83 U.S. 36 (1872). The Court held there that the clause secures only those rights which "owe their existence to the Federal Government, its national character, its Constitution, or its laws." *Id.* at 79. "[T]he Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens." *McBurney v. Young*, 133 S. Ct. 1709, 1715 (2013). Because Plaintiffs do not allege that the challenged rule was enacted in order to provide a competitive economic advantage for Tennessee citizens, in particular, the Privileges and Immunities argument fails as a matter of law. *See generally Merrifield v. Lockyer*, 547 F.3d 978, 983-84 (9th Cir. 2008) (noting that the Supreme Court's "only decision qualifying the bar [from the *Slaughter-House Cases*] on Privileges or Immunities claims against 'the power of the State governments over the rights of [their] own citizens' . . . was limited to the right to travel"). There being no set of facts Plaintiff can prove on which this argument could prevail, the Court should dismiss Plaintiff's Privileges and Immunities Clause claim for failure to state a claim upon which relief can be granted.

III. SUMMARY.

To briefly summarize the Board's position, the Court should dismiss all of the claims brought by Plaintiff under both Tenn. R. Civ. P. 12.02(1) and (6) with the exception of the federal constitutional claims, which should be dismissed only under Rule 12.02(6). Because Plaintiff failed to petition the Board for a declaratory order before filing this suit, she has not availed herself of the exclusive judicial means for challenging the State's regulation of shampooing and there is thus no subject matter jurisdiction in this Court for any of the complaint's State law claims. And, because there is no set of facts that Plaintiff can prove to sustain any of the claims as a matter of

law, all four claims fail to state a claim upon which relief can be granted and should be dismissed for that reason as well.

CONCLUSION

For the foregoing reasons, this Court should dismiss this suit with prejudice pursuant to Tenn. R. Civ. P. 12.02(1) and (6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Memorandum in Support of Motion to Dismiss has been served upon counsel for Plaintiff via U.S. Mail addressed to:

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